

IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
INC., and KEN HOFER,

Plaintiffs,

vs.

Case No. 09-CA-1735-16-W

SEMINOLE COUNTY, FLORIDA,
UNIVERSITY OF CENTRAL
FLORIDA, and UNIVERSITY OF
CENTRAL FLORIDA FOUNDATION,
INC.,

Defendants.

**RESPONSE TO DEFENDANT SEMINOLE
COUNTY'S MOTION TO DISMISS WITH PREJUDICE**

Plaintiffs CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby file this Response to the "Motion to Dismiss with Prejudice" served by Defendant Seminole County, Florida ("County"), on July 14, 2009, and state as follows:

I.

INTRODUCTION

1. This case involves a challenge by the Plaintiffs to a decision by the Seminole County Board of County Commissioners ("BOCC") to approve a major amendment to the Carillon Planned Unit Development ("Carillon PUD"), which includes the Plaintiffs' single-family neighborhood, to allow a 246,369 square foot University of Central Florida ("UCF") student housing complex to be built on Parcels 201 and 401 and Parcel 202, Lot 2 therein ("Carillon Major PUD Amendment").

The proposed student housing complex would include living accommodations for 600 UCF college students and would be up to four (4) stories tall. In addition to the four (4) story student housing complex, the Carillon Major PUD Amendment would also include two (2) parking garages of more than 280,000 square feet combined and up to four (4) stories in height, a 45,652 square foot religious/student center, and 53,977 square feet of commercial/retail use.

2. On or about July 2, 2009, the Plaintiffs filed a three-count Amended Complaint to challenge the BOCC's approval of the Carillon Major PUD Amendment:

- A. Count I is an action for declaratory judgment and injunctive relief pursuant to Section 163.3215, *Florida Statutes*, and asserts that the BOCC's approval of the Carillon Major PUD Amendment is inconsistent with the Seminole County Comprehensive Plan;
- B. Count II is an action for declaratory judgment and injunctive relief, and asserts that the BOCC improperly approved the Carillon Major PUD Amendment without first adopting an amendment to the Seminole County Comprehensive Plan as required; and
- C. Count III is an action for declaratory judgment and injunctive relief, and asserts that the BOCC's approval of the Carillon Major PUD Amendment violates the UCF Campus Master Plan.

(See Amended Complaint at ¶¶ 14-70).

3. This case is of critical importance to the Plaintiffs because the BOCC's decision, if not invalidated, will permit the intrusion of an incompatible student housing complex within the Carillon PUD. At its core, the project is an extension of university uses into the Plaintiffs' single-family neighborhood. The noise, lighting, litter, traffic, crime, and other activities associated with 600 college students and their guests will have a detrimental impact on the Plaintiffs' residential

neighborhood and adversely affect the quality of life of those who own homes or live within the Carillon PUD.

4. On July 14, 2009, the County served its Motion to Dismiss, alleging that all Counts of the Plaintiffs' Amended Complaint should be dismissed with prejudice. The County's arguments for dismissal are without merit and should be rejected by the Court.

II.

LEGAL STANDARD

5. In ruling on a motion to dismiss, the Court must confine itself to the allegations contained within the four (4) corners of a complaint, accepting all well-pled facts as true and drawing all reasonable inferences in favor of the plaintiff. *See Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971). A motion to dismiss tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact. *See Roberts v. Children's Med. Servs.*, 751 So. 2d 672, 673 (Fla. 2d DCA 2000). Moreover, speculation about the sufficiency of evidence which may be produced on the merits is wholly irrelevant and immaterial to deciding such a motion. *See Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174-75 (Fla. 4th DCA 2000).

III.

COUNT I

6. In its Motion to Dismiss, the County first claims that Count I of the Plaintiffs' Amended Complaint should be dismissed because:

- A. The Plaintiffs have allegedly failed to join indispensable parties as defendants to such claim – namely, the property owners/applicants for the Carillon Major PUD Amendment, *i.e.*, AHG Group, LLC, and University of Central Florida Foundation, Inc. (*See* Motion at ¶¶ 1-4); and

- B. The Plaintiffs have allegedly failed to plead facts showing that the Carillon Major PUD Amendment materially alters the use, density, or intensity of the property at issue and that the Plaintiffs have some right or privilege affected by the Carillon Major PUD Amendment. (*See id.* at ¶¶ 14-18).

The County's arguments are without merit and provide no basis for the dismissal of Count I.

A. The Property Owners/Applicants For The Carillon Major PUD Amendment Are *Not* Indispensable Parties Pursuant To Section 163.3215, *Florida Statutes*, Or Established Case Law

7. As previously noted, Count I of the Plaintiffs' Amended Complaint is an action for declaratory judgment and injunctive relief pursuant to Section 163.3215, *Florida Statutes*, and asserts that the BOCC's approval of the Carillon Major PUD Amendment is inconsistent with the Seminole County Comprehensive Plan.

8. Section 163.3215, *Florida Statutes*, provides the exclusive method by which an "aggrieved or adversely affected party" may challenge the consistency of a development order with a local comprehensive plan. In this regard, Section 163.3215(3), *Florida Statutes*, provides:

Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief **against any local government** to challenge any decision of such local government granting . . . an application for, or to prevent such local government from taking any action on, a development order . . . which is not consistent with the comprehensive plan adopted under this part. . . .

(Emphasis supplied).

9. By its plain and unambiguous language, Section 163.3215, *Florida Statutes*, provides for a statutory cause of action against **the "local government"** which granted the contested development order, *i.e.*, Seminole County in the instant case. Section 163.3215, *Florida Statutes*, does **not** authorize a cause of action against the property owner/applicant for the contested

development order, nor does it even require the property owner/applicant to be named in an action filed thereunder. Had the Legislature intended for the property owner/applicant to be named in actions filed pursuant to Section 163.3215, *Florida Statutes*, it could have easily said so -- but it did not. See *Karell v. Miami Airport Hilton/Miami Hilton Corp.*, 668 So. 2d 227, 229 (Fla. 1st DCA 1996) (“Our task is to interpret and apply the statutes as written . . . and not as one party or the other would like to have them written.”). Thus, on this basis alone, the County’s indispensable party argument fails as a matter of law. See, e.g., *Weber v. Zoning Bd. of Appeals of City of West Palm Beach*, 206 So. 2d 258, 260 (Fla. 4th DCA 1968) (holding trial court erred in dismissing complaint for failure to join the city as a party where the controlling statute did not require the city to be named as a party, reiterating that “such a requirement cannot be raised by judicial construction”); cf. *Kagan v. Pollock*, 638 So. 2d 151, 152 (Fla. 4th DCA 1994) (holding statute contained no requirement that defendant be specifically named in petition seeking statutory extension of time and court refused to read such a requirement into the statute).

10. In addition, Florida courts have consistently held that the property owner/applicant affected by a zoning action is not an indispensable party in a legal challenge to such action. For example, in *Concerned Citizens of Bayshore Community, Inc. v. Lee County*, 923 So. 2d 521 (Fla. 2d DCA 2005), the Second District reversed the trial court’s order dismissing the petitioners’ lawsuit for failure to name the property owner/applicant as a party, stating:

Case law clearly establishes that a property owner affected by a zoning regulation change is not an indispensable party to a review of that administrative action.

Id. at 523 (emphasis supplied); see also *Brigham v. Dade County*, 305 So. 2d 756, 758 (Fla. 1974) (holding applicant was not an indispensable party to action challenging zoning decision); *City of St.*

Petersburg, Bd. of Adjustment v. Marelli, 728 So. 2d 1197, 1198 (Fla. 2d DCA 1999) (holding property owner was not an indispensable party to action challenging approval of zoning variance). Thus, contrary to the County's contention, the property owners/applicants for the Carillon Major PUD Amendment are not indispensable parties to Count I of the Plaintiffs' Amended Complaint.¹

11. Accordingly, for the reasons discussed above, the County's contention that Count I of the Plaintiffs' Amended Complaint should be dismissed for failure to join indispensable parties is without merit and provides no basis for dismissal.²

¹ The County's reliance upon *Immer v. City of Miami*, 898 So. 2d 258 (Fla. 3d DCA 2005), and *Allman v. Wolfe*, 592 So. 2d 1261 (Fla. 2d DCA 1992), in its Motion to Dismiss to support its contention that the property owners/applicants for the Carillon Major PUD Amendment are indispensable parties to Count I of the Amended Complaint is misplaced as both cases are factually and legally distinguishable. First and foremost, neither case involved a statutory action filed pursuant to Section 163.3215, *Florida Statutes*. Second, neither case involved a challenge to a local zoning decision. Rather, *Allman* involved an action to rescind an agreement for deed and *Immer* involved a writ of mandamus to cancel a building permit.

² To the extent the property owners/applicants for the Carillon Major PUD Amendment would like to participate in Count I of the Amended Complaint, the proper course of action is for such entities to seek this Court's permission to intervene pursuant to Florida Rule of Civil Procedure 1.230. See, e.g., *Save the Homosassa River Alliance, Inc. v. Citrus County*, 2 So. 3d 329, 331 (Fla. 5th DCA 2008) (noting applicant/property owner "was allowed to intervene" in action filed pursuant to Section 163.3215, *Florida Statutes*); *Dunlap v. Orange County*, 971 So. 2d 171, 173 (Fla. 5th DCA 2007) (noting applicant "filed a motion to intervene" in action filed pursuant to Section 163.3215, *Florida Statutes*); *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 194 (Fla. 4th DCA 2001) (noting "[t]he developer intervened" in action filed pursuant to Section 163.3215, *Florida Statutes*).

B. Count I Of The Amended Complaint Alleges Sufficient Facts To State A Cause Of Action Pursuant To Section 163.3215, Florida Statutes

12. The County’s additional contention that Count I should be dismissed because the Plaintiffs have allegedly failed to plead facts showing that the Carillon Major PUD Amendment materially alters the use, density, or intensity of the property at issue and that the Plaintiffs have some right or privilege affected by the Carillon Major PUD Amendment is similarly without merit.

13. First, the Plaintiffs’ Amended Complaint specifically alleges that “[t]he County’s approval of the Carillon Major PUD Amendment materially alters the allowable uses or density or intensity of uses of the subject property.” (Amended Complaint at ¶ 21). Moreover, contrary to the County’s contention, the Plaintiffs’ Amended Complaint contains sufficient allegations demonstrating that the Carillon Major PUD Amendment materially alters the use, density, or intensity of the subject property. (*See id.* at ¶¶ 8-13, 30, 35).

14. Second, it is well established that adjacent property owners, such as the Plaintiffs, have standing to maintain an action pursuant to Section 163.3215, *Florida Statutes*, to challenge the consistency of a local development order, such as the Carillon Major PUD Amendment. *See, e.g., Dunlap v. Orange County*, 971 So. 2d 171, 174-75 (Fla. 5th DCA 2007); *Southwest Ranches Homeowners Ass’n, Inc. v. Broward County*, 502 So. 2d 931, 934-35 (Fla. 4th DCA 1987).

15. Accordingly, the County’s additional arguments for the dismissal of Count I of the Amended Complaint are without merit and provide no basis for dismissal.³

³ As an aside, the County’s suggestion that the facts do not support a cause of action pursuant to Section 163.3215, *Florida Statutes*, is unavailing. (*See* Motion at ¶ 22). Indeed, the County’s conclusory suggestion is directly refuted by the detailed allegations in the Plaintiffs’ Amended Complaint, which set forth numerous grounds on which the Carillon Major PUD Amendment is inconsistent with the Seminole County Comprehensive Plan. (*See* Amended Complaint at ¶¶ 8-49).

IV.

COUNT II

16. The County contends that Count II of the Plaintiffs' Amended Complaint should be dismissed because:

- A. The Plaintiffs cannot allege that the Carillon Major PUD Amendment involves any future land uses not previously approved for the Carillon PUD. (*See* Motion at ¶ 19);
- B. The Plaintiffs have allegedly failed to plead sufficient facts as to the existence of some right or privilege which may be affected by the Carillon Major PUD Amendment as required to maintain an action for declaratory judgment. (*See id.* at ¶ 20); and
- C. There is no basis for Count II if Count I of the Amended Complaint is dismissed. (*See id.* at ¶ 21).

The County's arguments are without merit and provide no basis for the dismissal of Count II.

A. Count II Alleges Sufficient Facts To State A Cause Of Action

17. Count II of the Amended Complaint is an action for declaratory judgment and injunctive relief, and asserts that the BOCC improperly approved the Carillon Major PUD Amendment without first adopting an amendment to the Seminole County Comprehensive Plan, as required by law. (*See* Amended Complaint at ¶¶ 50-60). In support thereof, the Plaintiffs assert that “[t]he Revised Final Master Plan submitted as part of the Carillon Major PUD Amendment includes uses that were not previously approved as part of the Carillon PUD,” and that “[t]he Carillon Major PUD Amendment seeks to increase the maximum residential density . . . beyond that allowed pursuant to the approved Carillon PUD.” (*Id.* at ¶¶ 54-55).

18. In its Motion to Dismiss, the County attempts to dispute the Plaintiffs' allegations that the Carillon Major PUD Amendment involves uses that were not previously approved as part of the Carillon PUD. (*See* Motion at ¶ 19).⁴

19. As previously noted, in ruling on a motion to dismiss, this Court must confine itself to the allegations contained within the four (4) corners of a complaint, accepting all well-pled facts as true and drawing all reasonable inferences in favor of the plaintiff. *See Pizzi v. Central Bank & Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971). Further, "speculation by the court as to whether the allegations will ultimately be proven is not permitted." *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1175 (Fla. 4th DCA 2000).

20. Accordingly, the County's first argument, which attempts to dispute the merits of the Plaintiffs' claim, provides no basis for the dismissal of Count II. *See Royal Selections, Inc. v. Florida Dep't of Revenue*, 687 So. 2d 893, 894 (Fla. 4th DCA 1997) ("A motion to dismiss a complaint for declaratory judgment is not a motion on the merits. Rather, it is a motion only to determine whether the plaintiff is entitled to a declaration of its rights, not to whether it is entitled to a declaration in its favor.").

⁴ The County's Motion to Dismiss does not address the Plaintiffs' allegation that the Carillon Major PUD Amendment seeks to increase the maximum residential density beyond that allowed pursuant to the approved Carillon PUD.

B. The Plaintiffs Are Entitled To Seek Declaratory And Injunctive Relief To Enforce The County's Ordinances

21. The County's contention that Count II should be dismissed because the Plaintiffs have allegedly failed to plead sufficient facts as to the existence of some right or privilege which may be affected by the Carillon Major PUD Amendment as required to maintain an action for declaratory judgment is similarly without merit.

22. First, it is well established that adjacent property owners, such as the Plaintiffs, have standing to seek declaratory and injunctive relief to prevent violations of local ordinances, such as the Seminole County Comprehensive Plan. *See, e.g., Conrad v. Jackson*, 107 So. 2d 369, 371 (Fla. 1958) (holding adjoining property owners had standing to maintain action for relief against violation of local ordinance); *Kagan v. West*, 677 So. 2d 905, 908 (Fla. 4th DCA 1996) (holding adjacent landowners had standing to seek relief for violations of the city's building code).

23. Second, contrary to the County's contention, the Plaintiffs' Amended Complaint contains sufficient allegations demonstrating the Plaintiffs' right to, and need for, a declaratory judgment in the instant case. Not only does the Amended Complaint contain sufficient allegations demonstrating the Plaintiffs' standing to maintain such claim, but the Amended Complaint contains sufficient allegations establishing the existence of a bona fide dispute between the Plaintiffs and the County concerning whether the BOCC was required to first process and adopt a plan amendment to the Seminole County Comprehensive Plan before it could approve the Carillon Major PUD Amendment. (*See* Amended Complaint at ¶¶ 1-2, 22-24, 56-58).

24. Accordingly, the County's second argument is without merit and provides no basis for the dismissal of Count II. *See, e.g., Smith v. City of Fort Myers*, 898 So. 2d 1177, 1178 (Fla. 2d DCA 2005) (holding complaint against city seeking declaratory judgment that the city's approval of the transfer of certain property violated notice requirements stated a cause of action).

C. Count II Is Not Dependent Upon Count I Of The Amended Complaint

25. Lastly, the County's argument that there is no basis for Count II if Count I of the Amended Complaint is dismissed is without merit.⁵ Count II is based upon the BOCC's failure to adhere to its adopted procedures, and such Count is separate and distinct from Count I, which is an action pursuant to Section 163.3215, *Florida Statutes*, challenging the consistency of the Carillon Major PUD Amendment with the County's Comprehensive Plan. Thus, the County's suggestion that Count II is dependent upon Count I is without merit and provides no legal basis for dismissal.

V.

COUNT III

26. Lastly, the County contends that Count III of the Plaintiffs' Amended Complaint should be dismissed because it allegedly only seeks a temporary injunction against the County and, thus, fails to state a cause of action. (*See* Motion at ¶ 23). In addition, the County contends that there is no basis for Count III if Counts I and II of the Amended Complaint are dismissed. (*See id.* at ¶ 24). The County's arguments are without merit and provide no basis for the dismissal of Count III.

⁵ As discussed in Paragraphs 6 through 15 above, the County's arguments for the dismissal of Count I are legally without merit.

27. In Count III of the Amended Complaint, the Plaintiffs assert that the BOCC's approval of the Carillon Major PUD Amendment violates the UCF Campus Master Plan, which requires university-owned housing to be built on campus. (See Amended Complaint at ¶¶ 61-70). Contrary to the County's contention, Count III does *not* only seek a temporary injunction against the County. Indeed, the County's contention is directly refuted by Paragraph 61 of the Amended Complaint, which states:

Count III is an action for a declaratory judgment, temporary injunction, and permanent injunction.

(*Id.* at ¶ 61).

28. Moreover, the prayer for relief in Count III specifically requests that the Court: (a) enter a declaratory judgment declaring that the BOCC's approval of the Carillon Major PUD Amendment violates the UCF Campus Master Plan; (b) enter a temporary and permanent injunction enjoining any development activities authorized by the BOCC's approval of the Carillon Major PUD Amendment; and (c) enter a temporary and permanent injunction enjoining the County from issuing any building permits and/or other development approvals related to the Carillon Major PUD Amendment. Thus, the County's first argument for the dismissal of Count III is without merit.⁶

⁶ The County's reliance upon *International Village Association, Inc. v. Schaaffee*, 786 So. 2d 656 (Fla. 4th DCA 2001), to support its contention that Count III should be dismissed for failure to state a cause of action is misplaced. (See Motion at ¶ 23). Unlike the instant case, the plaintiff in *Schaaffee* only sought a temporary injunction and never requested any ultimate relief, such as a permanent injunction and declaratory relief. See *Schaaffee*, 786 So. 2d at 658-59. Thus, *Schaaffee* is inapplicable to the instant case.

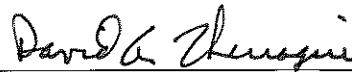
29. Likewise, the County's argument that there is no basis for Count III if Counts I and II of the Amended Complaint are dismissed is without merit.⁷ Count III is based upon a violation of the UCF Campus Master Plan, and such Count is separate and distinct from Counts I and II, which are based upon violations of the County's Comprehensive Plan. Thus, the County's suggestion that Count III is dependent upon Counts I and II is without merit and provides no legal basis for the dismissal of Count III.

VI.

CONCLUSION

30. For the reasons set forth above, the Court should deny the County's Motion to Dismiss with Prejudice dated July 14, 2009.

RESPECTFULLY SUBMITTED this 23rd of September 2009.



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COUNSEL FOR PLAINTIFFS

⁷ As discussed in Paragraphs 6 through 25 above, the County's arguments for the dismissal of Counts I and II are legally without merit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Telefacsimile and United States Mail to **Robert A. McMillan, Esquire**, Seminole County Attorney's Office, 1101 East First Street, Sanford, Florida 32771, and **Janet M. Courtney, Esquire**, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., P.O. Box 2809, Orlando, Florida 32802-2809, this 23rd day of September 2009.



DAVID A. THERIAQUE, ESQUIRE