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
_____/

APPELLANT CAPTIVA CIVIC ASSOCIATION'S MOTIONS FOR REHEARING EN BANC AND REHEARING, FOR CERTIFICATION AND FOR WRITTEN OPINION

Appellant Captiva Civic Association, Inc. ("CCA"), pursuant to Fla. R. App. P. 9.330(a)(2) respectfully requests that this Court:

(1) enable review of the panel's May 22, 2026 per curiam affirmance by providing a written opinion. F.R.A.P. 9.330(a)(2)(D);

(2) grant a rehearing and rehearing en banc. F.R.A.P. 9.330(a)(2)(A);

(3) certify a question of great public importance to the Florida Supreme Court. F.R.A.P. 9.330(C).

I. Introduction and Summary

South Seas Resort is a 304-acre Master Planned Development at the north end of Captiva, approved in 1973 for a maximum density of 912 residential and guest/ hotel units (three-units per acre) and almost completely built. R. 3061. SSIR purchased 272 units on 120 acres of South Seas in 2021 and worked with Lee County staff to draft an amendment to the County's Land Development Code to accommodate SSIR's redevelopment plans by exempting development at South Seas from the Code's three - unit per acre density limit, and from the long – standing building height limit. R. 3064 - 3065.

Florida's *Community Planning Act* requires every City and County in the State to adopt and periodically update a Comprehensive Plan and implementing Land Development Code that establish the standards for how property can be developed within their jurisdiction. These regulations implementing the Comprehensive plan determine what developers can legally construct and where, and the density and intensity of development that will be permitted. Florida's appellate Courts have consistently ruled, consistent with the statutory scheme, that changes to these regulations are considered based on their consistency with the

applicable Comprehensive plan.

The CCA challenged the Code change on the basis, among others, that it violated the Lee County Comprehensive Plan, specifically, Goal 23 (to "enforce development standards that maintain the historic low-density residential development pattern of Captiva."), Objective 23.2 ("continue … existing land use patterns") and Policy 23.2.4 ("limit development to that which is in keeping with the historic development pattern on Captiva." R. 3069 - 3070. (emphasis added).

But the agency Final Order upheld by the Court's per curium affirmance ruled that a determination of the amount of development the Code change could allow is not relevant to a proceeding determining the amendment's consistency with the County's Comprehensive Plan. The Final Order holds that the extent of the density and intensity of use allowed by a change to the land development code is not properly considered until a specific rezoning request or other individual development order is acted upon. R. 3067, 3070-3071.

This is no academic dispute. SSIR has already sought the very sort of zoning change that is now permitted, but should not have been

permitted, by the change in the Land Development Code. R. 3061, 3066.

While that specific rezoning action is not at issue in this case, the extent of rezonings the Code change will allow is, under the statute and precedent, **the** issue in a case such as this. Once the Code provisions that govern rezonings are in place, the County is then obliged to approve rezonings consistent with those rules. This Final Order below conflicts with decisions by at least three appellate districts and raises an issue of exceptional public importance.

II. ARGUMENT

A. The Rulings Below on Which These Motions Are Based

The legal ruling rendered in the challenged Final Order is that the amount (density and intensity) of development a land development regulation would allow through subsequent development orders is not relevant when the consistency of that regulation with the local government's comprehensive plan is challenged. Instead, according to the lower tribunal, the amount of authorized development only becomes relevant when a specific rezoning application or other individual development order is acted

upon. R. 3067, 3070-3071.

Specifically, the Final Order ruled that:

> 52. **"Petitioner's land use expert**, Charles Gauthier, **calculated potential density** for the PUD if the hotels were built to the maximum of 75 feet (a possibility if sought in the PUD rezoning), or six stories. Mr. Gauthier calculated a total of 1,142 units at 14 units/acre. Mr. Gauthier calculated the possible density based on buildout scenarios for the 120 acres owned by SSIR, as well as proportional development of the remaining acreage at South Seas. Mr. Gauthier even calculated a "worse-case scenario" buildout that included converting the golf course acreage to residential use developed as 75-foot hotel buildings. **However, none of the resulting density numbers are actually allowable under the challenged Ordinance. These calculations are dependent on approval by the County through a rezoning process**."
>
> 53. "The PUD rezoning is not at issue in this case. Only the challenged Ordinance. **Any analysis based on projected development density is pure speculation**."
>
> 75. "As discussed above, **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. 3067, 3070-3071. (emphasis added).

To remind the Court, under Florida's Community Planning Act, all local governments are required to adopt and maintain a comprehensive plan, and more detailed land development regulations to implement the comprehensive plan. The plan and its

corresponding implementing regulations are the legislative standards that govern all future action of applications for rezonings and other "development orders." Section 163.3161(6), 163.3167(1) and (2), 163.3177(1), 163.3194 (1)(b), 163.3194(3)(a), and 163.3202(2)(b), Fla. Stat. *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).

The specific statutory requirements important to this Court's determination of whether to uphold the ruling below - are:

a). Section 163.3194 (1)(b), Fla. Stat.:

> "All **land development regulations** enacted or amended **shall be consistent with the adopted comprehensive plan** …."

b). Section **163.3194(3)(a),** Fla. Stat.:

> "A … land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development ***permitted by such … regulation*** are compatible with and **further the objectives, policies, land uses, and densities or intensities in the comprehensive plan** …."

(emphasis added to all).

B. <u>Motion For Rehearing and Rehearing En Banc</u>

i. <u>Motion For Rehearing</u>

While motions for rehearing are typically reserved for situations where an appellate court has issued a written decision, "a petition for

rehearing *en banc*, coupled with a motion for rehearing" may be appropriate if "the issue presented is of exceptional importance…." Brannock and Weinzier, *Confronting a PCA: Finding a Path Around a Brick Wall*, *Stetson Law Review*, Vol. XXXII, 367, 375, 377 (2003).

Appellant asks the Court to rehear the matter under F.R.A.P. 9.330(a)(2)(A) because the Court's order of affirmance overlooked or misapprehended the point of law of whether the amount (density and intensity) of development a land development regulation would allow through subsequent development orders is relevant when the consistency of that regulation with the local government's comprehensive plan is challenged, or becomes relevant only when a specific rezoning application or other individual development order is acted upon.

Motion for Rehearing *En Banc*

Appellant moves for Rehearing En Banc under F.R.A.P. 9.331(d) on the grounds that the case or issue is of exceptional importance.

Land Development Codes are the mechanism under which local governments implement their comprehensive plan. These codes regulate how land can be used and are amended frequently. The issue raised in this case will recur regularly.

Chapter 163 requires local governments to, among other things:

a. Amend their land development regulations whenever necessary to maintain their consistency with their comprehensive plans within one year after the adoption of a comprehensive plan amendment. §163.3202, Fla. Stat.

b. Evaluate and update their comprehensive plans and land development codes, at least every 7 years, based on changes in local conditions. (§163.3191 (1) – (3), Fla. Stat.)

The scope of matters regulated by land development regulations is vast. Section 163.3202, Fla. Stat. Requires local governments to maintain and amend regulations regarding "at a minimum:

(a) Regulate the subdivision of land.
(b) Regulate the use of land and water for those land use categories included in the land use element and ensure the compatibility of adjacent uses and provide for open space.
(c) Provide for protection of potable water wellfields.
(d) Regulate areas subject to seasonal and periodic flooding and provide for drainage and stormwater management.
(e) Ensure the protection of environmentally sensitive lands designated in the comprehensive plan.
(f) Regulate signage.
(g) Provide that public facilities and services meet or exceed the standards established in the capital improvements element required by s. 163.3177 and are available when needed for the development, or that development orders and permits are conditioned on the availability of these public facilities and services necessary to serve the proposed development. A local government may not issue a development order or permit that results in a reduction in the level of services for the affected public facilities below the level of services provided in the local government's comprehensive plan.

(h) Ensure safe and convenient onsite traffic flow, considering needed vehicle parking."

There are 67 counties and 411 municipalities in Florida. Section 163.3213, Fla. Stat. includes a cause of action for affected persons to challenge land development regulations on the basis that the regulations are inconsistent with the local government's comprehensive plan.. These challenges are heard by an administrative law judge, who, in a departure from typical Chapter 120 administrative hearings, has authority to issue final orders directly appealable to a district court of appeal. Sections 163.3213(5) and (6), Fla. Stat.

It is of exceptional importance for local governments, the landowners regulated by them, the citizens whose interests are dependent upon them, and the administrative law judges who preside over these consistency challenges, to know how, under Section 163.3194(3)(a), Fla. Stat., it is to be determined if "the land uses, densities or intensities, and other aspects of development *permitted by such … regulation"* are "compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan …."

The Final Order under appeal holds that analyzing the range of uses and development densities and intensities allowed by the regulation is irrelevant to such a determination.

If the Final Order is an accurate statement of the law, the law is incapable of implementation, and the legislative intent will be frustrated.

Statement of Counsel

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

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C. MOTION FOR WRITTEN OPINION

Appellant requests, pursuant to F.R.A.P. 9.330(a)(2)(D), that the Court issue a written opinion, which Appellant believes would provide:

(i) a legitimate basis for supreme court review;

(ii) an explanation for an apparent deviation from prior precedent; and

(iii) guidance to a lower tribunal, as the issue decided is expected to recur in future cases, and there are conflicting decisions on the issue from lower tribunals.

A written opinion would provide a legitimate basis for Supreme Court review.

If the Court were to issue a written decision that endorses the Final Order's ruling that analyzing the range of uses and development densities and intensities allowed by a land development regulation is irrelevant to determining, under Section 163.3194(3)(a), Fla. Stat., whether "the land uses, densities or intensities, and other aspects of development *permitted by such … regulation"* are *"*compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan …", this would conflict with other appellate decisions, which hold that the consistency of a land development regulation is determined based upon the subsequent development orders the regulation allows.

It is axiomatic that once a land development regulation is adopted, development applications that meet its terms cannot be

denied. Waiting until a rezoning or other development approval is considered under a regulation is too late to determine the regulation's consistency with the comprehensive plan. Conflicting decisions include:

a. *Windward Marina, L.L.C., v. City of Destin*, 743 So.2d 635, 637-638 (Fla. 1d DCA 1999) (Overturning a City's denial of a development order because the substance and content of city's land development code did not place developers on notice that the city could deny a development order based on its effect on boat traffic).

b. *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So.2d 257, 259 - 261 (Fla. 1d DCA 1985) (reciting "the requirement that zoning ordinances and their exceptions must be predicated upon legislative standards ..." and that "once the requirements are met, the governing body may not refuse the application." (emphasis added).

c. *Powell v. City of Delray Beach*, 711 So.2d 1307, 1310 (Fla. 4th DCA 1998) (Holding that a City's zoning code did not grant it the authority to impose upon a building permit a requirement that the applicant pave a portion of an alley).

d. *Effie, Inc. v. City of Ocala*, 438 So.2d 506, 509 (Fla. 5th DCA 1983) (Holding that, "once the requirements [of the zoning code] are met, the governing body may not refuse the application.")

e. *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146, 149 (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."[1]

If the Court were to issue a written decision that this is the correct interpretation of sections 163.3202, 163.3213, and 163.3194, the conflict with the decisions of the First, Third, Fourth and Fifth Districts, and of the Florida Supreme Court would support discretionary Florida Supreme Court review under Article V, section 3(b)(3) of the Florida Constitution and F.R.A.P. 9.030(a)(2) (iv).

D. Motion For Certification of Question of Great Public Importance.

For the reasons explained above, Appellant asks the Court, pursuant to F.R.A.P 9.330(a)(2)(C) to certify that its May 22, 2026

[1] Each of these decisions was brought to the Court's attention in Appellants' briefing. See Initial Brief pp. 64 -65.

Order raises the following question of great public importance:

Is the use and density and intensity of use a local government land development regulation will allow to be approved through future rezonings and other development orders relevant in a Section 163.3213, Fla. Stat. proceeding to determine whether a land development regulation is consistent with its comprehensive plan?

III. CONCLUSION

WHEREFORE, Appellant CCA respectfully requests that the Court:

1. Grant rehearing and rehearing *en banc*; or

2. issue a written opinion (a) identifying the grounds for affirmance and (b) certifying conflict with the First, Fourth and Fifth Districts.

3. Certify the foregoing question of great public importance;

4. Certify direct conflict with the foregoing supreme court and district court cases.

RESPECTFULLY SUBMITTED this 8th day of June, 2026.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 8, 2026, 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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