STATE OF FLORIDA
FIFTH DISTRICT COURT OF APPEAL

RAINBOW RIVER CONSERVATION, INC.,
FREDERICK S. JOHNSTON, et al.,
Appellants

v. **5DCA Case No. 5D15-2436**

RAINBOW RIVER RANCH, LLC;
CONSERVATION LAND GROUP, LLC;
and CITY OF DUNNELLON, FLORIDA

Appellees
_____/

REPLY BRIEF

Thomas G. Pelham, Esq.
Fla Bar No. 138570
Co-Counsel for RAINBOW RIVER CONSERVATION et al
1474 Constitution Pl E
Tallahassee, Florida 32308
Phone (850)386-9401
tgpelham@aol.com
tom.pelham61@gmail.com

Ralf Brookes Attorney
Florida Bar No. 0778362
Co-Counsel for RAINBOW RIVER CONSERVATION et al
1217 E Cape Coral Parkway #107
Cape Coral, Fl 33904
(239) 910-5464;
(866) 341-6086 fax
Ralf@RalfBrookesAttorney.com
RalfBrookes@gmail.com

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ARGUMENT

I. The Circuit Court failed to perform its duty to ensure that relief granted by the SA complies with the requirements of the Bert Harris Act.

Appellant/Intervenors contend that this Court did not closely scrutinize the Settlement Agreement (SA) to ensure that it complies with the Bert Harris Act. (Initial Brief, at 7-8) In response, the Applicant and the City contend that generally settlement of litigation is favored in the law and that in general, settlement agreements are subject to only limited judicial scrutiny. (Answer Brief, at 18, 30-31) They cite a number of general settlement agreement cases not involving the Bert Harris Act to support their argument, but they are inapposite to the instant case, which contains statutory review criteria for Settlement Agreements under the Harris Act. Unlike the Bert Harris Act, none of these cases involve such a statute that creates a new cause of action, a process and standards for the settlement of litigation arising from it, and provides for judicial review of settlements to "ensure" compliance with the statutory criteria contained in the Bert Harris Act. Property Owners and City seem to suggest that if this Court disapproves the SA, it will be a violation of the Separation of Powers Doctrine. (Answer Brief, at 30-31) However, in *Brevard County v. Stack*, 932 So.2nd 1258 (Fla. 5th DCA 2006), this Court rejected the argument that the Bert Harris Act violates that doctrine.

II. The SA violates Florida Statutes §163.3184 because it amends the city comprehensive plan without complying with the statute.

In their Initial Brief, Appellant/Intervenors contend that the plain and unambiguous language of §163.3184 requires all local plan amendments to comply with that statute, including those adopted in Bert Harris settlement agreements. (Initial Brief, at 10-12).

Ignoring the plain language of the statute, Property Owners have responded hyperbolically that this interpretation of the Act would render it "meaningless," lead to "absurd" results, "gut the provisions of § 70.001(4)(b), (c), and (d) of the Harris Act," and render local governments powerless to make settlement offers and enter into settlement agreements. (Answer Brief, at pp. 21, 24-25). This is simply not true.

Harris Act settlements that do not involve a plan amendment will not even be affected. In cases involving a plan amendment, the local government can simply agree to "process" a plan amendment application in accordance with §163.3184, Florida Statutes. If the application is rejected by the local government or the state, the landowner can then re-instate, maintain or bring a Bert Harris claim against the local government, the state, or both.

Property Owners assert that in enacting the Harris Act, the Legislature envisioned that Chapter 163 requirements, including those pertaining to plan amendments, would be the most likely impediment to settlement of land use disputes. (Answer Brief, at 21). No source or documentation is cited to support this speculation about what the Legislature envisioned. However, if that were true, surely the Legislature would have addressed or mentioned plan amendments under Chapter 163, Florida Statutes in the Harris Act, section 70.001 Florida Statutes.

But there is no mention of plan amendments in the Act, and the list of possible remedies set forth in §70.001(4)(c) does not include plan amendments. There is a good reason for this omission. The listed remedies are all within the control of local governments, but a local government lacks the authority to unilaterally adopt a plan amendment, *Town of Ponce Inlet v. Pacetta, 120 So.3d 27 (Fla. 5th DCA 2013)*, particularly without holding the requisite public adoption and transmittal hearings and affording adversely affected parties the opportunity to petition for a formal administrative hearing under §163.3184(5), Florida Statutes.

Property Owners also argue that the Harris Act is a remedial statute that should be liberally construed. (Answer Brief, at p. 22). This Court rejected that argument in *Citrus County v. Halls River Development, Inc.*, 8 So.3rd 413 (Fla. 5th DCA 2009, stating "in the absence of ambiguity the plain meaning of the statute prevails." Id. at 424 n. 3.

Property Owners and City assert that the Harris Act allows the SA to contravene a Florida statute. (Answer Brief, at 13, 23-24) Therefore, they do not have to comply with F.S. §163.3184. The Act provides that if a settlement agreement "would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property," it must be submitted to the circuit court for approval. F.S. §70.001(4)(d)2 This language does not permit contravention of any and every statute. The Legislature has declared that §163.3184 applies to every plan amendment in the state. Further, Chapter 163 specifically provides that *"***Where this act [Chapter 163] may be in conflict with any other provision or provisions of law** relating to local governments having authority to regulate the development of land, **the provisions of this act shall govern** unless the provisions of this act are met or exceeded by such other provision or provisions of law relating to local government, including land development regulations adopted pursuant to chapter 125 or chapter 166." §163.3211 (emphasis added). Therefore, if there is any conflict between the B. Harris Act §70.001(4)(c) and Florida's Community Planning Act §163.3184, the requirements of Florida's Community Planning Act in Chapter 163 controls.

Thus, the clear and express provisions of Florida's Community Planning Act Chapter 163 governing plan amendment criteria, standards and procedure cannot be contravened by a Harris Act settlement agreement.

Finally, Property Owners contend that the Legislature intended Chapter 163 to be subject to the Harris Act. (Answer Brief, at 21-22). In support of this argument, they cite F.S. §163.3161(10)[1], which contains general intent language that briefly mentions F.S. §70.001(3)(c)and (f) of the Harris Act. There is nothing in this general intent language that even remotely suggests that local governments do not have to comply with F.S. §163.3184 when entering into Harris Act settlement agreements. *Significantly*, DCA (now DEO), in its motion to intervene in this case, previously argued and stated that adoption of plan amendments by agreement without going through the mandated statutory process violates F.S. §163.3184. (R: vol.1, p.101, 116). Further, the DCA's own prior motion stated that in the event of conflict between F.S. §163.3184 and any other law relating to local government's land development authority, F.S. §163.3184 controls as provided in F.S. §163.3211. (R: vol.1, p.101, 116)

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[1]**163.3161** (10) "It is the intent of the Legislature that all governmental entities in this state recognize and respect judicially acknowledged or constitutionally protected private property rights. It is the intent of the Legislature that all rules, ordinances, regulations, comprehensive plans and amendments thereto, and programs adopted under the authority of this act must be developed, promulgated, implemented, and applied with sensitivity for private property rights and not be unduly restrictive, and property owners must be free from actions by others which would harm their property or which would constitute an inordinate burden on property rights as those terms are defined in s. 70.001(3)(e) and (f). Full and just compensation or other appropriate relief must be provided to any property owner for a governmental action that is determined to be an invalid exercise of the police power which constitutes a taking, as provided by law. Any such relief must ultimately be determined in a judicial action."

III. The SA grants relief that does not protect public interests served by §163.3184, Florida Statutes.

Even assuming the City may lawfully contravene section §163.3184, Intervenors identified three important public interests that must be but are not protected by the SA: (Initial Brief, 12-15). In the DCA's motion to intervene which was granted by the circuit court, the DCA (now DEO) previously identified the same three interests as important public interests served by §163.3184 (R: vol. 1, p. 16).

In their Answer Brief, Property Owners ignore and do not address or even mention two of those interests: (1) public participation in the planning process and (2) ensuring compliance of all local plan amendments with state law, through broad citizen standing to challenge the plan compliance decisions of the state planning agency. The reason for Property Owners' and City's silence on these two public interests is obvious. The SA provides no protection for these interests. On the contrary, the SA is designed to, and does, exclude public participation in plan amendment process and to deprives Intervenors and other citizens of their statutory right to challenge the compliance of the subject plan amendment as provided in §163.3184(5) under Chapter 120, Florida Statutes (Florida's Administrative Procedure Act).

Regarding the third interest, (3) intergovernmental planning coordination, Property Owners argue that the involvement of DEO and DEP representatives in the negotiations over the SA was sufficient to protect this interest. (Answer Brief at pages 26-27).

However, this informal ad hoc, extra-legal settlement negotiation arrangement is not an adequate substitute for the statutorily mandated intergovernmental coordination process. That process would have included the county, the regional planning council, and six (6) state agencies dealing with a range of issues such as water quality and consumption, traffic, schools, and historical and archeological resources, and impacts on the county and region.[2]

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[2] Florida Statutes §163.3184(1)(c)

"'Reviewing agencies' means:

1. The state land planning agency;
2. The appropriate regional planning council;
3. The appropriate water management district;
4. The Department of Environmental Protection;
5. The Department of State;
6. The Department of Transportation;
7. In the case of plan amendments relating to public schools, the Department of Education;
8. In the case of plans or plan amendments that affect a military installation listed in s.163.3175, the commanding officer of the affected military installation;
9. In the case of county plans and plan amendments, the Fish and Wildlife Conservation Commission and the Department of Agriculture and Consumer Services; and
10. In the case of municipal plans and plan amendments, the county in which the municipality is located."

The Property Owner and City try to justify the absence of the Southwest Water Management District from the "negotiations" by citing the SA's requirement that the Property Owner obtain permits from the District. (Answer Brief, at 26-27). This requirement adds nothing because existing law already requires such permits. District involvement at the permitting stage is not an adequate substitute for its input at the planning stage as required by §163.3184(1)(c)(3), Florida Statutes.

Regarding the involvement and current position of DEO (formerly DCA), the state land planning agency has no authority to waive compliance with §163.3184, including the intergovernmental coordination and planning requirements for plan amendments. DEO could not grant any other relief under the Harris Act in this case because no valid Harris Act claim was made against DEO. Therefore, DEO's complicity in the SA's circumvention of §163.3184 does not legitimize it.

IV. The SA violates the Harris Act because it improperly vests the Project.

Appellant/Intervenors contend that Property Owners had no vested right, a prerequisite to relief under the Harris Act, and do not satisfy the Act's definition of "vested right" required to establish a valid Harris Act claim. (Initial Brief, at 19-30) In their Answer Brief Property Owner and City do not respond to the substance of this contention. Instead they give several reasons for their refusal to respond.

First, they contend that because the Property Owners and the City stipulated that Property Owners have vested rights, even if they do not, the issue cannot be raised by Intervenors or considered by this Court. (Answer Brief, at 14-15, 33). However, the Bert Harris Act does not provide that vested rights will be determined by *fiat*. The Act expressly provides that the existence of a vested right must be established and shall be determined by applying the principles of the common law or equitable estoppel. F.S. §70.001(3)(a). The record reflects that the determination of vested rights in this case was not made based on those principles. The settlement agreement or stipulations do not meet the criteria contained in §70.001(3)(a) which require that "The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state." Acceptance of the argument that the Property Owner and City may simply stipulate to the existence of vested rights, without such a factual showing, would render the Harris Act's definition "meaningless."

Second, Property Owners argue that Intervenors cannot raise the vested rights issue because they are bound by the record as it existed at the time of intervention and cannot raise new issues. (Answer Brief, at 15). Vested rights is not a "new" issue. Property Owners and the City made it an issue when they petitioned the circuit court to approve a SA which purports to grant vested rights.

The circuit court was required under the Bert Harris Act to determine whether the relief granted by the SA "is the appropriate relief necessary" to prevent an inordinate burdening of Property Owners' vested rights as defined in the Harris Act. Making this determination necessarily requires the circuit court to consider the nature and extent of any vested rights and whether those rights have been inordinately burdened.

This determination is important because the Property Owners are entitled to relief under the Harris Act *only* if and when the City's action has inordinately burdened their vested rights. §F.S. 70.001(2).

Property Owners and City argue that Intervenors seek a trial on the vested rights issue as if there had not been a settlement. (Answer Brief, at 34) This argument mischaracterizes Intervenors' position. Intervenors' contention is that the record before the circuit court reflects that Property Owners have no vested right as defined in the Harris Act and therefore are not entitled to the relief granted by the SA.

V. The relief exceeds the appropriate relief necessary to prevent an inordinate burden in violation of the statutory criteria.

The Answer Brief fails to respond to Intervenors' argument on this point. (See Initial Brief, pp. 32-36). Property Owners claim the relief granted by the SA is appropriate because it restored their vested right to 450 residential units and

125,000 square feet of commercial on their property as allowed by the 2001 PlanAmendment/Cubbage Agreement. Further, they contend this relief puts "them essentially back in the position they were in prior to the 2007 Comprehensive Plan Amendments." (Answer Brief, at p. 28). But, as the Intervenors pointed out in their Initial Brief (at pages 32-36), the SA grants far more relief than the vesting of 450 residential units and 125,000 square feet of commercial. The SA grants Property Owners far greater rights than they had before adoption of the 2007 Plan Amendment. As set forth in detail in the Initial Brief, among many other things, the SA "vests" the Property Owners' specific development Project and grants Mixed Use PUD zoning, plat approval, and variance approvals for the project. The Property Owners had none of these zoning or plat or variance approvals at the time the 2007 Plan Amendment was adopted. Thus, the SA grants far greater relief than is appropriate and necessary to prevent the 2007 Plan Amendment from inordinately burdening the Property.

Just as they failed to do in the circuit court, Property Owners and the City have failed in their Answer Brief to explain or justify why the "extra relief" granted by the SA-—over and above vesting of their property under the 2001 Plan Amendment/Cubbage Agreement-—is appropriate and necessary. Intervenors respectfully submit that their silence on this issue is an implicit admission that the "extra" relief is not appropriate and necessary.

VI. The SA Constitutes Illegal Contract Zoning violating the public interest.

The Property Owners and the City contend that the SA does not constitute illegal contract zoning or contracting away of future police powers for several reasons. None of them have merit.

First, *Brevard County v. Stack*, 932 So.2d 1258 (Fla 5th DCA 2006), the case relied on by Property Owners and the City, does not support but undermines their position. That case did not involve the validity of a Bert Harris settlement agreement. Rather it involved the county's challenge to the constitutionality of the Bert Harris Act itself. This Court rejected the county's constitutional arguments, including the argument "that the Act authorizes local governments to contract away their inherent sovereign police powers." *Id.* at 1261-1262.

Second, the fact that Chapter 163 authorizes local governments to enter into development agreements, F.S. §§ 163.3220--.3243(the Florida Local Government Development Agreement Act), does not exempt this Harris Act SA from the prohibition against contract zoning. In *Morgran Company v. Orange County*, 818 So.2d 640(Fla. 5th DCA 2002), this Court upheld the county's argument that it's development agreement with Morgran, a developer, was unenforceable because it constituted illegal contract zoning. In reaching this conclusion, this Court expressly recognized that development agreements are specifically permitted by F.S. 163.3220--.3243, but nevertheless invalidated the development agreement in that

case because it violated long and well established Florida law prohibiting contract zoning.

Third, the SA in this case is not saved by two "bail out" provisions in the agreement cited by the Property Owners. (Answer Brief, p. 36). As pointed out in the Initial Brief, these provisions are illusory because the SA subjects the City to severe penalties if it does not comply with the terms of the SA. (Initial Brief, p. 37-39). In their Answer Brief, Property Owners and City have ignored these provisions that make it impractical and unrealistic for future City Commissions to refuse to abide by the terms and conditions of the SA.

Fourth, contrary to the arguments of the Property Owners and City, *Hartnet vs. Austin*, 93 So.2d 86 (Fla. 1956) stands for the fundamental proposition that local governments cannot contract away their police powers, which include zoning and other land use regulations. That is precisely what the City has done in this case. There is nothing in the Bert Harris Act that repeals longstanding Florida Law prohibiting a local government from contracting away the police power or that exempts development agreements under Bert Harris from that law.

VII. Reply to additional defense argumens raised by the Property Owners and City:

Argument (1) The court is not authorized, or required, to consider vesting and contract zoning issues. (Answer Brief, at 14-16).

Florida Statute §70.001(4)(D)2 does not expressly prohibit the court when reviewing SAs from considering vesting and contract zoning issues as matters of a valid underlying claim and public interest determination. The court should not be expected to put on blinders and ignore violations of the vested rights doctrine and the law against contract zoning when it is asked to approve a settlement agreement.[3] The Act does expressly provide that the court "may enter any orders necessary to effectuate the purposes of this section," one of which is to provide relief to landowners who have an inordinately burdened vested right as determined in accordance with the common law of equitable estoppel.

Argument (2) The Harris Act provides broad protection for landowners who suffer economic loss from government action. (Answer Brief, at 15-16).

In fact the Act is very narrowly focused on specific valid claims. It provides relief only to private property owners who have (1) an existing use or (2) a vested

[3] Chisholm Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689b (Fla. 11th Cir. Ct., August 9, 2001), *cert. denied* , City of Miami Beach v. Chisholm Properties South Beach, Inc. 830 So.2d 842 (Fla. 3d DCA 2002) *rehearing en banc denied* , 830 So.2d 842 (Fla 3d DCA 2002).

right determined in accordance with common law principles of equitable estoppel. Further, the relief available under the Act is limited to relief "appropriate and necessary to prevent an inordinate burden." Nothing less, but nothing more.

Argument (3) Intervenors improperly sought to have the circuit court to enforce ordinances of the City and the rules and regulations of DEO, DEP, and SWFWMD. (Answer Brief, at 32)

This claim is incorrect. Intervenors sought only to have the circuit court deny approval of the SA as drafted because it does not comply with the requirements of the Harris Act as set forth herein and in the Initial Brief.

Argument (4) The relief granted by the Settlement Agreement is specifically envisioned and authorized by F.S. §70.001. (Answer Brief, at 35).

As previously discussed herein and in the Initial Brief, the Act expressly limits the relief that may properly be granted by a Harris Act settlement agreement. The relief must (1) "protect the public interests protected by the statute contravened" and (2) "be the appropriate relief necessary to prevent an inordinate burden." The SA satisfies neither of these requirements.

The SA illegally contracts away the police power, fails to protect the public interest, and grants relief grossly in excess of that necessary to prevent an inordinate burden. The relief granted by this SA, is a sweetheart deal that is is neither envisioned nor authorized by the Harris Act. See *Chisholm*, supra.

/s/ Ralf Brookes
Ralf Brookes Attorney
Fla Bar No. 0778362
Co-Counsel for Intervenors RRC et al
1217 E Cape Coral Parkway #107
Cape Coral, Fl 33904
(239) 910-5464;
(866) 341-6086 fax
RalfBrookes@gmail.com
Ralf@RalfBrookeSAttorney.com

/s/Thomas G. Pelham
Thomas G. Pelham, Esq.
Fla Bar No. 138570
Co-Counsel for Intervenors RRC et al
1474 Constitution Pl E
Tallahassee, Florida 32308
Phone (850)386-9401
tgpelham@aol.com
tom.pelham61@gmail.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Reply Brief is in New Times Roman 14 point font and meets all requirements of Rule 9.210(a)(2), Florida Rule of Appellate Procedure.

/s/ Ralf Brookes
Ralf Brookes Attorney
Fla Bar No. 0778362
Co-Counsel for Intervenors RRC et al
1217 E Cape Coral Parkway #107
Cape Coral, Fl 33904
(239) 910-5464;
(866) 341-6086 fax
RalfBrookes@gmail.com
Ralf@RalfBrookeSAttorney.com

/s/Thomas G. Pelham
Thomas G. Pelham, Esq.
Fla Bar No. 138570
Co-Counsel for Intervenors RRC et al
1474 Constitution Pl E
Tallahassee, Florida 32308
Phone (850)386-9401
tgpelham@aol.com
tom.pelham61@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email on this November 16, 2015 to the following:

Bryce Ackerman 125 NE 1 Ave Suite 1 Ocala Fl 34470	BAckerman@gahlaw.com parrish@gahlaw.com
Virginia Cassady 2300 Maitland Center Parkway 100 Maitland Florida 32751	vcassady@shepardfirm.com lsmith@shepardfirm.com
Aaron C Dunlap DEO, Office of General Counsel 107 E Madison Street MSC 110 Tallahassee Fl 32399-4128	DEOEService@deo.myflorida.com Aaron.Dunlap@deo.myflorida.com

/s/ Ralf Brookes
Ralf Brookes Attorney
Fla Bar No. 0778362
Co-Counsel for Intervenors RRC et al
1217 E Cape Coral Parkway #107
Cape Coral, Fl 33904
(239) 910-5464;
(866) 341-6086 fax
RalfBrookes@gmail.com
Ralf@RalfBrookeSAttorney.com

/s/Thomas G. Pelham
Thomas G. Pelham, Esq.
Fla Bar No. 138570
Co-Counsel for Intervenors RRC et al
1474 Constitution Pl E
Tallahassee, Florida 32308
Phone (850)386-9401
tgpelham@aol.com
tom.pelham61@gmail.com