

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' RESPONSE TO DEFENDANT SEMINOLE COUNTY'S
MOTION FOR REHEARING ON 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 for Rehearing on Seminole County's Motion to Dismiss with Prejudice," served by Defendant Seminole County, Florida ("County"), on October 19, 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, which includes the Plaintiffs' single-family neighborhood, to allow a four (4)

story, 600-bed University of Central Florida student housing complex to be built on Parcels 201/401 and Parcel 202, Lot 2 therein (“Carillon Major PUD Amendment”).

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. Count I of the Plaintiffs’ Amended Complaint is a statutory action 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. (See Amended Complaint at ¶¶ 14-49).

3. On July 14, 2009, the County served its Motion to Dismiss alleging, in part, that Count I of the Plaintiffs’ Amended Complaint should be dismissed with prejudice because the Plaintiffs allegedly failed to joined indispensable parties – namely, the property owners/applicants for the Carillon Major PUD Amendment. The County did not cite a single case in its Motion to Dismiss involving Section 163.3215, *Florida Statutes*, to support its contention that the property owners/applicants were indispensable parties to Count I.

4. On September 24, 2009, the Plaintiffs filed their Response to the County’s Motion to Dismiss. In so doing, the Plaintiffs pointed out that the plain language of Section 163.3215, *Florida Statutes*, only authorizes an action against the “local government” issuing the development order being challenged. In addition, the Plaintiffs cited several cases, including two (2) decisions from the Fifth District, which indicate that a property owner/applicant should move to intervene if it desires to participate in an action filed pursuant to Section 163.3215, *Florida Statutes*.

5. On October 8, 2009, the Court heard oral argument on the County’s Motion to Dismiss. During the October 8 hearing, the Court asked the County if it had a case holding that a property owner/applicant is an indispensable party to a Section 163.3215 action by virtue of Section

86.091, *Florida Statutes*, to which the Assistant County Attorney candidly admitted, “I do not have a case that says that.”¹ (Tr. at 19).

6. At the conclusion of the October 8 hearing, the Court denied the County’s Motion to Dismiss. In so doing, the Court stated that the plain language of Section 163.3215, *Florida Statutes*, does not require the property owner/applicant to be named in an action filed thereunder. The Court also noted that the County’s argument was contrary to *Dunlap v. Orange County*, 971 So. 2d 171 (Fla. 5th DCA 2007), wherein the Fifth District indicated that the property owner/applicant was permitted to intervene in the Section 163.3215 action. In conclusion, this Court commented that granting the County’s Motion to Dismiss “would get me reversed.” (Tr. at 22). Accordingly, the Court denied the County’s Motion to Dismiss.

7. On October 19, 2009, the County filed a Motion for Rehearing, requesting this Court to reconsider its Order denying the County’s Motion to Dismiss. Tellingly, the County does ***not*** cite a single case in its Motion for Rehearing that holds a property owner/applicant is an indispensable party in an action filed pursuant to Section 163.3215, *Florida Statutes*.

8. The Court should summarily deny the County’s Motion for Rehearing because:
- A. The County’s Motion for Rehearing simply reargues a matter raised by the County during the October 8 hearing on its Motion to Dismiss; and
 - B. The Court did not overlook or misapprehend the law in denying the County’s Motion to Dismiss.²

¹ The County did not rely upon or even cite Section 86.091, *Florida Statutes*, in its Motion to Dismiss. Rather, in an apparent attempt to “sandbag” the Plaintiffs, the County cited Section 86.091, *Florida Statutes*, for the first time during the October 8 hearing.

² As an initial matter, it bears emphasizing that the County’s Motion for Rehearing is not authorized by the Florida Rules of Civil Procedure. See *Deal v. Deal*, 783 So. 2d 319, 321 (Fla.

II.

ARGUMENT

A. The County's Motion For Rehearing Simply Reargues A Matter Raised By The County During The October 8 Hearing On Its Motion To Dismiss

9. It is well settled that a motion for rehearing which simply reargues matters previously presented to and considered by the court is improper and should be denied:

The purpose of a motion for rehearing is to give the trial court an opportunity to consider matters which it failed to consider or overlooked. The motions below merely set forth matters which had previously been considered by the trial court.

Pingree v. Quaintance, 394 So. 2d 161, 162 (Fla. 1st DCA 1981) (citation omitted).

10. In the instant case, the County does not allege in its Motion for Rehearing that the Court failed to consider or overlooked any issue in denying the County's Motion to Dismiss. Rather, the County's Motion for Rehearing simply takes exception to the Court's ruling and reargues a matter already presented to and rejected by the Court during the October 8 hearing. Accordingly, the Court should summarily deny the County's Motion for Rehearing. *See Pingree*, 394 So. 2d at 162.

B. The Court Did Not Overlook Or Misapprehend The Law In Denying The County's Motion To Dismiss

11. Even assuming the County could allege on rehearing that the Court failed to consider or overlooked an issue in denying its Motion to Dismiss, which it cannot, the County's Motion for Rehearing would still be without merit.

5th DCA 2001); *see also* Philip J. Padovano, *Florida Civil Practice*, § 22.9 (2007-08 ed.) ("A motion for rehearing may only be directed to a final judgment. There is no provision in the Florida Rules of Civil Procedure that authorizes the filing of a motion for rehearing of a nonfinal order."). On this basis alone, the Court should summarily deny the County's Motion for Rehearing.

12. As previously noted, Count I of the Plaintiffs' Amended Complaint is a statutory action filed pursuant to Section 163.3215, *Florida Statutes*, which 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.

13. 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).

14. As this Court recognized during the October 8 hearing, the plain language of Section 163.3215, *Florida Statutes*, provides for a statutory cause of action against *the "local government"* which granted the contested development order. 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. In fact, Section 163.3215(1), *Florida Statutes*, specifically advises that "[t]he local government that issues the development order is to be named as a respondent in all proceedings under this section." 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.

15. Notwithstanding the plain language of Section 163.3215, *Florida Statutes*, the County continues to reargue in its Motion for Rehearing that the Court should engraft the requirements of Section 86.091, *Florida Statutes*, onto Section 163.3215, *Florida Statutes*, and hold that a property

owner/applicant is an indispensable party to an action filed pursuant to Section 163.3215, *Florida Statutes*. The County's position is without merit.

16. The County does *not* cite a single case in its Motion for Rehearing which holds that a property owner/applicant is an indispensable party in an action filed pursuant to Section 163.3215, *Florida Statutes*, nor does the County cite a single case engrafting the requirements of Section 86.091, *Florida Statutes*, upon Section 163.3215, *Florida Statutes*. Rather, the County cites cases from Hawaii and Michigan, as well as some non-Section 163.3215 cases, in an attempt to support its position. The cases relied upon the County do *not* involve Section 163.3215, *Florida Statutes*, and, thus, are factually and legally distinguishable from the instant case.³

17. Moreover, it is black letter law that a court is "not at liberty to add words to statutes that were not placed there by the Legislature." *Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005). To do so, would be an abrogation of legislative power. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (holding that courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms"). Thus, the County's renewed attempt in its Motion for Rehearing to have this Court read a requirement into the plain and unambiguous text of Section 163.3215, *Florida Statutes*, that the property owner/applicant be named as a party in an action filed thereunder fails as a matter of law. *See 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

³ The County's citation to such case law for the first time in its Motion for Rehearing is also improper. *See, e.g., Cartee v. Florida Dep't of Health and Rehabilitative Servs.*, 354 So. 2d 81, 83 (Fla. 1st DCA 1977) (stating court would not consider additional authorities cited for the first time in motion for rehearing).

the controlling statute did not require the city to be named as a party in challenge to zoning approval, reiterating that “such a requirement cannot be raised by judicial construction”).

18. The County’s argument that the property owner/applicant is an indispensable party to an action filed pursuant to Section 163.3215, *Florida Statutes*, is also contrary to existing case law, including decisions from the Fifth District, which indicates that the proper procedure is for a property owner/applicant to move to intervene in an action filed pursuant to Section 163.3215, *Florida Statutes*. 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*).

19. Lastly, the County’s contention that the property owners/applicants for the Carillon Major PUD Amendment are indispensable parties to Count I of the Plaintiffs’ Amended Complaint is contrary to 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:

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.

Concerned Citizens of Bayshore Cmty., Inc. v. Lee County, 923 So. 2d 521, 523 (Fla. 2d DCA 2005) (emphasis supplied); *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).

III.

CONCLUSION

20. Accordingly, for the reasons set forth above, the Court should summarily deny the County's Motion for Rehearing dated October 19, 2009.

RESPECTFULLY SUBMITTED this 28th of October 2009.



DAVID A. THERIAQUE, ESQUIRE
Florida Bar No. 0832332
S. BRENT SPAIN, ESQUIRE
Florida Bar No. 0320810
LESLIE E. BRYSON, ESQUIRE
Florida Bar. No. 498831
THERIAQUE VORBECK & SPAIN
433 North Magnolia Drive
Tallahassee, Florida 32308
Telephone: 850/224-7332
Facsimile: 850/224-7662

COUNSEL FOR PLAINTIFFS

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 28th day of October 2009.



S. BRENT SPAIN, ESQUIRE