IN THE CIRCUIT COURT, OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR MARION COUNTY, FLORIDA

Case No.: 2010-1960-CA-B

In re: CITY OF DUNNELLON, FLORIDA
RAINBOW RIVER RANCH, LLC, and
CONSERVATION LAND GROUP, LLC.

Joint Petitioners.
_____/

ORDER TO SET EVIDENTIARY HEARING OR, IN THE ALTERNATIVE, GRANTING LEAVE TO AMEND PETITION FOR APPROVAL OF REVISED SETTLEMENT AGREEMENT

THIS CAUSE came before the Court on the Amended Petition to Affirm the Settlement Agreement between Petitioners, CITY OF DUNNELLON, FLORIDA, RAINBOW RIVER RANCH, LLC, and CONSERVATION LAND GROUP, LLC, filed on January 29, 2013. The DEPARTMENT OF ECONOMIC OPPORTUNITY f/k/a THE DEPARTMENT OF COMMUNITY AFFAIRS, RAINBOW RIVER CONSERVATION, INC., and FREDERICK JOHNSTON were granted leave to intervene on December 10, 2010.

Factual background

It is undisputed that RAINBOW RIVER RANCH, LLC, and CONSERVATION LAND GROUP, LLC, ("Owners") individually own certain contiguous tracks of land within the city limits of Dunnellon, Florida, ("City"). The Owners and the City ("Petitioners") filed an Amended Petition indicating the Owners filed certain claims against the City in circuit court, and other claims were pending from the City's 2007 amendments to its Comprehensive Plan and other

land use ordinances. Petitioners stipulate those amendments significantly affect the allowable densities and usage intensities on the parcels at issue.

On March 19, 2010, the Petitioners entered into an agreement to settle all suits and claims between Petitioners. FREDERICK JOHNSTON, RAINBOW RIVER CONSERVATION, INC., ("Intervenors"), and DEPARTMENT OF ECONOMIC OPPORTUNITY ("DEO") f/k/a THE DEPARTMENT OF COMMUNITY AFFAIRS, were allowed to intervene by the court's order entered December 23, 2010. DEO sought modification of the settlement agreement to properly address Florida Statute §166. Petitioners negotiated with DEO and the resulting settlement agreement was executed August/September of 2013.

Among the claims extinguished by the revised settlement agreement is a claim pursuant to Florida Statute §70.001, otherwise known as the Bert Harris Act. The Bert Harris Act was enacted to provide "for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property." Florida Statute §70.001 (2006) (amended 2011). Although the Petitioners argued that, as the parties agree the owners are correct in their claims, the only issue before this Court is whether the settlement agreement is a valid contract that binds the parties, Florida Statute §70.001(4)(d)(2), does provide, in pertinent part, as follows:

> Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement

> agreement by the court *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*. (emphasis added)

Under the Bert Harris Act claim, governmental entities are permitted to include several types of concessions in a settlement offer, including (but not limited to):

a. adjustments to land development or permit standards or to other provisions controlling the development or use of land
b. increases or modifications in the allowed density, intensity, or use
c. Including conditions related to the amount of development or use
d. Issuance of a development order, a variance, special exception, or other extraordinary relief

See, Florida Statute §70.001(4)(c) (2006).

One of the arguments raised by Intervenors is that the revised settlement agreement should be rejected because it circumvents some of the provisions of Florida Statute §163, Intergovernmental Programs. The primary objection relates to Florida Statute §163.3211 (2013), which designates Florida Statute §163 as the controlling legislation when conflicts arise with other, less stringent, provision(s) of law related to the authority of local governments to regulate the development of land. "A rule of statutory construction which is relevant in this construction is that where two statutory provisions are in conflict, the specific provision controls the general provision." ***Murray v. Mariner Health***, 994 So.2d 1051, 1061 (Fla. 2008), ***State v. J.M.***, 824 So.2d 105, 112 (Fla. 2002). "[W]here two laws are in conflict, courts should adopt an interpretation that harmonizes the laws, for the Legislature is presumed to have intended that both laws are to operate coextensively and have the fullest possible effect." ***Palm Beach County Canvassing Bd. v. Harris***, 772 So. 2d 1273, 1287 (Fla. 2000). "[I]t also is well

settled that when two statutes are in conflict, the more recently enacted statute controls the older statute . . . The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent." ***Id.***

In the instant case, the Court finds that when a remedial statute – such as Florida Statute §70.001 – specifically grants a governing entity leave to include variances and exceptions to zoning plans as a means to achieve a settlement necessitated by regulatory changes not amounting to a taking, such provisions are controlling over the general language contained in the previously-enacted Florida Statute §163.3211. Furthermore, the Court rejects any attempt by the Intervenors to turn the court's duty to review the settlement agreement into litigation of the claims being settled under the agreement.

Borrowing from the jurisprudence of takings, it is clear that "[e]ven a regulation that complies with the standards for the exercise of police power may still result in a taking." ***Vatalaro v. Dep't of Envtl. Regulation***, 601 So. 2d 1223, 1228 (Fla. 5th DCA 1992). The court in ***Vatalaro*** stated that although the land may remain in the physical condition in which it was purchased, government action, in that instance the denial of a permit, leaves owners in a different position, because while the land, itself, is unaffected "yet the bundle of rights the owner had has been diminished. The owner no longer has the right to own and enjoy the property as he intended. The extent to which this right has been diminished is the test for determining whether a taking occurred." ***Id.***

Unlike the law of takings, the Bert Harris Act provides for land use concessions and other forms of relief if governmental action interferes with a

vested right, determined under equitable estoppel theories, or "such reasonably foreseeable, non-speculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property." Florida Statute §70.001 (2006). "The doctrine of equitable estoppel may be invoked against a governmental body when a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred 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 Dev., Inc.***, 8 So. 3d 413, 421-22 (Fla. 5th DCA 2009).

Settlements are contracts not commonly subjected to the court review absent allegations that a party has breached the terms of the settlement. "Settlement agreements are contractual in nature and are therefore, interpreted and governed by contract law." ***Commercial Capital Res., LLC v. Giovannetti***, 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007). In contrast, Florida Statute §70.001, tasks this Court with determining whether the settlement both protects the public interest served by the statutes affected by the terms of the settlement *and* prevents governmental action from inordinately burdening the real property.

Although Petitioners correctly assert there is no provision in the statute for an evidentiary hearing[1] to assist the Court in reaching a ruling, the Court declines

[1] It should also be noted there is no provision in the statute which prohibits an evidentiary hearing.

to undertake this balancing of competing interests while effectively blind. The Amended Petition does not provide sufficient information – stipulated or otherwise – which demonstrates the manner in which the 2007 Comprehensive Plan amendments affected the land in question so as to permit the Court to determine whether the settlement complies with Florida Statute §70.001. Furthermore, Intervenor raised sufficient concerns regarding whether the settlement agreement protects the public interest for the Court to consider evidence (as opposed to non-evidentiary arguments) regarding the same.

Lastly, the court is concerned with the fact DEO is noticeably silent in addressing Intervenor's arguments regarding the protection of public interest not being served under the present agreement. Paragraph four (#4) of DEO's Motion to For Leave to Intervene, filed June 14, 2010, states "the Department has a direct interest in whether the public interest is being served ..." However, paragraph three (#3) of the Amended Joint Petition to Affirm Settlement Agreement states DEO "intervened in the underlying litigation seeking revisions to the prior Settlement Agreement in order to achieve the purposes of Chapter 176, *Florida Statutes* ..."[2] and the first page of the actual Conservation Land Group, LLC and Rainbow River Ranch, LLC and the City of Dunnellon Settlement Agreement states "the DEO has requested revisions of a prior settlement agreement in order to achieve the purposes of Chapter 163, F.S. ..." In consideration of the Court granting DEO's request to intervene in this action, it would be desirable for DEO to indicate if (in its opinion) the subject settlement agreement protects the public interest.

[2] It should also be noted Florida Statute §176 was repealed by the legislature in 1973.

WHERERFORE, based upon the foregoing, it is therefore ORDERED as follows:

1. An evidentiary hearing shall be conducted to address:

   (a) Petitioner's claim regarding the nature and extent of the effect of the amendments contained in the CITY's 2007 Comprehensive Plan on the subject property, and

   (b) Intervenor's claim(s) regarding the failure of the proposed settlement agreement to protect the public interest.

2. The parties are permitted to conduct discovery, if so desired, in anticipation of the evidentiary hearing.

3. Petitioners shall contact the judicial assistant of the undersigned judge to coordinate the evidentiary hearing. However, any/all discovery related to the evidentiary hearing shall be conducted at least one (1) week prior to the scheduled hearing.

4. As an alternative remedy, in lieu of the evidentiary hearing referenced above, Petitioners are granted leave to amend the petition and may submit a Second Amended Joint Petition to the Court for review and consideration.

Dated this 19th day of June, 2014.

STEVEN G. ROGERS
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail or e-mail to the following this 26th day of June, 2014:

Marsha Segal-George, Esq.
marsha@fofslaw.com
rnarshaisg@bellsouth.net
holly@fofslaw.com
Counsel for City of Dunnellon

Bryce Ackerman, Esq.
BAckerrnan@gahlaw.com
parrish@gahlaw.com
Counsel for Conservation Land Group, LLC and Rainbow River Ranch LLC

Sherry Spiers, Esq.
sherry.spiers@deo.myflorida.com
Counsel for State of Florida Department of Economic Opportunity

Ralf Brookes, Esq.
Ralf@RalfBrookesAttorney.com
Counsel for Intervenors RRC, et al.

Glenda Reed
Judicial Assistant