IN THE FIFTH JUDICIAL CIRCUIT COURT
IN AND FOR MARION COUNTY

RAINBOW RIVER RANCH, LLC and
CONSERVATION LAND GROUP, LLC — Case No. 10-1960-CA-A
CITY OF DUNNELLON, FLORIDA — Case No. 09-6247-CA-A
Petitioners.
v.
RAINBOW RIVER CONSERVATION, INC.,
and FREDERICK S. JOHNSTON, et al.,
Intervenors
_____/

Intervenors' Response to Amended Petition
&
Motion for Evidentiary Hearing
with Memorandum of Law

Florida Statute §70.001(4)(d)2, F.S., requires the court to review a proposed B. Harris Act settlement in order to review the ***facts*** of each case in order to determine whether the statutory criteria for settlement under the B. Harris Act have been met. Without taking testimony from witnesses at an evidentiary hearing where expert opinion and evidence can be submitted and considered by the court, the court cannot adequately fulfill its duty to explore the facts and reasons why the relief granted: (1) is the **"*appropriate*"** relief ***necessary*** to prevent an inordinate burden; and (2) protects the **"*public interest.*"** In order to do so, the court must be fully informed of the facts, as noted in this court's prior order. Without presentation of facts and expert testimony in opposition the Court cannot fully examine whether the relief exceeds the appropriate relief **necessary.**

Without close examination by the Court, there is nothing that prevents a proposed settlement from becoming a "sweetheart deal" that improperly departs from otherwise applicable substantive requirements and procedural safeguards contained in Florida Statutes and City Code provisions and that the specific settlement terms be "**necessary"** and "**appropriate"** to prevent an inordinate burden. Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002); Chisholm v City of Miami Beach, 8 Fla. L. Weekly Supp. 689, Circuit Court Opinion August 9, 2001, (Judge Altonaga).

This Court has a statutory duty under Section 70.001(4)(d)2, Florida Statutes, to review the agreement to "ensure that the relief granted protects the *public interest* served by the statute at issue and is the *appropriate relief necessary* to prevent the governmental regulatory effort from *inordinately burdening* the real property." Under Section 70.001(3)(e), Fla.Stat. "*inordinately burdened*" is defined to include a governmental action that has restricted or limited the use of real property such that the property owner is unable to attain the reasonable investment backed expectation for an existing use *or vested right* to a specific use of the property. Section 70.001(3)(a) Fla.Stat provides 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. In order to weigh the appropriate relief, the court must necessarily

examine and to what extent, and from what requirements, the development is vested. And vested from what? It is important to note that there is not in existence any formal denial for development as the property owner never went through any city zoning or plat approval or site plan development application or obtained any denial, which is necessary to establish a valid Bert Harris Act claim. However, the threat of a seven million dollar suit against the city was enough to bring the city government to capitulate to all demands of the property owner/developer regardless of any state or local laws including the city's comprehensive plan or public outcries by Rainbow River Conservation, Inc. and the other Intervenors in this case. The only hope for review as to whether the settlement is appropriate and necessary to protect the public interest lies now with the judiciary in the voice of the affected parties to be heard and upheld by the court. This is a precedent setting case with far reaching consequences, not only on this parcel, but in other Bert Harris Act cases.

I. Relief Granted not Appropriate or Necessary to Prevent Inordinate Burden.

This Court is required by Section 70.001(4)(d)2, F.S. to determine whether the relief:

> "***is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property***"

Necessarily, in order to determine whether the relief granted is the appropriate relief necessary to prevent an inordinate burden, the court must determine the *extent* of the inordinate burden.

The developer never received approval of a final plat or any other site plan approval, as required to claim a vested right. Similarly, the developer never received a denial of any application, which is required to bring a ripe claim under the B. Harris Act. The statute does not contemplate the parties submit the settlement agreement for a "rubber stamp" in order to avoid filing for a plan amendment, a plat, a Conservation Development application, or even a preliminary development site plan. The Harris Act instead requires meaningful judicial review under the Court's powers and jurisdiction in equity before approving settlement.

Under many recent rulings in the B. Harris Act cases[1] including M & H Profit, Inc. v. City of Panama City 28 So.3d 71, 76 -77 (Fla.App. 1 Dist.,2009) cert denied Fla S Ct at 2010 WL 2682139, 1 (Fla.,2010) (petition for review denied) the court explained and held that:

> "**Simply put, until an actual development plan is submitted, a court cannot determine whether the government action has "inordinately burdened" property**: Without the benefit of an actual development application and expert staff review to determine how the general requirement applies to a particular property, how can the impact of a density limitation be determined? It is common to find that a particular piece of property cannot develop to the maximum extent theoretically permitted by

[1] Citrus County v. Halls River Development, 8 So.3d 413 (Fla. 5th DCA, 2009)

> the code, when all of the setbacks, landscaping requirements, preservation of environmentally sensitive areas, traffic flow and parking requirements, etc., are taken into account. In that event, the financial effect of a downzoning could be overstated if it is measured with respect to the theoretical maximum density and not the density actually achievable on the property. The actual achievable density cannot be known until one does the work of applying the regulations to the property. If claims are to be allowed under the act based on the mere enactment of a general density limitation, and the owner has not done this work, is the government now forced to site plan the property for the owner in order to figure it out? That seems to go beyond what should reasonably be expected of government. Susan L. Trevarthen, *Advising the Client Regarding Protection of Property Rights: Harris Act and Inverse Condemnation Claims,* 78 Fla. B.J. 61, 63-64 (July/Aug. 2004); *see also* Ronald L. Weaver and Joni Armstrong Coffey, *Private Property Rights Protection Legislation: Statutory Claims for Relief from Governmental Regulation,* Florida Environmental & Land Use Law at 30.3-8 (June 2007) (stating the plain language of the Bert Harris Act supports the conclusion that "a jurisdiction-wide piece of legislation would not become actionable under the Act until a property owner has applied for development approval and been denied under the provisions of the legislation")." Id.

In M&H Profit the district court affirmed that the "trial court properly held the mere enactment of a general police power ordinance or regulation does **not** give rise to a Bert Harris Act claim." Id. Without at least some review of the nature of the inordinate burden and what is vested, the court cannot determine whether the relief exceeds that necessary to prevent the inordinate burden.

The developer in this case has never received a plat or planned development approval, but instead relies upon prior oral representations from prior City officials that were not reduced to writing or memorialized in any approvals. In Town of Ponce Inlet v. Pacetta, LLC, 120 So.3d 27 (Fla. 5th DCA, 2013), the appellate court explained that

> "Pacetta based its Harris Act claim on the similar theory that it had a vested right, through the application of the principle of equitable estoppel, to develop its properties as negotiated by the parties, notwithstanding the fact that such development would violate Ponce Inlet's Comprehensive Land–Use Plan. However, as explained in Citrus County v. Halls River Development, 8 So.3d 413 (Fla. 5th DCA, 2009), equitable estoppel can be invoked only when a property owner relies in good faith upon some government action. No such good faith reliance was established in this case. At the time Pacetta purchased its properties, Ponce Inlet's Comprehensive Land–Use Plan expressly prohibited the type of development which Pacetta proposed for its properties. **Any assurances by town officials that the Comprehensive Plan would be amended so as to authorize Pacetta's development plans could not be relied upon in good faith by Pacetta**, since **town officials lacked the authority to unilaterally amend the Comprehensive Land–Use Plan**. See§ 163.3184(4),(15), Fla. Stat. (2009) (requiring any proposed change to Comprehensive Plans to be subject to approval by various government agencies). Recognition of a vested right based on assurances from town officials to amend the Comprehensive Land–Use Plan would also be in violation of public policy, in light of the public hearings and other government approvals required for Comprehensive Plan amendments. Id. Accordingly, the trial court's order finding Ponce Inlet liable to Pacetta under the Harris Act is reversed."
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> Town of Ponce Inlet v. Pacetta, LLC, 120 So.3d 27 (Fla. 5th DCA, 2013).

By its own terms, the Amended Settlement Agreement (SA) was entered into "under the authority of section 70.001, F. S," (SA, at p. 14, para. 20). Further, the Amended Settlement Agreement has been submitted to the circuit court to satisfy section 70.001(4)(d), F.S." (SA, at p. 1, para. 1). Accordingly, the SA may only grant "the appropriate relief ***necessary*** to prevent the governmental regulatory effort from inordinately burdening the real property." Section 70.001(4)(d)(1), and (2), Florida Statutes (2013).

As Joint Petitioners acknowledge on page 6 of their Amendment to Amended Joint Petition, this Court has the duty to determine whether the SA provides only the appropriate relief ***necessary.*** The basis of Joint Petitioners' Bert Harris claim is that the City inordinately burdened their vested rights. They claim the following vested rights on their property under the prior Cubbage Agreement Limiting Development which is incorporated into a Partial Stipulated Settlement Agreement with the Department of Community Affairs and in regard to the 2001 City Comprehensive Plan ("Cubbage Agreement").

Petitioners attached the Cubbage Agreement to the subject B. Harris Act Amended Settlement documents presented to this Court for review as the basis for their purported vested rights. However, the prior Cubbage Agreement limited petitioners to:

- 450 residential units and
- 125,000 sq. ft. of commercial space.

(Amendment to Amended Joint Petition, pp. 2-3; 5; Ordinance NO. 01-02).

The previous Cubbage Agreement/Partial Stipulated Settlement Agreement upon which Joint Petitioners rely provides that development "shall not exceed" 450 residential units and 125,000 sq. ft. of commercial space, and that the development

shall take place in accordance with the legal descriptions and future land use designations in Exhibit B. (SA, at p. 4, para. 4.) These designations included:

- **36 acres of Conservation land along the river permitting no residential or commercial development;** and an
- Agricultural tract along the river that was permitted **no more than 30 residential units.**

Perhaps most importantly, the prior Cubbage Agreement also expressly agreed and provided that "any modification in the limitations provided in this Agreement purporting to permit an increase in the number of residential units or commercial space shall be effective only if adopted by further amendment to the City of Dunnellon Comprehensive Plan **in accordance with the formalities then required for amendments to the Comprehensive Plan**."

Joint Petitioners allege the City's 2007 Comprehensive Plan amendment inordinately burdened their vested rights under the 2001 City Comprehensive Plan by reducing "the permitted development on their properties from 450 residential units and 125,000 sq. ft. of commercial space to at the most 29 residential units and no commercial development." (Amendment to Amended Joint Petition, at p. 4). However, even the new Comprehensive Plan, as amended, allows the same density as the prior comprehensive plan if the applicant utilizes the available Conservation

Development, which is available to cluster the same number of units on the parcel in order to protect conservation areas within a proposed development. In 1999, the Comprehensive Plan: "Policy 1.1 (13) Agricultural Use: Primarily agricultural uses: residential densities **may be permitted up to 1 dwelling unit per 5 acres**; structures must be clustered to provide 50% aggregate open space." Under the 2007 Comprehensive Plan Amendment, an Agricultural density is 1 per 10 acres but a density of 1 per 5 acres is *still* allowed if the open space clustering is accomplished utilizing a new Conservation Development policy. The 2007 Plan Amendment was "Policy 1.8. The agriculture land use category includes agricultural and silvicultural activities. Residential dwelling units are permissible at a density of one 1 unit per ten 10 acres except where a conservation subdivision is proposed. A **conservation subdivision design allows a density of one 1 unit per five 5 acres and requires clustering**. The minimum lot area in a conservation subdivision design development is two 2 acres. A conservation subdivision shall meet the design standards set forth in Policy 1.11[2]. The maximum building height is forty 40 feet." There always was, and still is, a 50% open space requirement.

[2] Policy 1.11 Conservation subdivisions shall meet the following requirements
a Clustering of units is required A conservation subdivision on land designated for agricultural use may have lots of two 2 or more acres.
b **Required open space is at least fifty 50 percent of the site** with at least fifty 50 percent of the open space in one 1 contiguous parcel.
c All open spaces shall be connected to the maximum extent feasible. Whenever possible required open space shall be adjacent to open space on adjacent parcels.

Even assuming *arguendo* the validity of Joint Petitioners' vested rights argument, the only relief necessary to remove the inordinate burden to their vested rights is restoration of their development rights under the Cubbage Agreement/2001 City Comprehensive Plan. The Stipulated Settlement Agreement of 2001 between the state and city regarding this property was known by the applicants when they purchased the property. The agreement depicts the allowable uses for future development as well as the provision that the property could ONLY be changed through the city's comprehensive plan.

Vested rights could only be interpreted as those rights contained in the Cubbage Agreement, i.e., the Agreement to Limited Development 2001 and its property description shown by the map and written legal description. Further, the 2001 agreement contained no mixed-use or PUD designation.

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d No more than twenty 20 percent of the open space shall be devoted to storm water facilities
e Open space should be located on the most vulnerable portion of the site There shall be no chemical applications permissible on required open space land.
f Required open spaces shall be protected in perpetuity through recorded easements.
g Central water and sewer treatment facilities are available.
h Development shall be located in such a manner as to minimize the length of new roads and drives from existing public streets to the development.
1 Development shall be sited as far away as possible from water bodies, rivers, wetlands or other environmentally fragile features.
J Development shall be designed to minimize site disturbance to the minimum area necessary to accomplish development This shall include minimizing soil compaction by delineating the smallest disturbance area feasible.
k Existing native vegetation shall be protected whether within the designated open space or on the developed portion of a site.

Joint Petitioners claim that the SA restores their vested rights under the 2001 Comprehensive Plan (Amendment of Amended Joint Petition, pp. 5-6), but they fail to acknowledge that the SA does much more than that beyond what is necessary to avoid an inordinate burden for impairment of development rights under the 2001 settlement.

The SA goes beyond what is necessary and appropriate and contains ultra vires acts that are without basis in the City Code that improperly bind future police power of the City in violation of Section 70.001(4)(d)(1), and (2), Florida Statutes (2013). This Settlement Agreement grants relief that is ***far in excess of what is necessary to prevent an inordinate burden*** to Joint Petitioners' vested rights, including but not limited to the following:

1. The SA approves the preliminary plat attached to the SA as Exhibit "A" (SA, at para. 1) without complying with City Land Development Regulations pertaining to approval of preliminary plat, and violates the 2001 Cubbage Agreement by increasing the number of residential lots allowed on Conservation and Agriculture lands that border the river.

2. The City agrees in the SA to advance to commit and bind police power to establish a transfer of development rights ordinance under which Joint Petitioners' property will be deemed a "sending" area, and agrees to amend the City

Comprehensive Plan and Land Development Code to do this, in advance of any noticed public hearings. (SA, at para. 2).

3. The City agrees in the SA that Transfer of Development Rights units from Joint Petitioners' property will be exempt from zoning approvals for receiving lands (SA, para 2).

4. At Joint Petitioners' discretion, but in violation of the Cubbage Agreement, all of the commercial space can be converted to residential units without a public hearing based only upon the unilateral approval of the City Manager and his/her designee. (SA, para. 3 & 4).

5. The SA wrongfully provides that the 2001 comprehensive plan amendment granted Joint Petitioners' Property a Mixed Use future Land Use designation. (SA, para.4 & 4b). This is incorrect because the 2001 City Comprehensive Plan did not even have a Mixed Use future land use classification. The 2001 plan amendment designated Joint Petitioner's property as Agricultural, Residential Medium Density, Conservation, and Commercial.

6. City agrees that property owners will approve and record a plat that has not been submitted or reviewed or noticed for a public hearing and public participation. (SA, para 12).

7. City presumes that concurrency requirements for potable water, sanitary sewer, solid waste, schools, parks, fire, and police are satisfied if Property Owners accept the conditions of the SA (SA at para 15), even though the property owners have not complied with the concurrency management requirements of sections 15.1—15.12 of the City's Code of Ordinances.

8. City agrees that if the Settlement agreement contravenes the City's comprehensive plan, zoning regulations, or City Code of Ordinances, the SA shall prevail. (SA, para 20).

9. City decrees that Property Owners have complied with substantive requirements of a variance under section 14.2 of the City's Code of Ordinances even though the property owners have not complied with the procedural and substantive requirements for a variance set forth in sections 14.1—14.6 of the City's Code of Ordinances.

10. The City will not charge application fees for any zoning or development approvals which are addressed in the SA. (SA, para 21).

11. The Property Owners are given the option of developing the Project on an interim basis pursuant to an Interim Development Plan. (SA, Para 25)

A local government does not have the authority to regulate by contract or contract away its future police powers in this fashion. See *Hussey, supra*, Order

Denying Approval of Joint settlement Agreement, at 24-15, in which the circuit court rejected a Bert Harris Settlement Agreement because it constituted illegal contract planning and regulation. See also *County of Volusia v. City of Deltona*, 925 So.2d 340, 345 (Fla 5th DCA 2006) ("an agreement contracting away a city's exercise of its police power is unenforceable); *Morgran Co., Inc. v. Orange County*, 818 So. 2d 640, 643 (Fla. 5th DCA 2002) (illegal contract zoning exists even if the development agreement only requires the local government to "support" an application for development approval); *Chung v. Sarasota County*, 686 So.2d 1358, 1359 (Fla. 2d DCA 1996) (holding that a local government cannot enter into settlement agreements which commit the local government to enact a zoning ordinance); *Hartnet v. Austin*, 93 So.2d 86, 89-90 (Fla. 1956) ("a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body.").

Therefore and thereby, the SA goes far beyond the relief necessary to remove the inordinate burden allegedly caused by the 2007 City Comprehensive Plan Amendment about which Joint Petitioners complain. (SA, pp. 2-4). As set forth above, the SA improperly:

- grants Joint Petitioners greater development rights than they had under the Cubbage Agreement/2001 Comprehensive Plan upon which they relied upon at purchase.
- grants approvals without complying with the City's own regulations.
- exempts the applicants and the development project from numerous City zoning and development requirements, regulations, and fees.

It is this kind of gross overreaching that the Legislature intended to prevent when it provided for circuit court review in Section 70.001(4)(d)(1), and (2), Florida Statutes (2013).

Further, the City's stated basis for entering into the SA is the potential exposure to monetary loss in the underlying B. Harris Act claim which is repeatedly cited by the City of Dunnellon in its pleadings in this case as a public interest reason to agree to the settlement. However, the threat of potential damage award alone is insufficient to protect the public interest, especially without a valid underlying claim for liability. A common expression is "anyone can sue anyone for anything" what stops damage awards for claims that are not valid is judicial review. Judicial review by the court in an evidentiary hearing is necessary to ensure that the City does not improperly yield under such pressure and enter into an improper settlement that vastly exceeds the amount and degree of relief

necessary to prevent the inordinate burden, simply to avoid exposure to monetary liability, even when there is no valid claim to vested rights giving rise to an inordinate burden.

The courts have specifically held that a City's alleged interest in avoiding a claim for monetary damages is not sufficient to protect the interests of the public. In the circuit court opinion upheld in Chisholm, Judge Altonaga addressed the City's alleged interest in minimizing exposure to damage awards as a basis for Bert Harris Act settlement as a ***false rationale*** because:

> "The [City] maintains that the public interest served in the settlement are the resolution of the pending litigation and limiting the potential **financial exposure of the City as a result of [B. Harris Act] lawsuits**. This position misapplies the statutory standard. If this position were upheld, every Harris Act settlement would, by definition, serve a public interest by resolving pending claims and avoiding further litigation[3]. The City properly recognizes, in agreement with the position of the Petitioners, that the public interest is that which is served by the regulations at issue… Similarly, where a use is not allowed under the applicable land development regulations, it logically follows that the use is ``speculative'' in nature. …. Respondent maintains that the public interest served in the settlement are the resolution of the pending litigation and limiting the potential financial exposure of the City as a result of the three lawsuits. This position misapplies the statutory standard. If this position were upheld, every Harris Act settlement would, by definition, serve a public interest by resolving pending claims and avoiding further litigation... To adopt the reasoning that a settlement of a Harris Act claim is necessary simply because there is a pending Harris Act claim, is to construe the statutory language in such a way that renders meaningless the language that the relief must be necessary to prevent inordinately burdening the property owner. That argument could thus be utilized any time a property

[3] In the instant case before this court, the settlement agrees to merely "toll" the litigation.

owner made a Harris Act claim, which appears an illogical application of the statute."

Chisholm Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689 (Fla. 11th Cir.Ct. August 9, 2001) upheld Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002). The mere avoidance of potential damages that purports to settle an invalid claim would also violate legal and statutory requirements. The Harris Act was not intended to be a windfall for claims that were never ripened where applications were never filed or pursued. With regard to B. Harris Act settlements, the lower circuit court opinion in Chisholm noted that with regard to the second prong, whether "the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property, the Bert J. Harris Act settlement was not ``**necessary**'' for any purpose other than to take away this Court's jurisdiction to review the legality of the subsequent approvals, an outcome that cannot be sanctioned as ``**necessary**'' in and of itself…." In reviewing this decision, in Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002), the Third District noted that procedurally at the very least, the application should have been required go through the appropriate quasi-judicial hearings and demonstrate that it meets the applicable criteria and go through the procedures contained in the City Code sections at issue prior to

approval of the actual development. Id.[4] The relief granted in this instant case far exceeds that needed to relieve the inordinate burden because it goes far beyond that necessary and allows the developer to:

- waive the requirement of submitting a plan amendment under Florida Statute Chapter 163 Part II,
- waive the requirements of City River Protection Ordinance,
- waive the requirements of the City Tree Ordinance, and
- waive user development fees and
- waive public hearings required approval of future modifications (by the City Manager)
- waive public participation
- waive rights of future City Councils

for which there is no demonstrated vested right and waives public hearings. Id.

The Agreement essentially serves as a development order with adjustments to be approved by the City Manager in violation of his limited scope of authority under the City Code[5] at the developer's request. This would usurp the power of the

[4] See also, See also, "The Status of Florida Law on Contract Zoning: Practical Drafting Suggestions to Avoid Contract Zoning Claims in Settlement Agreements, The Florida Bar Journal, February, 2007 Volume 81, No. 2 Page 5.

[5] Sec. 2-104. - Powers and duties. City Manager.

City Council[6] and Planning Commission and prevent public participation and public commenting before a final decision on amendments to the development plan are made by the City Manager under 286.0114, Florida Statutes.

If the relief granted exceeds that needed to relieve the inordinate burden or grants approvals that depart from City Code then the settlement agreement becomes a "sweetheart" deal that exceeds the relief necessary to prevent an inordinate burden on this property.

This is all the more reason why the court needs to review and determine the issues in an evidentiary hearing.

II. Relief Does Not Protect the Public Interest

An evidentiary hearing by the circuit court is necessary for the court itself to determine under the first prong of judicial review required by Section 70.001(4)(d)2, F.S. whether the: **"*the relief granted protects the public interest served by the statute at issue.*"** The *public interest* served by the statute involves both substantive and procedural requirements. Florida's Community Planning Act requires the following:

> **163.3194 Legal status of comprehensive plan.—**
> (1)(a) After a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, **all development undertaken by, and all actions taken in regard to development orders by, governmental**

[6] Section 13.15. - Action by City Council of Dunnellon.

> **agencies in regard to land covered by such plan or element shall be consistent with such plan** or element as adopted.

Procedurally, Section 163.3184(2), (3)(a), and (10), Florida Statutes, establishes the exclusive and mandatory procedures for amending comprehensive plans. Section 163.3194(1)(a), Fla. Stat., requires that all development and all actions taken in regard to local development orders shall be "consistent" with the duly adopted local comprehensive plan. Section 163.3211, Fla. Stat., provides as follows:

> Section 163.3211 - **Conflict with other statutes.**
>
> **Where this act 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."

The Settlement Agreement purports to approve the Plaintiffs' proposed development plan without the need to submit a plat or site plan for public hearings. *See* Settlement Agreement, paragraphs 1, 4, and 12-13. The Settlement Agreement also admits that the proposed development plan is inconsistent with the City Comprehensive Plan, and purports to amend Objective 1, Policy 1.6 of the Future Land Use Element, of the Comprehensive Plan. (See Settlement Agreement, paragraph 4.b. which states in part: "Policy 1.6 is modified to include….").

Further, the Settlement Agreement, in paragraph 20, provides that "in the event of a conflict between this Agreement and City Comprehensive Plan…., this Agreement shall prevail.") The Settlement Agreement thereby violates Chapter 163 Florida Statutes both procedurally and substantively.

Procedurally, the proposed settlement, as written, would violate requirements that a plan amendment to the Future Land Use Map (FLUM) be processed under §163.3184 Florida Statutes to depart from the duly-adopted effective Comprehensive Plan. The Settlement Agreement improperly waives the public participation and reviewing agency comment process required in Chapter 163 that would occur during an amendment of the comprehensive plan. Procedurally, the case can ***only*** legally be settled through a process by which the City agrees to accept and process a plan amendment by initiating a plan amendment through the 163.3184 process, which shall be followed instead of waived.

Substantively, the proposed settlement, as written, would violate Fla. Stat. §163.3125 requirement that all development orders must be consistent with the duly adopted plan) and that the duly adopted plan and any plan amendments meet the minimum substantive requirements of Section 163.3177, Florida Statutes.

Contrary to the Petitioners assertion that the Harris Act §70.001 takes precedence over Chapter 163, Section 163.3211 Florida Statutes specifically states

that Chapter 163 expressly governs over conflicts with other Florida Statutes. This language in Section 163.3211, Florida Statutes has not been amended even though Chapter 163, Part II was substantially re-written in the Community Planning Act of 2011. Instead of agreeing to hold public hearings to process a comprehensive plan amendment to amend the Future Land Use Map for the subject parcel, the settlement agreement purports to waive the plan amendment requirement and process altogether, and that is not allowed even under the new 2011 Community Planning Act.

The proposed settlement, as written, does more than simply agree to process a Plan Amendment, it purports to instead go further and waive the statutory requirement that the plan be amended. Florida Statutes, Chapter 163 (2013). That is improper overreaching of statutory authority. This would violate state law. The Florida Supreme Court has affirmed that plan amendments are required and has explained the requirements in Coastal Dev. of N. Fla. v. City of Jacksonville Beach, 788 So. 2d 204, 207-209 (Fla. 2001) ("The amendment process entails, among other things, an integrated review process involving a **mandatory review by the Department**....") and reviewing agencies, including the water management districts, regional planning council and other commenting agencies. See, Martin County v. Yusem, 690 So. 2d 1288 (Fla. 1997) (explaining plan amendment process required under Fla. Stat Chapter 163, Part II).

The Circuit Court opinion in Hussey v. Collier County, ("**Hussey I**") Case No. 08-6933-CA, Twentieth Judicial Circuit, (**Sept. 19, 2013**), Order Denying Approval of Joint Settlement Agreement, (rehearing denied*)*, held that a Bert Harris Settlement agreement cannot amend a local comprehensive plan. The circuit court refused to approve a Bert Harris settlement agreement between Hussey and Collier County because it amended the county comprehensive plan in contravention of the mandatory amendment procedures of Chapter 163, Part II, Florida Statutes. The court noted in Hussey I that the Bert Harris Act does not specifically authorize amendments of comprehensive plans through a settlement agreement and that Section 163.3184 provides the exclusive method for amending comprehensive plans, and that Section 163.3211 expressly provides that in the event of a conflict between the provisions of Chapter 163 and any other provisions of law, Chapter 163 shall govern. Hussey, at 12-13.

In addition, the settlement agreement purports to waive future local public hearings otherwise required by the City Code for future modifications to the development, instead allowing the City Manager to unilaterally approve changes and modifications without a required public hearing in violation of City Code requirements and exceeding the delegated powers of the City Manager, which is clearly not in the public interest because it denies public participation.

This waiver of procedural due process violates principles of well-drafted settlement agreements concerning land use and zoning claims that allow the City to agree to process applications or amendments but do not agree to approve applications without holding the required public hearings under the statutes and codes and applying the applicable standards and criteria. Chisholm v Miami Beach, 830 So.2d 842 (Fla. 3rd DCA 2002).

Substantively, the relief contained in the agreement affects the public interest in the Rainbow River springs run adjacent to the Rainbow River State Park, an important natural and economic resource for Marion County, not just the City of Dunnellon. The Rainbow River springs run contains a scenic corridor and is visited by thousands of people annually because of the clear spring water and the river's corridor of trees and natural vegetation along the river's banks which serve as important wildlife habitat. See, Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013; Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013.

The settlement agreement unnecessarily waives the public interest requirements for river corridor protection set forth in the City's River Corridor Protection Ordinance and the City's Tree Ordinance.

The City's comprehensive plan and its River Corridor Protection Ordinance both call for a vegetated 150' buffer for lots with depth greater than 300' in order

to reduce pollution and provide wildlife habitat. See, Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013; Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013.

Under the Settlement Agreement, twenty-four (24) lots are proposed on the river, 23 of which are to have docks and gazeboes, including a community dock on lot 24. The docks and accompanying gazeboes and boats will detract from the littoral shoreline habitat and scenic river corridor. Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013; Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013.

Thirty percent of all trees over 4"DBH and all smaller foliage on the property may be cleared, thereby needlessly, excessively and adversely impacting wildlife habitat including nesting sites for five listed bird species and the Suwanee Cooter. Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013; Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013.

The buffers provided in the Agreement are entirely inadequate to protect the riverine habitat, especially around the East Blue Cove.

Approximately 20 acres adjacent to the East Blue Cove are classified as Conservation Area yet the settlement allows eleven (11) one acre lots directly on East Blue Cove in the Conservation area, each allowed a dock and a gazebo and the building setback for these eleven lots is only 25' with clearing of 30% of trees over 4" DBH and all other foliage within the setback will result in adverse impacts. Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013; Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013.

This development is inconsistent with the designation of this area as Conservation on the Future Land Use Map. Id. The intensity of development along the east side of the property is not compatible with State Park land adjacent to the east side. Id. The real property contiguous to the owner's property is the state of Florida purchased for environmental protection by the taxpayers of Florida, (ie the Rainbow Springs State Park). The land along the river has special value for environmental protection and eco-tourism as an economic driver in the City of Dunnellon that should be carefully weighed and balanced with appropriate restrictions on development.

While the city amended its comprehensive plan for Agricultural use to allow one unit per ten acres (1 unit/10 acres) (consistent with Marion County), the plan amendment also allows an increased density to one unit per five acres (1 unit/5 acres) if a Conservation Subdivision is utilized, which is consistent with the land density for agricultural land in the Agreement of 2001.

The City's agreement is contrary to the public interest by reducing or waiving user development fees.

The agreement specifies a City services impact fee of $500/unit. This is less than 1/10 of the usual impact fee and again increases the burden of services impact on existing taxpayers for this development at the expense of taxpayers. Reference is made to future needs for police and fire staffing and equipment and a new public safety building to accommodate this development. The developer's contribution to this cost is the one-time $500/unit impact fee and $50,000 toward the acquisition or construction of a new public safety building. This contribution is entirely inadequate and places the burden on existing taxpayers. This agreement makes it clear that the City is obligated to provide sewer and water to the development. The City also promises the developer a right to reserve any existing water and sewer capacity. The developer has offered the City a one acre site on his property or $50,000 to purchase another site to drill a well and install pumping facilities adequate to supply his development. Once again, this places a monetary burden on

the City, and potential draw down of the aquifer adjacent to Rainbow Springs, which is an important state park and a national treasure.

The Settlement Agreement grants the developer all rights to use the Exhibit "A" site plan without further approvals or development orders.

This constitutes a departure for development orders from the City Comprehensive Plan and Land Development Code without providing procedural due process for a Future Land Use Map change and development plan review, recommendations and approval by the City of Dunnellon's Planning Commission and City Council.

The Settlement Agreement purports to negate the provisions of the comprehensive plan and any land development regulations. The Bert Harris Act does not override the Growth Management Act. The approval of the development site plan without obtaining the required plan amendment far exceeds the intent of Florida Statute 70.001(4). It is an end-run around public hearings required for plan amendments and planned developments. The agreement is not in the public interest because it purports to bind the future police power authority of the city council. Future City Councils will not have any input beyond this agreement.

The Court must conduct an Evidentiary Hearing to weigh Equities.

An evidentiary hearing is required for the court to fully consider the facts and expert opinions, before it, to ensure that the relief granted "*protects the public interest*" and is "*the **appropriate** relief **necessary***" to prevent an inordinate burden on these particular parcels under these particular circumstances. The statute allows the court to weigh the facts of each case under its powers in equity, but in order to do so the court must be fully informed of the facts. As set forth above, there are facts and expert opinions in dispute regarding the proposed Settlement Agreement, which Respondent Intervenors allege:

a. Allows adverse impacts to Rainbow River springs run littoral zone, which is an important natural resource protected by the city's comprehensive plan.

b. Imposes substantial additional financial burdens on the City and its taxpayers.

c. Conflicts with Florida Statute 163, procedurally and substantively.

d. Allows an intensity of development on the RRR and CLG property that is inconsistent with the comprehensive plan future land use designations and surrounding land uses.

e. Would not be developed in accordance with the Dunnellon land development regulations and improperly binds future city councils.

f. Grants excessive property rights, far beyond any historical property vestments.

g. Is not supported by a financial analysis and does not require the development to pay its fair share of infrastructure, instead requiring

that the City be responsible for the infrastructure needed to serve this development.

h. This development would provide little or no net benefit to the City because it would have an adverse impact on traffic, water and sewer, police and fire services, natural resources and wildlife, and is not compatible with the surrounding existing uses and community.

i. Does not protect the public interest.

Affidavits in support of this Response are contained in the Notice of Filing of Affidavits with Exhibits filed with this court in this action in December 2013 and include the following expert opinion affidavits:

- Intervenors' Notice of Filing Affidavit of ***Expert Michael G. Czerwinski, P.G., P.W.S***. with Exhibits (Volume 1, 2, 3, and 4) filed on or about December 23, 2013
- Intervenors' Notice of Filing Affidavit of ***Expert Bob Knight*** filed on or about December 23, 2013
- Intervenors' Notice of Filing cited sections from the ***City of Dunnellon Charter*** and ***City of Dunnellon Code*** filed on or about December 30, 2013.

The court is not afforded the opportunity to fully hear, decide and fulfill its statutory duties without taking expert witness testimony from the witnesses listed above in opposition in an evidentiary hearing to explore the facts concerning:

1) whether the relief does not protect the public interest; and

2) whether it, in fact, exceeds the appropriate relief necessary.

In Florida, the doctrine of equitable estoppel is derived from equity and Florida courts use the concepts of vested rights and equitable estoppel interchangeably. Key West v. R.L.J.S. Corp, 537 So.2d 642, 644 n. 4 (Fla. 3rd DCA 1989).

It is the function of the courts to ultimately determine whether there is a vested right that operates as equitable estoppel under the circuit court's equity jurisdiction. Only this court has the power to weigh equities:

Article V, Section 20(c)(3), Fla. Const. provides: "Circuit courts shall have exclusive original jurisdiction .....in all cases in equity...."[7]

Florida Statute section 26.012(2)(c) also provides that circuit courts "shall have exclusive original jurisdiction...in all cases in equity..."

Unless there is review and approval by the circuit court, after reviewing opposing facts and weighing the equities of a proposed B. Harris Act settlement, that purports to waive state statutes or City Codes, the City, developer, and DEO would be making an "end run" around the circuit court's exclusive original jurisdiction over equitable vested rights claims. This power is unique to circuit courts and county courts do not have jurisdiction of cases arising in equity.

[7] Under Article V, section 5(b), Florida Constitution, the: "circuit court shall have original jurisdiction not vested in county courts."

Vested rights equitable estoppel will be applied to prevent application of new governmental regulations to land if a property owner: (1) relies in good faith; (2) upon some act or omission of government by making such a substantial change in position or by incurring such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired. Citrus County v. Halls River Development, Inc., 8 So.3rd 413, 421 (Fla. 5th DCA 2009); Town of Ponce Inlet v. Pacetta, LLC, ,supra; Hollywood Beach Hotel Company v. City of Hollywood, 329 So. 2d 10, 15-16 (Fla. 1976).

Unless there is court review of the nature and extent of any vested rights giving rise to an inordinate burden, the City, developer, and DEO would be making an "end run" around the circuit court's exclusive original jurisdiction over equitable estoppel, vested rights claim.

This Court must evaluate the sufficiency of the City acts that were allegedly relied on by Plaintiffs are as follows:

(1) A meeting with City staff (the City Manager and City Community Development Director) in 2004 at which meeting Plaintiffs "were assured and promised that the City would support development on the property,…and assist future development should the property be purchased." (Count I, paragraph 4)

(2) A meeting with the City Community Development Director on November 23, 2004, to review Plaintiffs' proposed development plans for the

property and at which meeting the Director "was encouraging to (Plaintiffs)…and made positive suggestions for the future development of the site." (Count I, paragraph 6)

(3) Meetings with the Planning Commission and the City Council in January and February, 2005. At the meeting with the City Council, Plaintiffs allegedly presented their proposed development. As alleged by Plaintiffs, "at these meetings, the Plaintiff received support and encouragement from the City." (Count 1, paragraph 8).

Significantly, Plaintiffs do not allege that the City Council voted to approve, or took any other official action on, Plaintiffs' proposed development plan. For several reasons, these are not sufficient governmental acts upon which to base a claim for vested rights or equitable estoppel against the City.

First, and foremost, if the City Council or City staff represented to Plaintiffs that its development plan was permissible under the City's comprehensive plan, the representation was a mistake of law. The development plan was and is inconsistent with the Comprehensive Plan in existence at the time of the alleged city acts and now.

An estoppel against the City cannot be based on a mistake of law. *Citrus County v. Halls River Development, Inc*., 8 Sos.3d 413, 422-23 (Fla. 5th DCA 2009) ("the doctrine of estoppel does not generally apply to transactions that are

forbidden by law or contrary to public policy."); *Branca v. City of Miramar*, 634 So. 2d 604, 606) (Fla. 1994) ("as a general rule, estoppel will not apply to mistaken statements of the law."); *Ammons v. Okeechobee County*, 710 So. 2d 641 (Fla. 4th DCA 1998) ("Estoppel cannot be asserted against a government entity based on mistaken statements of the law….It would not serve public policy well to permit such mistakes to persist when they affect public welfare, like planning and zoning decisions do.").

Second, the Plaintiffs do not allege that the City Manager and Community Development Director approved their development plan or even had the power to do so. Moreover, these two city staff persons do not have the authority to approve Plaintiffs' development plan. Only the City Council has that authority. *See* City Charter, section 7; City Code, Chapter 2, section 2-104; Chapter 94, Article II, section 94-37; Chapter 98, sections 98-81 & 98-82 & 98-83. Thus, the acts of these two city staff persons cannot be the basis of an estoppel against the City. See *Corona Properties of Florida, Inc. v. Monroe County*, 485 So.2d 1314 (Fla. 3rd DCA 1986 (Vested rights determination issued by county zoning official was invalid because the official lacked the authority to issue the determination); *Striton Properties, Inc. v. City of Jacksonville Beach*, 533 So 2d. 1174 (Fla. 1st DCA 1988, *rev. denied*, 544 So. 2d 201 (execution of redevelopment agreement by the City

redevelopment agency could not form the basis of vested rights because only the City Council had the authority to grant final approval for the redevelopment).

Third, as alleged by Plaintiffs, the assurances given by the City staff were vague and general and did not refer to any specific development plan. Plaintiffs do not allege that they applied for, or presented, to the City Manager or the City Community Director a specific development plan. This is another reason why the city staff's comments cannot be the basis of valid equitable estoppel claim against the City. *M & H Profit, Inc., v. City of Panama City*, 28 So.2d 3rd 71, 76 (Fla. 1st DCAA 2009) ("Simply put, until an actual development plan is submitted, a court cannot determine whether government action has 'inordinately burdened' property."

Fourth, Plaintiffs have not alleged that the City Council voted on or took any official action to approve Plaintiffs' development plan. In the absence of official action by the City Council, comments by individual Council members are irrelevant and do not support an estoppel against the City. *Barefield v. Davis*, 251 So.2d 699 (Fla 1st DCA 1971) (statements by one county commissioner to developer did not give rise to estoppel where County Commission itself failed to take any action).

Plaintiffs cannot establish good faith reliance on the City actions described hereinabove. At the time of the alleged meetings with the City Council, City

Planning Commission, and City staff in 2004 and 2005 and at the times the Plaintiffs purchased the property and made other expenditures, the City Comprehensive Plan did not permit the development plan in which Plaintiffs are now claiming vested rights. Accordingly, Plaintiffs' alleged reliance on the City's assurances could not be in good faith. *Town of Ponce Inlet v. Pacetta*, supra, holding that good faith reliance and an estoppel against the Town could not be established where the existing comprehensive plan did not allow Pacetta's proposed development, and Town's "assurances that comprehensive plan would be amended could not be relied on in good faith since Town officials lacked the authority to unilaterally amend its Comprehensive Land Use Plan."

In the case *Citrus County v. Halls River Development, Inc*., supra at 421-22, in which the court held that where the comprehensive plan did not permit the County to approve the developer's proposed development, the County and the developer should have known that, and therefore, the developer could not "utilize the doctrine of equitable estopped to compel the County to issue the necessary approvals for the project, despite the County's willingness to do so."

Similarly, in the instant case, both Plaintiffs and the City knew that Plaintiffs' proposed development plan was inconsistent with the City Comprehensive Plan, as amended in 2001 pursuant to a Stipulated Settlement Agreement between the City and the Department of Community Affairs.

On two different occasions, in 2004 and 2005, the City and Plaintiffs attempted to amend the City Comprehensive Plan to allow Plaintiffs' proposed development, but the state planning agency objected to both amendments and neither ever became legally effective.

Thus, as in the *Town of Ponce Inlet* and *Citrus County* cases, Plaintiffs in the instant case could not in good faith rely on any City's assurances that the proposed development was permissible under the existing plan or that the City would amend the Comprehensive Plan to allow it.

The statute allows the court to weigh the facts of each case under its powers in equity, but in order to do so the court must be fully informed of the facts. Without taking expert witness testimony in opposition in an evidentiary hearing to explore the facts and reasons whether the relief does not protect the public interest and whether it, in fact, exceeds the appropriate relief necessary, the court is not afforded the opportunity to fully hear, decide and fulfill its statutory duties.

Further this case is untimely filed as set forth in **Hussey II**, *Collier County v. Hussey, ("***Hussey II")**, ___So.3rd____, (Fla. 2nd DCA, opinion filed **June 27, 2014**, Case No. 2D13-5078) , rehearing denied September 19, 2014. Conservation Land Group, LLC June 1, 2009 Notice of Intent to pursue claims against the City under the Bert Harris Act, and Rainbow River Ranch, LLC July 1, 2009 Notice of Intent to pursue claims against the City under the Bert Harris Act.

On November 13, 2009, Petitioners Rainbow River Ranch, LLC and Conservation Land Group, LLC filed a Bert Harris claim in circuit court.[8] Not until more than 180 days later on March 19, 2010, did the Joint Petitioners enter into the settlement agreement purporting to waive compliance with statutes and comprehensive plan policies under the Bert Harris Act. As recently decided by the only District Court in Florida addressing the timing issue, in *Collier County v. Hussey*, ("**Hussey II**"), ___So.3rd____, (Fla. 2nd DCA, opinion filed June 27, 2014, Case No. 2D13-5078) , rehearing denied September 19, 2014:

> "…the clear, unambiguous language of section 70.001(4) leads us to conclude that the denial of approval of the Agreement is nonetheless the correct result. The Bert Harris Act seeks to encourage settlement and, in fact, requires that the relevant governmental agency present the property owner with a settlement offer during the Act's presuit period. § 70.001(4)(c). To further encourage such early settlement, the Act sets out available remedies which may result in contravening otherwise applicable regulations and statutes. § 70.001(4)(c). When a settlement agreement incorporates remedies that result in the contravention of a statute, the parties must obtain court approval of the settlement agreement through the procedure set out in section 70.001(4)(d)(2). When the parties are unable to reach a settlement agreement, and after the ripeness prerequisite has been met, the property

[8] Rainbow River Ranch, LLC and Conservation Land Group, LLC, v. City Of Dunnellon, Case No. 09-6247-CA-B, which was consolidated with this Case No. 10-1960-CA-B in this 5th Circuit Court. *See also*, Petitioners' prior Harris Act claims in related cases in: 5th Circuit Case No. 08-5202-CA-G Rainbow River Ranch, LLC v. the City of Dunnellon; 5th Circuit Case No. 08-5203-CA-G Conservation Land Group, LLC v. The City of Dunnellon; Case No. 5D09-2004, 5th District Court of Appeal, City of Dunnellon, v. Rainbow River Ranch, LLC.

owner may "file a claim for compensation in the circuit court." § 70.001(5)(b) (emphasis added). At the point of filing the circuit court action for compensation, the section 70.001(4)(c) presuit settlement negotiations have concluded, and the issue remaining pertains to whether the property owner is entitled to compensation and, if so, how much. While the parties may well choose to enter into settlement negotiations during the pendency of the compensation lawsuit, such negotiations do not take place pursuant to the section 70.001(4) pre-suit settlement procedures, including the procedure providing for contravention of statutes. See § 70.001(8) ("This section does not supplant methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize such methods to augment or facilitate the processes and actions contemplated by this section.").

The Bert Harris Act sets forth a specific timeline for providing notice of a claim, presentation of a settlement offer, and filing of a lawsuit for compensation. § 70.001(4)-(5). The timeline as to when a governmental entity shall make a written settlement offer to effectuate the available remedies set out in section 70.001(4)(c)(1)-(11) is clear and unambiguous, and courts are without power to construe this unambiguous statute in a way which would extend its express terms or its reasonable and obvious implications. Hill, 70 So. 3d at 575; Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). To do so would be contrary to the intent of the legislature to encourage early settlement of Bert Harris Act claims.

Conclusion

As the Settlement Agreement at issue in this case does not comply with the clear and unambiguous presuit settlement timeline set forth in section 70.001(4), and as the trial court was constrained from extending the availability of section 70.001(4) presuit settlements, the trial court was without jurisdiction to review and approve the Settlement Agreement pursuant to section 70.001(4)(d)(2).”

Collier County. v. Hussey (Fla. 2nd DCA, 2014).

WHEREFORE, Intervenors respectfully request that the court deny the Amended Petition to approve the Amended Settlement Agreement, or in the alternative, grant Intervenor’s Motion for Evidentiary Hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email on this September 29, 2014 to the following:

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