

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

Defendants.

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**DEFENDANT, 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 1.140(b)(7), hereby moves to dismiss Plaintiffs' Amended Complaint with prejudice and alleges as follows:

1. Count I of the Amended Complaint must be dismissed with prejudice for failure to join an indispensable party, to wit, AHG Group, LLC. The Amended Complaint must also be dismissed with prejudice because the addition of an indispensable party, University of Central Florida Foundation,

Inc., who was not named as a defendant in the original Complaint, is barred by the Statute of Limitations.

2. The Amended Complaint seeks declaratory and injunctive relief asking that the Court determine that the Seminole County Board of County Commissioners' ("BCC") decision on or about January 27, 2009, which approved a Planned Unit Development ("PUD") Major Amendment, Addendum #4 (Addendum #4 to the Developer's Commitment Agreement) and Final Master Plan for a mixed use development (hereinafter "Addendum #4") is inconsistent with the Seminole County Comprehensive Plan (Count I); required a comprehensive plan amendment (Count II); and is inconsistent with the University of Central Florida Campus Master Plan (Count III). Addendum #4 is a "development order" within the contemplation of Section 163.3215(3), Florida Statutes. Counts I and II and III of the Amended Complaint further seeks a temporary and permanent injunction enjoining any development activities authorized by the approval of Addendum #4; and enjoining the County from issuing any building permits and/or other development approvals related to Addendum #4. Count I also seeks the Court order the removal of all structures associated with Addendum #4 that are built while the litigation is pending.

3. The property that is the subject of Addendum #4 is owned by AHG Group, LLC and University of Central Florida Foundation, Inc. As property owners, AHG Group, LLC and University of Central Florida Foundation, Inc., are indispensable parties. See, *Allman v. Wolfe*, 592 So.2d 1261 (Fla. 2d DCA 1992); *Immer v. City of Miami*, 898 So.2d 258 (Fla. 3d DCA 2005).

4. Failure to name the property owners as defendants in this action subjects the Amended Complaint to dismissal for failure to join indispensable parties. An indispensable party is one whose interest in a controversy makes it impossible to completely adjudicate the matter without affecting either party's interest or the interest of another party in the action. All persons materially interested, either legally or beneficially in the subject matter of the suit, must be made parties either as complainants or defendants, so that a complete decree may be binding upon all parties. *Bal Harbour Village v. City of North Miami*, 678 So.2d 356 (Fla. 3rd DCA 1996); *Lee v. St. John's County Board of County Commissioners*, 776 So.2d 1110 (Fla. 5th DCA 2001).

5. The injunction against development is meaningless when the Amended Complaint fails to join the property owner. It is

not possible to grant an injunction against persons not a party to the action. Fla. R. Civ. Proc. 1.610.

6. The property owners have a material property interest in the outcome of the action. The Court would not just be quashing the decision of the BCC if the Plaintiffs prevailed but granting declaratory relief with respect to rights of the property owners to develop their property. This is an action upon which the property owners have a right to be heard. Procedural due process requires that the property owners have notice and opportunity to be heard before they can be deprived of an established property right in approved Addendum #4. See, *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389, (Fla. 4th DCA 2003).

7. Plaintiffs allege at Paragraph 8 and 12 of the Amended Complaint that AHG Group, LLC (who is not named as a defendant) and University of Central Florida Foundation, Inc. (who was named as a defendant after the expiration of the Statute of Limitations) applied for approval of Addendum #4 on or about April 13, 2007, which was granted on January 27, 2009.

8. Addendum #4 was executed by the Chairman of the BCC, then recorded on March 30, 2009.

9. Count I of the Amended Complaint should be dismissed with prejudice, because the defect described in paragraphs 1 - 7

above cannot be cured by amendment. Plaintiffs filed the initial Complaint pursuant to Section 163.3215(3), Florida Statutes, which requires that the action "be filed no later than 30 days following the rendition of a development order..." The 30-day period provided in the statute is jurisdictional, such that an action brought thereafter is untimely and barred. *Bal Harbour Village v. City of North Miami*, 678 So.2d 356 (Fla. 3rd DCA 1996); *Patel v. School Board of Volusia County*, 813 So.2d 135 (Fla. 5th DCA 2002).

10. A Complaint may not be amended to include a new party beyond the time limitation provided in the statute. Florida Rule of Civil Procedure 1.190(c) does not permit relation back of amended pleadings where an entirely new party is added. *Patel v. School Board of Volusia County*, 813 So.2d 135 (Fla. 5th DCA 2002); *West Volusia Hosp. Authority v. Jones*, 668 So.2d 635 (Fla. 5th DCA 1996).

11. If there remains sufficient time to rectify the deficiency, the action should be dismissed with leave to amend. *City of Coconut Creek v. City of Deerfield Beach*, 840 So.2d 389 (Fla. 4th DCA 2003). However, as in this case, where the time has expired and is jurisdictional, the action should be dismissed with prejudice.

12. The foregoing demonstrates "beyond doubt" that Count I of Plaintiffs' Amended Complaint must be dismissed with prejudice. *Johnson v. Gulf County*, 965 So.2d 298 (Fla. 1st DCA 2007).

13. In the event that this honorable Court determines that dismissal with prejudice is not appropriate under the law, the County submits the following as an additional defense and basis for dismissing the Amended Complaint.

14. Section 163.3215, Florida Statutes, allows an aggrieved party to challenge a development order "which materially alters the "use" or "density" or "intensity" of use on a particular piece of property which is not consistent with the comprehensive plan".

15. The Amended Complaint fails to allege any facts showing that Addendum #4 materially alters the "density" or "intensity" permitted for the subject property as required by Section 163.3215(3), Florida Statutes, other than a conclusive statement (Amended Complaint Para. #21).

16. Plaintiffs cannot allege that Addendum #4 materially increases the density of the previously approved development order in that the number of units proposed does not exceed the maximum number of units permitted prior to Addendum #4.

17. Plaintiffs cannot allege an increase in intensity and density in that the proposed traffic generated in Average Daily Trips (ADT's), as defined by Institute of Transportation Engineers trip generation standards, is not increased by Addendum #4.

18. As to Count I, Plaintiffs failed to allege sufficient facts as to the existence of some right, status, immunity, power, or privilege which may be at stake under Addendum #4 as is required in an action for declaratory judgment.

19. Count II must also be dismissed because at paragraph 54 of the Amended Complaint, Plaintiffs allege that Addendum #4 includes "uses" that were not previously approved including "C-2 uses (parking garages), student rooming apartments, a religious community center, and a UCF [University of Central Florida] student Center." However, even if this is true, the Comprehensive Plan does not prohibit new uses, just new future land uses. These uses are permitted in the existing future land uses. Therefore, Plaintiffs cannot allege there are any new future land uses not previously approved.

20. As to Count II, Plaintiffs failed to allege sufficient facts as to the existence of some right, status, immunity, power, or privilege which may be at stake under Addendum #4 as is required in an action for declaratory judgment.

21. Count II is inextricably entwined with Count I such that if Count I must be dismissed there is no controversy to be determined under Count II.

22. Therefore, Counts I and II of the Amended Complaint must also be dismissed because the facts do not support a cause of action pursuant to Section 163.3215, Florida Statutes. There are no facts the Plaintiffs have alleged, nor can the Amended Complaint be further amended to allege facts upon which relief may be granted.

23. Count III must be dismissed as against the County because Count III only seeks injunctions against the County which are meaningless when the claim asserts no underlying action against the County. Count III is a claim related to the UCF Master Plan. A complaint asking for nothing but a temporary injunction is improper. *International Village Association, Inc. v. Schaaffee*, 786 So.2d 656, 657 (Fla. 4<sup>th</sup> DCA 2001).

24. In addition, once Counts I and II are dismissed there is no basis for the claim of an injunction only against the County in Count III.

25. The County reserves the right to assert affirmative defenses not asserted herein in the event that an answer is ordered by the Court.

WHEREFORE, the County respectfully requests that this honorable Court dismiss Count I of the Amended Complaint with prejudice; dismiss Count II of the Amended Complaint; and dismiss Count III with prejudice as to the County; or in the alternative extend the County's time to answer by thirty (30) days after receipt of the decision on this motion and for such other and further relief as the Court deems appropriate.

DATED this 14<sup>th</sup> day of July, 2009.

RESPECTFULLY SUBMITTED,

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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 by U. S. Mail this 14<sup>th</sup> day of July, 2009:

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