

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

CASE NO. 09-CA-1735-16-W

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

Plaintiffs,

vs.

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

Defendant.

**DEFENDANT, SEMINOLE COUNTY'S MOTION FOR REHEARING ON
SEMINOLE COUNTY'S MOTION TO DISMISS WITH PREJUDICE**

Defendant, Seminole County (the "County"), by and through its undersigned attorneys, pursuant to Florida Rule of Civil Procedure 1.530, hereby moves for rehearing as to the County's Motion to Dismiss Plaintiffs' Amended Complaint with prejudice and alleges as follows:

1. On Thursday October 8, 2009, the Court heard from all parties on the County's Motion to Dismiss the Plaintiffs' Amended Complaint and the Court denied the motion from the bench.

2. An order of denial was entered on the County's motion to dismiss. The Order is attached as Exhibit "A".

3. A copy of the transcript of the hearing on the ~~County's Motion to Dismiss is attached hereto as Exhibit "B."~~

References to the record in this motion are designated by parenthetical reference to the transcript page number followed by a backslash and the line numbers, as "(5/15-25)" refers to transcript page 5, lines 15 through 25. "(7/23 - 8/7)" refers to transcript page 7, line 23 through page 8, line 7.

4. The Court rejected the County's argument that Section 163.3215, Florida Statutes, must be read in pari materia with the Declaratory Judgment Act, Chapter 86, Florida Statutes, and more particularly, Section 86.091. (7/19-8/25; 16/16-21)

5. Section 86.091, Florida Statutes, provides in part: "No declaration shall prejudice the rights of persons not parties to the proceedings." Failure to join the property owners as defendants in light of this provision in Section 86.091 results in the failure to join indispensable parties.

6. The Court ruled that there is no requirement that Section 86.091 "be engrafted onto" Section 163.3215 or that these two sections be read in pari materia. The Court accepted the argument that if the legislature wanted the provisions to be

read together, they would have stated so in Section 163.3215. (19/3-9, 21-24; 21/1-8).

7. The Court stated: "This Legislature—when the Legislature says who you can sue in a statutory action and then says what kind of an action you can bring, that does not mean that 86.091, Chapter 86.091 is engrafted on that statute. If the Legislature had intended that they would have said no declaration shall prejudice the rights of persons not parties to the proceedings under 163.3215(3) and that's why the aggrieved parties have the right to intervene." (21/1-8) And, "There is a conflict between these two statutes." (21/10) And, "...but the Legislature knowing what Chapter 86.091 says only authorized the suit against one entity and that's the County. The Legislature knew what Chapter 86.091 said because it's been on the books a lot longer." (22/5)

8. In consideration of the following cases regarding proper application of the "in pari materia" rule of statutory construction, the County requests that this honorable Court reconsider its conclusion that the Sections 163.3215 and 86.091 conflict, and instead find that these two statutes can only be read in pari materia and Section 86.091 **does** apply to declaratory actions under Section 163.3215.

9. In *Edgewater Beach Owners Ass'n, Inc. v. Walton County*, the court held that since the vesting rights section of 163.3171 addressed developments of regional impact, it must be read in pari materia with Section 380.06 which is the comprehensive statute governing review of developments of regional impact. *Edgewater Beach Owners Ass'n, Inc. v. Walton County*, 833 So.2d 215, 222 (Fla. 1st DCA 2002) rev. den. 845 So.2d 889 (Fla. Apr. 22, 2003). *Edgewater* was receded from on other grounds in *Bay Point Club, Inc. v. Bay County*, 890 So.2d 256, (Fla. 1 DCA 2004). In *Edgewater* there was no express requirement in Section 163.3167 that it be read in pari materia with Section 380.06. Similarly, the absence of such an express requirement in Section 163.3215 does not mean that its declaratory judgment provision should not be read in pari materia with Chapter 86, including Section 86.091.

10. *Edgewater* cited *State v. Fuchs* and *Miami Dolphins* as authority that statutes relating to the same or closely related subject should be read in pari materia; and, "Although the legislature may direct that statutes be read in pari materia, the absence of that directive does not bar such a reading." *State v. Fuchs*, 769 So.2d 1006, 1009-1010 (Fla. 2000); *Miami Dolphins, Ltd. v. Metropolitan Dade County*, 394 So.2d 981, 988 (Fla. 1981). In the instant case, the material portions of both

Sections 86.091 and 163.3215(3) relate to the same subject: declaratory actions.

11. In *Miami Dolphins*, the Supreme Court of Florida held that ambiguities are resolved by reading similar statutes in *pari materia*. "Statutes may be read **in pari materia** without such being specifically directed, because laws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws in *pari materia*, though they contain no reference to each other." *Miami Dolphins, Ltd. V. Metropolitan Dade County*, 394 So.2d 981, 988 (Fla. 1981)[emphasis in original].

12. Section 163.3215 must be interpreted to conform with constitutional guarantees and not abridge them. *State v. Fuchs*, as this case, involved an exclusive statutory remedy (there, for damages inflicted by an employee) by way of an action against the governmental entity. The Court held that laws should be construed with reference to the constitution. Even though the statutes did not reference each other, they must be read in *pari materia* to include another party, the defendant, fellow employee. *Holmes County School Bd. v. Duffell*, 651 So.2d 1176, 1179 (Fla. 1995) (cited in *Fuchs*) supports the conclusion that a statute that provides for an exclusive remedy only naming the government entity does not preclude the necessity of naming

other indispensable parties. This supports a conclusion that the property owners in this case should be named under an action pursuant to Section 163.3215.

13. When interpreting two statutes which arguably cover the same subject matter (in this case, declaratory action), they must be construed to preserve the intent of each and, if possible, interpreted in such a way that neither denies the effectiveness of the other. *Crawford County v. Secretary of State, State of Michigan*, 408 N.W.2d 112, 116 (Mich. Ct.App 1987).

14. Section 163.3215 authorizes a declaratory action which must be read in pari materia with Section 86.091 because declaratory actions are governed by Chapter 86. *Orange County v. Expedia, Inc.*, 985 So.2d 622, 625 (Fla. 5th DCA 2008) certification denied (2008) *Rev. Den.*, 999 So.2d 644 (Fla. 2008) ("Chapter 86, Florida Statutes, governs declaratory actions...").

15. Instead of the two statutes being in conflict, Section 163.3215 is actually complemented by Chapter 86 when read in pari materia. Counsel for Plaintiffs repeatedly argued that the declaratory action authorized by Section 163.3215(3) "is a statutory cause of action; it is not a common law cause of action." (10/21-24; 11/9-10; 12/11-14; 13/10-11) As such, the

statute should specify the elements of the cause of action. In this regard, however, it is clear that Section 163.3215(3) does nothing more than authorize "[a]ny aggrieved or adversely affected party [to] maintain a de novo action for declaratory . . . relief against a local government." There is no other guidance as to the nature or requirements of such action provided in Section 163.3215. This set of circumstances demonstrates not only that the Court may, but actually should, read Section 163.3215(3) in pari materia with Chapter 86. The Court should construe the whole of Chapter 86 to apply to a declaratory action under Section 163.3215, including Section 86.091, rather than just the parts of Chapter 86 that the Court chooses ("That doesn't mean that every provision of Chapter 86 is engrafted on that statute.") (21/25- 22/1).

16. The case of *Costa v. Sunn*, held that a limited section of one statute authorizing declaratory actions (HRS 91-7) must be read in pari materia with the other comprehensive declaratory judgment act (HRS 632-1). *Costa v. Sunn*, 697 P.2d 43, 47-48 (5 Haw.App. 419, 1985) ("Although 91-7 does not specifically authorize ancillary relief, we find nothing in its language or its legislative history indicating the legislature's intent to limit the court's authority in declaratory actions under HRS 91-7 as opposed to under chap. HRS 632" "Consequently, the

filing of an action [for declaratory judgment] under § 91-7 brings into play all the power and authority of the court extant under chapter 632."). In the instant case, this Court likewise should read these statutes (Sections 163.3215 and 86.091) in pari materia.

17. The declaratory judgment statute should be liberally construed. *Trafalgar Developers, Ltd. v. Morley*, 305 So.2d 274, 275 (Fla. 3d DCA 1974), cert. denied, 317 So.2d 443 (Fla. 1975). ("Chapter 86, F.S.A., providing for declaratory judgments is to be construed and administered liberally in order that a multiplicity of suits can be avoided while affording an adequate and expedient remedy for litigants in one action.") *Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc.* 509 F.Supp.2d 1158, 1160 (M.D. Fla.2007), vacated in part on other grounds, 2:04-cv-26-FTM-29DNF, 2007 U.S. Dist. LEXIS 35730 (M.D. Fla. May 16, 2007), aff'd, 312 Fed. Appx. 211 (11th Cir. 2009). ("Florida Declaratory Judgment Act is substantive law intended to be remedial in nature, and is to be liberally administered and construed.")

18. The fact that Section 86.091 limits the effect on the rights of non-party property owners, such that complete relief cannot be obtained without them, does not conflict with the naming of the property owner and the local government both as

party defendants under Section 163.3215. Both statutes may be read together and be consistent.

19. Count I is brought under Section 163.3215(3) which states an aggrieved party "**may** maintain a de novo action for declaratory...relief against **any local government**". Section 163.3215(1) provides "The local government that issues the development order is to be named as a respondent in all proceedings under this section." [emphasis added] It does not say "**the**" respondent or "**exclusive**" respondent. Reading Sections 163.3215(3) and (1) together with Section 86.091 does not support the conclusion that the local government should be the only party. The fact that other defendants may be necessary is a consistent reading when all these sections are read in pari materia.

20. Based on these cases, the rule of statutory construction of in pari materia should have been employed to read Sections 163.3215 and 86.091 together.

21. The Court agreed that Count II needs to include the developer as a necessary party. (19/21-24).

22. The Court agreed that Chapter 86 governs declaratory actions. (22/2-4) Section 163.3215(3) authorizes declaratory actions (" Any aggrieved or adversely affected party may maintain a de novo action **for declaratory**, injunctive, or other

relief..."[emphasis added]. It would be contrary to existing law to rule that Chapter 86 applies but Section 86.091 "is not engrafted" on to the declaratory action under Section 163.3215. The whole of Chapter 86 should apply, including Section 86.091. Declaratory judgment statutes should be liberally construed, rather than restricted to only apply in part, such that these two sections may be read in pari materia.

23. With respect to Count II, in consideration of the County's argument that Count II is really a Section 163.3215 consistency challenge, (see colloquy at (20/8-25)), if the Court agrees with the County's view that the two sections must be read in pari materia, and the Court did seem to agree at the hearing (20/20-25) that Count II was appropriately an action under Section 163.3215, then the same argument for dismissal must apply to Count II to the extent that it applies to Count I.

24. Case law as noted herein has established that one section of a statute does NOT have to expressly state that it is to be read in pari materia with another section of the statutes on the same subject in order for the rule of statutory construction to apply.

25. Therefore, the rationale upon which the Court relied to deny the motion to dismiss Counts I and II of the Amended Complaint for failing to join the owner and applicant as

indispensible parties within the jurisdictional time limit is not supported by relevant authorities.

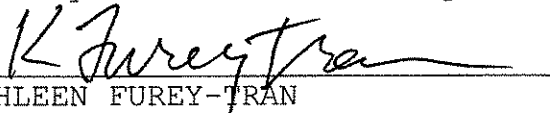
WHEREFORE, the County respectfully requests that this honorable Court reconsider the decision to deny the County's Motion to Dismiss Plaintiffs' Amended Complaint and dismiss Counts I and II of the Amended Complaint with prejudice; and for such other and further relief as the Court deems appropriate.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished to David A. Theriaque, Esq., S. Brent Spain, Esq., and Leslie E. Bryson, Esq., 433 N. Magnolia Drive Tallahassee, FL 32308-5083 and Janet Courtney, Esq. P.O. Box 809 Orlando, FL 32802-2809 by U. S. Mail this 19th day of October, 2009:

RESPECTFULLY SUBMITTED,
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By: _____


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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.

**ORDER DENYING DEFENDANT
SEMINOLE COUNTY'S MOTION TO DISMISS**

This case is before the Court on Defendant Seminole County's "Motion to Dismiss with Prejudice," served on July 14, 2009. Having reviewed the Defendant's Motion and the Plaintiffs' Response thereto, heard argument of counsel on October 8, 2009, and being otherwise fully advised, it is ORDERED AND ADJUDGED:

1. That Defendant Seminole County's Motion to Dismiss is hereby DENIED.

EXHIBIT A

2. That Defendant Seminole County shall serve its Answer to the Plaintiffs' Amended Complaint within ~~twenty~~ ^{30 AM} (20) days from the date of this Order.

DONE AND ORDERED in Sanford, Seminole County, Florida, on this 8 day of October 2009.



ALAN A. DICKEY
CIRCUIT JUDGE

Conformed copies furnished this _____ day of October 2009 to:

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IN THE CIRCUIT COURT, IN AND
FOR SEMINOLE COUNTY,, FLORIDA

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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.

BEFORE THE HONORABLE
ALAN A. DICKEY
JUDGE OF THE COURT

REPORTED BY:
LINDA M. GOODALL, RPR
In Courtroom G
Seminole County Courthouse
Sanford, Florida
October 8, 2009

APPEARANCES:

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Attorney for University of Central Florida and
University of Central Florida Foundation

1 THE COURT: Everybody identify yourselves for the
2 record. We'll start with attorneys for the plaintiff.

3 MR. THERIAQUE: David Theriaque.

4 THE COURT: Okay and do you represent both
5 plaintiffs?

6 MR. THERIAQUE: Yes, sir, along with my partner
7 Brent Spain sitting to my right.

8 THE COURT: Okay. And the defendant is Seminole
9 County.

10 MS. FUREY-TRAN: Kathleen Furey-Tran for Seminole
11 County, Your Honor.

12 MR. METNER: Matthew Metner for Seminole County.
13 I am just watching today, Judge.

14 THE COURT: Okay. And the University of Central
15 Florida.

16 MS. COURTNEY: Yes, sir, I'm Janet Courtney. I'm
17 here for UCF Foundation and the University of Central
18 Florida. We are not parties to Counts I and II of the
19 complaint. We are parties to Count III, but we have an
20 interest since we own or one of my clients owns the
21 property and that's why I am here.

22 THE COURT: Okay and I show that Seminole County
23 has filed a motion to dismiss, is that what was set for
24 today?

25 MS. FUREY-TRAN: That is correct, Your Honor.

1 THE COURT: Okay, I will let you go ahead and
2 argue that.

3 MS. FUREY-TRAN: May it please the Court, I would
4 like to start with some background information.

5 THE COURT: Okay.

6 MS. FUREY-TRAN: Carillon planned unit development
7 or PUD is a mixed use project that was first approved in
8 1987 with multifamily residential, retail commercial and
9 industrial uses and planned development for PD land use.
10 In 1988 the PUD was rezoned to PUD adding land. In 1988
11 the PUD was approved for single family residential,
12 multifamily residential, retail commercial, light
13 industrial and public benefit land uses.

14 The developer's commitment agreement specified
15 details of the project and was executed in 1988. The
16 developer's commitment agreement was amended several
17 times since 1988 once in 1992 and once in 2000, 2003 and
18 the latest one is the one that is under contention today.
19 Addendum Number 4 is the last amendment to the DCA which
20 was approved by the BCC, the Board of County
21 Commissioners, on January 27, 2009.

22 Addendum 4 is the development order as defined in
23 the Florida statutes at issue in this litigation. The
24 purpose of revising the DCA or the developer's commitment
25 agreement with Addendum 4 allowed a revised final master

1 plan for the properties for a mixed use development
2 including student housing and community center with
3 commercial, retail and parking. The parcels were
4 approved multifamily, commercial and retail in previous
5 versions of the developer's commitment agreement prior to
6 Addendum Number 4.

7 The final master plan describes features to
8 mitigate potential effects that the development may have
9 on adjacent properties such as setbacks, landscape
10 buffers, parking revisions, building locations and
11 height, lighting, traffic flow and public safety issues.
12 Addendum Number 4 described with specificity the nature
13 of the mixed use development and allowed multifamily in
14 more than ten percent of the area to be developed
15 removing this restriction from C17 from the first
16 addendum to the DCA.

17 The property owners AHG Group, LLC and the
18 University of Central Florida Foundation, Incorporated
19 are owners of the parcels affected by Addendum Number 4
20 who were not timely named in this lawsuit. Only UCF
21 Foundation was named in Count III. Neither owner was
22 named in Counts I or II. The amendment to the DCA was
23 executed and subsequently recorded in the Seminole County
24 clerk's records on March 30, 2009.

25 The Homeowners Association appealed that approval

1 to the Circuit Court by petition for certiorari which has
2 been denied and brought the action herein for declaratory
3 relief. Briefly in addition to the request for
4 injunctive relief, Count I is a challenge pursuant to
5 Florida Statutes Section 163.3215 the exclusive vehicle
6 for challenging consistency with the comprehensive plan.

7 Count II alleges the procedures were not in
8 accordance with the comprehensive plan on that a future
9 land use amendment should have been a precondition of
10 approval of Addendum Number 4. Count III alleges
11 inconsistency with the UCF master plan and that has no
12 jurisdiction in Seminole County.

13 Let me start with Count II. Although Count II
14 does not allege that it's a consistency challenge under
15 Section 163.3215, the County urges the Court to see that
16 it is just that. Count II alleges that procedural action
17 of the County was quote not in accordance with unquote or
18 in other words inconsistent with the future land use
19 element of the comprehensive plan. Although Section
20 163.3215 is not mentioned in Count II, Count II should be
21 dismissed as 163.3215 is their exclusive remedy if they
22 have any remedy at all.

23 In the case of Lee versus St. Johns County Board
24 of County Commissioners the plaintiff alleged that quote
25 the final development plan cannot be implemented if it is

1 inconsistent with the comprehensive plan without approval
2 of a comprehensive plan amendment unquote. The same is
3 alleged in Count II. The Lee Court held that the action
4 was reviewable under Section 163.3215 as likewise this
5 Court should rule.

6 However even with leave to amend the complaint to
7 include Count II as a part of Count I, it must be barred
8 like Count I for failure to join indispensable parties
9 within the jurisdictional time limit. Indispensable
10 parties are defined as an indispensable party is one
11 whose interest in a controversy makes it impossible to
12 completely adjudicate the matter without affecting either
13 parties interest or the interest of another party in the
14 action. All persons materially interested either legally
15 or beneficially in the subject matter of the suit must be
16 made parties either as complainants or defendants so that
17 a complete decree may be binding on all parties.

18 Your Honor, the reason why these parts are
19 indispensable is because the Declaratory Judgment Act
20 provides in Section 86.091 that quote no declaration
21 shall prejudice the rights of persons not parties to the
22 proceedings unquote. Plaintiffs clearly want to stop the
23 property owner from developing the property. The owner
24 who currently has a development order to proceed with
25 such development, but they want to prevent him from

1 developing and prejudice his rights indirectly without
2 making him a party to this action.

3 Since the property owners have obtained a
4 development order, whatever declaration is entered will
5 not abrogate the owner's property rights because the
6 plaintiffs did not name them as parties. The matter
7 cannot be fully adjudicated.

8 Clearly if the plaintiffs obtain the declaratory
9 relief they seek against the County and the related
10 injunctive relief, that would enjoin the County from
11 issuing necessary development approvals to the property
12 owners who were not joined within the jurisdictional time
13 limit in furtherance of the developer's commitment
14 agreement as amended. That would certainly prejudice the
15 property owners and affect their now established property
16 rights and that's why the property owners fit within the
17 definition of indispensable parties.

18 AHG Group is an indispensable party as the
19 property owner but was not named in this action. UCF
20 Foundation although named eventually in Count III only
21 was not named in a timely fashion. The time limits of
22 Section of 163.3215 are jurisdictional. Florida Rules of
23 Civil Procedure Rule 1.90(c) as interpreted in case law
24 prohibits relation back of amended pleading for new
25 parties therefore Counts I and II should be dismissed.

1 As for Count III, the University of Central
2 Florida may be governed by the UCF master plan but
3 Seminole County is not. The UCF master plan has no
4 jurisdiction in Seminole County. There is no requirement
5 on Seminole County that its development approvals be
6 consistent with the UCF master plan and UCF cannot act
7 based on a decision that development is inconsistent with
8 the UCF master plan. That only bears on the actions of
9 UCF and not on the actions of Seminole County.

10 In fact according to Florida Statutes Section
11 1013.30 which defines a host local government it states
12 that a host local government does not include a county if
13 no point of an institution is located within its
14 unincorporated area. That was the case her, Your Honor.
15 UCF is in Orange County. That's all that I have if it
16 please the Court.

17 THE COURT: Okay. Thank you very much.

18 I guess are we just doing the County's motion
19 today?

20 MR. THERIAQUE: Yes, sir.

21 THE COURT: So, you are just watching?

22 MS. COURTNEY: Yes, and, Your Honor, if I can just
23 clarify. The original complaint was filed on February 26
24 and included only two counts Counts I and II and sued
25 only Seminole County. Approximately five months or four

1 months later on July 2 an amended complaint was filed and
2 that is when my two clients were brought in as to Count
3 III only.

4 THE COURT: Thank you.

5 Okay.

6 MR. THERIAQUE: May it please the Court, my name
7 is David Theriaque. I represent the plaintiffs. I will
8 just refer to them jointly, Your Honor. It is the
9 association of which Ken Hofer is the president and also
10 he is a resident that lives in the association.

11 I want to start off with pointing out that this is
12 a motion to dismiss, Your Honor. We're not on the merits
13 and I believe and I don't want to rehash stuff that
14 perhaps you have already reviewed.

15 THE COURT: I haven't reviewed anything. What you
16 sent got to me this morning.

17 MR. THERIAQUE: Then I will walk through that in a
18 little bit more detail --

19 THE COURT: Okay.

20 MR. THERIAQUE: -- than I would have otherwise.
21 Count I is a cause of action that was created by the
22 Florida Legislature. It is not a common law cause of
23 action and it's a cause of action under 163.3215 Florida
24 Statutes. We have quoted rather than having you walk
25 through all of the tabs on Page 4 of our response, Your

1 Honor --

2 THE COURT: Okay.

3 MR. THERIAQUE: -- Page 5 Paragraph 8 is the
4 actual language out of the statute that creates the cause
5 of action and it is Subsection 3215 Sub 3 and it states
6 any aggrieved or adversely affected party may maintain a
7 de novo action for declaratory injunctive other relief
8 against any local government.

9 Again, this is a statutory cause of action. It's
10 not a common law cause of action and the Legislature when
11 they created this cause of action which is the exclusive
12 option, it's the exclusive remedy for a property owner or
13 a neighbor to contend that a local government has
14 violated this comprehensive plan, the only way that that
15 property owner can challenge a violation of the
16 comprehensive plan is through this statute 163.3215.

17 As Your Honor sees, this statute does not mention
18 the applicant. It doesn't mention the developer. In
19 fact under the definition of aggrieved or adversely
20 affected party, it does mention the developer or the
21 applicant which gives the developer or the applicant a
22 right to also sue the local government.

23 We have cited to on Page 6, Your Honor, Footnote 2
24 there are three cases that give which we believe a nice
25 example of how 163 operates. It is in Footnote 2 save

1 the Homosassa River also Dunlap and Pine Crest Lake and
2 Pine Crest you might be familiar with. That's where a
3 developer was challenged for building an apartment
4 complex. The developer moved and intervened. They
5 weren't named. The same thing in Homosassa. The same
6 thing in Dunlap.

7 In Pine Crest the Court actually ruled in favor of
8 the plaintiffs and ordered the developer to tear down the
9 apartment complex, but in that case as well as the other
10 two the developer was not named because the statute
11 doesn't require the developer to be named. Again, this
12 is not common law. This is a statutory cause of action
13 which this Court is bound to apply pursuant to the plain
14 language of the statute.

15 And then also in our -- on Page 5, Paragraph 10 we
16 have cited to a couple of three cases which state that in
17 a zoning land use type of case that the property owner is
18 not an indispensable party to that type of a proceeding.
19 The County has failed to cite any 3215 case that supports
20 their contention that the property owner or the applicant
21 is an indispensable party.

22 They clearly have the right to intervene, Your
23 Honor, and if they were to move to intervene in Count I
24 and Count II we would not oppose that but there is no
25 obligation for a challenger under 3215 to name the

1 applicant or the developer. The statute is clear. If
2 the Legislature intended to require a property owner, an
3 adjacent neighbor or somebody challenging a development
4 that the Legislature would have stated the local
5 government and the applicant or the local government and
6 the developer.

7 You can't have a development order that is being
8 challenged without an applicant or a property owner so
9 the Legislature knew that there are applicants and
10 developers and when they created this statutory cause of
11 action did not include them as a party that was to be
12 named in the litigation. That goes to Count I.

13 There is also an argument which the County didn't
14 touch opinion which we have addressed in our response
15 that we haven't demonstrated that there is a change in
16 the intensity or use and we have pled that there is a
17 change in the intensity and use and again this is a MTD
18 motion to dismiss. We are not reaching the merits and we
19 believe that our complaint clearly lays out that there
20 has been a change of use as a result of the approval by
21 the County.

22 In Count II, Your Honor, it is slightly different.
23 It's a declaratory judgment action because the County
24 failed to process a plan amendment and the County's
25 argument really goes to the merits. In their motion they

1 are basically stating that we're wrong because a use
2 means and a use means that. Well, a motion to dismiss on
3 a declaratory judgment action this Court doesn't weigh
4 whether or not the count will prevail. The standard is
5 whether we have appropriately pled a deck action.

6 And we respectfully submit when the Court looks at
7 our amended complaint which is included, it's I believe
8 the second document in the tabs, Your Honor, I believe
9 the Court will observe that we have properly pled a deck
10 action in Count II and the deck action is based upon a
11 requirement that as we read the County's rights that they
12 were supposed to process a plan amendment to approve this
13 project which includes six hundred student beds next to a
14 single family neighborhood.

15 Six hundred student beds is something new that was
16 not part of the previous approvals for this piece of
17 property. In fact, I believe the property is both vacant
18 and with a closed Winn-Dixie. We don't have anything
19 close to what's being proposed as a result of this
20 development approval.

21 On the third count, Your Honor, I must ask if the
22 Court's going to allow this new argument the County in
23 its motion to dismiss never alleged that there was no
24 jurisdiction. The County's sole argument in their
25 motion, Your Honor, is right before our response and if

1 you turn to their motion, Your Honor, it is simply argued
2 or the County simply argued that it must be dismissed
3 because Count III only seeks temporary injunctions which
4 is inappropriate and we responded back, no, we haven't
5 sought only a temporary injunction.

6 In fact, Paragraph 61 of our amended complaint
7 states that Count III is an for a declaratory judgment,
8 temporary injunction and permanent injunction. Our
9 prayer for relief also clearly identified that we were
10 requesting the Court to enter a declaratory judgment,
11 enter a temporary permanent injunction then also a second
12 temporary and permanent injunction. They have never
13 raised the argument until this morning that somehow this
14 Court lacks jurisdiction because of some statute. That
15 is the first time that we have ever heard that argument.

16 THE COURT: And if it makes you feel any better, I
17 don't doubt what counsel said, but I don't know that
18 nothing of the UCF campus is in Seminole County. So, I
19 don't know that. I don't think that you can raise that
20 through this motion.

21 It may very well be and it certainly can be
22 handled at a later time, but I can't take judicial notice
23 of something that I don't know. In fact, I have always
24 heard it was in Seminole County so that just goes to show
25 you what I know.

1 MR. THERIAQUE: So on those grounds, Your Honor,
2 we would request that the Court deny the motion to
3 dismiss. If the property owner and the applicant desires
4 even today to ore tenus move to intervene, we won't
5 object to that. They have every right to proceed as a
6 party if they desire to, but the statute specifically
7 limits the party we were supposed to name which was the
8 County and that's what we have done. Thank you, Your
9 Honor.

10 THE COURT: Thank you.

11 Response.

12 MS. FUREY-TRAN: Thank you, Your Honor. I would
13 just like to point out to you -- may I approach with a
14 copy of Section 86.091?

15 THE COURT: Yes, of course you can.

16 MS. FUREY-TRAN: Since this is a declaratory
17 judgment, Your Honor, Section 86.091 and 163.3215 must be
18 read in para materia, therefore no declaration shall
19 prejudice the rights of persons not parties to the
20 proceedings. It is very clear, Your Honor, that they
21 have not named the parties that are required to be named.

22 A resulting decision that would be adverse to the
23 property owners would leave the County in an odd position
24 of having on both sides a judgment against as far as an
25 injunction and a property owner with development rights

1 that exist and no way to issue the permits.

2 The original development order which was approved
3 in 1987-1988 allowed commercial, industrial and
4 multifamily future land uses. The plaintiffs' counsel
5 stated that right now it is a vacant lot with a
6 Winn-Dixie. It doesn't matter what the existing -- what
7 exists on the property right now, Your Honor. What
8 matters is what is approved to be developed on that
9 property compared to how Amendment 4 changed that
10 approval.

11 Amendment to the DCA Number 1 limited residential
12 use to ten percent of the land developed in C1. Addendum
13 Number 4 removed that restriction. It's not a
14 comprehensive plan future land use issue. If a future
15 land use issue was required, what future land use would
16 it be changed to? Commercial and multifamily are already
17 approved land uses. There is no way the plaintiffs can
18 amend Count II to state a cause of action with respect to
19 new uses as a result of Addendum Number 4 the challenged
20 development order in this case.

21 As a side note, Your Honor, failure to follow a
22 procedural requirement that would result in the approval
23 being void is the nature of an essential requirement of
24 the law which is only reviewable under a petition for
25 certiorari. The cases cited by the plaintiff regarding

1 indispensable parties that property owners are not
2 indispensable parties concerned citizens, Bringham versus
3 Dade County and the City of St. Petersburg likewise
4 neither refer to 163.3215 cases.

5 Those are all petitions for certiorari cases where
6 the Court had a direct appeal and decided that those
7 property owners already had notice of the case and the
8 Court actually in Bringham made a distinction between de
9 novo cases and cases that were reviewed on appeal.
10 That's all that I have, Your Honor.

11 THE COURT: Well, I am looking at this Dunlap
12 versus Orange County case and in that case the homeowners
13 brought the suit against the County and then the -- and
14 then the developer -- I assume there was a developer MI
15 Homes. I am just reading this. MI Homes filed a motion
16 to intervene in the lawsuit.

17 The Trial Court granted the motion and then MI
18 raised the issue of whether the homeowners had standing
19 to challenge the permit application approval and the
20 Circuit Court granted that and the Fifth reversed and
21 then they talk about whether or not that action is of the
22 nature of a de novo trial not a de novo appeal.

23 MS. FUREY-TRAN: Your Honor, the procedure is not
24 to put the onus on other parties to intervene. The
25 appropriate procedure in this case is a declaratory

1 judgment and must be read in connection with 86.091 is
2 that they have to be named as parties.

3 THE COURT: Have you got a case that specifically
4 says that because Chapter 163.3215 says an action for
5 declaratory relief or an injunction that that means that
6 you have to read that statute in para materia with
7 Chapter 86.091 and if you don't name a person whose
8 rights could be prejudiced, that the case is subject to
9 dismissal?

10 MS. FUREY-TRAN: Your Honor, I --

11 THE COURT: If you don't have a case that says
12 that, I am not going to do it.

13 MS. FUREY-TRAN: I do not have a case that says
14 that but in his complaint, amended complaint, the
15 plaintiff says that it is brought under Chapter 86 so
16 therefore he has made it a part of his claim and that has
17 to be read in para materia.

18 THE COURT: The way that I am reading this
19 complaint Count I is an action under 163.3215(3). Count
20 II is an action under 85.091 and I don't have to rule
21 what Count III is. So, I agree with the County that the
22 deck action as opposed to the 163.3215(3) action needs to
23 also include the developer but that's not jurisdictional
24 under 86.091. So your whole argument is naming the party
25 is jurisdictional under 163.3215(3) but nothing in

1 163.3215(3) requires what 86.091 requires.

2 MS. FUREY-TRAN: Well, I have the Lee versus St.
3 Johns County case, Your Honor, that says that -- in that
4 case they made nearly the same allegations and they said
5 that that case was a 163.3215 case so that is why I am
6 arguing, Your Honor, that --

7 THE COURT: Let me look at that case.

8 MS. FUREY-TRAN: Count II is really an attempt to
9 get around that jurisdictional time limit by calling it
10 something else other than what it really is. To say that
11 the actions of the County, procedural actions, are not in
12 accordance with the future land use element of the
13 comprehensive plan is to say that it is not -- it is
14 inconsistent with the comprehensive plan which means that
15 that should be a 162.3215 claim since that is the only
16 way that they can challenge the comp plan consistency.
17 In the St. Johns case it's on Page 1113 where the
18 allegation is put in the case.

19 MR. THERIAQUE: May I briefly respond?

20 THE COURT: If I accept your argument, which I am
21 perfectly willing to do for today, then they don't have
22 to name in Count II either. If you are correct, and she
23 may very well be, you can't bring a separate deck action.
24 You have to go ahead with 163.3215(3) then he is not
25 required to name the aggrieved party.

1 This Legislature -- when the Legislature says who
2 you can sue in a statutory action and then says what kind
3 of an action you can bring, that does not mean that
4 86.091, Chapter 86.091 is engrafted on that statute. If
5 the Legislature had intended that they would have said no
6 declaration shall prejudice the rights of persons not
7 parties to the proceedings under 163.3215(3) and that's
8 why the aggrieved parties have the right to intervene.

9 MS. FUREY-TRAN: Your Honor --

10 THE COURT: There is a conflict between those two
11 statutes. So whether -- so if I accept your argument,
12 then I am just going to deny the motion. If you want to
13 -- if you as a representative of the County thinks that
14 the developer needs to part of this lawsuit, then the
15 County can move to allow the Court to -- the County can
16 bring them in. An aggrieved party can move to intervene.
17 They can do whatever they want to but at this point, see,
18 it may be that the developer does not want to intervene.

19 THE WITNESS: May I make one point, Your Honor?

20 THE COURT: What?

21 MS. FUREY-TRAN: You said that 163.3215 does not
22 refer to Section 86, but at the beginning of the statute
23 it says that they may bring a deck action.

24 THE COURT: I agree. I have already addressed
25 that. That doesn't mean that every provision of Chapter

1 86 is engrafted on that statute.

2 MS. FUREY-TRAN: But Chapter 86 respectfully, Your
3 Honor, governs deck action.

4 THE COURT: Yes, it does and it says what the
5 result of the declaratory relief action is, but the
6 Legislature knowing what Chapter 86.091 says only
7 authorized the suit against one entity and that's the
8 County. The Legislature knew what Chapter 86.091 said
9 because it's been on the books a lot longer.

10 So, you know, that's what we go by but the case
11 law says there is no prohibition against the people
12 intervening and the County is -- the County is faced with
13 this problem and I understand the County's problem. If
14 the County loses this lawsuit, the County's worried about
15 getting sued by the developer. That's the position the
16 County is in.

17 But the County is not helpless, so the County can
18 help avoid that by taking the appropriate action, but
19 dismissing the lawsuit with prejudice is not the
20 appropriate action. That would obviously solve the
21 County's problem, but that would get me reversed.

22 Now I get reversed a lot, but I am always
23 surprised when I get reversed. I don't want to get a
24 reversal and say, well, I knew that was going to happen
25 so the motion is denied but it's very interesting.

1 Like I say, if anybody wants to bring that other
2 folks in or write them a letter and say you may want to
3 intervene or do whatever you want to do. You know more
4 about it than I do.

5 MS. FUREY-TRAN: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. THERIAQUE: Judge, we brought a proposed order
8 that essentially states the motion is denied with
9 self-addressed envelopes.

10 THE COURT: I guess does an answer need to be
11 filed by the County?

12 MR. THERIAQUE: We have to do that within twenty
13 days.

14 THE COURT: Is that okay? Is twenty days enough?

15 MS. FUREY-TRAN: Can we have thirty days, Your
16 Honor?

17 THE COURT: Sure.

18 MR. THERIAQUE: That's okay.

19 THE COURT: They are not building the housing so
20 they don't care if you never answer and it just sits here
21 forever.

22 MR. THERIAQUE: Thank you, Judge.

23 THE COURT: I have changed it to thirty on the
24 original.

25 MR. THERIAQUE: Here's the other copy too, Your

1 Honor. Thank you, sir.

2 THE COURT: Let me give you these back and you can
3 distribute. You have got everybody here I think.

4 MR. THERIAQUE: Yes, we will do it.

5 THE COURT: I have signed two.

6 MR. THERIAQUE: I have to change that to thirty.

7 THE COURT: I already did. There's one more that
8 you need to do. If you will sign the certificate of
9 service.

10 MR. THERIAQUE: Certainly I will do that.

11 THE COURT: Okay. Thank you very much.

12 Thank you for a very interesting hearing and we
13 will be in recess.

14 (Whereupon proceedings concluded in this matter.)

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CERTIFICATE OF REPORTER

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2

STATE OF FLORIDA
COUNTY OF SEMINOLE

3

4

5 I, Linda M. Goodall, Registered Professional
6 Reporter, RPR, certify that I was authorized to and did
7 stenographically report the foregoing proceedings and that the
8 transcript is a true and complete record of my stenographic
9 notes.

10

11 I further certify that I am not a relative,
12 employee, attorney, or counsel of any of the parties, nor am I
13 a relative or employee of any of the parties' attorney or
14 counsel connected with the action, nor am I financially
15 interested in the action.

16

17 Dated this the 13th day of October, 2009.

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22



23

LINDA M. GOODALL, RPR

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