IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT COURT IN AND FOR SARASOTA COUNTY, FLORIDA

Dr. James P. Wallace, III,
222 Beach Owners Association, Inc.,
Robert I. Sax and
Marina Del Sol Condominium Association, Inc.

Plaintiffs/Petitioners,

v. Case No. 2021 CA-5582-NC
Div. A Circuit

Sarasota County,

Defendant/Respondent.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Plaintiffs/Petitioners, by and through undersigned counsel, hereby respond in opposition to Defendant/Respondent's Motion to Dismiss filed herein as follows.

I. Introduction

1. There are only two bridges to the barrier island of Siesta Key and these two bridges separate the island and its inhabitants from the mainland and the rest of Sarasota County. Plaintiffs/Petitioners all reside on Siesta Key and are injured to a greater degree and in a different way than the general public who reside on the mainland. Their access to their properties are limited to two points of access. Their access will be adversely affected by the increased number of hotel rooms allowed for each of the hotels which will generate additional traffic on both of the already over-crowded, heavily and unacceptably congested barrier island access routes. All Plaintiffs/Petitioners, not just Robert Sax, will be affected by the increased traffic generated by the proposed large-scale hotel developments whose densities exceed that allowed by the County's comprehensive plan as alleged in the Complaint and as can be shown at trial or by affidavits attached to summary judgment motions.

2. Count I of Plaintiff/Petitioners' Complaint seeks declaratory and injunctive relief

as to whether the County's approval of special exceptions for the proposed Calle Miramar Hotel Development and the Old Stickney Point Hotel Development and associated parking garage are unauthorized, ultra vires and void, and of no legal force and effect. It specifically requests this Court to declare whether the special exceptions are valid when their validity is dependent upon an ordinance the County adopted and is treating as a self-executing, *de facto* plan amendment (the "Ordinance") having the effect of increasing the hotel room density under the Siesta Key Overlay District without first amending the County's comprehensive plan as required by section 163.3184, Florida Statutes.

3. Count I specifically asks this Court to declare whether these approvals violate: (i) Chapter 163, Florida Statutes (a general law prescribing procedures for amending the density limitations of the County's comprehensive plan upon which the approvals depend); Article VIII, Section 1 of the Florida Constitution (limiting the home rule authority of the County to that not inconsistent with general law), and (iii) Article II, Section 2.2A(1) of the Sarasota County Charter (requiring super-majority vote of the county commission to amend land use density under the County's comprehensive plan.

4. Counts II and III bring separate alternative petitions for common law certiorari challenging the County's approval of special exceptions approving the two hotels. Counts IV and V bring separate alternative claims under section 163.3215, Florida Statutes, alleging that the special exception approvals are inconsistent with the County's Comprehensive Plan.

II. Applicable Standards Governing Motions to Dismiss Declaratory Judgment Actions Such As Count I

5. The role of a motion to dismiss in a declaratory judgment action under chapter 86, Florida Statues is not to test the merits of the claims. *Flagship Real Estate Corp. v. Flagship Banks, Inc.*, 374 So.2d 1020, 1022 (Fla. 2d DCA 1979) ("The circuit court must address

questions properly brought before it under Declaratory Judgment Act. The merits of complaint and probability of plaintiff's success demonstrated therein are not criteria for deciding a motion to dismiss."); *Meadows Comm. Ass'n Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1279-80 (Fla. 2d DCA 2006) ("[O]nce a cause of action for declaratory relief is sufficiently pleaded, the plaintiff is entitled to a judicial determination of the rights at issue. The prospect that the determination may not lead to the relief sought by the plaintiff will not thwart the action.").

6. As the Second District holds. "[A] motion for judgment of dismissal in an action for declaratory judgment could be granted only if the plaintiff failed to establish the existence of a justiciable controversy cognizable under the Declaratory Judgment Act, chapter 86, Florida Statutes." *Thompson v. Florida Cemeteries, Inc*., 866 So.2d 767, 769 (Fla. 2d DCA 2004). Additionally, under the Declaratory Judgment Act, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief." § 86.111, Fla. Stat.

III. The County's Failure to State A Claim Argument That Count I Fails To Provide A Short Plain Statement Of Ultimate Facts Misses The Mark

7. Notably, the County does not argue that Plaintiffs have not alleged a justiciable controversy under chapter 86, Florida Statutes. Instead, it argues in conclusory fashion that Count I fails to comply with Florida Rule of Civil Procedure 1.110)(f) because it seeks a declaration as to the three special exceptions and the enabling ordinance upon which they depend in a single count instead of separate counts for each of the County's actions.

8. The allegations of the Complaint, which must be taken as true, are sufficient to establish entitlement to a declaratory judgment. Compl. ¶¶ 40-46**.** The County's argument addresses the merits of Plaintiffs' claims and, therefore, is without merit.

9. Even if properly considered at the motion to dismiss stage, Rule 1.110(f) requires separate counts only to "facilitate[] the clear presentation of the matter set forth." The County

makes no effort to explain how its separate pleading requirement facilitates a clearer presentation of Plaintiffs' claims. Instead. the County essentially argues that Count I should be subdivided into six separate counts. Rule 1.110(f) does not contemplate such a hyper-technical separate pleading requirement for a number of reasons. First, the legal issues are identical. Second, the applicable facts are undisputed, virtually identical, inextricably intertwined and overlapping. Third, the claims are in part dependent on the same occurrence (i.e., adoption of an ordinance amounting to a *de facto* plan amendment that was not adopted in accordance with the procedures required by section 163.3184, Florida Statutes). Fourth, the dispositive legal issues are identical. And, finally, the County's argument is at odds with the requirement that the Rules of Civil Procedure "be construed to secure the just, speedy and inexpensive determination of every action." Fla. R. Civ. Pr. 1.010.

10. Citing *K.R. Exchange Services, Inc. v. Fuerst, Humphrey, Ittleman, PL.*, 48 So. 3d 889 (Fla. 3d DCA 2010) and *Maiden v. Carter*, 234 So. 2d 168 (Fla. 1st DCA 1970), the County attempts to bolster its flawed argument by contending, once again in completely conclusory fashion, that the "complaint lacks minimal organization and coherence" and "is an unnecessarily convoluted combination of claims." The County's reliance on these cases is misplaced. In *K.R. Exchange Services*, it was impossible for the court to determine what allegations applied to which of multiple, collectively referred to separate defendants by sorting through the various interspersed factual and legal conclusions as to the alleged malpractice of the defendants. As argued above, no such lack of coherence or minimal organization appears on the face of Count I. The allegations involve a single defendant, are straightforward, and involve identical common material issues of fact and law. *K.R. Exchange Services* is clearly distinguishable. As to *Maiden,* it does not even remotely support the County's argument.

11. The County also contends that the claims are convoluted because different

standards of review apply to the special exceptions and the Ordinance. While that is true, the County completely misses the point. Count I does not seek review of ***otherwise authorized*** County action. Rather, it seeks determination of whether approval of the special exceptions was ***unauthorized*** because their underlying validity depends upon an ordinance that amounts to a back-door, *de facto* amendment of the applicable density limitations set forth in its comprehensive plan; a plan amendment enacted and being enforced without the County having first complied with the plan amendment procedures set forth in 163.3184, Florida Statutes. Challenges to the underlying authority of government to act in the first instance are cognizable by an original de novo action seeking declaratory and injunctive relief. See, *Neapolitan Enterprises, LLC v. City of Naples*, 185 So. 3d 585, 593 (Fla. 2d DCA 2016) (landowner could seek declaratory and injunctive relief on the basis that the Planning Director engaged in an ultra vires act although landowner had failed to seek certiorari review regarding resolution of city's design review board approving restaurant's plans to renovate building).

12. In sum, as the architect and orchestrater of its own legal legerdemain, the County can hardly complain that it cannot make sense of Count I.

IV. The County's Failure To State a Claim Argument That Section 163.3184, Florida Statutes, Does not Provide A Statutory Remedy For Failure To Adopt An Ordinance Amending Its Comprehensive Plan Completely Fails

13. The County argues that Plaintiffs fail to state a claim because section 163.3184, Florida Statutes, "does not offer a cause of action for statutory relief based on failure to adopt or amend a comprehensive plan…" Plaintiffs' allegations, taken as true, are sufficient to establish entitlement to a judicial declaration under chapter 86. See, Compl. ¶¶ 40-46**.** The County's merits-based argument once again ignores the role of motions to dismiss under the Declaratory Judgment Act and should be rejected.

14. However, should this Court wish to consider the merits of the County's

arguments, it is a classic, fallacious strawman argument. Plaintiffs' entitlement to declaratory relief is independent of, and not legally dependent upon the administrative remedies provided under section 163.3184, Florida Statutes. That administrative remedy applies to determine whether ***an adopted*** plan amendment is "in compliance" with the requirements of chapter 163, Florida Statutes; not to ordinances amounting to *de facto* plan amendments adopted without complying with section 163.3184 or to special exceptions whose validity depends upon such ordinances. Section 163.3184(5) does not provide relief for the County's failure to amend a plan in accordance with the procedural requirements of section 163.3184 consistent with its constitutional home rule authority or charter. This is because section 163.3184(1)(b)'s definition of "in compliance" does not encompass consideration of these provisions of law. [1] Even if it did, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief." § 86.111, Fla. Stat.

15. The County attempts to avoid these fundamental flaws in its argument by resorting to cases addressing private claims for civil liability for damages grounded upon on statutorily created rights where such liability is not expressly or impliedly provided for by the applicable statute. These cases do not apply for several reasons. First, Plaintiffs seek a declaration of their rights which is independently provided for by chapter 86, Florida Statutes; not civil liability for damages by implication under chapter 163, Florida Statutes. Second, even if Plaintiffs' claims completely depend upon such implication—which they do not—section 163.3184(8) (providing for a variety of sanctions that may be imposed by the Administration Commission) expresses the Legislature's intent that there be penalties or consequences for

[1] "In compliance" means "consistent with the requirements of 163.3177, 163.3178, 163.3180, 163.3191, 163.3245, and 163.3248, with the appropriate strategic regional policy plan, and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable." §163.3184(1)(b), Fla. Stat. Notably, "in compliance" does not encompass the failure to amend a plan under section 163.3184, Florida Statutes.

failure to comply with the plan amendment requirements of section 163.3184. Thus, under the cases cited by the County, private civil action may be implied for failure to comply with section 163.3184.

16. The County further argues that there is no cause of action for violation of the section 2.2A(1) of the Sarasota County Charter. That section requires that an ordinance amending the County's comprehensive plan increasing allowable density and intensity of use must be adopted by 4-vote supermajority. Again, the County improperly argues the sufficiency of Plaintiffs' claims by motion to dismiss an action for declaratory relief. Even if the sufficiency is considered, Plaintiffs allege that the County's ordinance increasing the density allowable under the plan's Siesta Key Overlay District upon which the special exceptions depend amounted to a ***de facto*** plan amendment that only passed by a narrow 3-2 vote in violation of section 2.2A(1). Compl. ¶¶27, 32, 34 37 & 39.

17. The County's argument that there is no private cause of action for violation of its own charter is brazen to say the least. If a citizen of Sarasota County cannot challenge the County's own violation of its charter, who can? Indeed, acceptance of the County's argument would: (1) deny Plaintiff's access to the courts in violation of Article 1, section 21 of the Florida Constitution. ("The courts shall be open to ***every person*** for redress of ***any*** injury, and justice shall be administered without sale, denial or delay.") (emphasis supplied); and (2) leave the County free to ignore its own charter with impunity. That cannot be the law.

18. The County's argument that Article VIII, section 1 of the Florida Constitution does not provide a private cause of action in and of itself suffers from the same flaws as does its section 2.2A(1) charter argument. Moreover, even if the Court were to consider the County's merits-based argument at the motion to dismiss stage, the allegations of the Complaint, taken as true, are sufficient to establish that the Ordinance violates Article VIII, section 1, in the two

distinct ways contemplated by *Sarasota Alliance for Fair Elections v. Browning*, So. 3d 880, 885-86 (Fla. 2010). First, Section 163.3184, Florida Statutes, is a general law prescribing the procedures by which ***all*** local governments ***shall*** amend the land use density and intensity standards of their comprehensive plans.[2] Second, section 163.3211, Florida Statutes, states:

> 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.

(emphasis supplied).

19. These provisions clearly preempt the County as to the circumstances when and the manner by which the density and intensity of use set forth in a comprehensive plan must be amended. Second, as a *de facto*, self-executing plan amendment that was not adopted in accordance with the procedural requirements of section 163.3184, the Ordinance exceeds the County's home rule authority; authority that is limited by Article VIII, section 1 to actions not inconsistent with general laws such as section 163.3184. In sum, the County's adoption and enforcement of the Ordinance unconstitutionally violates Article VIII, section 1 in precisely the two distinct ways set forth in *Sarasota Alliance for Fair Elections.*

V. The County's Failure To State a Claim Argument That Section 163.3213, Florida Statutes, Administrative Proceedings Is The Exclusive Remedy For Challenging The Ordinance As Being Inconsistent With A Comprehensive Plan Fails

20. The County argues that Plaintiffs seek an impermissible remedy through

[2] §163.3167(2), Fla. Stat. ("***Each*** local government ***shall***…***prepare amendments to its existing comprehensive plan to conform it to the requirements of this part and in the manner set out in this part***.").The comprehensive plan ***shall*** consist of***…[a] future land use plan element designating proposed future general distribution, location, and extent of the uses of land*** for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public facilities, and other categories of the public and private uses of land." §§163.3177(1)(a), (6)(a) Fla. Stat. "[***T]he general range of density and intensity of use shall*** be provided for the gross land area included in each existing land use category." §163.3177(1)(a), (6)(a) Fla. Stat. (emphasis supplied).

declaratory relief instead of seeking the administrative remedy under section 163.3213, Florida Statutes, for challenging local ordinances on grounds they are inconsistent with the comprehensive plan. Once again, the County impermissibly seeks dismissal based on the sufficiency of the Plaintiffs' declaratory relief claim.

21. Moreover, this is a strawman argument. Count I of the Complaint does not seek a declaration that the Ordinance is inconsistent with the County's Comprehensive Plan. Rather it seeks the following declaratory relief:

> WHEREFORE, Plaintiffs respectfully request that this Honorable Court: (1) declare whether the BOCC's adoption of Sarasota County Ordinance No. 2021-047 and its approval of Special Exceptions Nos. 1822, 1823 and 1824 are unauthorized, ultra vires and void, and of no legal force and effect because they violate: (a) Article VIII, Section 1 of the Florida Constitution, (b) Chapter 163, Florida Statutes, and (c) Article II, Section 2.2A(1) of the Sarasota County Charter; (2) grant such further relief as may be proper under the circumstances, including injunctive relief enjoining development of the hotels and an associated parking garage purportedly authorized pursuant to Special Exceptions 1822, 1823 and 1824; (3) award them their costs of these proceedings; and (4) grant such other relief as may be just and proper under the circumstances.

(Compl. at 13-14).

VI. The County's Failure To State a Claim Argument That Count I Impermissibly Duplicates Counts IV and V Fails

22. The County argues that, at least in part, the declaratory and injunctive relief sought in Count I duplicates Alternative Counts IV and V. Again, the County's argument goes to the sufficiency of the claims. Moreover, to the extent Count I seeks declaration as to whether the County's actions were ultra vires and void, it does so based on whether the County's special exception approvals are valid when predicated upon an ordinance that amounted to a *de facto,* self-executing plan amendment that bypassed the procedural requirements of section 163.3184, Florida Statutes. That argument is different than whether the special exceptions are consistent with an ***otherwise validly enacted*** plan amendment which is what is presupposed by a

consistency challenge under sections 163.3215, Florida Statutes. Section 163.3215 provides a cause of action to challenge "the consistency of a development order with a comprehensive plan ***adopted under this part***." §163.3215(1) Fla. Stat. "This part" refers to the "Community Planning Act" codified at sections 163.3161-3217, Florida Statutes. See, §163.3161(1), Fla. Stat. Section 163.3184, Florida Statutes, prescribing the plan amendment process, is encompassed within "this part." Here, the gravamen of Count I is that the Ordinance amounts to a *de facto* plan amendment increasing and then applying the new increased density limitations beyond those otherwise allowable under the plan's Siesta Key Overlay District. That *de facto* amendment was not adopted in accordance with the procedural requirements of section 163.3184, Florida Statutes. Because the *de facto* amendment was not "adopted under this part," any special exception dependent thereupon would not be challengeable under section 163.3215. Therefore, Count I is not duplicative of Counts IV and V.

VII. The County's Arguments As To Petitioners' Petitions for Writ Of Certiorari Set Forth In Alternative Counts II and III Are Well-Taken

23. The County's arguments at II.A-C of its Motion that Petitioners' Alternative Counts II and III seeking writs of certiorari do not satisfy certain provisions of the Florida Rules of Appellate Procedure are well-taken. Given that Count I could not be disposed of within the thirty-day time period within which petitions for writ certiorari must be filed, Petitioners filed Counts II and III as alternative counts to preserve their rights to pursue such remedy depending on the Court's rulings on Count I. Petitioners request that this Court grant Petitioners leave to amend Alternative Counts II and III and abate these Counts pending final rulings on Count I.

VIII. The County's Arguments That The Petitions for Writ Of Certiorari Set Forth In Alternative Counts II and III Are Impermissible Consistency Challenges Fails

24. The County's argument that Petitioners' alternative petitions for writ of certiorari

amount to impermissible "consistency" challenges under section 163.3215, Florida Statutes, fails for several reasons. First, the gravamen of Counts II and III is not inconsistency with the County's comprehensive plan. Rather it is that the County's special exception approvals are unauthorized, ultra vires and void, and of no legal force and effect because they violate: (i) Article VIII, Section 1 of the Florida Constitution, (ii) Chapter 163, Florida Statutes, and (iii) Article II, Section 2.2A(1) of the Sarasota County Charter. Second, the remedy provided in section 163.3215 is to challenge "the consistency of a development order with a comprehensive plan ***adopted under this part***." §163.3215(1) Fla. Stat. As discussed above, the special exceptions are dependent upon a *de facto* plan amendment that was not "adopted under this part." Therefore, they are not challengeable under section 163.3215. Instead, they are quasi-judicial decisions challengeable via a petition for writ of certiorari alleging alleging departures from the essential requirements of law. See, §163.3161(6), Fla. Stat. ("It is the intent of this act that …no public or private development shall be permitted ***except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with this act.***" (emphasis supplied).[3]

IX. The County's Lack of Standing Arguments All Fail

A. As To Count I, Plaintiffs Have Sufficiently Alleged Standing To Seek A Declaration Under Chapter 86, Florida Statutes

25. Section 86.021, Florida Statutes provides:

> Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation

[3] Those procedures were not followed in this case even though "[t]he provisions of [Community Planning Act] in their interpretation and application are declared to be ***the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act;*** to protect human, environmental, social, and economic resources; and ***to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state."*** §163.3161(8), Fla. Stat. (emphasis supplied).

> made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing may have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum, or instrument in writing, or any part thereof, and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

26. The allegations of the Complaint are more than sufficient to demonstrate that each of the Plaintiffs are persons claiming to be interested or who may be in doubt about their rights under written instruments (i.e., the Ordinance and special exception orders) whose rights and or legal or equitable relations are being affected by: (1) statutes (i.e., chapter 163, Florida Statutes, and the Sarasota County Charter); (2) regulations (i.e., the Siesta Key Overlay District); and (3) other written instruments (i.e., the Florida Constitution). See, Compl. ¶¶ 1-2, 6-1. That is all that is required to establish standing at the motion to dismiss stage under chapter 86. All of the County's Count I standing arguments go to the sufficiency of Plaintiffs' claims; not to whether they are entitled to a declaration. Moreover, and contrary to the County's arguments, the Second District has squarely held that "[s]ection 86.021, Florida Statutes, which addresses standing to seek declaratory judgments, contains no requirement that a special injury be established." *Combs v. City of Naples*, 834 So. 2d 194, 197 (Fla. 2d DCA 2002).

27. To the extent the sufficiency of Plaintiff's' standing to bring their claims is properly considered at the motion to dismiss stage, the County's standing arguments as to all counts fail for the reasons that follow.

B. As To Counts I, II And III, The Allegations Of The Complaint Sufficiently Allege Common Law Standing Under *Renard v. Dade County*

28. The seminal case on standing in land use cases such as this is *Renard v. Dade County*, 261 So. 2d 832 (1972). There, the Florida Supreme Court set forth the standing necessary (1) to enforce a valid zoning ordinance; (2) to attack a valid zoning ordinance; and (3)

to attack a void ordinance, i.e., one enacted without proper notice under the enabling statute or without authority creating the zoning power. 261 So. 2d at 834.

29. The Court began its discussion by holding that "there is no basis for distinguishing between cases reaching the courts after appeal to a zoning board, in areas where such boards exist, and those originating in the court system." *Id*. at 837. In other words, the same non-chapter 86, substantive common law standing principles apply to Count I (declaratory and injunctive relief) and Counts II and III (petitions for writ of certiorari).

30. With respect to the first category of zoning challenges (i.e., enforcement of a valid zoning ordinance), the Court required that the challenger show "special damage different in kind from the general community." *Id*. at 834-35, 837. As to the second category (i.e., attack of a valid zoning ordinance), the Court held that "persons having a legally recognizable interest, which is adversely affected by the proposed zoning action, have standing to sue." And as to the third category (attack of a void ordinance), the Court held that "[a]ny affected resident, citizen, or property owner of the governmental unit in question has standing to challenge such an ordinance." *Id*. at 837-38.

31. Here Counts I, II and III allege that the County did an "end run" around the statutorily mandated comprehensive plan amendment procedures set forth in section 163.3184, Florida Statutes, thereby bypassing the procedures for public participation, public notice, hearings, state and regional review and possible administrative appeals to the Division of Administrative Hearings and the Governor and Cabinet sitting as the Administration Commission. Compl. ¶¶ 17-26. These counts seek determination whether the Ordinance and special exceptions are unauthorized, ultra vires and void, and of no legal force and effect on grounds that they violate: (1) Article VIII, Section 1 of the Florida Constitution, (2) Chapter 163, Florida Statutes, and (3) Article II, Section 2.2A(1) of the Sarasota County Charter.

32. Counts I, II and III clearly fall within the third category of challenge under *Renard*.

33. As to Plaintiff Wallace, it is alleged that:

> "Wallace owns property and resides on Siesta Key at its far south end and is a taxpayer in Sarasota County, Florida. He invariably utilizes Stickney Point Road to access mainland Sarasota. Development of the two hotels purportedly authorized by the BOCC's adoption of Sarasota County Ordinance No. 2021-047 and its approval of Special Exceptions 1822, 1823 and 1824 will adversely affect his ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key via Stickney Point Road to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key.

(Compl. ¶ 6).

34. As to Plaintiff, 222 Beach Road Association, Inc., it is alleged that:

> [222] Beach Road Association is a Florida not-for-profit corporation. Its purposes, among others, are to: (1) operate and manage common, social and recreational facilities for members of the corporation and corporate property at the 222 Beach Road Condominium; (2) manage the affairs of the condominium and the condominium property; (3) protect the aesthetic qualities and beauty of the condominium; (4) ensure the continuation of enjoyable living conditions at the condominium; and (5) maintain the value of the condominium units. It has all the express and implied powers of not-for-profit corporations provided for under Florida Law."
>
> As approved, Special Exceptions 1824 will allow development of a hotel grossly out-of-scale and incompatible with adjacent and nearby developed areas, including the 222 Beach Road Condominium, and will create severe traffic congestion and safety problems. It also will adversely affect the 222 Beach Road Condominium unit owners' ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key. As a result of these adverse impacts, Plaintiff's ability to successfully achieve its above-mentioned corporate purposes will be adversely affected.

(Compl. ¶¶ 7-8).

35. As to Plaintiff, Marina Del Sol Association, its is alleged that:

> The Marina Del Sol Association is a Florida not-for-profit corporation. Its purposes, among others, are to: (1) protect, maintain and operate the

> condominium property of the Marina Del Sol Condominium for the benefit of unit owners; (2) manage the affairs of the condominium and the condominium property; (3) maintain actions in its name on behalf of most all of the unit owners to ensure the continuation of enjoyable living conditions at the condominium; and (5) maintain the value of the condominium units. It has all the express and implied powers of not-for-profit corporations provided for under Florida Law.
>
> As approved, Special Exceptions 1822 and 1823 will allow development of a hotel and parking garage grossly out-of-scale and incompatible with adjacent and nearby developed areas, including the Marina Del Sol Condominium, and will create severe traffic congestion and safety problems. It also will adversely affect the Marina Del Sol Condominium unit owners' ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key. As a result of these adverse impacts, Plaintiff's ability to successfully achieve its above-mentioned corporate purposes will be adversely affected.

(Compl. ¶¶ 9-10).

36. As to Plaintiff, Robert I. Sax, it is alleged that:

> Sax owns property on Siesta Key approximately 100 yards away from the hotel purportedly authorized by Ordinance No. 2021-047 and Special Exception Nos. 1822 and 1823. As approved, this hotel and associated parking garage are grossly out-of-scale and incompatible with adjacent and nearby developed areas and will create severe traffic congestion and safety problems. It also will adversely affect his ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key.

(Compl. ¶10).

37. The allegations of the Complaint, taken to be true, are more than sufficient to establish Plaintiffs' standing under the *Renard*'s third category of challenge as "affected resident[s], citizen[s] or property owner[s] of the governmental unit in question" seeking to challenge land use decisions "enacted without proper notice under the enabling statute or without authority creating the zoning power." See, *Renard,* 261 So. 2d at 834.

38. The actual addresses of the real property owned by each Plaintiff can be

introduced at trial through witness testimony or by affidavits to a motion for summary judgment. Similarly, additional facts as to which roads are utilized by Plaintiffs to access the barrier island of Siesta Key can also be introduced at trial or by affidavit. 222 Beach Owners Association, Inc. and Marina Del Sol Condominium Association, Inc. are adjacent, or within the mailing notice area, of at least one of the respective subject hotel developments.

39. As alleged in paragraph 8 of the Complaint for 222 Beach "[a]s approved, Special Exceptions 1824 will allow development of a hotel grossly out-of-scale and incompatible with adjacent and nearby developed areas, including the 222 Beach Road Condominium, and will create severe traffic congestion and safety problems. It also will adversely affect the 222 Beach Road Condominium unit owners' ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key." The County argues that it is a fatal flaw to not include the address of 222 Beach Road, however the address is known to the County as plaintiff appeared before the County at the public hearing and the notice was mailed to plaintiff at their address. Further, this plaintiffs address is rather obvious by its name, it is the allegation that the plaintiff's property is adjacent to at least one of the subject hotels that is important. These are sufficient factual allegations to survive a motion to dismiss, other facts can be proved up through testimony or affidavits.

40. As alleged in paragraph 10 of the Complaint for Marina Del Sol Condominium "[a]s approved, Special Exceptions 1822 and 1823 will allow development of a hotel and parking garage grossly out-of-scale and incompatible with adjacent and nearby developed areas, including the Marina Del Sol Condominium, and will create severe traffic congestion and safety problems. It also will adversely affect the Marina Del Sol Condominium unit owners' ability to

safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key." The County once again argues that it is a fatal flaw to not include the address of Marina Del Sol, however the address is known to the County as plaintiff appeared before the County at the public hearing and the notice was mailed to plaintiff at their address. Again, it is the allegation that the plaintiff's property is adjacent to at least one of the subject hotels that is important. These are sufficient factual allegations to survive a motion to dismiss, other facts can be proved up through testimony or affidavits.

41. As alleged in paragraph 7 of the Complaint for Dr. James Wallace, "Wallace owns property and resides on Siesta Key at its far south end and is a taxpayer in Sarasota County, Florida. He invariably utilizes Stickney Point Road to access mainland Sarasota. Development of the two hotels purportedly authorized by the BOCC's adoption of Sarasota County Ordinance No. 2021-047 and its approval of Special Exceptions 1822, 1823 and 1824 will adversely affect his ability to safely utilize roadways to access areas of Siesta Key and to timely and safely enter and leave the barrier island of Siesta Key via Stickney Point Road, the Key's primary access road, to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key." These are sufficient factual allegations to survive a motion to dismiss, other facts can be proved up through testimony or affidavits that explain Dr. Wallace must pass by one or both of the proposed hotels to leave the island and to access his home "to timely and safely enter and leave the barrier island of Siesta Key via Stickney Point Road, the Key's primary access road, to access hospital facilities and doctors during medical emergencies and during daily trips on and off Siesta Key as well as daily trips within Siesta Key."

42. As the Second District has observed "Florida courts have repeatedly stated that the declaratory judgment statute should be liberally construed." *Coombs*, 834 So. 2d at 197. Such liberal construction and the inferences that follow from the above-referenced allegations are sufficient to establish each of Plaintiffs/Respondents' standing to maintain Counts I, II and III. See, *Id*. (nearby property owners, non-nearby persons having status as city resident and taxpayer and homeowners associations had standing to seek declaratory judgment on the constitutionality of a development agreement).

43. The County's argument that Count I falls into the second category of standing under *Renard* is conclusory, unsupported by authority and ignores the well-pleaded allegations of the Complaint. Plaintiffs are ***not*** "attack[ing] ***a validly enacted*** zoning ordinance as an unreasonable exercise of the police power" which is what *Renard*'s second category addresses. Rather, they are attacking the ***underlying validity*** of the special exceptions as constituting ***an unauthorized*** end around the statutorily mandated plan amendment process, including its notice and hearing requirements and administrative appeal rights.

C. <u>As To Counts IV and V, The Allegations Of The Complaint Sufficiently Allege Statutory Standing Under Section 163.3215 Florida Statutes</u>

44. Section 163.3215(2), Florida Statutes, provides that an "aggrieved or adversely affected party" may challenge a local government development order as being inconsistent with a comprehensive plan. An "aggrieved or adversely affected party" is defined

> "any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.

45. Section 163.3215 "enlarged the class of persons with standing to challenge a development order as inconsistent with the comprehensive plan" *Education Development Center, Inc. v. Palm Beach County, et al.*, 751 So.2d 621 (Fla. 4th DCA 1999) (emphasis supplied). And section 163.3215 must "be liberally construed to advance the intended remedy." 751 So. 2d at 623. The Act "demonstrates a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action." *Southwest Ranches Homeowners Association, Inc. v. Broward Co., Florida*, 502 So.2d 931, 935 (Fla. 4th DCA 1987) (emphasis added); *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191, 202 (Fla. 4th DCA 2001) (Holding that "citizen enforcement is the primary tool for insuring consistency of development decisions with the Comprehensive Plan.").

46. The law does not require Plaintiffs to either own property adjacent to a proposed development or conduct activities on property immediately adjacent to it to have standing under section 163.3215. See, *Save the Homosassa River Alliance*, 2 So. 3d 329 at 339. Nor is special injury required. A plaintiff's harm may be shared by others, as long as the extent of the plaintiff's harm will exceed that of the general public. As the Fifth District explained in *Save the Homosassa River*:

> An interpretation of the statute that requires *harm* different in degree from other citizens would eviscerate the statute and ignore its remedial purpose. It drags the statute back to the common law test. The statute is designed to remedy the governmental entity's failure to comply with the established plan, and, to that end, it creates a category of persons able to prosecute the claim. The statute is not designed to redress damage to particular plaintiffs. To engraft such a "unique harm" limitation onto the statute would make it impossible in most cases to establish standing and would leave counties free to ignore the plan because each violation of the plan in isolation usually does not uniquely harm the individual plaintiff. ***Rather, the statute simply requires a citizen/plaintiff to have a particularized interest of the kind contemplated by the statute, not a legally protectable right.***

2 So. 3d 329 at 340 (emphasis supplied).

47. Under this liberal standing test, Florida courts consistently find that nearby landowners and associations have standing under section 163.3215. *Edgewater Beach Owners Assoc., Inc. v. Walton County*, 833 So. 2d 215 (Fla. 1st DCA 2002) (association whose members' ocean views would be blocked by proposed building); *Southwest Ranches Homeowners Assoc., Inc. v. County of Broward*, 502 So. 2d 931, 934 (Fla. 4th DCA 1987) (association of property owners whose land was near a proposed landfill and who would thus be directly affected by its operation had a more direct stake in the matter than those with only general interest in environmental issues); *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 427 (Fla. 4th DCA 2007) (owner of historical property adjacent to a proposed development had standing due to alleged negative impacts from increased traffic, lights, alteration of enjoyment of light and air, visual and audio pollution, and the effects of shadow cast over the historical property); *Dunlap v. Orange County*, 971 So. 2d 171, 175 (Fla. 5th DCA 2007) (owners of lakefront property who would be affected by the construction of a boat ramp to a greater extent than other landowners in the area who did not own lake-front property).

48. The above-referenced allegations of the Complaint are more than sufficient to establish that Plaintiffs, all of whom are located a barrier island, will suffer an adverse effect to particularized interests protected or furthered by Sarasota County's comprehensive plan. Their interests include the use, traffic safety and adequacy of the already unacceptably congested transportation facilities serving Siesta Key, including its only two access roads to the mainland, upon which they depend for their daily needs and for emergency medical and hospital services, as well as and their interests in maintaining existing densities or intensities of development on Siesta Key.

X. Conclusion

Sarasota County's Motion to Dismiss should be denied except as to Alternative Counts II and III. As to Counts II and III, they should be abated or, alternatively, the County's motion should be granted without prejudice with leave to amend Counts II and III. Should the Court grant the County's motion with respect to Counts I or Alternative Counts IV and V, such dismissal should likewise be without prejudice with leave to amend as appropriate.

Respectfully submitted this 14th day of March 2022.

SMOLKER MATHEWS, LLP

/s/*David Smolker*
David Smolker
Florida Bar No. 349259
davids@smolkermathews.com
R. Clay Mathews
Florida Bar No. 0107015
clay@smolkermathews.com
100 South Ashley Drive, Suite 1490
Tampa, Florida 33602
Ph: (813) 819-2552
Fax: (813) 819-2551
Attorneys for Plaintiffs/Respondents

RALF BROOKES ATTORNEY

/s/ *Ralf Brookes*
Florida Bar No. 0778362
RalfBrookes@gmail.com
1217 East Cape Coral Parkway, #107
Cape Coral, Florida 33904
Ph: (230) 910-5464
Attorney for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been electronically filed and furnished to counsel of record via the e-portal this 14th day of March 2022.

/s/ David Smolker
David Smolker