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IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 2D19-3833
Lower Tribunal Case No.: 2017 CA 001181 NC

SIESTA KEY ASSOCIATION OF SARASOTA, INC.,
and DAVID N. PATTON,

Appellants,

vs.

CITY OF SARASOTA and
LIDO KEY RESIDENTS ASSOCIATION, INC.,

Appellees.

Appeal from a Final Order

INITIAL BRIEF OF APPELLANTS

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INTRODUCTION

The sole issue before the Court is whether the circuit court erred in interpreting section 403.412(2)(e), Fla. Stat., to bar a cause of action under section 403.412, Fla. Stat., because the Department of Environmental Protection ("DEP") issued a Joint Coastal Permit pursuant to state statutes, when Appellants' cause of action under section 403.412, Fla. Stat., is premised on the City's failure to obtain a permit from Sarasota County. The answer is yes.

Section 403.412, Fla. Stat., comes as a directive from the Florida Constitution—"It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources." Art. II, § 7(a), Fla. Const.; *Fla. Wildlife Fed'n v. State Dep't of Envtl. Reg.*, 390 So. 2d 64, 66 (Fla. 1980). The circuit court erroneously found that if an actor has a permit, regardless of who issued the permit, how many other permits the project may require, and what "law, rule, or regulation" the lawsuit is premised upon, then section 403.412,(2)(e), Fla. Stat., applies to bar a cause of action under section 403.412, Fla. Stat.

Many complex projects, such as the one at issue in this case, require numerous permits from various federal, state, and local authorities. The circuit

court's conclusion that issuance of a single permit at the state level by DEP bars a section 403.412, Fla. Stat., action for failure to obtain a permit at the local level is contrary to the plain language of section 403.412(2)(e), Fla. Stat. Because Appellants' properly pled a cause of action pursuant to section 403.412, Fla. Stat., the circuit court's order in this case should be reversed.

STATEMENT OF THE CASE AND FACTS

I. THE PROJECT

On March 14, 2015, the City of Sarasota ("City") and U.S. Army Corps of Engineers ("Corps") (collectively "Permittees") filed an application for a Joint Coastal Permit (the "Lido Key JCP") authorizing a beach restoration project known as the Lido Key Beach Nourishment and Groins Project ("Project")—JCP No. 0333315-001-JC. R. at 13. The Permittees have not as of the date of this filing sought approval for the Project from any local authorities, including the Sarasota County Water and Navigational Control Authority ("WNCA").

The Joint Coastal Permit Program was designed to streamline approval at the state level for activities that extend onto sovereign submerged lands and are likely to have a material physical effect on the coastal system or natural beach and inlet processes, pursuant to Sections 161.021, 161.041, and 161.055, Fla. Stat., and Rule 62B-49.001, F.A.C. Activities that would have required both a coastal construction permit and an environmental resource permit are now authorized by a

single joint coastal permit. *See* Rule 62B-49.001, F.A.C. In addition, the Joint Coastal Permit Program provides for concurrent review of any activity requiring a joint coastal permit that also requires a proprietary authorization for use of sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund. *Id.* A Joint Coastal Permit is issued by both the DEP and the Board of Trustees of the Internal Improvement Trust Fund (collectively both will be referred to as "DEP"). A Joint Coastal Permit is issued pursuant to Chapters 161, 253, and 373, Fla. Stat., and Chapter 62B-49, F.A.C.

The Project is a beach re-nourishment project that would, among other things, dredge Big Sarasota Pass for the first time. R. at 13. The Project consists of the placement of up to 1.3 million cubic yards (cy) of sand along a 1.6 mile segment of the Lido Key coastline between DEP monuments R-34.5 and R-44 and construction of two groins on Lido Key with subsequent dredging of approximately 500,000 cubic yards of material every five years for approximately fifteen years. *Id.* The Big Sarasota Pass channel and ebb shoal are proposed as the main sediment source for the Project. *Id.* The Permit is for a period of 15 years and allows periodic maintenance re-nourishment of the Project area with additional sand being dredged from the identified sediment sources and placed on Lido Key. *Id.*

On December 22, 2016, DEP issued its Consolidated Notice of Intent to Issue the Lido Key JCP authorizing the Permittees to implement the Project. R. at 14. Shortly thereafter, Appellants and others filed a Petition challenging the Notice of Intent with DEP that was referred to the Division of Administrative Hearings. R. at 1693. Following an administrative challenge, the Lido Key JCP was ultimately issued on June 20, 2018. R. at 792.

II. ORIGINAL COMPLAINT

Based on the City's failure to seek local approvals for the Project, including approval from the WNCA, Appellants the Siesta Key Association of Sarasota, Inc., ("Association") and David N. Patton, a member of the Association, (collectively "SKA"), on March 9, 2017, filed their Original Complaint against the City for injunctive and declaratory relief under section 403.412(2)(a), Fla. Stat., which provides a cause of action as follows:

> The Department of Legal Affairs, any political subdivision or municipality of the state, or a citizen of the state may maintain an action for injunctive relief against:
>
> 1. Any governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations;
> 2. Any person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from

> violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state.

In the Original Complaint, SKA alleged that the City was in violation of Sarasota County Comprehensive Plan ("County Comprehensive Plan") Environmental Policy 4.6.1 which is designed to protect the water and other natural resources within Sarasota County. R. at 16-20. County Comprehensive Plan provision 4.6.1 "require[s] approval by the Board of County Commissioners" before any new dredge and fill activities occur within the Gulf of Mexico, and within the County's bays, rivers, and streams. R. at 16. Additionally, SKA also alleged that the Introduction to Volume I of the Sarasota Comprehensive Plan ("City Comprehensive Plan") states that all development orders within the geographic area are subject to the provisions of the County Comprehensive Plan and shall be consistent with it. R. at 16-17.

The City filed a motion to dismiss the Original Complaint on April 5, 2017. R. at 34. Lido Key Resident Association ("LKRA") intervened in the case to support the City. R. at 164; 323-24. The City's Motion to Dismiss was not ruled upon because, at the City's and LRKA's request, the case was held in abeyance until the conclusion of the pending administrative challenge to the Lido Key JCP. R. at 317.

While the case was held in abeyance for more than a year, the administrative challenge proceeded. Following the conclusion of the administrative challenge, DEP issued the Lido Key JCP on June 20, 2018. R. at 2146. The Lido Key JCP approved the Project only with respect to laws administered by DEP. The Lido Key JCP states: "Authorization from the Department does not relieve you from the responsibility of obtaining other permits (Federal, State or local) that may be required for the project." R. at 794. Additionally, General Condition 3 of the Lido Key JCP warns the Permittees:

> This permit does not eliminate the necessity to obtain any other applicable licenses or permits that may be required by federal, state, local or special district laws and regulations. This permit is not a waiver or approval of any other Department permit or authorization that may be required for other aspects of the total project that are not addressed in this permit.

R. at 795. As of the date of this filing, the City has not applied for and Sarasota County has not issued a WNCA Permit for the Project.

After the issuance of the Lido Key JCP, the circuit court action was unabated. The City, on July 19, 2018, filed an Amended Motion to Dismiss, in which LKRA joined. R. at 325; 626-29. The motion argued that the Original Complaint should be dismissed for various reasons. SKA filed a response in opposition. R. at 767.

III. CIRCUIT COURT'S FIRST ORDER

The circuit court issued an order granting the Amended Motion to Dismiss without prejudice on October 12, 2018, concluding that "the Complaint does not state a legal cause of action under § 403.412, Fla. Stat." R. at 983. The circuit court reasoned:

> Because the County Plan is most like a "conceptual framework" in its form and purpose, it cannot also qualify as an enforceable "law," "rule," or "regulation," as defined under the terms of [section 403.412, Fla. Stat.]. *See* § 403.412(2)(a)2. Rather, the County Plan serves as the constitution pursuant to which such laws, rules, and regulations are fashioned. Section 403.412 was intended to provide a means for citizens, along with the government, to enforce "environmental *laws*." *Friends of Hatchineha, Inc. v. State, of Florida, Dep't of Environ. Reg.*, 580 So. 2d 267, 273 (Fla. 1st DCA 1991) (emphasis added).

R. at 988. The circuit court also concluded that SKA could not avail itself of the benefits of a section 163.3215, Fla. Stat., challenge because there was no "development order" issued by the City or County with respect to the Project. Thus, there was no basis to challenge whether the Project was consistent with the County Comprehensive Plan.

Finally, the circuit court suggested that the Lido Key JCP may bar SKA's section 403.412, Fla. Stat., action. The circuit court stated:

> In addition to the foregoing, the fact that a valid permit from FDEP authorizing the Project is currently in effect **appears** to preclude any action under FEPA. . . .

> Plaintiffs urge the Court to consider this statutory prohibition as unrelated to the question of whether the County must approve the Project under its own comprehensive plan. Plaintiffs' argument serves only to highlight the fact that any action challenging the Project's conformance with the County Plan must be brought under Chapter 163, at the appropriate juncture. *See* §163.3194(1)(a), Fla. Stat. (2007) ("all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by [a comprehensive] plan" must be consistent with that plan) (emphasis added); *accord Save Homosassa River All., Inc.*, 2 So. 3d at 336 (citing same); *Heine v. Lee County*, 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017) (observing that "Florida law mandates consistency between a local government's comprehensive plan and its development orders.").

R. at 988-90 (emphasis added).

IV. SECOND AMENDED COMPLAINT

Following the circuit court's order, SKA filed an Amended Complaint[1] alleging two counts—a cause of action pursuant to section 403.412, Fla. Stat., and a petition for writ of mandamus.[2] R. at 992. In the Second Amended Complaint, SKA pled a cause of action pursuant to section 403.412, Fla. Stat., based on the City's violation of Section 54-653(4)(a) of the Code of Ordinances of Sarasota County wherein a permit is required from the County WNCA. R. at 997-998.

[1] That complaint was subsequently amended to correct a typo, making the Second Amended Complaint the operative complaint in this case. R. at 1175.
[2] SKA only addresses and challenges the circuit court's conclusions on the first count of the pleading.

That section states that "[n]o work shall be performed having the effect of Altering any Jurisdictional Areas without first obtaining a permit from the Authority or Administrator, unless specifically exempted under the provisions of section 54-653(4)(g)" (i.e., a "WNCA Permit"). R. at 1179-82. Ultimately, the Second Amended Complaint pled:

> Section 54-653(4)(a) of the Code requires a permit for work Altering Jurisdictional Areas; the Project involves work altering jurisdictional areas, as defined in the Code; the Project does not qualify for an exemption from the permitting requirement; and the City and the Corps, as co-permittees, have not obtained a permit from the Authority or Administrator for the Project. Therefore, the City is in violation of the Act, section 403.412(2)(a), Fla. Stat.

R. at 1181-82. The City and LKRA filed a Joint Motion to Dismiss the Second Amended Complaint. R. at 1032.

V. CIRCUIT COURT'S SECOND ORDER

The circuit court's order on the Joint Motion to Dismiss dismissed Count I of the Second Amended Complaint on the following basis:

> As explained in the prior order of dismissal, relief under § 403.412, Fla. Stat. is barred because the City obtained a valid permit from the appropriate issuing agency. The Court finds that no amendment to the [section 403.412, Fla. Stat.] action, can cure the statutory prohibition against a lawsuit due to the City's valid permit.

R. at 1172. The circuit court did not address whether Section 54-653(4)(a), Sarasota County Code, was a "law, rule, or regulation," pursuant to section 403.412, Fla. Stat. SKA timely appealed. R. at 2170.

SUMMARY OF ARGUMENT

The circuit court's dismissal of SKA's Second Amended Complaint in this case was based solely on the issuance of the Lido Key JCP and section 403.412(2)(e), Fla. Stat. The circuit court's analysis, however, ignores that section 403.412(2)(e), Fla. Stat., requires that the permit or certificate covering such operations be "issued by the appropriate governmental *authorities* or *agencies*," and that the actor is "is complying with the requirements of said *permits* or *certificates*." § 403.412(2)(e), Fla. Stat. (emphasis added).

SKA's cause of action is not premised upon violations of Chapters 161, 253, or 373, Fla. Stat., pursuant to which the Lido Key JCP is issued. To the contrary, SKA alleges that the City is in violation of the Sarasota County Code because it has not obtained a WNCA Permit as required by the Sarasota County Code. The circuit court's order and analysis in this case failed to consider the plain language of section 403.412(2)(e), Fla. Stat., and the distinction between a WNCA Permit and the Lido Key JCP. For this reason, and because SKA otherwise properly pled a cause of action pursuant to section 403.412, Fla. Stat., the circuit court's order should be reversed.

ARGUMENT

I. THE LIDO KEY JCP DOES NOT PRECLUDE SKA'S CAUSE OF ACTION PURSUANT TO SECTION 403.412, FLA. STAT.

Standard of Review

This Court reviews the circuit court's order granting a motion to dismiss *de novo*. *Swope v. Rodante, P.A. v. Harmon*, 85 So. 3d 508, 509 (Fla. 2d DCA 2012). "'For . . . purposes of a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff.'" *Id.* (quoting *Wallace v. Dean*, 3 So. 3d 1035, 1042-43 (Fla. 2009)). The circuit court's interpretation of section 403.412(2)(e), Fla. Stat., is reviewed de novo. *Kumar v. Patel*, 227 So. 3d 557, 558 (Fla. 2017) ("We review questions of statutory interpretation de novo.").

Argument

The sole issue before the Court is whether the circuit court erred in interpreting section 403.412(2)(e), Fla. Stat., to bar a cause of action under section 403.412, Fla. Stat., because DEP issued the Lido Key JCP pursuant to state statutes, when SKA's claim is based on the City's failure to obtain a WNCA Permit. Section 403.412(2)(e), Fla. Stat., provides:

> No action pursuant to this section may be maintained if the person (natural or corporate) or governmental agency or authority charged with pollution, impairment, or

> destruction of the air, water, or other natural resources of the state **is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, issued by the appropriate governmental authorities or agencies**, and is complying with the requirements of said permits or certificates.

§ 403.412(2)(e), Fla. Stat. (emphasis added). The circuit court found that the Lido Key JCP issued by DEP barred any and every action pursuant to section 403.412, Fla. Stat., notwithstanding that SKA's action was based on the City's failure to obtain a WNCA Permit in violation section 54-653(4)(a) of the Sarasota County Code.

The circuit court concluded:

> As explained in the prior order of dismissal, relief under § 403.412, Fla. Stat. is barred because the City obtained a valid permit [Lido Key JCP] from the appropriate issuing agency [DEP]. The Court finds that no amendment to the [section 403.412, Fla. Stat.] action, can cure the statutory prohibition against a lawsuit due to the City's valid permit [Lido Key Permit].[3]

R. at 1172.

[3] The circuit court's prior order did not actually dismiss the Original Complaint based on section 403.412(2)(e), Fla. Stat. Rather, the circuit court suggested it may be a basis for dismissal:

> In addition to the foregoing, the fact that a valid permit from FDEP authorizing the Project is currently in effect **appears to** preclude any action under FEPA.

R. at 988-90 (emphasis added).

A. The circuit court erred in concluding that section 403.412(2)(e), Fla. Stat., bars SKA's cause of action.

The circuit court found that if an actor has a permit, regardless of who issued the permit, how many other permits the project may require, and what "law, rule, or regulation" the suit is premised upon, then section 403.412(2)(e), Fla. Stat., applies to bar a cause of action under section 403.412, Fla. Stat. This was error and misconstrues the plain language of the statute.

Section 403.412(2)(e), Fla. Stat., requires that the permit or certificate covering such operations be "issued by the appropriate governmental *authorities* or *agencies*." § 403.412(2)(e), Fla. Stat. (emphasis added). Second, subsection (2)(e) requires that the actor is "is complying with the requirements of said *permits* or *certificates*." *Id.* (emphasis added). The plural used in both provisions acknowledges the reality that a project will require multiple permits from multiple federal, state, and local authorities. In fact, it is not uncommon for complex projects such as this Project to require multiple different permits or authorizations from numerous governmental authorities. *See e.g.*, Eric Biber and J.B. Ruhl, *The Permit Power Revisited: The theory and practice of regulatory permits in the administrative state*, 64 Duke L.J. 133, 158 (2014) (internal quotations removed) (noting that the U.S. Department of State concluded that the controversial Keystone XL pipeline project "will require over ninety [90] major permits, licenses, approvals, authorizations, and consultations by federal, state, and local

agencies prior to implementation of the proposed Project."); *General Project Planning Considerations*, 5 Fla. Real Estate Transactions § 180.02 (explaining the varying government agencies that may be required to approve a project at the federal, state, and local level).

A case directly on point explains that compliance with local city ordinances is required notwithstanding a permit from DEP for coastal construction under Chapter 161, Fla. Stat. In *GLA & Associates v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th DCA 2003), the Fourth District Court of Appeal affirmed the trial court judgment which upheld a city ordinance that required a city permit for construction seaward of the established coastal construction control line. *Id.* at 280. GLA and Associates, a developer, applied for and received a permit from DEP to "rehabilitate" a beach dune by lowering its height and to also construct a dune walkover. *Id.* DEP granted GLA a permit pursuant to Chapter 161, Fla. Stat., which included a condition that "required GLA to 'obtain any applicable license or permits which may be required by federal, state, county, or *municipal law*.'" *Id.* (emphasis in original).

GLA began the dune restoration under the DEP permit. *Id.* After work began, the City of Boca Raton cited GLA for violation of the City of Boca Raton Code section 28-1556(3) which required GLA to obtain a permit from the City of Boca Raton for construction or excavation seaward of the coastal construction

control line. *Id.* GLA subsequently filed an application for a permit from the City of Boca Raton for its dune rehabilitation project and walkover but the City of Boca Raton denied the application. *Id.* Thereafter, DEP revoked its permit issued under Chapter 161, Fla. Stat., for GLA's failure to obtain a permit from the City of Boca Raton.

GLA filed a lawsuit arguing that the City of Boca Raton Code's permit requirement for coastal construction was preempted by Chapter 161, Fla. Stat. In essence, GLA argued because it had a DEP permit (pursuant to Chapter 161, Fla. Stat.) it did not need a City of Boca Raton Permit—the state-issued DEP permit preempted the City of Boca Raton Code and City Permit. The trial court and the Fourth District disagreed, holding that Chapter 161, Fla. Stat., does not preempt local ordinances.[4]

In the instant case, like in *GLA*, the Lido Key JCP authorizes activities pursuant to Chapters 161, 253, and 373, Fla. Stat. The Lido Key JCP is three permits in one. It is a coastal construction permit under Chapter 161, Fla. Stat., an environmental resource permit pursuant to Chapter 373, Fla. Stat., and a proprietary authorization for use of sovereign submerged lands owned by the

[4] In fact, DEP filed an amicus brief affirmatively arguing that the City's ordinances are not preempted by Chapter 161, Fla. Stat., and has "<u>always</u> interpreted the provisions of *Chapter 161* in that manner." *Id.* at 283. (emphasis in original).

Board of Trustees of the Internal Improvement Trust Fund pursuant to Chapter 253, Fla. Stat.

SKA does not allege in its Second Amended Complaint that the City's Project would violate Chapters 161, 253, or 373, Fla. Stat. To the contrary, SKA alleges that the City has not obtained a WNCA Permit from Sarasota County as required by the Sarasota County Code:

> No work shall be performed having the effect of Altering any Jurisdictional Areas without first obtaining a [WNCA] permit from the Authority or Administrator, unless specifically exempted under the provisions of Section 54-653(4)(g).

§54-653(4)(a), Sarasota County Code. SKA has alleged in the Second Amended Complaint that the City has not obtained (or even applied for) a WNCA Permit and that a WNCA Permit is required because the Project would Alter Jurisdictional Areas (as those terms are defined in the Sarasota County Code) and that the Project is not exempt under the Sarasota County Code.

It is undisputed that the Lido Key JCP is not a WNCA Permit nor is it issued by Sarasota County. *GLA* is again instructive, as there, GLA possessed a coastal construction permit pursuant to Chapter 161, Fla. Stat., issued by DEP, but did not apply for or possess a City of Boca Raton Permit. Just like GLA's DEP permit, the Lido Key JCP – issued by DEP – expressly recognizes that numerous other permits

from other governmental entities may be required for the Project. "General Condition" 3 of the Lido Key JCP states:

> This permit does not eliminate the necessity to obtain any other applicable licenses or permits that may be required by federal, state, local or special district laws and regulations. . .

R. at 1503. Thus, the Lido Key JCP explicitly warns that it does not relieve the City from obtaining approvals for the Project at the federal and local levels.

After GLA failed to obtain a City of Boca Raton Permit for the dune rehabilitation construction under the City of Boca Raton Code, DEP revoked its coastal construction permit (issued pursuant to Chapter 161, Fla. Stat.) for failure to comply with the conditions of the permit. *See GLA*, 855 So. 2d at 280 ("Based upon the City denial of [the City of Boca Raton Permit], the DEP revoked GLA's state permit."). Similar to General Condition 3 in the Lido Key JCP, GLA's DEP permit provided that it did not relieve GLA from any requirement to "obtain any applicable license or permits which may be required by federal, state, county, or *municipal law*." *Id.* (emphasis in original).

The circuit court's order and analysis in this case failed to consider the plain language of section 403.412(2)(e), Fla. Stat., and the distinction between a WNCA

Permit and the Lido Key JCP.[5] The plain language of section 403.412, Fla. Stat., provides the following:

> [A] citizen of the state may maintain an action for injunctive relief against:
>
> > Any … governmental agency or authority to enjoin such … agencies … from violating **<u>any</u> laws, rules, or regulations** for the protection of the air, water, and other natural resources of the state.

§ 403.412(2)(a)(2), Fla. Stat. (emphasis added). In this case, there is no dispute that Sarasota County's WNCA is a law that protects the water and natural resources of the state.[6]

With the WNCA forming the basis of the law that the City is alleged to have violated, we turn to section 403.412(2)(e), Fla. Stat., that provides:

> No action pursuant to this section may be maintained if … governmental agency … charged with pollution, impairment, or destruction of the air, water, or other natural resources of the state **is acting or conducting operations pursuant to currently valid permit or certificate covering such operations, <u>issued by the appropriate governmental authorities or agencies</u>**, and is complying with the requirements of said permits or certificates.

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[5] "'The cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.'" *Gordon v. Fishman*, 253 So. 3d 1218, 1220 (Fla. 2d DCA 2018) (quoting *Gaulden v. State*, 195 So. 3d 1123, 1125 (Fla. 2016)).

[6] Recall, SKA has not alleged that the City or Project would violate Chapters 161, 253, or 373, Fla. Stat.

§ 403.412(2)(e), Fla. Stat. (emphasis added). Based on the plain language above, SKA's cause of action premised on a violation of the WNCA can only be barred if Sarasota County, as the "appropriate issuing authority" of a WNCA Permit, has issued a WNCA Permit to the City.[7] It is undisputed that the City has not even applied to Sarasota County for a WNCA Permit and that a WNCA Permit has not been issued to the City by Sarasota County.[8]

Accordingly, the circuit court erred in dismissing the Second Amended Complaint because Sarasota County has not issued the City a WNCA Permit for the Project.

B. SKA properly pled a cause of action under section 403.412, Fla. Stat., for the City's violation of the Sarasota County Code

Section 403.412, Fla. Stat., creates a private cause of action for injunctive relief against "[a]ny governmental agency or authority charged by law with the duty of enforcing laws, rules, and regulations for the protection of the air, water, and other natural resources of the state to compel such governmental authority to enforce such laws, rules, and regulations," and against "[a]ny person, natural or corporate, or

[7] The "appropriate governmental authority" to issue a permit for construction regulated by Chapters 161, 253, and 373, Fla. Stat., is the DEP.

[8] Pursuant to the plain language of the statute, SKA acknowledges that the issuance of the Lido Key JCP precludes a section 403.412, Fla. Stat., cause of action for any alleged violation of Chapters 161, 253, or 373, Fla. Stat. But as noted throughout, SKA has not alleged the City is or will be violating Chapters 161, 253, or 373, Fla. Stat.

governmental agency or authority to enjoin such persons, agencies, or authorities from violating any laws, rules, or regulations for the protection of the air, water, and other natural resources of the state." § 403.412(a), Fla. Stat.

Count I of the Second Amended Complaint, pled: (1) the Plaintiffs are citizens of the State; (2) the City, as a political subdivision of the State of Florida, is a governmental agency within the meaning of the Act; (3) section 54-653(4)(a) of the Sarasota County Code, requires a WNCA Permit for work Altering Jurisdictional Areas; the Project involves work altering jurisdictional areas, as defined in the Code; the Project does not qualify for an exemption from WNCA permitting requirement; and (4) the Permittees, have not obtained a WNCA Permit from the Authority or Administrator for the Project.

The circuit court is required to assume all allegations in the Second Amended Complaint are true. *Wallace v. Dean*, 3 So. 3d 1035, 1042-43 (Fla. 2009) ("For . . . purposes of a motion to dismiss for failure to state a cause of action, allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff.").

While the circuit court, in its Order dismissing the Original Complaint, erroneously found that a Comprehensive Plan was not a "law, rule, or regulation," the circuit court in its Order dismissing the Second Amended Complaint did not address whether sections 54-651 to 54-662 of the Sarasota County Code are

"law[s], rule[s], or regulation[s]."[9] A County Ordinance is a "law, rule, or regulation." "A statute is a form of positive law enacted by the legislative branch of government. Similarly, an ordinance is a form of statutory law enacted by a local governmental body, such as a county commission or city council." *Snow v. Ruden, McClosky, Smith, Schuster, & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. 2d DCA 2005). And there can be no doubt that the WNCA Ordinances are designed to protect the water and natural resources.

SKA, in Count I of the Second Amended Complaint, has stated a cause of action under section 403.412, Fla. Stat. Accordingly, the circuit court erred in dismissing Count I of SKA's Second Amended Complaint. Thus, the circuit court's Order should be reversed and remanded with directions that the case is to proceed on Count I of the Second Amended Complaint.

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[9] The circuit court's initial ruling of whether the County's Comprehensive Plan, in and of itself, was a "law, rule, or regulation" as contemplated by section 403.412(2), Fla. Stat., is mooted by the fact Sarasota County's Code expressly requires any development be consistent with its Comprehensive Plan:

> Sec. 54-655. – Permit Approval Criteria.
>
> ***
>
> (4) The proposed plan or development shall be consistent with the Sarasota County Comprehensive Plan.

CONCLUSION

This Court should reverse the circuit court's Order dismissing Count I of the Second Amended Complaint for failure to state a claim pursuant to section 403.412, Fla. Stat., and remand the case back to the circuit court for further proceedings.

Respectfully submitted this 6th day of February 2020, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to the following counsel of record by electronic mail on this 6th day of February, 2020:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is presented in 14-point Times New Roman and complies with the font requirements of rule 9.210, Rules of Appellate Procedure.

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