

COPY

**IN THE CIRCUIT COURT FOR THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

**STATE OF FLORIDA, on relation of ex. rel,
PHIL BUCHANAN, an individual citizen,
CALOOSAHATCHEE RIVER CITIZENS ASSOCIATION, Inc. (Riverwatch),
RESPONSIBLE GROWTH MANAGEMENT COALITION, INC.,
CALUSA LAND TRUST AND NATURE PRESERVE OF PINE ISLAND, INC.,
SANIBEL-CAPTIVA CONSERVATION FOUNDATION, INC.,
GREATER PINE ISLAND CIVIC ASSOCIATION, INC., and
SOUTHWEST FLORIDA WATERSHED COUNCIL, INC.,
Plaintiffs,**

vs.

CASE NO.: 14-CA-1204

**CITY OF CAPE CORAL,
Defendant.**

ORDER DENYING MOTION TO DISMISS

THIS CAUSE comes before the Court on Defendant's "Motion To Dismiss," filed August 27, 2014. Having reviewed the motion, response, the case file, the applicable law, and having heard argument by the parties on December 8, 2014, the Court finds as follows:

1. Plaintiffs filed a complaint on April 26, 2014. The complaint seeks to force Defendant to submit a modified design for a boatlift and barrier to the Florida Department of Environmental Protection (FDEP), as it was required to do by the second amended consent order within 90 days of DEP's denial of the previously submitted permit in 2011.

2. Defendant filed a motion to dismiss on August 27, 2014, arguing Plaintiffs have not alleged a cause of action because they had not exhausted administrative remedies. Defendant also argued that Plaintiffs have failed to join FDEP and all stakeholders as indispensable parties.

3. Plaintiffs filed a response on December 5, 2014, arguing that it had exhausted all administrative remedies when its petition for an administrative hearing was denied, and that FDEP was given notice and responded that it was not a required party.

4. A hearing on the motion to dismiss was held on December 8, 2014. Following the hearing, Plaintiffs filed the final administrative order. Defendant filed a post-hearing response to this filing, as well as a brief in response to Plaintiffs' response to the motion to dismiss.

5. In a motion to dismiss for failure to state a cause of action, in determining sufficiency of the complaint, the Court may not look beyond the four corners of the complaint. Henderson v. Johnson, 97 So.3d 946, 950-951 (Fla. 1st DCA 2012); Bess v. Eagle Capital, Inc., 704 So. 2d 621, 622 (Fla. 4th DCA 1997) (internal citations omitted). The test for a motion to dismiss is whether the plaintiff could prove any set of facts at all in support of the claim. Rocks v. McLaughlin Engineering, Co., 49 So.3d 823 (Fla. 4th DCA 2010). All allegations in the complaint must be taken as true, and all reasonable inferences to be drawn must be construed in favor of the non-moving party. United Auto. Ins. Co. v. Law Offices of Michael I. Libman, 46 So.3d 1101, 1103-1104 (Fla. 3d DCA 2010) (internal citations omitted).

6. At the hearing, Defendant argued that FDEP was a necessary party because its permission is required for any action to be taken, and that the Court should not usurp the authority of the permitting agency. Defendant further argued that Lee County should be joined, since the County was working with Defendant on the project. When the Court inquired what remains to be done in the administrative process, Defendant stated that it needs FDEP and the Army Corp of Engineers to tell it what to do before it submits another application. Defendant asserted that it was willing to enter into a letter agreement with Plaintiffs to meet with FDEP and obtain a solution from the agency. Plaintiffs argued that FDEP had requested not to be joined, and that the statute did not require it to be joined. Plaintiffs stated that it had been three years, and that they had no other options left to seek relief once the petition for administrative hearing had been denied. Plaintiffs conceded to striking the portion of its complaint that sought the Court

to require FDEP to take any action. Plaintiffs argued that they agreed that the environmental solution was appropriately left to FDEP to decide, but Defendant needed to submit a new design permit in order for the parties to begin discussions again with FDEP.

7. The Court finds that the four corners of the complaint state a sufficient cause of action to proceed. Defendant did not affirmatively provide administrative steps that remain to be taken for Plaintiffs to seek relief, and thus, it appears Plaintiffs have exhausted their administrative remedies. If indispensable parties remain to be joined, the appropriate procedure would be for a party to move to amend the complaint or join those parties.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant's motion to dismiss is DENIED.

DONE AND ORDERED in Chambers in Fort Myers, Lee County, Florida this

16 day of December, 2014.



Alane C. Laboda
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the above order has been furnished to: **Steven D. Griffin, Esq.**, sgriffin@capecoral.net, P.O. Box 150027, Cape Coral, FL 33915-0027; **Ralf Brookes, Esq.**, Ralf@ralfbrookesattorney.com, 1217 E. Cape Coral Parkway #107, Cape Coral, FL 33904; and **Court Administration (XIV)**, 1700 Monroe St., Ft. Myers, FL 33901, this 16 day of December, 2014.

By: 
Judicial Assistant