

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.

**PLAINTIFFS' REPLY TO DEFENDANT
SEMINOLE COUNTY, FLORIDA'S AFFIRMATIVE DEFENSES**

Plaintiffs CARILLON COMMUNITY RESIDENTIAL ASSOCIATION, INC., and KEN HOFER (collectively, "Plaintiffs"), by and through their undersigned counsel, hereby file this Reply to Defendant Seminole County, Florida's Affirmative Defenses to the Plaintiffs' Amended Complaint, and state as follows:

1. On November 9, 2009, Defendant Seminole County, Florida ("County"), served its Answer to the Plaintiffs' Amended Complaint, raising the following Affirmative Defenses: (1) statute of limitations; (2) failure to join indispensable parties; (3) Count II was untimely filed; (4) Counts I and II fail to state causes of action; and (5) Count III fails to state a cause of action. The Plaintiffs deny each and every allegation of the Affirmative Defenses raised in the County's Answer.

First Affirmative Defense – Statute Of Limitations

2. The Plaintiffs deny the County’s First Affirmative Defense in which the County alleges that “[a]ny claims or actions challenging [the Carillon Major PUD Amendment] under 163.3215 not filed by April 29, 2009[,] are barred by the statute of limitations.” (See Answer at ¶¶ 71-72). The County’s First Affirmative Defense fails to set forth a valid legal defense. Indeed, as conceded by the County within its First Affirmative Defense, the Plaintiffs filed their initial Complaint, which included a consistency challenge pursuant to Section 163.3215, *Florida Statutes*, on February 26, 2009 – *prior* to the County’s rendition of its written approval of the Carillon Major PUD Amendment. Thus, it is indisputable that the Plaintiffs timely invoked this Court’s jurisdiction pursuant to Section 163.3215, *Florida Statutes*, to challenge the consistency of the Carillon Major PUD Amendment with the County’s Comprehensive Plan, *i.e.*, no later than thirty (30) days of rendition of the contested development order. Further, to the extent the Plaintiffs’ Amended Complaint includes any additional consistency allegations, such allegations relate back to the date of the Plaintiffs’ initial Complaint. See Fla. R. Civ. P. 1.190(c). The Plaintiffs further deny the County’s suggestion that the Plaintiffs’ Amended Complaint raises claims regarding approvals granted prior to the Carillon Major PUD Amendment.

Second Affirmative Defense – Failure To Join Indispensable Parties

3. The Plaintiffs deny the County’s Second Affirmative Defense in which the County alleges that the Plaintiffs have failed to join indispensable parties as defendants to Counts I and II of the Amended Complaint – namely, the property owners/applicants for the Carillon Major PUD Amendment, *i.e.*, AHG Group, LLC, and University of Central Florida Foundation, Inc. (See Answer at ¶¶ 73-81). The County’s Second Affirmative Defense fails to set forth a legal defense.

Indeed, this Court previously rejected the County's indispensable party argument in denying the County's Motion to Dismiss by Order dated October 8, 2009.

4. Nevertheless, the Plaintiffs deny any suggestion by the County that the property owners/applicants for the Carillon Major PUD Amendment are indispensable parties to either Counts I or II of the Amended Complaint. As explained in the Plaintiffs' Response to the County's Motion to Dismiss and the Plaintiffs' Response to the County's Motion for Rehearing, which are hereby incorporated by reference into this Reply, the County's indispensable party argument is without merit. Indeed, the County's contention is directly refuted by the plain and unambiguous language of Section 163.3215, *Florida Statutes*, which only authorizes a cause of action against the "local government" which granted the contested development order, as well as existing case law, which holds that a property owner/applicant affected by a zoning action is not an indispensable party in a legal challenge thereto.¹ The Plaintiffs further deny the County's suggestion that Counts I and II are barred by the statute of limitations and that the statute of limitations bars the amendment of their Complaint to name additional parties.

Third Affirmative Defense – Count II Was Untimely Filed

5. The Plaintiffs deny the County's Third Affirmative Defense in which the County claims that Count II of the Plaintiffs' Amended Complaint was untimely filed. (See Answer at ¶¶ 82-83). The County's Third Affirmative Defense fails to set forth a legal defense. Contrary to the County's suggestion, Count II is not a "consistency challenge" pursuant to Section 163.3215, *Florida*

¹ As this Court indicated during the hearing on the County's Motion to Dismiss, the property owners/applicants are free to seek permission to intervene pursuant to Florida Rule of Civil Procedure 1.230 if they desire to participate in this proceeding. See, e.g., *Dunlap v. Orange County*, 971 So. 2d 171, 173 (Fla. 5th DCA 2007). As of the date of this Reply, however, they have not chosen to do so.

Statutes, and, thus, is not subject to the thirty (30) day time frame therein. However, even assuming Count II was a consistency challenge pursuant to Section 163.3215, *Florida Statutes*, which it is not, the County's untimeliness argument would provide no bar to such claim. As discussed above, the Plaintiffs filed their initial Complaint, which included a consistency challenge pursuant to Section 163.3215, *Florida Statutes*, on February 26, 2009 – well before April 29, 2009, which the County contends was the deadline for filing a consistency challenge to the Carillon Major PUD Amendment. Hence, it is undisputed that the Plaintiffs timely invoked this Court's jurisdiction pursuant to Section 163.3215, *Florida Statutes*. To the extent Count II of the Plaintiffs' Amended Complaint encompasses additional consistency allegations, as the County erroneously claims, such allegations relate back to the date of the Plaintiffs' initial Complaint. *See Fla. R. Civ. P. 1.190(c)*.

Fourth Affirmative Defense – Counts I & II Fail To State Causes Of Action

6. The Plaintiffs deny the County's Fourth Affirmative Defense in which the County summarily alleges that Counts I and II of the Plaintiffs' Amended Complaint fail to state causes of action because the Carillon Major PUD Amendment does not materially alter the density or intensity of prior approvals and does not approve future land uses that were not previously approved. (*See Answer at ¶¶ 84-85*). The County's argument fails to set forth a legal defense. The County's Fourth Affirmative Defense is conclusory and sets forth no facts to support the County's assertion. *See Valdes v. Lambert*, 568 So. 2d 117, 118 (Fla. 5th DCA 1990) (striking affirmative defense that was conclusory and set forth no ultimate facts supporting defendant's assertion of defense); *Cady v. Chevy Chase Savs. & Loan, Inc.*, 528 So. 2d 136, 137 (Fla. 4th DCA 1988) (reiterating that "[c]ertainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient"). Moreover, this Court has already rejected the

arguments raised in the County's Fourth Affirmative Defense in denying the County's Motion to Dismiss by Order dated October 8, 2009. The Plaintiffs further deny any suggestion by the County that the Carillon Major PUD Amendment does not materially alter the use, density, or intensity of the subject property or involve uses that were not previously approved as part of the Carillon PUD.

Fifth Affirmative Defense – Count III Fails To State A Cause Of Action

7. The Plaintiffs deny the County's Fifth Affirmative Defense in which the County alleges that Count III of the Plaintiffs' Amended Complaint fails to state a cause of action against the County. (See Answer at ¶¶ 86-92). The County's Fifth Affirmative Defense fails to set forth a legal defense. Contrary to the County's suggestion, Section 1.2 of the County's Land Development Code has no bearing or legal relevance to Count III of the Plaintiffs' Amended Complaint. The Plaintiffs further deny any suggestion by the County that the BOCC's approval of the Carillon Major PUD Amendment was not required to comply with the UCF Master Plan. In addition, the Plaintiffs deny any suggestion by the County that there is no actual and present controversy in Count III involving the County and that Count III fails to state a cause of action against the County.

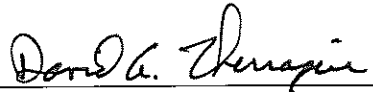
RESPECTFULLY SUBMITTED this 30th day of November 2009.



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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 36th day of November 2009.



DAVID A. THERIAQUE, ESQUIRE