IN THE FOURTH JUDICIAL CIRCUIT COURT
IN AND FOR NASSAU COUNTY

ERIC TITCOMB,
ROBERT WEINTRAUB,
JULIE FERREIRA,
Plaintiffs

v.

Case No. 06-201-CA
DIV A - Judge Davis

NASSAU COUNTY
Defendants
_____/

FINAL ORDER

The court held a *de novo* trial on remaining Count I, a statutory action brought pursuant to Florida Statutes Section 163.3215, in the above styled action. Plaintiffs allege that the planned development rezoning is inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan.

The Court heard testimony from witnesses called by the parties over the course of two days on the substantive issue of whether the development order was inconsistent with the density established by the Comprehensive Plan and then reconvened for an additional half day of testimony regarding standing.

The parcel in question is the southern portion of Crane Island, which is designated as Conservation Wetlands in the Comprehensive Plan and is privately owned. This parcel is located entirely within in the Category 1 hurricane evacuation zone and the 100 year flood plain. The northern end of Crane Island is a parcel owned by the Florida Inland Navigation District, and this northerly portion is not part of the development proposal.

Crane Island –
Aerial Photograph, Plaintiffs Exhibit 1

The development proposal for the privately–held southern portion of the island includes 166 residential dwelling units and a marina to be dredged out from the islands interior. The island is currently un-bridged and the development proposal includes a bridge to provide vehicular access to Crane Island.

The current Future Land Use Map shows Crane Island as wetlands, which corresponds to the "Conservation – Wetlands" land use designation as described in the text of the Future Land Use Element of the Comprehensive Plan. The land use category of "Conservation-Wetlands" is limited to a maximum allowable density of 1 unit per 5 acres under the Comprehensive Plan. The Comprehensive Plan establishes a maximum allowable density on "Conservation Wetlands" at "no greater than 1 unit per 5 acres." *See*, Nassau County Comprehensive Plan FLUM; Policy 1.04A.02.

Because the planned development area on Crane Island is approximately 207 acres the maximum allowable density under the "Conservation-Wetlands" land use designation would allow approximately 41 units. The proposed planned development rezoning would allow 169 units greatly exceeding the maximum allowable density.

The County and Intervenors argue that the Comprehensive Plan contains a Policy 1.09.03 that provides for adjustment of the actual wetlands line once a formal delineation has been obtained from the St. Johns Water Management District. The County based upon a memorandum from the County Attorney utilized this policy to approve the additional density on Crane Island without first submitting an amendment to the Comprehensive Plan Future Land Use Map.

Witnesses from the State of Florida Department of Community Affairs (DCA) described Policy 1.09.03 as a "ground-truthing" policy necessary because the scale and scope of Future Land Use Maps are inadequate to delineate the exact wetlands boundaries on individual parcels.

The Department of Community Affairs chief of Comprehensive Planning Mike McDaniel and Department of Community Affairs General Counsel Shaw Stiller testified that DCA informed the County and the Applicant in this case that Policy 1.09.03 could not be used to change the land use designation of Crane Island and thereby increase density.

The Department of Community Affairs testified that Policy 1.09.03 (as previously approved by DCA) could not be used in a manner that would change the land use designation for the entire privately held portion of Crane Island and that a Comprehensive Plan Amendment would be required to amend the Future Land Use Map designation for such a large scale change.

The State of Florida Department of Community Affairs witnesses testified that they had in fact visited Crane Island and that at no time did DCA ever think that Crane Island was wetlands, but that the Department of Community Affairs nonetheless determined that "Conservation-Wetlands" was the appropriate land use designation from

Crane Island due to Crane Island's current undeveloped state as a "conservation" resource, its extraordinary geographic location in the intracoastal, Amelia River where Crane Island is particularly vulnerable to hurricanes and storms in the category 1 coastal high hazard area. The former County Attorney also admitted in his testimony that the Department of Community Affairs had insisted on the "Conservation" land use designation for Crane Island that was a material issue in the settlement and adoption of Nassau County's Comprehensive Plan.

The County and the Applicant originally agreed to the designation of Conservation for Crane Island and in fact, did submit multiple applications to amend the Comprehensive Plan FLUM designation specifically for Crane Island seeking additional density. Each of these previous Comprehensive Plan Amendments received negative objections, recommendations or comments from the Department of Community Affairs acting as the state land planning agency charged with review of Comprehensive Plan Amendments. Each of these proposed amendments to the Comprehensive Plan to change the land use designation on Crane Island from "Conservation" to various other categories were eventually withdrawn after receiving the Department of Community Affairs' negative comments.

The County and Applicants then invoked Policy 1.09.03 to increase the density of Crane Island without submitting a formal Comprehensive Plan Amendment. The former County Attorney also admitted in his testimony that the Department of Community Affairs had specifically informed him in meeting specifically called to discuss the issue that use of Policy 1.09.03 to change the density of Crane Island would violate state statutes and would be impermissible. The County nonetheless ignored the state of Florida Department of Community Affairs and utilized the Policy to approve 169 units on Crane Island without amending the Future Land Use Map designation for Crane Island.

The State of Florida Department of Community Affairs chief of Comprehensive Planning and Department of Community Affairs General Counsel testified that this would violation Chapter 163 and Florida Administrative Code 9J-5 because it would "have the effect of amending" the Comprehensive Plan without submitting a Comprehensive Plan Amendment to the Future Land Use Map to the appropriate regional and state agencies for review and comments, including the state land planning agency.

The State of Florida Department of Community Affairs General Counsel testified that to utilize Policy 1.09.03 in this manner would lead to an "absurd result" that would violate state statutes. While Policy 1.09.03 "on its face" did not violate state statutes, and that the Policy could be used to make minor adjustments to land use districts to correspond to wetlands delineation lines once formalized by the water management district without violating state statutes, use of the Policy to make large-scale changes to the Future Land Use Map of whole cloth would violate state statutes and deprive the reviewing agencies an opportunity to object, comment and make recommendations and the public participation in the Comprehensive Plan Amendment process as set forth in Chapter 163, Florida Statutes.

The use of Policy 1.09.03 as an “end-run” around the State of Florida Department of Community Affairs after previous attempts at amending the Comprehensive Plan designation for Crane Island had failed or been withdrawn also deprived the Department of Community Affairs of the ability to find the Comprehensive Plan “in compliance” or “not in compliance” with Florida Statutes Chapter 163 and F.A.C. 9J-5 and the opportunity for public participation that is further afforded citizens within the County who had submitted comments on a proposed comprehensive plan amendment to seek a formal administrative hearing before an Administrative Law Judge at the Division of Administrative Hearings (DOAH).

Chapter 163, Part II, Florida Statutes, the Local Comprehensive Planning and Land Development Regulation Act ("Local Comprehensive Planning Act"), requires each local government in Florida to prepare and adopt a local comprehensive plan containing mandatory elements that address important issues such as land use, traffic circulation, conservation, coastal zone management, and the adequacy of facilities and infrastructure. After a local government has adopted its comprehensive plan, §163.3194(1)(a) of the Local Comprehensive Planning Act requires that all actions taken by the local government in regard to development orders be consistent with the adopted local comprehensive plan. § 163.3215, Florida Statutes. Development and development orders, which must be consistent with the Comprehensive Plan, are defined by §163.3194(3), Florida Statutes. Section 163.3194(3), Florida Statutes defines "consistency" as follows:

> (a) A development or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspect of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and **densities** or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.
>
> (b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, or other aspects of the development are compatible with or further the objectives, policies, land uses, and **densities** or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

The planned development rezoning at issue in this case is a “development order” that must be consistent with the density set forth in the Comprehensive Plan. Pursuant to §163.3215(1), Fla. Stat. “any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order ... which materially alters the

use or **density** or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." Pinecrest Lakes, Inc. v. Shidel 795 So.2d 191, 194 (Fla. 4 DCA, 2001).

The **non-deferential standard of strict judicial scrutiny** applies in actions challenging a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan. Pinecrest Lakes 795 So. 2d at 197.

As the state of Florida Department of Community Affairs witnesses noted, the Local Comprehensive Planning Act largely places the obligation for enforcement of the consistency requirement on citizens. "The statute [Fla. Stat. 163.3215] authorizes a citizen to bring an action to enjoin official conduct that is made improper by the statute." Pinecrest Lakes, 795 So.2d at 197. Section 163.3215(1) provides that "any aggrieved or adversely affected party" may bring a civil action for injunctive or other relief against any local government to prevent the local government "from taking any action on a development order which materially alters the use or **density** or intensity of use" on a tract of property in a manner that is not consistent with the adopted local comprehensive plan.

Once a local government has adopted its comprehensive plan, Section 163.3194(1)(a) of the Local Comprehensive Planning Act or Growth Management Act, requires that all actions taken by the local government in regard to development orders be consistent with the duly-adopted local comprehensive plan unless a plan amendment is submitted and approved by the state Department of Community Affairs prior to approval of the inconsistent action. See, Machado v. Musgrove 519 So.2d 629 (Fla. 3rd DCA 1987) affirmed en banc at 1988 Fla. App. Lexis 705; 13 Fla. Law W. 522 (1998) review denied Machado v. Musgrove,529 So. 2d 694 (Fla. 1988).

The Florida Supreme Court in Brevard County v. Snyder 627 So.2d 469 (Fla. 1993) held that a rezoning must be consistent with Comprehensive Plan. See also, Pinecrest Lakes, Inc. v. Shidel, 795 So.2d 191 (Fla. 4th DCA, 2001) cert. denied 821 So.2d 300 (Fla. 2002)(inconsistency with comprehensive plan).

The Court finds the density approved by the development order to be inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan.

Upon hearing the testimony of plaintiffs as to standing, the Court further finds that plaintiffs have standing to bring this action.

Crane Island appears in its current state to be undeveloped, although certain areas of Crane Island have been impacted by the activities of the Florida Inland Navigation District. Crane Island's tree canopy, as shown on aerials, wholly covers the uplands of Crane Island other than the wetland marsh that surrounds the area to the immediate north, east and southern end of the island. The western portion of the island is directly adjacent to the intracoastal waterway of the Amelia River, and the intracoastal waterway's

navigation channel passes within a few feet of the western uplands of Crane Island. Crane Island is currently undeveloped except for dredge spoils placed on and around the island by the Florida Inland Navigation District, which are now vegetated. A lost, abandoned homestead of one of the islands' early figures, Alice Broadbent, who legend has it kept visitors from the island with a shotgun and returned to the City of Fernandina Beach on occasion for supplies, is present somewhere on the island although the exact location of her home has not been identified.

Plaintiffs testified that they actually use the area adjacent to Crane Island to lead both organized and informal kayak outings and for wildlife photography due to its scenic beauty, conservation values and recreational opportunities. Plaintiffs actually used the area adajacent to Crane Island and the Florida Inland Navigation District lands on Crane Island itself in order to observe and conduct kayak outings to view and photograph Crane Island's conservation resources. Payne v. City of Miami, 927 So.2d 904 (Fla 3rd DCA, 2005); Education Development Center, Inc. v. Palm Beach County 751 So.2d 621, 623 (Fla. 4th DCA, 1999); .

Plaintiff, Eric Titcomb is a certified outings leader for Sierra Club who has obtained special wilderness first aid and "Florida Master Naturalist" training in order to lead multiple kayak outings to and around Crane Island both as an official guide for Sierra club outings and as an informal guide for outings with others. He testified that he intended on continuing to lead outings to Crane Island in the future, but could not take kayak tours to the area to experience the same conservation values if Crane Island were allowed to develop at the density allowed by the subject development order because it would no longer be a conservation area that he would be able to visit and experience the same conservation resources and that he would have to find another location if development at this density were approved.

Similarly, Julie Ferreira is an apprentice outings leader for Sierra and is actively engaged in obtaining her outings leader certification. She too has been on organized and informal training outings to Crane Island and actually utilizes the area surrounding Crane Island for enjoyment of recreational activities that are dependent upon the conservation resources of Crane Island.

Plaintiff Robert Weintraub also utilizes the area surrounding Crane Island for recreational fishing and utilizes the conservation resources afforded by Crane Island's tree canopy, to photograph resident and migratory birds on this island habitat in the intracoastal waterway for natural photography as an avid wildlife photographer.

All plaintiffs have appeared at public hearings regarding the development order and also appeared at numerous hearings on the prior applications to amend the Comprehensive Plan for Crane Island that were later withdrawn. Robert Weintraub and Eric Titcomb also attended the meeting with the state of Florida Department of Community Affairs at which the County was informed that Policy 1.09.03 should not be used to change the land use designation to increase density on Crane Island without a Comprehensive Plan Amendment. As a remedial statute, section 163.3215 should be

liberally construed to advance the intended remedy, i.e., to ensure standing for any party with a protected interest under the comprehensive plan who will be adversely affected by the governmental entity's actions. Parker v. Leon County, 627 So.2d 476, 479 (Fla.1993); Putnam County Environmental Council, Inc. v. Board of County Com'rs of Putnam County, App. 5 Dist., 757 So.2d 590 (2000); Education Development Center, Inc. v. Palm Beach County 751 So.2d 621, 623 (Fla. 4th DCA, 1999).

Plaintiffs testimony at trial was sufficient to show actual recreational use of the area in question to both conduct kayak outings and engage in wildlife photography, as specific on-going activities related to conservation resources on Crane Island, and that their interests will be adversely affected by the increased inconsistent density, which is an interest protected by the Comprehensive Plan. Plaintiffs testimony is sufficient to show an interest that exceeds the interest of the general public in "community good." Plaintiffs testified as to their personal use and with the specificity that is directly related to their claims and interest in protecting Crane Island from inconsistent development densities.

Upon consideration, the Court finds plaintiffs to be "aggrieved or adversely affected" parties with standing within the purview of Florida Statutes Section 163.3215.

ORDERED AND ADJUDGED

1. The Court finds plaintiffs to be "aggrieved or adversely affected" parties with standing within the purview of Florida Statutes Section 163.3215.

2. The Court finds the density approved by the development order to be inconsistent with the maximum allowable density established by the Nassau County Comprehensive Plan.

3. The Court hereby quashes, reverses and vacates the inconsistent development order granting approval.

DONE AND ORDERED this 22nd day of December 2008

Brian J. Davis, Circuit Judge

Copies to:

Ralf Brookes, Esq.
David Hallman, Esq.
Fred D. Franklin, Jr., Esq.

A TRUE COPY HEREOF
IN ABOVE CASE SIGNED

DEC 22 2008

Circuit Court Judge