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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

INITIAL BRIEF OF APPELLANT CAPTIVA CIVIC ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Judicial Decisions

Agency Orders

Constitutional Provisions

Statutes

Rules

STATEMENT OF BASIS FOR JURISDICTION

The Court has jurisdiction under Fla. R. App. P. 9.030(b)(1)(C) (District Courts of Appeal shall review, by appeal administrative action if provided by general law), and sections 120.68(1)(a) ("A party who is adversely affected by final agency action is entitled to judicial review."), and 120.68(2)(a), Fla. Stat. which establishes jurisdiction in the appellate district where a party resides. All parties to this appeal reside in Lee County (the "County"). The Agency Final Order was rendered on February 3, 2025, and this appeal was initiated on February 13, 2025, within the 30 – day deadline in section 120.68(2)(a), Fla. Stat.

I. INTRODUCTION

The Lee County Comprehensive Plan (the "Lee Plan") devotes an entire Chapter ("Chapter 23") to the protection of the barrier island of Captiva, requiring the County to maintain and enforce development regulations that continue the well-defined historic development pattern on Captiva, including the historic development pattern on the master planned development known as South Seas Island Resort ("South Seas"). The historic development pattern on Captiva, including South Seas, was limited to three units per acre for

both hotel and residential dwelling units, including a specific 912 – unit cap at South Seas, with building heights no greater than the lesser of 35 feet above grade or 42 feet above sea level on South Seas, and no greater than the lesser of 35 feet above grade or 42 feet above sea level or 28 feet above base flood elevation on the rest of Captiva.

The Administrative Law Judge ("ALJ") below misread the Lee Plan, however, to allow amendments to the County's Land Development Code that repealed the historic hotel room density and building height limits at South Seas in effect for more than fifty years, thereby allowing a major expansion of that almost fully built master development, and increased building heights throughout Captiva. The ALJ's misinterpretation of the Lee Plan, and fundamentally erroneous legal ruling that the extent of the hotel density and height increases allowed by the changes to the County' regulations were not relevant to this proceeding, require reversal of the Final Order. The approved amendments to the County's Land Development Code violate the statutory requirement that a local government's regulations be consistent with its Comprehensive Plan.

II. STATEMENT OF THE CASE AND FACTS[1]

A. The Nature of the Case, Course of Proceedings, and Disposition in the Lower Tribunal

This appeal is from a Final Order of the Florida Division of Administrative Hearings, entered after an administrative hearing on whether changes made to Lee County's Land Development Regulations by Ordinance 23-22 violated the Lee Plan, and thus violated section 163.3213(5)(a), Fla. Stat. R. 3051 - 3052. (Final Order, p. 1)

The hearing was initiated against Appellee, Lee County by Appellant, Captiva Civic Association ("CCA") pursuant to section 163.3213(3), Fla. Stat. R. 3052. (Final Order, p. 3). Appellee, WS SSIR Owner, LLC, d/b/a South Seas Island Resort ("SSIR") appeared and joined with Lee County, and the City of Sanibel ("City")

[1] References to the record appear as R. xxxx, and, unless already apparent from the text, a brief description of the record to which citation is made. Citations to the transcript appear as Tr., witness name, V. and page and line numbers, and, for the Court's convenience, identify the specific page of the 1,179 – page complete transcript pdf document filed with the Court by the clerk of the lower tribunal – e.g. Tr. pdf 483/1179.

intervened as a co-petitioner with CCA. R. 3053 – 3054. (Final Order, pp. 3 -4).

After an evidentiary hearing, the parties submitted Proposed Final Orders. R. 3053 - 3054 (Final Order, pp. 4 - 5). The ALJ issued her Final Order pursuant to section 163.3213(5)(a), Fla. Stat. R. 3053. (Final Order, p. 4).

B. <u>The Governing Statutory Requirements</u>

Under Florida's Community Planning Act, all local governments are required to adopt and maintain a comprehensive plan, as its "constitution"[2] governing all development. Section 163.3167(1) and (2), Fla. Stat. "[N]o public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof …." Section 163.3161(6), Fla. Stat. Sections 163.3177(1), and 163.3202(2)(b), Fla. Stat. mandate that comprehensive plans be implemented through "more detailed land

[2] *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987) (A comprehensive plan is "a constitution for all future development ….")

development and use regulations",[3] which must be consistent with the comprehensive plan. Sections 163.3167(1), 163.3194(1)(a) and (b), Fla. Stat., and 163.3202(1), Fla. Stat. Under this statutory structure, land development regulations are inferior to plans; they are "the means by which the plan is implemented". *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla. 4d DCA 1987); See also, *Brevard Co. Snyder*, 627 So. 2d 469, 473 (Fla. 1993)*; Buck Lake Alliance, Inc. v. Leon County*, 765 So.2d 124 (Fla. 1st DCA 2000).

Sections 163.3213(1) and (3), Fla. Stat. establish a cause of action for a formal administrative challenge to a land development regulation on the basis that it is not consistent with the local comprehensive plan. In such a challenge, the land development regulation shall be deemed inconsistent with a comprehensive plan if there is no "fair debate" otherwise. Section 163.3213(5)(a), Fla. Stat. To be found 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

[3] A "land development regulation" is "an ordinance enacted by a local governing body for the regulation of any aspect of development. Section 163.3213(2)(b), Fla. Stat.

further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets **all other criteria** enumerated by the local government." Section 163.3194(3)(a), Fla. Stat. (emphasis added). This case involves a section 163.3213, Fla. Stat. challenge.

The Act is to be "construed broadly to accomplish its stated purposes and objectives." § 163.3194(4)(b), Fla. Stat. *See*, *Graves v. City of Pompano Beach*, 74 So. 3d 595, 598 (Fla. 4th DCA. 2011).

C. Statement of the Facts

1. Captiva Island.

Captiva is a 725-acre barrier island within Lee County's Coastal High Hazard Area ("CHHA"), Level "A" hurricane evacuation zone, and an Area of Special Flood Hazard as determined by the Federal Emergency Management Agency. R. 3061 (Final Order, p. 11 ¶¶17-19).

Captiva and adjacent Sanibel Island sustained serious damage from Hurricane Charley in 2004, and Hurricane Ian in 2022. R. 3061 (Final Order, p. 11 ¶20). Sanibel and Captiva were devastated in 2022 by Hurricane Ian, which washed away the Causeway Bridge

from Sanibel and Captiva to the mainland, and caused dozens of fatalities in Lee County. R 2222 (PH Stip., p. 7 ¶15); Tr., Dalton p. 375 (pdf 483/1179); Tr., Alexander, p. 468 – 469 (pdf 576-577/1179); R. 2319. (Pet. Ex. 34, p. 3).

All automobiles, low-speed vehicles, golf carts, bicycles and pedestrians share a two-lane constrained roadway from the entry point on Captiva at Blind Pass Bridge, along Captiva Drive, to the northern tip of South Seas. R. 3060. (Final Order p. 10 ¶11); R. 2381, 2438, 2708, 2714.

The Island of Sanibel (incorporated as a "City") is adjacent to Captiva, and situated between Captiva and the County's mainland. Sanibel's resident population is 6,382, and the seasonal population increases to approximately 30,000. During the peak season, Sanibel experiences 10,000 to 11,000 cars from the mainland traveling into Sanibel to visit beaches, hotels, restaurants, or other locations on either Sanibel or Captiva. R. 3060. (Final Order, p. 10, ¶10).

All vehicular traffic leaving Captiva headed for the mainland, including all vehicles evacuating Captiva and Sanibel, and vice versa, must pass through Sanibel, mostly on Sanibel-Captiva Road. R.

3059-3060. (Final Order, pp.9 -10, ¶9). This evacuation route is a "narrow, two-lane, constrained roadway, beginning on Captiva Drive, then continuing through the City of Sanibel on Sanibel-Captiva Road, Tarpon Bay Road, Periwinkle Way, and then Causeway Boulevard to the mainland." R. 3060. (Final Order p. 10 ¶11)

The intersection at Periwinkle Way and Causeway Boulevard, on Sanibel, is the critical link in the evacuation route. Causeway Boulevard is comprised of three bridges that cross over two separate spoil islands. R. 3060. (Final Order, p. 10 ¶11).

Four streets come together at the intersection of Periwinkle Way and Causeway Boulevard with a four-way stop sign at the termination of each street. Traffic queues at this intersection every day, year–round, and the queues get much longer during peak season – Thanksgiving through Easter. R. 3060. (Final Order, p. 10 ¶12). The traffic volume on Sanibel, especially on Sanibel-Captiva Road, sometimes presents life-safety issues for the City. It is often difficult for an ambulance to efficiently navigate through and off the

island. R. 3060. (Final Order, p. 10 ¶13).[4] The City utilizes police officers and trained civilians to direct traffic at its two most congested intersections: Periwinkle Way and Causeway Boulevard, and Periwinkle Way and Casa Ybel. R. 3060. (Final Order, p. 10 ¶14).

The ALJ found that "Sanibel proved that its substantial interests in managing hurricane evacuation of Sanibel residents and visitors, as well as those evacuating from Captiva through Sanibel, could be impacted by the Ordinance. The impact on Sanibel would undoubtedly be greater than that of the general public because evacuation through Sanibel is the only route from the islands to mainland Lee County." R. 3081 (¶100).

2. The Appellant Captiva Civic Association.

The Captiva Civic Association ("CCA") is a non-profit corporation with its principal place of business in Lee County. CCA's mission is to protect Captiva's ambiance, environment, and quality of life of its members. CCA works to ensure that any land use changes

[4] The ALJ noted the testimony of the City's Police Chief William Dalton about a person on the island who had a heart attack, and due to the delay caused by traffic in getting an ambulance to him and off the island, passed away. Id.

on Captiva comply with its land use policy. CCA has approximately 430 members, of whom approximately 45 own homes within South Seas. R. 3058. (Final Order, p. 8, ¶¶1-3). A primary mission of CCA is to "defend and preserve our comprehensive land use policy" and to "protect our residents' safety, the island ecology, and the unique island ambiance[.]" This includes working to ensure adequate evacuation capability, prevent increasing road congestion, and preserving the quality of life and fragile environment on the unique barrier island community of Captiva. CCA's land use committee monitors land use decisions that impact Captiva's environment and quality of life. CCA works with governmental authorities, property owners and other associations to "[m]aintain the strict limits on density and height as currently stated in the … Comprehensive Plan, and to oppose any exceptions …; Strictly enforce zoning and other regulations including those which have the effect of limiting traffic and excessive noise…[.]" CCA has brought legal actions on behalf of its members to accomplish its mission and purpose. R. 3059 (Final Order, p.9, ¶¶4-6). CCA owns and operates the Captiva Civic Center, the Captiva Library which it leases to the County, and a single family home, which it leases to the Lee County Sheriff's Department as a

residence for a deputy sheriff and his family. R. 3059. (Final Order, p.9 ¶7).

The ALJ found that CCA "suffered an injury-in-fact" because Ordinance 23-22 "allows greater building height for new construction and redevelopment at South Seas, and on Captiva as a whole, than under the previous [regulations]" and thus "established that its substantial interests - to "'defend and preserve our comprehensive land use policy' and to 'protect our residents' safety, the island ecology, and the unique island ambiance' - could reasonably be affected by the Ordinance." R. 3080 – 3081. (¶109).

The ALJ found the County and SSIR's argument that CCA and Sanibel's injuries are speculative was "not persuasive." R. 3083 (¶118).

3. South Seas and the 2002 Administrative Interpretation

South Seas is a 304-acre Master Planned Development at the north end of Captiva, approved in 1973 for a maximum density of three-units per acre, and now almost completely built, with 247 units to be rebuilt - 107 hotel units destroyed by Hurricane Ian, and 140

employee-housing units recently demolished. R. 3061. (Final Order, p. 11 ¶¶ 21-22).

The 1973 Zoning Resolution approving the South Seas Resort Master Development Plan included "a **special limitation of [three] units per acre ...** and … up to [five] acres of commercial property," **and limited the development density for the** South Seas Resort District ("SSRD") **to 912 units**. **Counted against that cap are both residential units and "guest accommodation" or hotel units.** The Resolution describes the clustering of buildings with open "green belt" separations within the 912-unit cap. R. 3062. (Final Order, p. 12 ¶24). (emphasis added). The Zoning Resolution approved a master development plan which designated future development areas within South Seas. R. 3062. (Final Order, p. 12 ¶25).

The Support Document for the 2018 amendment that placed current Chapter 23 into the Lee Plan defines South Seas as "the unique development known as **SSIR, a blend of hotel, commercial and residential uses delineated in a separate 2002 Administrative Interpretation** with the county." R. 2434. (emphasis added).

In 2002, the County issued Administrative Interpretation 2002-00098 ("2002 ADD") "to **'summarize and clarify all prior approvals** into one comprehensive document **detailing what development currently exists** [and] **clarify what additional development may be permitted** …." The 2002 ADD includes the following **"enforceable conditions of the SSRD"**:

> "a. Development … will evolve over a number of years in line with … **very low-density development** utilizing a number of small-scale clusters; **carefully planned and tightly-controlled development** ….
>
> b. The project will be **limited to 912 residential units** (304 acres **at three units per acre**) and five (5) acres of commercial development.
>
> c. Four (4) miles of mangrove and bayou shoreline will be preserved by clustering higher density into smaller development areas with greenbelt separations." R. 3062 - 3063. (Final Order, pp. 12-13 ¶26a & b).

The 2002 ADD includes development standards for open space, landscaping, buffers, setbacks, building heights, parking, and other aspects of the development. **Building height is limited to the lesser of 35 feet above the building grade or 42 feet above mean sea level.** R. 3063. (Final Order, p. 13 ¶27).

The 2002 ADD identifies the total number of hotel and residential dwelling units allocated to each of the 19 named sections of South Seas, and identifies 877 of the total allocated 912 units as having been developed, leaving a total of 35 units to be developed as of 2002. R. 3063 (Final Order, p. 13 ¶28). The 2002 ADD references the developer's plans for future improvements to "guest facilities" and development of additional small-scale clusters of residential units. R.3063. (Final Order, p. 13 ¶29). The ALJ found that:

> "The competent, substantial evidence supports a finding that South Seas' approval for 912 residential units includes 'guest facilities,' which is synonymous with hotel and motel units in today's language. Hotels were developed on the property, prior to the 1973 rezoning, which the County did not exclude from the unit count." R. 3063. (¶30).

SSIR purchased approximately 120 acres of South Seas in 2021, and has applied, pursuant to the increased density and height limits allowed by the ordinance at issue in this case, for rezoning approval for that portion of the resort area to increase development

from its allowable 272 units to 707 units[5] in new buildings. R. 3061, 3066. (Final Order, pp. 11, 16 ¶¶16, 48.)

4. The Lee Plan Historic Land Use and Development Pattern Provisions - Chapter 23.

The Lee Plan includes several chapters governing development in special areas (called "Community Plans"), including Captiva, that include additional development limitations and requirements based on "specific conditions unique to [the] area, [which] may be physical, architectural, historical, environmental or economic in nature." Lee Plan Policy 17.1.2. R. 3069. (Final Order, p. 19 ¶64). The Captiva Community Plan is located in Chapter 23 ("Chapter 23") of the Lee Plan, and includes Goal 23 and its implementing objectives and policies. R. 3068. (Final Order, p. 18 ¶55 – 57). The Goal of Chapter 23 is to "**enforce development standards that maintain the historic low-density residential development pattern of Captiva**." R. 3069. (Final Order, p. 19 ¶68). (emphasis added). Chapter 23 requires the County's land use regulations to "**protect**[] community

[5] The proposed development would be almost 2.6 times the density historically allowed on SSIR's 120 acres.

resources", "[**continu[e]** … **"existing land-use patterns, unique neighborhood style commercial activities**, infrastructure capacity, and historically significant features[]," and **"limit development to that which is in keeping with the historic development pattern on Captiva."** R. 3070. (Final Order, p. 20, ¶68). (emphasis added). Chapter 23 contains objectives and policies governing development regulations for building heights, evacuation and coastal hazard protections, and natural resource protections. R. 3068 (Final Order, p. 18 ¶60.) The full text of the Chapter 23 provisions that control this case are:

> "**Goal 23:** Captiva Community Plan. The goal of the Captiva Community Plan is to protect the coastal barrier island community's natural resources such as beaches, waterways, wildlife, vegetation, water quality, dark skies and history. *This goal will be achieved through* environmental protections and ***land use regulations that*** … ***enforce development standards that maintain the historic low-density residential development pattern of Captiva***." R. 3069. (Final Order, p. 19 ¶68). (emphasis added).
>
> **"Objective 23.2:** Protection of Community Resources. ***To continue the long-term protection and enhancement of*** community facilities, ***existing land use patterns*****, unique neighborhood style commercial activities**,

infrastructure capacity, and historically significant features on Captiva." R. 3070. (Final Order, p. 20 ¶68)

Policy 23.2.3: Building Heights. ***Maintain building height regulations*** *that account for barrier island conditions, such as mandatory flood elevation and mean-high sea level, for measuring height of buildings and structures*. R. 3070. (Final Order, p. 20 ¶68)

Policy 23.2.4: Historic Development Pattern. **Limit development to that which is in keeping with the historic development pattern on Captiva** including the designation of historic resources and the rehabilitation or reconstruction of historic structures. ***The historic development pattern on Captiva is comprised of low-density residential dwelling units****, … minor commercial development* ***and South Seas Island Resort.*** R. 3070. (Final Order, p. 20 ¶68).(emphasis added).

Lee Plan Chapter 23 is implemented by Chapter 33 and portions of Chapter 34 of the County Land Development Code (the "LDC"), the land development regulations called for in the Plan. R. 3068. (Final Order, p. 18 ¶61). In the hearing below, CCA and the City of Sanibel challenged amendments to the Land Development Code provisions governing hotel room density and building height limits on South Seas and Captiva adopted by Ordinance 23-22 on the basis that they are inconsistent with and violate Chapter 23 of the Lee Plan. R. 3072. (Final Order, p. 21 ¶77).

Chapter 23 was placed into the Lee Plan in 2018 by plan amendment CPA2015-0009, adopted by Ordinance 18-04, which also adopted, as "'Support Documentation' for the Lee Plan", "the corresponding Staff Reports and data and analysis … for this amendment…." R. 2346. (Ord. 18-4, p. 2, Section 2). That support document explains that the Goal 23[6] requirement to "[l]imit development to that which is in keeping with the historic development pattern on Captiva" and the statement that "[t]he historic development pattern on Captiva is comprised of low-density residential dwelling units… and [SSIR]"[7] "**protects the existing neighborhood form and densities**…." R. 2379 (emphasis added). The Support Document explained that:

> "This goal [of the] Captiva Community Plan serves as a **description of Captiva as it has historically developed and exists today - a pattern of land use and low-impact development** within the island's long-time context of environmental protection **that should be maintained and supported into the future**."

R. 2416. (emphasis added).

It explained that "the Captiva community's goal is to preserve and protect the unique aspects of Captiva - natural, historical and

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[6] Identified then as Goal 13 and subsequently moved to Chapter 23
[7] This is the current Pol 23.2.4, with abbreviations SSIR and LDC.

human-made" and "address both the environmental and land use and development issues vital to the protection of a fragile barrier island …." R. 2416, 2434. (emphasis added).

The Support Document explains that Captiva's geographic setting is a primary determinant of Chapter 23's development limits:

> "**Captiva's land use pattern is guided by its location in a Coastal High Hazard Area. Public Safety and evacuation are a concern.** The Island's only evacuation route is a constrained roadway …. Consistent with … Policies … that limit development where hazards exist, **density** on Captiva **is three units an acre** …. **Heights are also limited in keeping with Captiva's low rise buildings.** This is also consistent with Lee Plan Goal 105 that protects life and property in [CHHAs]."

R. 2379. (emphasis added).

The Support Document further explains that:

> "Florida Statutes … and the Lee Plan … identify the **need for additional regulation and requirements for CHHAs such as Captiva**. Specifically cited as **issues of concern … are evacuation times,** building structural requirements, **density increases and infrastructural capacity.** These reflect a recognition of additional risk to life and property present in CCHAs, sufficient to **warrant more stringent regulations for safety** while protecting the property rights of owners. The CHHA goal is to minimize or mitigate storm risk …."

R. 2427. (emphasis added)

The Support Document explains the challenges of evacuating residents and hotel guests from Captiva and Sanibel islands, and the reason that Chapter 23 enforces the historic development pattern and prohibits future increases in density, intensity and building heights on Captiva:

> "**Risk reduction is typically accomplished (particularly in the Lee Plan**) by … limiting rezoning approvals to those which **do not increase density** …."

R. 2427. (emphasis added)

and

> "Avoiding replacement of current residential structures with much larger structures able to house considerably more people --which is **inconsistent with the goal of putting fewer people at risk to storms and coastal hazards**". R. 2427 -2428. (emphasis added)

The Support Document states that "[e]fforts to control density":

> "also can keep storm evacuation times from becoming longer - a critical issue on an island in the Zone A evacuation area with the **longest evacuation times to shelter in the county.**
>
> **Evacuation times** … **are further complicated since any evacuation must use a single route -** Captiva Drive - off the island and a single exit point - the Sanibel Causeway, **through the limited road system of Sanibel Island** which must also accommodate the evacuation of Sanibel Island residents and visitors at the same time.
>
> … the main **evacuation route** off the island is **a constrained roadway**, leading to another island with a

limited … road system eventually leading to a single two-lane causeway to the mainland and (eventually) higher ground. The Sanibel Causeway operates near its design capacity at its highest hour counts … so even making it a one-way off-island roadway could still create capacity constraints depending on how many vehicles are attempting to evacuate at peak times… particularly since there are **wind-speed issues for the highest causeway bridge that could force it to close to traffic once a trigger wind speed is reached**, as well as **low-lying causeway islands susceptible to overwash** as tides and waves rise ahead of any storm. […]

Another issue of moving extraordinary numbers of vehicles on constrained or limited roadways is the higher probability for problems. **Any traffic incident interrupts the flow** of traffic and will **slow the overall evacuation … and on narrow roadways with minimal shoulder area, one vehicle breaking down could slow down the entire evacuation process for hours** until it can be cleared and a "normal" flow restored.

[…] **the right-of-way** for Captiva Drive never exceeds 50, and **narrows to 25 feet** in certain portions**.** The design width of the roadway is 10-11 feet […] but the maximum shoulder width (which is not consistent in many sections of the roadway) barely meets the two-foot standard for a rural highway with the lowest traffic count**.** (R. 2430) (emphasis added)

This means that **any vehicular breakdown has very little room to be moved to the shoulder in order to clear any resulting traffic backup.** The very limited clear zone along much of Captiva Drive, combined with the heavy vegetation planted on the adjacent private property, makes moving a disabled vehicle off the roadway more difficult, with consequent traffic tie-ups slower to clear. This **problem worsens in the case of an evacuation (when drivers may not always be at their best or most calm)**

> even if that evacuation is being conducted in reasonably good weather ….
>
> **Reasonable limits on the number of residents *and visitors* who need to evacuate from the island is vital** for public safety.
>
> … the increased popularity of Captiva as an off-season (summer) vacation destination … warrants … **steps to control the density and intensity of use for island properties to that which currently exists**." R. 2431 (emphasis added).

5. Captiva's Historic Density and Height Regulations

Mirroring the three-unit per acre density limit for hotels and residential dwelling units on South Seas as set by the 1973 Zoning Resolution (and affirmed in the 2002 ADD), in 1982, the County established the identical three-unit per acre density limits for all of Captiva. R. 2111 – 2112 (Ord. 82 – 44). That limit currently resides in Section 1628(c) of Chapter 33 of the LDC, which Ordinance 23-22 did not amend – other than the exemption newly created for South Seas. R. 1367.

Similarly, Chapter 33 and 34 of the LDC for decades limited building heights on Captiva to the lesser of 35 feet above grade or 42 feet above sea level – the same as on South Seas. Outside of South

Seas, at least since 1982, the intent and effect of the building height regulations of Chapter 33 and 34 of the LDC limited the number of permittable floors on Captiva to two habitable floors – even after the Code was amended to integrate FEMA's base flood elevations. R. 2112. (Ord. 1982-44).

6. Ordinance 23-22's Amendments to the Regulations To Permit Taller Buildings on all of Captiva and Exempt South Seas from the Hotel Room Density Limit.

Ordinance 23-22 repeals the requirement that, in order to be exempt from Chapter 33 of the LDC, development at South Seas must be consistent with the 2002 ADD. In other words, it exempts South Seas from the entire land development code chapter establishing density and height limits for the Captiva Planning Community, without the default application of the 2002 ADD. R. 3064, 3068. (Final Order, p. 14 ¶33, p. 19 ¶62). Ordinance 23-22 was "at least partially drafted to accommodate SSIR's redevelopment plans for the 120 acres it has purchased within South Seas." R. 3064. (Final Order p. 14, ¶32). It exempts South Seas from the density and height limitations for Captiva in Code sections 34-1805 and 34-2175(a)(2). R. 3065. (Final Order, p. 15 ¶38).

The text of the relevant changes is as follows:

a. "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~~. "

R. 1363

b. "Section 33-1614. Definitions.

South Seas Island Resort means certain land generally lying north of Captiva Drive and bounded by the Gulf of Mexico, Red Fish Pass, and Pine Island Sound, commonly known as South Seas Island Resort, along with certain parcels lying south of and fronting Captiva Drive as depicted in Appendix I, Map 18."

R. 1363.

c. "Section 33-1627(a). Height Restrictions on Captiva Island.

(a) The height of buildings and structures is subject to the requirements of section 34-2175. ~~may not exceed the least restrictive of the two following options:~~

~~(1) Thirty five feet above the average grade of the lot in question or 42 feet above mean sea level measured to the peak of the roof, whichever is lower; or~~

~~(2) Twenty eight feet above the lowest horizontal member at or below the lawful base flood elevation measured to the mean level between eaves and ridges in the case of gable, hop and gambrel roofs. If the lowest horizontal member is set above the base flood elevation, the 28 foot measurement will be measured starting from the base flood elevation. Notwithstanding the above height limitations, purely ornamental structural appurtenances and appurtenances necessary for mechanical or structural functions may extend an additional four feet above the roof peak or eight feet above the mean height level in the case of gable, hip, and gambrel roofs, whichever is lower, so long as these elements equal 20 percent of the total roof area.~~"

R. 1363 - 1364.

d. "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. The redevelopment of nonconforming hotels or motels on Captiva Island will be governed by the provisions of section 33-1628(b). That section will be interpreted to prohibit an increase in the number of rental units and to establish a maximum average unit size of 550 square feet."

R. 1367. (emphasis added)

e. Section 34-2175(a)(2). Height Limitations for Special Areas and Lee Plan Land Use Categories.

The following areas have special maximum height limitations applicable to all conventional and planned development districts.

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 provisions of section 34-2174(a) do not apply to Captiva Island. No variance or deviation from this height restriction may be granted; provided however, one communication tower, not to exceed 170 feet in height, may be constructed in accord with section 33-1627 ~~Lee Plan Policy 23.2.3.~~"

R. 1369.

A. Hotel Room Density Increase for South Seas.

The ALJ found 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 (¶109) (emphasis added); *see also*, R. 3082 (¶116).

The ALJ found that the Ordinance:

"**leaves South Seas subject to no particular development density standard** in the land development code. Because development would no longer have to comply with the ADD, which establishes density at three units per acre, and exempts South Seas from the applicable requirements in chapter 33, there is **no**

applicable numeric density standard in the LDC." R. 3066 (¶44).

B. Building Height Increases for All of Captiva

The ALJ indicated her belief that one purpose of the Ordinance was to allow structures to be built or rebuilt under newer and higher federal base flood elevations to improve resiliency without losing previously allowed buildable space. R. 3070 - 3071. For Captiva, however, the Code already allowed height to be measured at 28 feet above base flood elevation prior to Ordinance 23's change to section 33-1627(a)(2). R. 1363 - 1364. The Ordinance allowed for an additional habitable floor unrelated to resiliency. For South Seas, while the 2002 ADD had not allowed building height to be measured from the base flood elevation, Ordinance 23-22 went well beyond changing the point of height measurement to the base flood elevation. Tr. Barraco pp. 927-928 (pdf. 816 – 817/1179; Tr., Crespo, p. 852 (pdf. 741/1179).

On South Seas, the Ordinance increased allowable building heights from the previous standard (the lesser of 35 feet above grade or 42 above sea level), to 45 feet (above base flood elevation) as of

right, or up to 75 feet (above base flood elevation) by vote of the County Commission, which SSIR's expert acknowledged would **increase overall allowable heights from at least 14, and up to 45 feet** (depending on the base flood elevation and whether a building sought to take advantage of the 45 or the 75 – foot standard). Tr., Fountain, p. 1035 (pdf. 961 of 1179). As a result, Ordinance 23-22 permits buildings up to six habitable floors. R. 3067 (Final Order, p. 17 ¶52); Tr., p. 160, Gauthier (pdf 192/1179).

CCA's expert characterized this as "a very significant increase in building height" Tr. Gauthier, p. 146 (pdf. 178 of 1179). South Seas' expert acknowledged that the increase in building height limits, as opposed to the starting point of measurement, were not required to improve the resiliency of buildings on Captiva. Tr., Fountain, pp. 1023, 1030 (pdf 949 and 956 / 1179).

7. The ALJ's Legal Rulings on the Building Height Increase.

The ALJ rejected CCA and Sanibel's claim that Ordinance 23-22 is inconsistent with Lee Plan Policy 23.2.3 when it exempts South Seas from the building height limits of the 2002 ADD and Chapters 33 and 34 of the LDC R. 3070 - 3071. (Final Order, pp. 20 - 21

¶¶69,76). The ALJ ruled that "this policy does not speak to historic patterns, but rather to height regulations that "account for barrier island conditions, such as mandatory flood elevation and mean-high sea level" for measuring height of buildings." R. 3070. (¶70). The ALJ did not specifically address the issue that Ordinance 23-22 allows for a significant increase in building heights unrelated to FEMA-required mandatory flood elevations or changing sea levels referenced in Policy 23.2.3.

CCA and the City also challenged the increased building heights permitted by Ordinance 23-22 (45 feet above base flood elevation as of right and 75 feet above base flood elevation if requested and approved on South Seas; and 35 feet above base flood elevation on Captiva) as inconsistent with (i) Lee Plan Goal 23 by failing to "enforce development standards that maintain the historic low-density residential development pattern of Captiva", (ii) Plan Objective 23.2 by failing to "continue the long-term protection and enhancement of … existing land use patterns [and] unique neighborhood style commercial activities…", and (iii) the mandate of Policy 23.2.4 to "limit development to that which is in keeping with the historic

development pattern on Captiva" – including South Seas Island Resort. R.145 – 146, 150 – 151, 3024, 3026 – 3027. The ALJ did not address the application of these Plan provisions on the substantial changes to the building height regulations.

The ALJ also rejected the opinion of CCA's planning expert that allowing buildings as tall as 75 feet above base flood elevation would "stick out like a sore thumb" and be inconsistent with the historic development pattern and out of proportion with the existing development at South Seas. R. 3071. (¶74). The ALJ's erroneous basis for this ruling was that:

> "the **75-foot (or higher) limits are not available as a right under the Ordinance** itself. For a developer to attain those heights, the County **must approve** a comprehensive development plan through **a rezoning** process."
>
> R. 3071 (¶75). (emphasis added).

8. The ALJ's Legal Rulings on the Hotel Density Increase.

CCA and the City claimed that the increased development densities allowable under Ordinance 23–22 for South Seas are inconsistent with Goal 23, Objective 23.2., and Policy 23.2.4 because they are inconsistent with the historic development pattern of the resort. R. 3071. (Final Order, p. 21 ¶77).

The ALJ found, as to the facts, that:

> "Petitioner **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. (Final Order, pp. 35-36 ¶128)

The ALJ's legal interpretation however, was that this did not violate the Lee Plan, ruling that:

> "However, the **success of Petitioner's argument** … **hinged on an interpretation that, together, Goal 23, Objective 23.2., and Policy 23.2.4. prohibited land development regulations that would allow development contrary to the historic development pattern of South Seas**. The plain language of the Plan, specifically Policy 23.2.4., did not support Petitioner's interpretation. The evidence showed that it was at least fairly debatable that **the historic development pattern of Captiva, referenced in Policy 23.2.4., singled out South Seas as a separate land use subject to its own regulations**."
>
> R. 3085 - 3086. (¶128).

Observing that "[**CCA] interprets that policy to require the County to limit development within South Seas to that which is consistent with the historic development pattern of South Seas**, the ALJ's interpretation was that:

> "The **plain language** of the policy **does not say that the County must limit development of South Seas to that which has been historically developed at South Seas.**

> The policy sets out three characteristics of the historic development of Captiva: low-density residential, minor commercial, and the resort."

R. 3072. (¶¶80-81).

The ALJ cited testimony by the County's planning expert that South Seas is treated separately because it encompasses a large 304 - acre area of Captiva, is "somewhat insulated or secluded from the rest of Captiva, located behind security gates at the very north end of the island; and it has developed in a sort of flexible planned development scenario … different and apart from other properties on the island, which have developed according to traditionally-defined zoning categories." R. 3072 (¶81).

However, Policy 23.2.4, in recognizing that South Seas is part of Captiva's historic development pattern, expressly and specifically includes South Seas as subject to its "historic development pattern" requirement and mandate to "limit development to that which is in keeping with the historic development pattern on Captiva."

As an example of increased density and intensity that would be permitted by Ordinance 23-22, the ALJ found that SSIR's pending rezoning application, in reliance on Ordinance 23-22, requested to

increase the currently allowed 272 units on its 120 acres with 707 units, for a density of **8.7 units an acre – almost three times the historic density**. R. 3066 - 3067 (¶¶48, 51).

CCA's comprehensive planning expert, Charles Gauthier presented an example of the full extent of the increase in hotel room density the Ordinance could allow by calculating potential hotel density if the hotels were built to the maximum of 75 feet, or six stories. Mr. Gauthier calculated the potential density based upon buildout scenarios for the 120 acres owned by SSIR, and a proportional development of the remaining acreage at South Seas. The ALJ found that Mr. Gauthier calculated a "worse-case scenario" buildout that included converting the golf course acreage to residential use developed as 75-foot hotel buildings for a total of **1,142 units at 14 units/acre**. R. 3067 (¶52).[8]

[8] Because the ALJ ruled as a matter of law that any projection of the amount of hotel units Ordinance 23-22 would allow is not relevant to a determination of the Ordinance's consistency with the Lee Plan, the discrepancy may not be material to the issues on appeal, but the ALJ's finding that Mr. Gauthier's projections for SSIR's 120 acres of 1,142 units at 14 units/acre is not accurate, and not supported by any evidence in the record. Mr. Gauthier's projections of the total amount of development units Ordinance 23-22 would allow on the 120 – acre South Seas property were, depending on the specific

As a matter of law, however, the ALJ ruled that **the potential density allowed by the challenged Ordinance is not relevant because the increase is dependent on approval by the County through a rezoning process**, and that:

> "The PUD rezoning is not at issue in this case. Only the challenged Ordinance. **Any analysis based on projected development density is pure speculation**."

R. 3067 (Final Order, p. 17 ¶52 – 53).

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configuration on the site, much higher - between 1,740 and 5,000 units. Tr., p. 159-161, Gauthier (pdf 191 - 195/1179). For the entire 304 acres of land to which Ordinance 23-22 now applies, his "practical" projections were that the result could be an increase from the current 912 allowed units to as many as 3,000 units, and theoretically, over 10,000 units. Tr., p. 163, Gauthier (pdf 195/1179). The historical development pattern on those 120 acres is of 272 residential dwelling and hotel units.

III. SUMMARY OF THE ARGUMENT

Chapter 23 of the Lee Plan specifically limits development on the fragile, evacuation–challenged barrier island of Captiva to historic development levels. Interpreting the Plan to instead allow a substantial expansion and increase in development, the Final Order wrongly upheld an Ordinance exempting South Seas and Captiva from existing height limitations and any hotel room density limits on South Seas whatsoever.

The Final Order erroneously interpreted the Goal 23 mandate to "enforce development standards that maintain the historic low-density residential development pattern of Captiva" to not apply to South Seas, on the theory that its implementing Policy 23.2.4 identifies South Seas as distinct from the rest of Captiva. But Policy 23.2.4 categorically requires the County to '[l]imit development to that which is in keeping with the historic development pattern on Captiva", and then defines "*South Seas Island Resort*" as one of the components of that historic development pattern. This misreading of Goal 23, Objective 23.2 and Policy 23.2.4 to allow Ordinance 23-22 to exempt South Seas from the historic development pattern that had

governed its development for decades and permit a major expansion of development on South Seas is - **beyond any fair debate** – a clearly erroneous interpretation. Under no reasonable interpretation can Plan Goal 23 ("*enforce development standards that maintain the historic low-density residential development pattern of Captiva*."), Objective 23.2 ("*continue the long-term protection and enhancement of … existing land use patterns"),* and Policy 23.2.4 ("*Limit development to that which is in keeping with the historic development pattern on Captiva*", including "*low-density residential dwelling units … minor commercial development and South Seas Island Resort*.") be read to allow the major expansion of development at South Seas permitted by Ordinance 23-22.

The Court should overturn the ALJ's untenable interpretation, which ignored the obvious intent and terms of Chapter 23, and rule that Ordinance 23-22 violates the Lee Plan by allowing increased building heights and density that far exceed the historic development pattern on South Seas and Captiva.

Furthermore, failing to recognize that, as a matter of law, a Land Development Code governs and authorizes subsequent rezoning

decisions, the Final Order erroneously ruled that the increases in hotel room density and building heights permitted by the Ordinance were not relevant to this proceeding because the density and height increases must be approved by a separate rezoning action. That critically erroneous ruling ignores the very existence of section 163.3213, Fla. Stat., which specifically contemplates comprehensive plan consistency challenges to local ordinances – separate and apart from rezonings or other development order decisions. By their nature, land development regulations are not actual development approvals – they determine what development approvals may and may not be permitted. The Court, in recognizing the clear statutory scheme, should rule that challenges to land development regulations under the statute must recognize and take into consideration the rezoning and other development order decisions that an ordinance would permit in the future.

There is no fair debate that Ordinance 23–22 violates Goal 23, Objective 23.2., and Policy 23.2.4 because the increased development densities it allows on South Seas, and the increased building heights it allows on South Seas and all of Captiva are clearly inconsistent

with the Comprehensive Plan's Goal 23 ("*enforce development standards that maintain the historic low-density residential development pattern of Captiva.*"), Objective 23.2 ("*continue the long-term protection and enhancement of … existing land use patterns"),* and Policy 23.2.4 ("*Limit development to that which is in keeping with the historic development pattern on Captiva*", including "*low-density residential dwelling units … minor commercial development and South Seas Island Resort.*")

The Court should overturn the Final Order, and rule that Ordinance 23-22 violates sections 163.3194 and 163.3213, Fla. Stat. because it is inconsistent with the Lee County Comprehensive Plan.

IV. ARGUMENT

1. THE ALJ MISINTERPRETED THE CHAPTER 23 MANDATE TO LIMIT DEVELOPMENT ON CAPTIVA TO HISTORICAL DEVELOPMENT LEVELS TO INSTEAD ALLOW A MAJOR EXPANSION AND INCREASE IN DEVELOPMENT.

A. Statement of Preservation

The issue of the correct interpretation of the provisions of Chapter 23 of the Lee Plan limiting development on Captiva and at South Seas to historical development levels was raised in CCA's Petition for Administrative Hearing, in testimony elicited during the formal hearing, and in the proposed Final Order. R. 145 - 147, 150 - 152, 154, 3024 – 3029. The Final Order ruled upon this issue at R. 3072, 3086.

B. Standard of Review

The interpretation of a comprehensive plan is a question of law, to be determined by the rules of statutory construction and subject to *de novo* review. *Rinker Materials Corp. v. North Miami Beach*, 286 So. 2d 552, 553 (Fla. 1973). Appellate courts review statutory interpretations *de novo*. *Bair v. City of* Clearwater, 196 So.3d 577, 581 (Fla. 2d DCA 2016).

C. Argument

The Final Order erroneously upheld an Ordinance exempting South Seas from the historic hotel room density and exempting both South Seas and Captiva from building height limits that had governed development for decades. Ordinance 23-22 is inconsistent with the Lee Plan.

The Court should overturn the ALJ's illogical interpretation, which ignored the obvious intent and terms of Chapter 23 of the Lee Plan, and rule that Ordinance 23-22 violates the Lee Plan by allowing building density and heights that exceed that of the historic development pattern on South Seas and Captiva.

a. The Historic Development Pattern at South Seas is Limited to 912 Combined Hotel and Residential Dwelling Units, for a Maximum Density of 3 Units Per Acre and a Maximum Building Height of the Lesser of 35' Above Grade or 42' Above Sea Level.

The ALJ's findings of fact show that the historic development pattern at South Seas was established by the 1973 Zoning Resolution, confirmed by the 2002 Administrative Interpretation, and constituted an almost completely built out – master planned development limited to 912 combined hotel and residential dwelling

units, for a maximum density of 3 units per acre and a maximum building height of the lesser of 35' above grade or 42 feet above sea level. The ALJ explicitly found that:

> "The competent, substantial evidence supports a finding that South Seas' approval for 912 residential units includes … hotel and motel units in today's language."
>
> R. 3063 (¶30).

The ALJ's findings of fact accurately reflect the competent substantial evidence, and prove the violation of the Plan. Those findings include:

a. The 1973 Zoning Resolution limited development of hotel and residential dwelling units to three units per acre, for a total maximum of 912 units. R. 3062 (¶24).

b. Administrative Interpretation (ADD 2002-00098) confirmed the 912 combined hotel and residential dwelling unit density limit, that the master planned development was almost completely built-out, and identified "enforceable conditions", including" utilizing a number of small-scale clusters; carefully planned and tightly-controlled." R. 3062 – 3063 (¶¶26a & b, 28).

c. The 2002 ADD limited building height to the lesser of 35 feet above the building grade or 42 feet above mean sea level. R. 3063 (¶27).

d. The Ordinance exempts South Seas from the height limits established decades ago in LDC Chapters 33 and 34 and the 2002 ADD, and instead allows heights as tall as 75 feet, increasing actual heights from between 49 and 79 feet above base flood elevation - enough to allow a third habitable floor on the rest of Captiva. R. 3064 - 3065 (¶¶34, 36, 38, 42, 43).

e. The Ordinance repealed the decades–old requirement that to be exempt from LDC Chapter 33, development at South Seas must comply with the 2002 ADD. R. 3064 (¶33).

f. Ordinance 23-22 exempts South Seas from all prior density limits, with no replacement density limit. R. 3066 (¶44).

g. Any existing vintage hotels on Captiva which exceed the density limits in the modern code are non-conforming structures that pre-existed the LDC and the Lee Plan, or were not properly permitted under the County's existing regulations. R. 3064 (fn. 6).

h. The Ordinance "**allows consideration of construction at** [heights up to 75 feet above base flood elevation] **through rezoning for the first time in the County's permitting history,** constituting a **significant departure from historic building regulations**…." R. 3082 (¶115) (emphasis added).

As a matter of law, these findings and the ALJ's factual findings that the Ordinance ""removes the density limit of 3u/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" proves a violation of the Lee Plan. R. 3080 (¶109); 3085-3086. (¶128).

The Court should reverse the ALJ's unreasonable contrary interpretation.

b. <u>The ALJ Incorrectly Interpreted the Lee Plan to Not Require the Maintenance of the Historic Development Pattern at South Seas and to Instead Allow a Major Expansion and Increase of its Historic Density and Height Development Pattern.</u>

The ALJ ruled that the Ordinance complied with Policy 23.2.4, which limits development to that in keeping with Captiva's historic development pattern and describes Captiva's "historic development

pattern" as "low-density residential dwelling units … minor commercial development, and South Seas Island Resort." R. 3072, 3085 - 3086. The ALJ erroneously ruled that by allowing "development at South Seas which departs from the historical development pattern, at least for density and height" the Ordinance did not violate the Lee Plan. R. 3085 - 3086.

The ALJ's interpretation of Chapter 23 of the Lee Plan, that the "historic development pattern" requirement does not apply to South Seas completely fails to recognize that Policy 23.2.4 is entitled "Historic Development Pattern" and explicitly identifies "South Seas Island Resort" as part of that historic development pattern. The interpretation that Policy 23.2.4 permits unlimited densities and double the building heights on South Seas tortures the language, intent and purpose of Policy 23.2.4 and Chapter 23 of the Lee Plan as a whole. To interpret Policy 23.2.4 to place no limits on development on South Seas is nonsensical – not a "fairly debatable" interpretation.

The ALJ correctly observed that CCA's argument "hinged on an interpretation that, together, Goal 23, Objective 23.2, and Policy

23.2.4 prohibited land development regulations that would allow development contrary to the historic development pattern of South Seas" and that CCA "interprets [Policy 23.2.4] to require the County to limit development within South Seas to that which is consistent with the historic development pattern of South Seas." R 3072, 3085 - 3086.

In rejecting CCA's interpretation, the ALJ states that the "plain language of the Plan, specifically Policy 23.2.4, did not support [CCA]'s interpretation" because it was "at least fairly debatable that the **historic development pattern of Captiva ... singled out South Seas as a separate land use subject to its own regulations**." The ALJ's interpretation, as outlined below, is erroneous on its face. R. 3086. (Final Order, pp. 35-36 ¶128). According to the ALJ,

> "The **plain language of the policy does not say that the County must limit development of South Seas to that which has been historically developed at South Seas."**

The ALJ's reasoning was that:

> "The **resort itself is a separate and distinct component of the historical development of the island**."
>
> R. 3072. (Final Order, p. 22 ¶80-81).

The ALJ misunderstood or misread Policy 23.2.4's treatment of the resort as a distinct component of the "historic development pattern on Captiva"**.** Policy 23.2.4 requires the County to **"[l]imit development to that which is in keeping with the historic development pattern on** Captiva", and explicitly defines "the historic development pattern on Captiva" as being:

> "***comprised of*** *low-density residential dwelling units, … minor commercial development and* ***South Seas Island Resort***.
>
> R. 3070. (Final Order, p. 20 ¶68). (emphasis added)

Beyond any fair debate, the Policy requires the County to **"[l]imit development to that which is in keeping with the historic development pattern" on "*South Seas Island Resort***. R. 3070. (Final Order, p. 20 ¶68) (emphasis added). The ALJ misreads the policy to arbitrarily remove South Seas from the "Historic Development Pattern" requirement of Policy 23.2.4 of which it is integral part. Even treating South Seas "as a separate land use **subject to its own regulations**" as the ALJ does, cannot eradicate the 50-year existence of those well-defined regulations, and cannot literally erase South Seas from the language of Policy 23.2.4 and its historic development pattern requirement.

The ALJ erroneously rejected the only possible interpretation of Chapter 23 of the Lee Plan. Goal 23, Objective 23.2, and Policy 23.2.4 limit development at South Seas to its historic development pattern, just as they do for the rest of Captiva.[9] They clearly do not treat South Seas as an open-ended land use, allowing future expansion of its historic density and intensity. Ordinance 23-22 destroys the meaning and decimates the limits set by Policy 23.2.4.

The Court must reverse the ALJ's ruling that development at South Seas was not subject to the Chapter 23 limitations.

c. The Plain Language of Chapter 23 of the Lee Plan Precludes the Increase in Density and Height Permitted by the Ordinance.

The ALJ's erroneous interpretation of Chapter 23 resulted in an ultimate ruling that the major increase in hotel room density and building heights permitted by Ordinance 23-22 did not violate the Lee Plan. This facial error of interpretation is evident from Chapter

[9] Each provision in the Plan must be read *in pari materia* and harmonized with all other applicable provisions so as to give effect to the entire plan as whole. *Realty Assocs. Fund v. Town of Cutler Bay*, 208 So.3d 735, 738 (Fla. 3d DCA 2016); *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19 (Fla. 1st DCA 2010); *Arbor Props., Inc. v. Lake Jackson Prot. All., Inc.*, 51 So.3d 502, 507-508 (Fla. 1st DCA 2010).

23's text and its support document, which eliminate any claimed ambiguities in the Lee Plan's governing provisions which, beyond any "fair debate," are intended to limit the density and intensity of any future development on Captiva to the island's historic level and preclude an expansion of the barrier island's historic development pattern. Under no reasonable interpretation can Lee Plan Goal 23 ("*enforce development standards that maintain the historic low-density residential development pattern of Captiva.*"), Objective 23.2 ("*continue the long-term protection and enhancement of … existing land use patterns"),* and Policy 23.2.4 ("Limit development to that which is in keeping with the historic development pattern on Captiva", including "*low-density residential dwelling units … minor commercial development and South Seas Island Resort.*") be read to allow the expansion of development at South Seas or the increased building heights throughout Captiva permitted by Ordinance 23-22.

The ALJ's wrong interpretation of Chapter 23 directly led to the incorrect outcome in this case. Ignoring the specific wording and plain language of Chapter 23, the ALJ upheld the "higher densities, intensities, or heights of development" of Ordinance 23-22 because

they were not "*inconsistent with* the historic development pattern of Captiva, as defined in Policy 23.2.4." R. 3073 (Final Order p. 23, ¶82) (emphasis added). But Chapter 23 does not allow for such elasticity or pliant legal standard. The ALJ's indefinite interpretation of Chapter 23 cannot be reconciled with its definitive plain language and unambiguous intent. Chapter 23 uses clear, precise and decisive words and phrases that preclude future 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).

The words "enforce", "maintain", "limit", and "continue" can in no way be equated with the words "**expand" or "increase**". By common definition, "**enforce**" means to "constrain" or "compel",[10] **"maintain**" means to "to **keep in an existing state**",[11] and "**limit"**

[10] https://www.merriam-webster.com/dictionary/enforce. (Last visited May 20, 2025) (emphasis added)
[11] https://www.merriam-webster.com/dictionary/maintain. (Last visited May 20, 2025) (emphasis added)

means "something that **bounds, restrains**, or **confines**" or "a **prescribed maximum** or minimum **amount, quantity**, or **number"**.[12] To "**continue**" is to "to **remain in existence**".[13] The reference to the *historic*[14] land use and development pattern cannot be read to permit future ahistoric ***expansion*** of those historic uses and development.

This is not "fairly debatable." The Lee Plan expressly requires the County's regulations to limit development throughout Captiva to that which is in keeping with its historic development pattern, including that at South Seas. Beyond any fair debate, the ALJ's interpretation of Chapter 23 is invalid.

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[12] https://www.merriam-webster.com/dictionary/limit. (Last visited May 20, 2025) (emphasis added)

[13] https://www.merriam-webster.com/dictionary/continue. (Last visited May 20, 2025). (emphasis added)

[14] Which means "known or *established in the past*" https://www.merriam-webster.com/dictionary/historic. (Last visited May 20, 2025) (emphasis added)

d. <u>The Historic Development Pattern at South Seas Has Never Exceeded Hotel and Residential Dwelling Unit Density Greater Than 3 Units Per Gross Acre or Building Heights Exceeding the Lesser of 35' Above Grade or 42' Above Sea Level - the Standards Clearly Established by Zoning Resolution Z-73-202 and ADD2002-00098.</u>

Based on the ALJ's findings of fact, and all relevant evidence, for the purposes of Policy 23.2.4, the historic development pattern of South Seas is defined by ADD2002-00098.

The Support Document for the amendments that placed Chapter 23 into the Lee Plan explicitly defines SSIR as:

> "a blend of hotel, commercial and residential uses ***delineated in a separate 2002 Administrative Interpretation***."
>
> R. 2434. (emphasis added)

The 2002 ADD's density and height limits have consistently applied to South Seas until the adoption of Ordinance 23-22, which exempts South Seas from Captiva's hotel density and building height limits and authorizes the County to replace those limits through a rezoning decision. R. 3064, 3066.

Even treating South Seas "as separate land use subject to its own regulations" as the ALJ does, cannot abolish the 50-year existence of those well-defined density and intensity limits. The

historic development pattern on South Seas was never unlimited, but was historically and consistently limited to 912 combined hotel and residential dwelling units by the 1973 Zoning Resolution and the 2002 ADD. South Seas' own regulations, in effect for decades, and confirmed and defined by the 2002 ADD, limited hotel and residential dwelling unit density to three units per acre and building heights to the lesser of 35 feet above grade or 42 feet above sea level.[15]

Chapter 23 was adopted to protect "the existing neighborhood form and densities", "put[] fewer people at risk to storms and coastal hazards" by ensuring safe "evacuation of … residents *and visitors",* on a Barrier Island with a constrained evacuation route, and to "limit[] rezoning approvals to those which **do not increase density and "control the density and intensity of use for island properties to that which currently exists**".

[15] There are hearsay and speculative statements in the record suggesting that some older, nonconforming buildings on South Seas may have been built exceeding the limitation in the 2002 ADD and zoning codes. Tr., Murphy pp. 246, 316, 324 (pdf. 278, 394, 402/1179); Tr., Crespo pp. 868, 870 (pdf. 757, 759). This evidence did not suggest any such buildings reached the heights permitted by Ordinance 23-22.

The ALJ's ruling that an Ordinance repealing the 912 unit (3 unit per acre) cap that has limited development at the master planned South Seas Resort approved in 1973 and continued for more than 50 years, in favor of an open ended, uncapped allowance for hotel rooms, is consistent with the Lee Plan is, beyond any fair debate, erroneous. By permitting a major increase in density and intensity at South Seas, by completely repealing the 3 unit per acre development limit at South Seas, and by permitting a substantial increase in the height of buildings on South Seas and throughout Captiva, Ordinance 23-22 violates the Lee Plan.

The Court should reverse the Final Order and rule that Ordinance 23-22 is inconsistent with Goal 23, Objective 23.2, and Policy 23.2.4 of the Lee Plan because it fails (i) to "enforce development standards that *maintain* the historic low-density residential development pattern"(Goal 23), (ii) to "*continue . . . existing* land use patterns" (Objective 23.2) and (iii) to *"limit* development to that which is in keeping with the *historic* development pattern" on Captiva and South Seas Island Resort. (Policy 23.2.4).

2. THE FINAL ORDER ERRED IN RULING THAT THE AMOUNT OF HOTEL ROOM DEVELOPMENT AND THE EXTENT OF THE BUILDING HEIGHT INCREASES ALLOWED BY ORDINANCE 23-22 IS NOT RELEVANT TO A SECTION 163.3213 LAND DEVELOPMENT REGULATION CONSISTENCY CHALLENGE.

A. Statement of Preservation

The issue of the relevance of the extent of the building heights and hotel room density allowed by the LDC change to this section 163.3213 "Land Development Regulation" challenge was raised in CCA's Petition for Administrative hearing, in testimony elicited during the formal hearing, and in the proposed Final Order. R. 145 - 147, 150 - 152, 154, 3024 – 3029. The Final Order ruled upon this issue at R. 3070-3071.

B. Standard of Review

Appellate courts review statutory interpretations *de novo*. *Bair v. City of* Clearwater, 196 So.3d 577, 581 (Fla. 2d DCA 2016) (citing *Borden v. East–European Ins. Co.*, 921 So.2d 587, 591 (Fla.2006)). Art. V, § 21, Fla. Const. prohibits judicial deference to an agency's statutory interpretations. *Kantor Real Estate LLC v. DEP, et al,* 267 So. 3d 483, 487 (Fla. 1st DCA 2019), *rev. dismissed*, 2019 WL

2428577 (Fla. 2019). "When an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand." *Legal Envtl. Assistance Found., Inc. v. Bd. of County Comm'rs*, 642 So. 2d 1081, 1084 (Fla. 1994).

An appellate court may set aside agency action if the agency erroneously interpreted the law and a correct interpretation compels reversal, or the agency's exercise of discretion was otherwise in violation of a statute. §§ 120.68(7)(d) and (e), Fla. Stat.

C. Argument

The Final Order Erroneously Ruled that a Challenge to the Extent of the Ordinance's Impact on Permittable Hotel Density and Building Height Was Not Relevant To This Section 163.3213 Administrative Challenge Because Actual Development Approvals Require a Future Zoning Action.

i. The ALJ ruled that the density and heights permitted by the Ordinance are not relevant until a Rezoning is approved.

As described by the ALJ, CCA's land use expert Charles Gauthier calculated potential density for the Intervenor's pending development proposal if the hotels were built to the maximum of 75 feet (a possibility if sought in the rezoning), or six stories. Mr. Gauthier calculated a total of 1,142 units at 14 units per acre.

The ALJ erroneously ruled that "none of the resulting density numbers are actually allowable under the challenged Ordinance" because they "are **dependent on approval by the County through a rezoning process**", which "**is not at issue in this case**," and thus "[a]ny analysis based on projected development density is pure speculation.". R. 3067. (Final Order, p. 17 ¶52 – 53). (emphasis added). This ruling by the ALJ grossly misinterprets and effectively repeals sections 163.3194 and 163.3213, Fla. Stat.

The ALJ made the same error regarding building heights. The ALJ rejected as irrelevant the opinion of CCA's land use expert that buildings as tall as 75 feet above base flood elevation are inconsistent with Policy 23.2.3 and the historic development pattern defined by the 2002 ADD, because that increased height is "not available as a right under the Ordinance", but instead subject to "a rezoning process." R. 3070-3071 (¶¶69, 75). Based on these clearly erroneous statutory interpretations, the ALJ ruled that CCA did not prove that Ordinance 23-22 is inconsistent with Chapter 23. R. 3071 (¶76).

The ALJ misunderstands the statutory scheme. While Ordinance 23-22, not a subsequent rezoning, is at issue in this

section 163.3213 challenge, its **consistency with the Lee Plan is determined by the rezoning approvals it would permit in the future**. Because Ordinance 23-22 would authorize subsequent zoning approvals at hotel room densities and building heights that are inconsistent with the Lee Plan, it violates sections 163.3194 and 163.3213, Fla. Stat.

The error of the ALJ's legal interpretation is apparent from, and clearly contradicted by, her factual findings that the Ordinance "***pav[es] the way* for approval of development proposals at higher densities** than previously allowed" and "**allows for development applications at higher densities**" R. 3080 (¶109); R. 3082 (¶116) (emphasis added). The ALJ's mistaken legal reasoning becomes obvious in her conflicting rejection of SSIR's argument that CCA and Sanibel's injuries were speculative. The ALJ found that:

> "SSIR repeatedly indicated that **the Ordinance itself allows it to apply for the very rezoning which is pending**. Thus, SSIR believes its substantial interests in future development of South Seas are being adjudicated in this challenge to the Ordinance, regardless of any subsequent rezoning decision by the County or challenge thereto. SSIR cannot have its proverbial cake and eat it too. SSIR's position is an admission that **the Ordinance, while not approving any specific development, allows future development at heights, densities, or**

intensities, that were not allowed under the previous LDR." R. 3083 (footnote 9). (emphasis added).

The ALJ's conclusion that Ordinance 23-22 was not inconsistent with the Lee Plan is clear legal error given her findings of fact that the Ordinance allows for greater heights, densities and intensities than previously allowed under the Land Development Code.

ii. <u>The Legislature Created a Specific Cause of Action for Challenges to Land Development Regulations, Separate and Apart from Challenges to Subsequent Rezonings.</u>

The ALJ's ruling that the densities and heights permitted by Ordinance 23–22 were not relevant to a section 163.3213 proceeding because they cannot be realized until a rezoning is approved grossly misunderstands the statute. Rezoning approvals and other development orders are dependent upon what is allowed in the Land Development Code and what the Code would allow in the future. They are expressly subject to the cause of action established in section 163.3213, Fla. Stat. *See Lourdes Ramirez v. Department of Economic Opportunity*, et al., 2023 WL 2898913, Case No. 22-1385GM (Fla. DOAH Apr. 5, 2023). The Final Order in *Ramirez* correctly ruled that a land development regulation change was

subject to challenge not because it approved construction – but because it "will allow for greater development of [hotels and motels] …." *Ramirez* Final Order, p. 8. The statutory scheme allows no other reading.

Under Chapter 163, Florida Statutes (Community Planning Act), a comprehensive plan sets "general guidelines and principles concerning its purposes and contents . . . ." § 163.3194(4)(b), Fla. Stat. The statute requires that comprehensive plans be implemented by the "adoption and enforcement" of local regulations or land development codes. § 163.3201, Fla. Stat. ("It is the intent of this act that the adoption and enforcement by a governing body of regulations for the development of land or the adoption and enforcement by a governing body of a land development code for an area shall be based on, be related to, and be a means of implementation for, an adopted comprehensive plan as required by this act.")

Section 163.3202(1), Fla. Stat. requires that "each county . . . adopt or amend and enforce land development regulations that are consistent with and implement their adopted comprehensive

plan.") (emphasis added); *see also Board of County Com'rs of Brevard County v. Snyder,* 627 So.2d 469, 473 (Fla.1993) ("The local plan must be implemented through the adoption of land development regulations that are consistent with the plan.") (citing § 163.3202, Fla. Stat. (1991)).

Section 163.3202(2)(b), Florida Statutes, further provides:

> "land development regulations shall contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan . . . ."

The hearing below was a proceeding under section 163.3213, Fla. Stat., **the very existence of which refutes the ALJ's ruling that the extent of development allowed by Ordinance 23 -22 was not relevant to the outcome.** Ordinance 23-22 is subject to review under Sections 163.3213(1) and 163.3213(5)(a), Fla. Stat., which create a specific statutory cause of action to challenge land development regulations as inconsistent with a local government's Comprehensive Plan. The statute makes a code change subject to challenge whether or not actual development approval has been granted.

Section 163.3213(1), Fla. Stat. (Administrative review of land development regulations.) provides:

> "It is the intent of the Legislature that substantially affected persons have the right to **maintain administrative actions which assure that land development regulations** implement and are consistent with the local comprehensive plan." (emphasis added).

The statute then provides that:

> "a substantially affected person, within 12 months after final adoption of the land development regulation, **may challenge a land development regulation on the basis that it is inconsistent with the local comprehensive plan**." Section 163.3213(3), Fla. Stat. (emphasis added).

Under the statutory scheme, development orders, such as rezonings, are separate actions that are controlled by both plans and land development regulations and knowingly create a cause of action to challenge the latter based on development orders they will allow. The statute provides a separate section for judicial challenges to "development orders", including rezonings. Section 163.3215, Fla. Stat. A "development order" is "any order granting, denying, or granting with conditions an application for a development permit." Section 163.3194(15), Fla. Stat. In turn, a "development permit" is "any building permit, zoning permit, subdivision approval, **rezoning**, certification, special exception, variance, or any other official action

of local government having the effect of permitting the development of land." Section 163.3194(16), Fla. Stat. In addition, rezonings and other development orders, by separate mechanism, may be challenged as inconsistent with a land development code.

But, as explicitly provided in section 163.3213, Fla. Stat., the Legislature unambiguously intended that changes to the Code may be challenged for being inconsistent with the Comprehensive Plan as a separate cause of action from a challenge to a rezoning.

The ALJ's ruling that the extent of the height and density increases potentially authorized by Ordinance 23-22 is irrelevant to a Section 163.3213(3) proceeding is facially inconsistent with the very existence of Section 163.3213(3), Fla. Stat. Whether the regulation has been applied is irrelevant. Indeed, for a substantially affected party like CCA to await a rezoning approval to assert their rights is to waive them, as such a rezoning would, upon approval, be permitted by the regulation at issue and be unchallengeable on that basis. Ordinance 23-22 permits the rezoning approval of building heights and densities well in excess of the historical land use and

development pattern at South Seas and Captiva, and that is why is violates the statute.

Also, Section 163.3213(3) requires that a comprehensive plan consistency challenge to a land development regulation be brought within 12 months of its enactment. Surely the Legislature did not intend that a local government could avoid such a challenge by simply waiting for 12 months before granting any approvals based upon a change to its regulations.

While the Court need not venture beyond the plain reading of the statute to overturn the ALJ's Final Order, the caselaw overwhelmingly confirms the correct reading of sections 163.3194 and 163.3213, Fla. Stat. A land development regulation establishes minimum development standards and maximum development allowances to govern and be applied to individual development order applications. It **is adjudged by a forward – looking analysis based on the range of uses, densities and intensities that it will either allow or preclude in its future application to development order applications.** "[A] zoning ordinance must prescribe definite standards for the guidance and control of the building inspector, the

zoning officials *and indeed the municipal council,* when by the ordinance it reserves to itself various administrative zoning powers. *North Bay Village v. Blackwell,* 88 So.2d 524, 526 (Fla.1956). (emphasis supplied). "The right of the appellants should be determined, and the infringement upon them gauged, by the language of the ordinance itself." *Drexel v. City of Miami Beach,* 64 So.2d 317, 319 (Fla.1953).

The effect and relevance of a land development regulation is categorically about the subsequent development orders it either allows or prohibits. In *Windward Marina, L.L.C., v. City of Destin*, 743 So.2d 635 (Fla. 1d DCA 1999), the Court overturned a City's denial of a development order because the city's land development code did not "expressly place developers on notice that the city will consider, and possibly deny a development order, based solely on the effect a proposed development will have on boat traffic in an adjacent waterway." Id at 637-638. The Court held that:

> "case law that requires a local government's denial of a land development order to be based on specific criteria set forth in its duly enacted land use regulations. See Alachua County v. Eagle's Nest Farms, Inc., 473 So.2d 257, 259 (Fla. 1st DCA 1985). See also Powell v. City of Delray Beach, 711 So.2d 1307, 1310 (Fla. 4th DCA 1998)"

Id. at 635.

A local government, held the Court, "may not deny a development order based on criteria which are not specifically enumerated in its land use regulations." Id. (citing *Drexel v. City of Miami Beach*, 64 So.2d 317 (Fla.1953). See also *Rehman v. Lake Cty.* , 56 So.3d 852, 853-54 (Fla. 5th DCA 2011); *Effie, Inc. v. City of Ocala*, 438 So.2d 506 (Fla. 5th DCA 1983); *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146 (Fla. 1st DCA 1979) (holding that once an applicant for zoning approval meets the relevant code requirements, "the governing body may not refuse the application."

A land use allowance's compliance with law is adjudged based on what it would permit, not on speculation that something less might ultimately be approved. *United States Sugar Corp. v. 1000 Friends of Fla.*, 134 So. 3d 1052 (Fla. 4th DCA 2013).

Land development regulations are the mechanism by which local governments implement their comprehensive plans and must thus be interpreted and applied in the same manner. A comprehensive plan amendment "compliance" decision is based on the maximum amount of development the amendment would

authorize for approval. *BG Mine, LLC v. City of Bonita Springs*, 2018 WL 6729122, Case No. 17-3871GM (DOAH 2019) at ¶¶ 70–71, 105-112; *Zemel v. Lee Cnty.*, 15 F.A.L.R. 2735 (FDCA 1993), aff'd, 642 So. 2d 1367 (Fla. 1st DCA 1994); *Martin Cnty. Cons. Alliance, Inc., v. Martin Cnty.,* Case No. 10-0913GM (DOAH Sept. 3, 2010; Fla. DCA Jan. 3, 2011); *DCA v. Taylor County*, Case No: 10-001283GM at ¶26 (DOAH Dec. 13, 2010); *Sheridan v. Lee Cty,* Case No. 90-7791 (DOAH Jan. 27, 1992; DCA June 28, 1993; Admin. Comm. Feb. 15, 1994). Judicial decisions overturning the approval of comprehensive plan amendments do so because of what those amendments allow, regardless of what may or may be approved through future zoning actions. *Payne v. City of Miami*, 52 So. 3d 707 (Fla. 3d DCA 2010).

Here, the ALJ's ruling that the density and height impacts of Ordinance 23-22 are not relevant to a section 163.3213 Land Development Regulation challenge (and must await the approval of a rezoning) impermissibly renders that statute meaningless. *Hawkins v. Ford Motor Co.*, 748 So.2d 993, 1000 (Fla. 1999); *Unruh v. State,* 669 So.2d 242, 245 (Fla. 1996) ("[C]ourts should avoid readings that would render part of a statute meaningless.").

Under § 120.68(7)(d), Fla. Stat., an appellate court must set aside agency action when it finds that "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action . . . ." The Court should reverse the Agency Final Order and rule that challenges to land development regulations under the statute are based upon the future rezoning and other development order decisions that the ordinance would permit, and rule that Ordinance 23-22 violates the Lee Plan because it would permit development approval that exceeds the historic development pattern on South Seas and Captiva.

V. CONCLUSION

Ordinance 23-22, beyond fair debate, is inconsistent with Chapter 23 of the Lee County Comprehensive Plan. The Final Order's contrary conclusion is based on the erroneous legal interpretations that (i) South Seas is exempt from the requirement to "maintain the historic low-density residential development pattern of Captiva", "protect … existing land-use patterns" and "limit development to that which is in keeping with the historic development pattern"; (ii) those Lee Plan provisions allow an increase and expansion of prior

development patterns on both South Seas and Captiva, and (iii) the amount of development a land development regulation will allow in the future is not relevant in a section 163.3213 administrative challenge. Under the correct legal interpretations, the ALJ's factual findings require a ruling that Ordinance 23-22 is inconsistent with the Lee County Comprehensive Plan, and thus violates sections 163.3194(3)(a), 163.3201 and 163.3202, Fla. Stat. The Court should reverse the Agency Final Order.

RESPECTFULLY SUBMITTED this 21st day of May, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2025, a true and exact copy of the foregoing was furnished via electronic mail and the Court's e-filing portal to the following Service List:

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CERTIFICATE OF COMPLIANCE

I certify that this brief is filed in Bookman Old Style 14-point font and contains 12,713 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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