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

CORKSCREW GROVE LIMITED PARTNERSHIP, a Florida limited liability company,

Plaintiff,

vs. **CASE NO.: 2019-CA-008183**

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER GRANTING PLAINTIFF'S SECOND AMENDED MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF

THIS CAUSE, coming before the Court on Plaintiff's, Corkscrew Grove Limited Partnership, Second Amended Motion for Summary Judgment as to Count I of the Second Amended Complaint for Declaratory Relief, the Court having considered the pleadings, motions, memoranda, material facts, and authorities submitted by both Parties, and having heard argument from Counsel, it is therefore;

ORDERED that Plaintiff's Second Amended Moton for Summary Judgment as to Count I of the Second Amended Complaint is GRANTED based upon the following:

I. Introduction

1

A. Plaintiff's Claim

Plaintiff, Corkscrew Grove Limited Partnership (Corkscrew Grove) in Count I of its Second Amended Complaint, seeks a judgment granting declaratory relief declaring that the Lee County Board of County Commissioners ("Board" or "County") has violated its own Comprehensive Plan (Lee Plan) by adopting Resolution Z-18-008, Section 1 ("the Resolution"), which denied Corkscrew Grove's application for rezoning.

Count I asserts that the Board's Resolution is, in effect, a "permanent" denial of the future land use potential of the Subject Property for "natural resource extraction," a future land use which was a "permitted" future land use for that Property under the applicable Future land use designation in the 2007 Lee Plan. As a result, Plaintiff contends, the "consistency" requirement of Section 163.3194(1)(a), Fla. Stat. (2019) has been violated by the County.

B. Standards of Review

The standard of review applied to a motion for summary judgment under Fla. R. Civ. P. 1.510, is whether, as a matter of law, it is apparent from the pleading, affidavits, or other evidence, that there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *In Re: Amendments to Florida Rule of Court Procedure 1.510*, (Fla. April 29, 2021) 2021 WL 1684095.

The land use disputes between Corkscrew Grove and Lee County can be categorized as one dealing with the competent substantial evidence required for a rezoning action by the Board and another, separate claim, raising a comprehensive plan "consistency" challenge. The two issues are legally distinct. *Machado v. Musgrove*, 519 So.2d 629, 631-32 (Fla. 3d DCA 1987).

The land use evidentiary dispute between these Parties has been dealt with by the Court in its Order Denying Petition for Writ of Certiorari ("Certiorari Order") in Case No.: 19-CA-8190. The Board's decision in that action was subject to proof of "any competent substantial evidence to support it." Certiorari Order, paragraph 12. In a certiorari proceeding, the Circuit Court, in its appellate review capacity, reviews a local government's zoning action applying the "fairly debatable" deferential standard of review. *Machado*, 519 So.2d at 632; *Lee County v. Sunbelt Equities,* 619 So.2d 996, 1002 (Fla. 2d DCA 1993). This Court applied that deferential standard in denying Corkscrew Grove's Petition for Writ of Certiorari. Certiorari Order, paragraphs 9-12.

Corkscrew Grove's second claim brought in the instant *de novo* suit for declaratory relief, by contrast with the certiorari action, raises the distinct issue of whether the Board's action was "consistent" with the County's applicable comprehensive plan. The test in a consistency challenge, is markedly different

from of a traditional zoning action in that it involves adherence to the "statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality." *Machado*, 519 So.2d at 631-32. "The plan is likened to a constitution for all future development within the governmental boundary." *Id.*

In such a "consistency" challenge, the Court is to apply "strict scrutiny" to both the landowner's initial application and to the Board's action upon that application.

> Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. **It is the antithesis of a deferential review.**
>
> *Machado*, 519 So.2d at 632.
> (Emphasis, the Court's)

> Where the record is silent, or the evidence shows nonconformity with the plan, *e.g.*, that a proposed project constitutes a greater intensity of use, [citations omitted] a lesser intensity of use, a different and incompatible character of use, or a failure to comply with the plan's mandatory procedures, the requested rezoning will be denied as inconsistent with the comprehensive plan.
>
> *Id.* at 633.

This exacting standard of review is applied both to a landowner's application for rezoning, as well as to the local government's action on that application by development order. *Pinecrest v. Shidel*, 795 So.2d 191, 197-202 (Fla. 4th DCA

2001); *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993).

> In addition, all development, both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. [citing § 163.3194(1)(a) . . .
>
> Because an order granting or denying rezoning constitutes a development order and development orders must be consistent with the comprehensive plan, it is clear that orders on rezoning applications must be consistent with the comprehensive plan.
>
> *Snyder*, 627 So.2d at 473-74.
> (Emphasis the Court's).

Plaintiff has advocated this strict scrutiny review for both its rezoning Application and the Board's Resolution at issue. Defendant has concurred, with regard to the review applied to Plaintiff's Application; but has asserted that regarding its own burden, "*the threshold for upholding the Board's action is exceedingly low.*" "*If there is any competent substantial evidence to support the Board's conclusion, it should be upheld.*" Def.'s Second Motion for Summary Judgment as to Count I of Plaintiff's Second Amended Complaint ("Def.'s Sec. and MSJ"), paragraph 15. This level of scrutiny urged by Defendant is identical with the standard of review for certiorari petitions, not for consistency challenges via *de novo* declaratory relief actions. *Machado*, 519 So.2d at 632; *Sunbelt Equities*, 619 So.2d at 1003; *Snyder*, 627 So.2d at 475.

Accordingly, based upon the Court's consideration of the applicable statutes and case law, the Court finds that it must review Plaintiff's application for rezoning, with regard to "consistency" and related "compatibility" issues, with "strict scrutiny," as to compliance with the 2007 Lee Plan. The Court will also apply this exacting standard of review to the County's Resolution Z-18-008, with regard to those same issues.

C. Affirmative Defenses and Additional Defenses

Defendant has offered a variety of procedural defenses both in its Answer and Affirmative Defenses, as well as in its two Motions for Summary Judgment and Alternative Motion for Judgment on the Pleadings as to Count I. The Court has considered each such defense and Plaintiff's responses thereto.

The County's First, Second, Third and Fourth Affirmative Defenses all raise the similar argument, *i.e.*, whether a resolution denying a rezoning application constitutes a "development order" under Section 163.3215(3) and 163.3164, in that the County's denial of Corkscrew's zoning application did not, in itself, "alter" the use of the Subject Property.

Its argument was previously raised in Defendant's Amended Motion to Dismiss. The Court heard argument from the Parties and denied the Motion to Dismiss.

The Court has again considered Defendant's arguments in its Order Denying Defendant's Motion for Summary Judgment, as to Count I of the Second Amended Complaint and fully set out its reasoning therein. Essentially, the very language of Section 163.3215(1)(3) and 163.3164(15) expressly provided that a consistency challenge is applicable for an owner-developer to challenge a "denial" of an application for a development permit. A "development permit" is defined broadly enough by Section 163.3164(16) to encompass a rezoning application for a change in land use, the Court rejects Defendant's interpretation of those provisions. The First, Second, Third, and Fourth Affirmative Defenses are denied.

The County's Fifth Affirmative Defense is that Plaintiff has failed to plead all the elements necessary to establish a "cause of action for an injunction, citing Plaintiff's alleged failure to plead irreparable harm or lack of an adequate remedy at law.

This defense was raised by the County in its Amended Motion to Dismiss. The Court heard argument from the Parties on that defense and denied the Motion to Dismiss.

The County's contention that Plaintiff has attempted to plead "*a cause of action for an injunction*" is not correct. Plaintiff's Count I makes no such plea. The Wherefore Clause of Count I does ask for the relief that the Defendant be

ordered to re-hear Plaintiff's Application "without undue delay or further administrative or Hearing Examiner proceedings in accordance with law."

However, the prayer, or demand for relief in a Wherefore Clause is not part of a plaintiff's cause of action. Thus, the sufficiency of a complaint depends on the facts pleaded, not on the relief prayed for. *Circle Finance Co. v. Peacock*, 399 So.2d 81, 84 (Fla. 1st DCA 1981).

> But the fact that complainant might not be entitled to the exact relief specifically prayed for is not ground for demurrer, if upon the facts alleged and under the general prayer complainant is entitled to any relief consistent therewith.
>
> *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690, 693 (Fla. 1930).

Moreover, Chapter 86, the Declaratory Relief Act, gives the Court wide latitude to fashion the supplemental relief necessary under the facts of the case. Sections 86.061 and 86.101, Fla. Stat. (2019). The Court is not, therefore, bound by the Plaintiff's prayer for relief. The Fifth Affirmative Defense is denied.

The County's Sixth Affirmative Defense alleges that Plaintiff has improperly split its claims by filing a companion certiorari action (Case No.: 19-CA-8190). This defense, too, was raised by the County and rejected by the Court in its Order Denying Defendant's Amended Motion to Dismiss. Subsection 163.3215(4) provides that, "*An action for injunctive, or other relief, may be joined*

with the petition for certiorari." This Court has joined the two actions by Plaintiff for resolution, since Defendant had urged, and Plaintiff agreed, that the "consistency" challenge could not be heard in the certiorari action, but rather, exclusively, in Plaintiff's suit for declaratory relief. The two claims are not improperly split. The Sixth Affirmative Defense is denied.

Defendant's Seventh Affirmative Defense is problematic, but for the County, not Corkscrew Grove. Defendant alleges that Plaintiff's attempt at a rehearing of its application is "*futile*" because "*[g]iven the undisputed fact that 'without a large-scale amendment,' the Comprehensive Plan has prohibited mining on the Subject Property since 2010 . . . the Board is bound by law to deny same*." Def.'s Answer and Affirmative Defenses, paragraph 43.

The difficulty with this Defense raised by the County is that it assumes, contrary to the applicable law of this case, that the zoning rules and law from 2010 are applicable to Plaintiff's claim; rather than, as this Court has previously ruled, the 2007 Lee Plan. Such an assumption by the County is therefore incorrect as a matter of law. The law in this case requires the application of the land use regulations in effect as of September 17, 2007, and not subsequent revisions. Summary Final Judgment, *Old Corkscrew Plantation, LLC v. Lee County*, Case No.: 09-CA-2128. The Seventh Affirmative Defense is denied.

The County's Eighth Affirmative Defense, a repeat of the Seventh, suffers from the same legal misconception as its Seventh Affirmative Defense; that is, the Defendant mistakenly assumes the 2010 amendments to the Lee Plan prohibit any mining on the Subject Property. The Eighth Affirmative Defense is denied.

The County's remaining Affirmative Defenses are applicable to Count II of the Second Amended Complaint and will be dealt with by the Court in a separate Order.

Additional Defenses Raised by Defendant

In subsequent motions, Defendant has raised defenses not asserted in its Answer and Affirmative Defenses. First, the County asserts (the "*Snyder* defense") that "under **strict scrutiny**," Corkscrew Grove must plead and prove that "the existing zoning is *inconsistent* with the Comp. Plan." Citing *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469 (Fla. 1993). Defendant's Motion for Summary Judgment as to Count I of Plaintiff's Second Amended Complaint and Alternative Motion for Judgment on the Pleadings, paragraphs 15-16.

Defendant's argument would be appropriate if Corkscrew Grove were asking this Court, in Count I, to approve its rezoning application; or to rule that the existing Agricultural zoning should be changed to allow a mining use. But those are not Plaintiff's contentions in Count I.

Instead, Plaintiff pleads that its request for rezoning to IPD would be consistent with the 2007 Lee Plan, as appropriately conditioned. *See*, for example Second Amended Complaint, paragraphs 17, 24, 25 and 27. Plaintiff's claim is that the Hearing Examiner concluded that there were no conditions or special restrictions that could be placed on the Application that would protect current and future proximate residential land uses. *Id.*, paragraph 17. Plaintiff alleges, further that the Board "implicitly adopted the Hearing Examiner conclusion" that "'*no condition*' could protect adjacent land areas." *Id.* paragraph 27.

Defendant's argument in this defense assumes that, as in *Snyder, supra* and in *Lee County v. Sunbelt Equities, II, Ltd. P'ship*, 619 Sol2d 996 (Fla. 2d DCA 1993), Corkscrew Grove seeks Court approval of its application to rezone. Neither the Second Amended Complaint, Count I, nor Plaintiff's Motion for Final Summary Judgment, as to Count I make that claim or seek such relief. Therefore, this Defense is denied.

The second additional defense asserted by the County, as to Count I, relies upon this Court's Order Denying Petition for Writ of Certiorari, (Certiorari Order), Case No.: 19-CA-8190, the companion case to the instant Declaratory Relief suit, joined by the Court for disposition. Defendant alleges issue preclusion in the instant action, based upon the Certiorari Order, under the alternative doctrines of

res judicata, collateral estoppel, or "Law of the Case." Defendant's Second Motion for Summary Judgment as to Count I of Plaintiff's Second Amended Complaint.

This Court's Order Denying Defendant's Second Motion sets out a full analysis of why Defendant's issue preclusion defense is rejected. In summary, this defense does not meet the requisite tests for those preclusive doctrines. *Res judicata* is not applicable because the causes of action of Plaintiff's certiorari Petition and its suit for Declaratory Relief are substantially distinct. *Topps v. State*, 865 So.2d 1253 (Fla. 2004); *Denson v. State*, 775 So.2d 288, 290 n.3 (Fla. 2000).

Collateral Estoppel is not applicable herein because the Court did not rule upon the merits of whether the Board's action was inconsistent with the 2007 Lee Plan. *Topps*, 865 So.2d at 1255; *Gordan v. Gordan*, 59 So.2d 40, 44 (Fla. 1952); and *Kent v. Sutker*, 40 So.2d 145, 149 (Fla. 1949). In fact, in the Certiorari Order, this Court specifically declined to rule on the "consistency" and related "compatibility" issues; and expressly deferred ruling on those claims for the instant case. Certiorari Order, paragraphs 5-7, etc.

"Law of the Case" is not appropriate because the merits of the consistency claim were not decided in the prior certiorari case. *City National Bank of Florida v. City of Tampa*, 67 So.3d 293, 299 (Fla. 2d DCA 2011); *Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001); and *Dougherty ex rel. Eisenberg v. City*

of Miami, 89 So.3d 963, 996 (Fla. 3d DCA 2012). Defendant's issue preclusion defense is therefore denied.

D. Core Issues Presented by Count I

The core issues of Count I of the Second Amended Complaint and of Plaintiff's Second Amended Motion for Summary Judgment can be re-phrased as follows.

(1) Under Florida's Community Planning Act, does the Future Land Use Plan of a local government provide a statement of the locations of particular land uses that will ultimately be granted?

(2) Does the 2007 Lee Plan, within its Future Land Use category of DR/GR, state unequivocally the ultimate land uses for the Subject Property that will be eventually permitted including "natural resource extraction"? Lee Plan, Policy 1.4.5.

(3) Does the Board's Resolution Z-18-008, Section 1, denying Plaintiff's application for rezoning, dispositively conclude, in effect, that a natural resource extraction land use on the site for the Subject Property will not be permitted due to the incompatibility of such a use with nearby current and future residential land uses? Two subsidiary questions relate to this inquiry.

(a) Whether Corkscrew Grove's application for a proposed mining use contained "conditions" that would sufficiently mitigate the potential adverse effects of a mining operation on surrounding properties; and, given the findings and conclusions stated by the Hearing Examiner and by the Board's Resolution, were there any conditions that could be proposed that would be consistent with the applicable Lee Plan? And,

(b) Applying the "strict scrutiny" standard, are the Plaintiff's Application for Rezoning and the Board's Resolution denying that Application consistent with the entire 2007 Lee Plan, as applicable?

II. Factual and Legal Background

A. Nature and Uses of Surrounding Properties

Historically, limerock mining has been permitted in Southeast Lee County since the 1970's. Recommended Order, paragraphs 4-5, *Sakata Seed, et al. v. Lee County*, Divis. Of Admin. Hearing, Case No.: 19-3848GM, June 16, 2020 ("*Sakata Seed* R.O."); adopted without modification, Final Order, Case No.: 20-037. Dept. of Economic Opportunity, September 10, 2020. In 1989, through remedial amendments, this area of the County was classified with a future land use designation of Density Reduction/Groundwater Resource (DR/GR), an area expressly permitting "natural resource extraction." Policy 1.4.3, "the Density Reduction/Groundwater Resource," "Non-Urban" Future Land Use category in the

1990 Lee Plan revisions, expressly provided that "permitted land uses include . . . mineral or limerock extraction." This future land use category, although re-numbered to "Policy 1.4.5," was continued with the 2007 Lee Plan, which became effective August 13, 2007.

The land uses proximate to the Subject Property are: To the North, across from SR 82, Lehigh Acres, a 1960's platted "Urban Community" area with a strip of commercially zoned property line SR 82 and a balance of platted, but largely unimproved residential lots. Hearing Examiner ("HEX") Recommendation, pages 5-6.

To the South, immediately adjacent to the Subject Property, a DR/GR designated, approved limerock mine with blasting, Westwind Titan mine (previously, "Corkscrew Mining IPD," Z-01-016), with the balance of the southern Subject boundary still in the DR/GR, land zoned AG-2, (agricultural). Staff Report, page 3; HEX Recommendation, page 6.

To the west, more DR/GR land, a 400-acre County Conservation area, Eden Ski Lake, the Bell Road mine, Troyer Brothers Mine, Florida Rock Mine #2, and Harper Brothers (Florida Rock) mine. Staff Report, pages 2-4; Affidavit #2 of Daniel DeLisi, Maps 1 – 4, Appendix 26 to Plaintiff's Second Amended Motion

for Summary Judgment (Plaintiff's MSJ).[1] Bell Road mine is, like the Subject, immediately across SR 82 from Lehigh acres. This mine, originally approved as fill dirt mine, with no blasting (Resolution Z-04-047) has been recently approved for continued use as a limerock mine with permitted blasting, excavation, rock crushing, open storage of materials and associated uses. Resolution Z-20-024. Bell Road mine is also adjacent to a portion of the west side of Subject Property. The change in mining operation for Bell Road mine was authorized on September 16, 2020, subsequent to the HEX Recommendation (April 4, 2019); and to the Board's Resolution (November 6, 2019), but is part of the record of the instant action (Appendix 7 to Plaintiff's MSJ). The Troyer Brothers mine, also to the west of the Subject Property, is 1,732-acres in size. Troyer Brothers recently obtained an IPD limerock mining approval, with blasting. Resolution Z-18-022, adopted August 21 2019, less than three months before the Board's Resolution in this

[1] Defendant has objected to Affidavit #2 by Daniel DeLisi (Pl.'s Appendix #26). The Court has reviewed the Affidavit and finds that the statement and materials therein are admissible at trial and therefore is a proper affidavit for the Court to consider in this summary judgment proceeding. Defendant's objection is overruled.

matter. (Appendix 8 to Plaintiff's MSJ).

To the east, a portion of platted Lehigh Acres, zoned commercial, RM-1, and RS-1. Also to the east of the Subject, within the DR/GR designation, accessed by Wildcat Drive, is a large-lot residential area known as Wildcat Farms. There are approximately 33 properties that are on the eastern boundary of the Subject Property. Staff Report, pp. 2-3. Affidavit #2 of Daniel DeLisi, Map 5 (Appendix 26 to Plaintiff's MSJ). Most of the homes permitted by the County in the Lehigh Acres area south of SR 82 and in Wildcat Farms on the eastern border of the Subject Property were permitted by the County after the County adopted the 1989 Lee Plan, designating the area DR/GR and permitting natural resource extraction, but before the 2007 Lee Plan was adopted in August 2007. *Id.*, p. 3 and Map 5; Lee County Ordinance 89-02.

Thus, at the time of the Board's adoption of the 2007 Lee Plan, effective August 2007, and of the DR/GR future land use designation placed on the Subject, the Board knew, or should have known, of the character of the lands adjacent to, and in proximity to, the Subject Property.

B. The Application

Corkscrew Grove's application, DCI-2011-00007, sought a rezoning of the Subject Property, located in the DR/GR future land use category, from Agricultural

(AG-1) to Industrial Planned Development (IPD) and approval of a General Mining Permit to allow an aggregate (limerock) mining operation with blasting and dewatering. Staff Report, p. 1 (Appendix 25, Plaintiff's MSJ).

The Subject Property consists of approximately 4,202 acres, of which 1,727 acres was proposed to be excavated (41% of the site). The balance of the Subject Property was proposed for maintenance/processing/administrative areas, roads, and 1,694.5 acres of wetlands and preserves, plus 578.1 acres of other open space. Staff Report, p. 1.

C. Staff Report

The Lee County Planning Staff reviewed Plaintiff's application, and on March 13, 2018, issued its "Staff Report," recommending "Approval" of the Applicant's request with "conditions." Staff found Corkscrew Grove's application, as conditioned, in compliance with, and "consistent" with, the 2007 Lee Plan. Staff Report, p. 5.

> As conditioned, the requested IPD meets all the criteria for rezoning, complies with the LDC, is compatible with existing and planned uses in the surrounding area, and will not adversely affect environmentally critical or sensitive areas or natural resources . . . . Staff also finds that the [Staff's] proposed conditions provide sufficient safeguards to the public interest and that the conditions are reasonably related to the impacts on the public's interest and based on requirements of the LDC [Land Development Code] and consistency with the Lee Plan.
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> *Id.*, p. 16.

D. Hearing Before Hearing Examiner

In 2018, extensive factual hearings were conducted before a County Hearing Examiner ("HEX"). During its presentation, the Applicant, Corkscrew Grove, presented the testimony of its Property Manager, and consultants in the areas of land planning, mining, traffic, noise/vibration from blasting, hydrology, surface water, environmental issues, and appraisal findings related to impact, if any, on residential values from nearby mining operations. HEX Hearing Transcripts ("HEX Tr.") (Appendices 19 – 24 to Plaintiff's MSJ).

Staff presented testimony from expert consultants in the fields of planning, traffic engineering, and noise/vibration from blasting. HEX Tr., (Appendix 20, 23, Plaintiff's MSJ).

Public testimony was accepted from twenty-one citizens, expressing opposition to the proposed mining operation. *Id.* (Appendix 21, Plaintiff's MSJ). This Court has previously found such lay testimony as competent and substantial evidence with regard to the issues raised in Corkscrew Grove's Petition for Writ of Certiorari, except as may relate to the "consistency" and related "compatibility" issues raised in the instant complaint for declaratory relief. Certiorari Order, paragraphs 13, 15, 22, 29, 31-32, 35-36, and 37-40.

Several of these lay witnesses testified to annoyance by noise from the active Youngquist (West Lakes) mine and the active Titan (Westwind) mine, at distances from 2.5 miles to as close as 300 – 600 feet. HEX Recommendation, page 26 fn 207. The Court notes that no witness presented testimony or documents evidencing any court action for nuisance filed by any resident near active mines.

Of further relevance is the appraisal study by Matt Simmons presented by the Applicant. Mr. Simmons found that there is no fact-based evidence of any decrease in values to single family homes in proximity to active limerock mines. HEX hearing, Tr. 132-165 (Appendix 22, Plaintiff's MSJ). This testimony was uncontradicted.

Finally, with special relevance to "consistency" with the 2007 Lee Plan, the affidavit #2 of Daniel DeLisi (Map, attachments 1 – 4), demonstrates the proximity of permitted Single family housing from 250 feet to 950 feet of the Youngquist (West Lakes) mine, the Florida Rock #2 mine, and the Bell Road mine. All mines approved by the Board of County Commissioners. (Appendix 26, Plaintiff's MSJ).

E. Post-Hearing Submittals of Conditions

After the close of testimony on June 12, 2018, at the request of the Hearing Examiner, Corkscrew Grove and Staff submitted post-hearing material related to conditions proposed for the mining operation. Affidavit of Brandon Dunn submitted by Defendant, with attached Memorandum from County Department of

Community Development, dated July 30, 2018; and Affidavit of Neale Montgomery, with attached conditions, dated July 2, 2018, (Appendix 40), submitted by Plaintiff under separate cover from Plaintiff's MSJ.[2]

These post-hearing affidavits demonstrate a difference of opinion between Staff and the Applicant, regarding the sufficiency of the conditions each side proposed to the Hearing Examiner. There is, however, one uniformity between the conditions presented by Staff and those offered by Corkscrew Grove, in that both agree that the Applicant's rezoning request is "consistent" with the Lee Plan, as conditioned. The Hearing Examiner did not agree.

F. Hearing Examiner Recommendation

The Hearing Examiner's Recommendation, dated April 4, 2019, found the Corkscrew Grove Application "*inconsistent*" with the Lee Plan "*because it is incompatible with long-established, and on-going residential development patterns in the area.*" HEX Recommendation, p. 33. The Hearing Examiner conclusively stated that "*there is no protecting the residential environment from intrusions of blasting and noise from [mining-related vehicles and equipment]*". *Id.* p. 34, fn 246. The Hearing Examiner concluded that a large-scale mining operation on-site

[2] Defendant has objected to the admissibly of this affidavit (Appendix 40); however, the Court concludes that the statement and materials included therein would be admissible, if testified to at trial. Therefore, Defendant's objection is over-ruled.

was "*inappropriate*" given the proximity of surrounding residential uses; *Id.* p 35 and that "*[i]t is not possible to devise conditions to adequately protect the character and integrity of surrounding residential communities.*" *Id.*, p. 35, fn 251.

The Hearing Examiner found that although there are existing County and State objective performance standards for noise and blasting (HEX Recommendation, p. 28), the legal operation of a limerock mine would effectively be a "nuisance" to residence near the Subject Property. Id. pp. 26-29. The Hearing Examiner reached the "legal" conclusion that, "*. . . noise and vibrations may constitute a nuisance without violating the [governing] noise ordinance or the Florida Statutes.*" HEX Recommendation, p. 26. This conclusion is reached despite the acknowledgment that the State of Florida has legislatively pre-empted any local regulation of blasting per Section 552.30, Fla. Stat. HEX Recommendation, p. 29, fn 209.

The Hearing Examiner did not receive, nor cite, any evidence explaining why existing mines, such as Youngquist (West Lakes) and order Florida Rock #2, Harper Brothers, and Westwind (Titan) were permitted by the County even though similarly proximate to residential area, as the Subject Property.

Except for a brief citation on page 6 of the Recommendation, footnote 28, the HEX Recommendation, 39 pages in length, gives no detailed discussion of the DR/GR Policy 1.4.5 (expressly permitting "natural resource extraction"), Map 1, the Future Land Use Map (FLUM) of Policy 2.2.2 (providing the purpose and authority of the FLUM and stating that the FLUM designates future land uses that "will ultimately be permitted on a given parcel.") Plaintiff's Count I, alleging that the Board's Resolution is inconsistent with the Lee Plan, relies substantially on the Court's review and interpretation of those Policies and of the Future Land Use Map.

The Findings and Conclusions by the Hearing Examiner, containing citations to the Lee Plan and County Land Development Code (LDC) regulations, are identical to those Findings and Conclusions subsequently relied upon and adopted by the Board in Resolution Z-18-008. Those Findings and Conclusions will be discussed by the Court in connection with its analysis of the Resolution.

III. Analysis

A. The Applicable Lee Plan

Analysis of the Plaintiff's claim that the Resolution (Development Order) is inconsistent with the Lee Plan must begin with a discussion of which Lee Plan is applicable to Plaintiff's Application.

In response to concern about protection of the DR/GR area of Southeast Lee County, the Board in 2007, adopted a Moratorium for Southeast Lee County on the submittal and processing of zoning applications. Ord. 07-34.[3] The purpose of the Moratorium was to provide a study period to allow the implementation of a specific plan and corresponding regulations for the DR/GR area. *Id.*, p. 3.

The date of adoption of Ord. 07-34 was December 4, 2007, although the terms of the ordinance provided for retroactive effect to September 11, 2007. Subsequently on February 12, 2009, this Court, in another case involving a mining application within the DR/GR, *Resource Conservation Holdings, LLC ("RCH") v. Lee County*, Case No.: 08-CA-18477, ruled the Moratorium void *ab initio*, as to zoning applications to the County which were submitted prior to December 4, 2007.

On September 17, 2007, Plaintiff's predecessor-in-title, Old Corkscrew Plantation, LLC ("OCP") submitted to Lee County its application for a rezoning of the Subject Property to a mining use. Lee County Staff, upon instruction by the Board, and before the adoption of the moratorium, rescinded the Staff's initial acceptance of OCP's application. After the RCH Order was entered, and in

[3] Plaintiff has asked the Court to take Judicial Notice of Ordinance 07-34 per Section 90.202(10), Fla. Stat. Defendant has objected to the admissibility of that County Ordinance. The Court over-rules the Defendant's objection and grants judicial notice of this Ordinance, finding it relevant to the material issues herein.

conformance therewith, OCP then resubmitted its application for rezoning on May 8, 2009, in accordance with County zoning rules in effect on September 17, 2007. When the County still refused to accept OCP's application, OCP then sought extraordinary relief from the Court in *Old Corkscrew Plantation, LLC v. Lee County*, Case No.: 09-CA-002128. Subsequently, this Court issued a Summary Final Judgment against Lee County directing that OCP's rezoning application be processed in accordance with the zoning law and rules in effect as of September 17, 2007. That ruling is applicable to the instant application of Corkscrew Grove Partnership. OCP's renewed Application was re-submitted in March 2011, as DCI-2011-00007. HEX hearing, Tr. 214 (App. 20, Plaintiff's MSJ).

The current owner of the Subject Property, Corkscrew Grove Limited Partnership, acquired the Old Corkscrew Plantation property in September, 2016. Corkscrew Grove was assigned all of OCP's rights in the Subject Property including assignment of all of OCP's interests in its mining application. Affidavit # 2 of Mitchell A. Hutchcraft (Appendix 39, Plaintiff's MSJ).[4] In November 2017, Plaintiff, as the new owner of the Subject Property, and as the "official applicant of record," asked County Staff for an extension of time in which to resubmit the

[4] By Stipulation, Defendant has withdrawn its prior objection to Appendix #39, provided paragraphs 10 and 11 thereof should not be utilized. Plaintiff has agreed. The Court accepts this stipulation.

application filed by Old Corkscrew Plantation in 2011 (DCI 2011-00007). *Id.*, Exhibit "G." The County granted Plaintiff's request. *Id.*, Exhibit "H."

The County's Staff Report acknowledged the applicability of this Court's ruling in Case No.: 09-CA-002128, and asserted that "the applicable Lee Plan and LDC provisions in effect as of September 17, 2007" were the basis for Staff's review of Plaintiff's application, Staff Report, p. 1.

The Court's recitation of the history of Plaintiff's rezoning application is provided due to the Plaintiff's asserted applicability of the 2007 Lee Plan in paragraph 15 of its Second Amended Complaint, and Defendant's explicit denial of same in its Answer and Affirmative Defenses thereto. *Id.*, paragraph 15. Defense Counsel has, furthermore, contrary to the acknowledgement by County Staff, the Hearing Examiner and the Board, urged repeatedly that this Court consider Plaintiff's Second Amended Motion for Summary Judgment (and earlier Corkscrew Grove's Petition for Writ of Certiorari) in light of amendments to the Lee Plan occurring in **2010**, effective March 2012. *See*, initially, Defendant's Answer and Affirmative Defenses, Seventh Affirmative Defense (". . . *the Comprehensive Plan has prohibited mining on the Subject Property since 2010* . . .") and Eighth Affirmative Defense (repeating the Seventh Defense); Response to Petition for Writ of Certiorari pages 34-36; and Defendant's Response in Opposition to Plaintiff's Second Amended Motion and Supporting

Memorandum for Final Summary Judgment, pages 12-13 (citing an "*overlay area*" provided in Ordinance 10-19, and the County's 2010 "*Tier*" system for the DR/GR, including the Subject Property).

To reiterate, the Plaintiff's rezoning application for the Subject Property is to be considered in light of the zoning laws in effect as of September 17, 2007, not by subsequent amendments to the Lee Plan.

B. The Florida's "Community Planning Act" and the 2007 Lee Plan

Analysis of the 2007 Lee Plan as it relates to Count I of the Second Amended Complaint and Plaintiff's Motion for Summary Judgment thereon should be informed by Florida's Community Planning Act, ("the Act") Section 163.3161 *et seq.*

The purpose of this Act is "*to strengthen the existing role, processes and powers of local governments in the establishment and implementation of comprehensive planning programs* ***to guide and manage future development*** *consistent with the proper role of local government.*" Section 163.3161(2). (Emphasis, the Court's).

It is the intent of the Act that implementing their comprehensive plan, local governments must apply their plans "*with sensitivity for private property rights*

and [the plans and regulations] not be unduly restrictive" . . . or "*constitute an inordinate burden on property rights . . . .*" Section 163.3161(10).

The Act gives local governments both the power and responsibility to plan future development and growth and to adopt comprehensive plans "*to guide their future development and growth.*" Section 163.3167(1)(a), (b). (Emphasis, the Court's). Accordingly, the Act requires that each government "*shall establish meaningful and* ***predictable*** *standards for the use and development of land . . .*" Section 163.3177(1). (Emphasis, the Court's).

All mandatory and optional elements of the comprehensive plan "*shall be based upon relevant and appropriate data and analysis . . .*" Section 163.3177(1)(f). (Emphasis, the Court's). One of the mandatory elements of any comprehensive plan is a "*future land use plan*" which *shall* designate "*proposed future general distribution, location, and extent of the uses of land . . .*" Section 163.3177(6)(a). (Emphasis, the Court's). "*The [Future Land Use] element shall establish the long-term end toward which land use programs and activities are ultimately directed.*" "*The proposed distribution, location, and extent of the various categories of land use shall be shown on a land use map . . . which shall be supplemented by goals, policies, and measurable objectives.*" Section 163.3177(6)(a)1. (Emphasis, the Court's).

The future land use plan, based upon "*surveys, studies, and data regarding the area*" (Section 163.3177(6)a.2) must include criteria to be used to: "***Provide for the compatibility of adjacent land uses***." Section 163.3177(6)(a)3.g. (Emphasis, the Court's). And, also significant to this case, *"[t]he several elements of the comprehensive pan shall be consistent;*" and, . . . *"[e]ach map depicting future conditions must reflect the principles, guidelines, and standards with all [plan] elements* . . . ." Section 163.3177(2). (Emphasis, the Court's). In other words, the future land use map is required to be drawn in based upon objective data and in coordination with, and consistent with, all of the overall plan's elements.

"Compatibility" is defined in the Community Planning Act as "*a condition in which land uses can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.*" Section 163.3164(9). (Emphasis, the Court's).

Compatibility with surrounding land uses and "*consistency,*" with the applicable comprehensive plan are, as acknowledged by the County, "*closely related concepts.*" *Response of Respondent Lee County Board of County Commissioners*, (County's Certiorari Response), p. 14. Logically, questions

concerning "*compatibility*" of a proposed use necessarily involve whether that proposed use is "*consistent*" with the local government's Future Land Use Map for that area. This Court's Certiorari Order repeatedly reaches this conclusion. Certiorari Order, paragraphs 13, 15, 22, 29, 31-32, 35-36, and 37- 40 (wherein the Court expressly reserved ruling on compatibility issues, as related to consistency).

C. The 2007 Lee Plan – Future Land Use

The 2007 Lee Plan is the source of authority for all of Lee County' land development regulations applicable herein. All citations by the Court to the "Lee Plan" will reference the 2007 comprehensive plan, unless expressly noted otherwise. The Lee Plan, adopted in compliance with the Growth Management Act, "*represents the community's vision of what it will, or should, look like by the end of the (2030) planning horizon.*" Plan, I-1. The Plan intends that "*growth patterns will continue to be dictated by a Future Land Use Map ("FLUM") that will not change dramatically during the time frame of this plan.*" *Id.*, I-1. (Emphasis, the Court's).

Concern for "compatibility" of land uses is apparent throughout the Lee Plan. The Lee Plan's land use accommodation is "*based on an aggregation of allocations for 22 Planning Communities.*" Each "*community*" is "*designed to capture the unique character of each of these areas of the County.*" *Id.*, I-1. The Subject Property is in Planning Community 18, "*Southeast Lee County.*" *Id.*, I-8,

and Map 16. The Plan provides: "*This 'community' consists of mining operations, agricultural uses, and very large lot residential home sites.*" The community "*is not expected to change in character through the year 2030.*" *Id.*, I-8. (Emphasis, the Court's). Clearly, mining was contemplated by the Lee Plan as an acceptable land use in the Southeast Planning Community, along with the other specified land uses. None of the other twenty-one (21) Planning Communities expressly declares "*mining operations*" as a recognized community land use. These Planning Communities and accompanying Map 16 are similar to the "Neighborhood" plans discussed in detail in *Machado*, 519 So.2d at 634-635 (emphasizing the importance of following the plan in order to avoid *ad hoc*, "spot zoning").

The Future Land Use Map in the Lee Plan is guided and controlled by Goal 1, therein. Again, "compatibility" of land uses is addressed thereby. The purpose of the Future Land Use Map, established in Goal 1, is *"[t]o maintain and enforce a Future Land Use Map showing the proposed distribution, location, and extent of future land uses by type, density and intensity . . . ."* *Id.*, p. II-1. (Emphasis, the Court's).

Policy 1.1.1 adopts the Future Land Use Map ("Map 1") "*as the pattern for future development . . . within the unincorporated portion of Lee County.*" *Id.*, p. II-1. Map 16 (the Planning Communities Map) and Table 1(b) (acreage

allocations) are designated as "*an integral part of the Future Land Use Map series (see Policies 1.7.6 and 2.2.2).*" Map 16 and Table 1(b) "*depict the extent of development through the year 2030).*" *Id.*, II-1.

In 2007, Table 1(b) designated 65 acres for "industrial" uses, a designation not encompassing mining activities, other than actual rock processing plants. Mining uses were considered in the 2007 Lee Plan as "*Active Agricultural,*" along with other agricultural uses, 15,101 acres in all. Appendix, Lee Plan, Table 1(b) – "Year 2030 Allocations;" and *Sakata Seed,* R.O., paragraphs 16, 20-21.

Also indicating the County's pre-2010 treatment of mining as "Active Agriculture" is Policy 1.7.8 regarding the Agricultural overlay (Map 20) which shows "*existing active and passive agricultural operations in excess of 100 acres located outside the Future Urban Areas.*" *Id.* page II-14. Map 20 in the 2007 Lee Plan overlays "*Agricultural Areas*" on lands which were active/approved mines along Alico Road. *See* Affidavit #2 of Daniel DeLisi, Map 1 (Appendix 26, Plaintiff's MSJ).

Objective 1.4 "*Non-Urban Areas,*" designates areas not immediately anticipated for urban development. *Id.,* II-9. These non-urban areas contain seven (7) distinct land use categories in Policies 1.4.1 – 1.4.7.

Policy 1.4.5 under Objective 1.4 is the "*Density Reduction/Groundwater Resource (DR/GR)*" Non-Urban area. That Policy expressly provides: "*Permitted*

land uses include agricultural, natural resource extraction and related facilities, conservation uses, publicly-owned gun range facilities, private recreation facilities and residential uses at a maximum density of one dwelling unit per ten acres (1 du/10 acres)." *Id.*, II-10. (Emphasis, the Court's). None of the other six (6) Non-Urban categories expressly permit "*natural resource extraction*" (or, mining operations). The Subject Property is located within the DR/GR Future Land Use Category, as depicted in the Lee Plan's, Future Land Use Map, Map 1, page 1.

Goal 2: Growth Management, sets out the location and timing of new development. *Id.*, II-16. Policy 2.2.2, also referenced in Policy 1.1.1, states: "***Map 1 of the Future Land Use Map series indicate the uses and density ranges that will ultimately be permitted on a given parcel.***" *Id.*, II-17. (Emphasis, the Court's). Although Policy 2.2.2 also makes clear that being in the FLUM "*is not a guarantee that such densities or uses are immediately appropriate, as the map provides for the county's growth over the next 26 years.*" *Id.*, II-17. (Emphasis, the Court's). This Policy is in conformity with the Supreme Court's statement in *Brevard County v. Snyder, supra*, the ". . . the fact that a proposed use is consistent with the Plan means that the planners contemplated that the use would be acceptable at some point in the future." *Snyder*, 627 So.2d at 476. (Emphasis, this Court's).

In order to guide the rezoning process, Policy 2.2.2 provides three additional factors to be balanced with the overall policies and standards of the plan. Those factors are: (1) whether public facilities would be unduly burdened; (2) where a proposal is so far beyond existing development that approval should be delayed; and (3) whether a proposal would result in unreasonable expectations in light of the acreage limitations in Table 1(b), referencing Policy 1.7.6 and Map 16. The Court notes that none of the three listed criteria for limiting the timing of a rezoning approval in Policy 2.2.2 were factors in the decisions of either the Hearing Examiner Recommendation or the Board's Resolution denying Corkscrew Grove's application.

D. 2007 Lee Plan – Other Related Goals, Objectives, Policies

There are four (4) additional Goals (with associated Objectives and Policies) which are relevant in this matter since they are expressly referenced in the Board's Resolution. Those Goals, Objectives and Policies from the 2007 Lee Plan are listed in the Resolution, Section C, Subsection 1, "*Findings and Conclusions*:"

1. Goal 7, Objective 7.1, Policies 7.1.1.(2), 7.1.2, 7.1.3, 7.1.8 and 7.1.10;
2. Goal 10, Policy 10.1.4;
3. (From Goal 135), Policies 135.9.5 and 135.9.6;
4. (From Goal 5), Objective 5.1 and Policy 5.1.5.

Goal 7: "Industrial Land Uses" relates to "industrial development" within the "Urban" areas of the County. "Industrial Development" is a specific future land use category in the Urban area; and is set out in Policy 1.1.7. The Subject Property is not within the Urban area of the Lee Plan, nor is it in the "Industrial Development" future land use category. Mining is regulated, in the 2007 Lee Plan, by Goal 10, "Natural Resource Extraction," and its associated Objectives and Policies

The Lee Plan's "Non-Urban" area (Objective 1.4) contains the "Density Reduction/Groundwater Resource" DR/GR future land use category. The Subject Property is within the Non-Urban area, DR/GR future land use category. It is this category which expressly permits "natural resource extraction" (mining). Goal 10 is applicable; not Goal 7. As discussed above in Section C, under the 2007 Lee Plan, the County treated mining as "Active Agriculture," not as "Industrial." It was not until the adoption of Ordinance 10-19 and 10-20 in March 2010 that mining land became allocated as "Industrial." *Sakata Seed* R.O., paragraphs 10, 14, 15, 16, 20, 23 and 24.

Thus, the Board's extensive references to Goal 7, "Industrial Land Use," are irrelevant to Plaintiff's Application, which must be processed and reviewed under the regulations in force as of September 17, 2007.

Goal 10, National Resource Extraction (a separate and distinct Goal from "*Industrial Land Uses*" in Goal 7) relates to the mining uses permitted by the Future Land Use Element. Goal 10 is designed "*to protect areas containing identified natural resources from incompatible urban development, while insuring [sic] that natural resource extraction operations minimize or eliminate adverse effects on surrounding land uses and natural resources.*" *Id.*, II-39. (Emphasis, the Court's). Notably, Goal 10 addresses many of the same issues of compatibility concern which are provided in Goal 7 and the Policies thereunder. It is not reasonable to assume the Board in 2007 intentionally meant to provide repetitive surplusage in Goal 10, if natural resource extraction were already dealt with in Goal 7.

Goal 135, Housing, is further removed from relevance to the facts in this case, since the Goal relates to "*decent, safe, and sanitary housing or suitable neighborhoods at affordable costs . . . .*" *Id.*, VIII-1. Objective 135.9, "*Neighborhood and Housing Conservation,*" refers to conservation of existing housing and improvements of neighborhood quality, "*through the Neighborhood District Program,*" affordable housing, community redevelopment, and development regulations. *Id.*, VIII-8. The Policies within this Objective cited in the Board's Resolution, 135.9.5 and 135.9.6 do relate generally to "*compatibility*"

with an area's existing character, and requires minimization of adverse impacts on adjacent residential properties. *Id.*, VIII-9.

Goal 5 – Residential Land Uses, "relates to sufficient land in appropriate locations on the future land use map . . ." to accommodate growth through 2030. Policy 5.1.5 provides with regard to Planned Development rezonings, that adequate "conditions" be required to minimize or eliminate the effect from "potentially incompatible" uses. And, "where no adequate conditions can be devised, the application will be denied."

One further portion of the Lee Plan is significant to disposition of the claims herein, Section XIII, Procedures and Administration. In subsection a. of the Plan, "*Effect and Legal Status of the Plan*," the terms "*consistent with*" and "*in conformity with*" are defined as follows:

> all development actions or orders will tend to further the goals, objectives, and policies of the plan **and will not specifically inhibit or obstruct the attainment of articulated policies**. Where goals, objectives, or policies of particular elements appear to be in conflict, such conflicts will be resolved upon an analysis of the entire Lee Plan as it may apply to the particular area at issue.
>
> *Id.*, XIII-1. (Emphasis, the Court's).

E. The 2010 Amendments to Lee Plan

On March 3, 2010, the Board adopted three Ordinances relating to the DR/GR area, two of which directly impacted mining uses within that area, Ord. 10-19 and 10-20. Several large tracts of land, including the Subject Property, were designated in Ord. 10-19, as "*Priority Restoration Strategy*," Tiers 1 – 7. The Subject Property was targeted on new Map 1, page 4, partially as Tier 5 and partially, Tier 6. Also, amended was the County's 2030 Allocation Table for available land use, Table 1(b). This amendment to Table 1(b) shifted 7,181 acres allocated from "active agriculture" to "industrial." Ord. 10-19, Table 1(b), page 2; *Sakata Seed,* R.O., paragraphs 23-24.

Ordinance 10-20 substantially amended Policy 1.4.5, the DR/GR Future Land Use Policy, amending May 14 to identify a mining area near the "*traditional Alico Road industrial corridor*" for continued limerock mining. That area excluded the Subject Property. Limerock mining was, per newly amended Policy 10.1.4, "*permitted only in accordance with Objective 33.1 and its Policies.*" In Policy 33.1.1, limerock mining was, for the first time in the Lee Plan described as "*a high-disturbance activity whose effects on the surrounding area cannot be completely mitigated.*" That Policy restricted mining approvals to areas, unlike the Subject Property, designated on amended Map 14. Rezonings were specifically not allowed unless within the Alico Road area of Map 14. The Subject Property

was, thus, removed from any limerock mining potential, absent an amendment to the Lee Plan. It is this Policy, among other Plan amendments from Ord. 10-19 and 10-20, that the Defendant has urged the Court to apply to Plaintiff's Application and to its Count I herein, Defendant's Answer and Affirmative Defense, Seventh and Eighth; Defendant's Response in Opposition to Plaintiff's Second Amended Motion and Supporting Memorandum for Final Summary Judgment, page 12-13; and Defendant's Response to Petition for Writ of Certiorari, pages 34-36.

In accordance with this Court's ruling in Case No.: 09-CA-002128, however the Subject Property was recognized by Staff as appropriately processed under the 2007 Lee Plan and not the 2010 amendments to the Plan. Both the Hearing Examiner and the Board facially acknowledged the exclusive applicability of the 2007 Lee Plan to Plaintiff's rezoning application. Nothing submitted by Defendant in this action has altered the Court's prior ruling in this regard.

F. Board's Resolution

1. The Board's Findings and Conclusions

Over twelve years after the initial application of Old Corkscrew Plantation was refused by the County and after a prolonged hearing before the County Hearing Examiner (HEX), the Board heard Corkscrew Grove's application on November 6, 2019. The Board was aware that it was bound by the Record, and

had thoughtfully reviewed the Hearing Examiner's Recommendation. Certiorari Order, paragraph 20. The resulting Resolution, Z-18-008, was adopted on the same day as the hearing.

Although not "required" by law to do so, the Board expressly set out its grounds for denying Plaintiff's Application. These "*Findings and Conclusions*" are useful to the Court in understanding the reasoning behind the Board's action. The Resolution states that the Application was denied "***based on** the findings set forth in Section C*." Resolution, page 2. (Emphasis, the Court's). Section C begins with the acknowledgment that the Board was proceeding under the 2007 Lee Plan. However, the findings set out in the Resolution, in part, apparently contradict that acknowledgment.

The first seven Goals, Objectives or Policies listed by the Board as the bases for its denial are related to *Goal 7, "Industrial Land Use."* As noted above, this support may have been appropriate after the 210 Plan; however, in 2007, the County Plan considered mining operations to be "Active Agricultural" and not "Industrial," except for any rock processing plants associated therein. Therefore, the Board's reliance on Goal 7, and its Objectives and Policies, is not in accordance with this Court's prior ruling, applicable in this action, that the Subject Property's rezoning application be processed under the County's land use regulation as of September 17, 2007.

To the extent that the Board relied upon Goal 7, the Board concluded regarding the Subject Property that it was an: "*unsuitable location for industrial development given proximity of established residential development patterns.*" *Id.*, Subsection 1.a. The Board's intent regarding the unsuitability of Plaintiff's property for a mining use is also evidenced in its citation in subsection C.1.e. to Policy 7.1.3 – "*Site not appropriate because proposed mining operation is incompatible with neighboring land uses.*" These findings conclude that, regardless of conditions, the site is unsuitable for natural resource extraction. This is the same conclusion reached by the Hearing Examiner's Recommendation, page 28, fn 189; page 34, fn 246; and page 35, fn 251.

The Board also cites Goal 10 – "*Natural Resource Extraction*" (which is applicable to this case) – "*[t]he proposed conditions do not sufficiently minimize adverse effects of mining operation on surrounding land uses.*" Resolution, page 3, Subsection C.1.h. (Emphasis, the Court's).

Policy 10.1.4 is also referenced by the Board – "*[the] proposed mining operation will have significant adverse effects on surrounding residential land uses from noise, vibrations, and dust.*" *Id.*, Subsection C.1.i. (Emphasis, the Court's).

Both Goal 10 and Policy 10.1.4, unlike the Board's reference to Goal 7, relate, not to inherent "*incompatibility*" of a mine at that location, but rather to

issues with the "*proposed mining operations*;" that is, to the mine's specific operational characteristics. Those characteristics are intended by Policy 10.1.4, to be tampered by "special restrictions," or conditions, that may be necessary to be attached during the rezoning process.

Goal 135, "*Housing*" and Objective 135.9 "*Neighborhood and Housing Conservation*" as discussed above, of remote relevance to the facts at bar. Two Policies are nevertheless cited by the Board's Resolution under that Goal. Policy 135.9.5 – "*A large scale mining operation adjacent to established residential neighborhoods will not improve the area's character.*" *Id.*, Subsection C.1.j; and Policy 135.9.6 – "*The proposed IPD does not acceptably minimize adverse impacts upon residential property.*" *Id.*, Subsection C.1.k. Policy 135.9.6 like Policy 10.1.4, relates to a specific mining operation, and to the "conditions" proposed by the Applicant, not to an inherent incompatibility of such a land use.

The Board's reference to Goal 5 and Policy 5.1.5 in Subsection C.1.b., states that "*the LDC and special conditions offered by Staff and applicant to not adequately minimize potential impacts to existing and anticipated future residential land uses near the proposed mine.*" As such, the Board's Findings and Conclusion regarding Goal 5 refers to the proposed mining application and the appropriate "conditions" to attach to the requested rezoning.

The Board's interpretation of Goal 7 and Policy 135.9.5, by contrast to the other Plan references, appears to declaratively conclude that any significant mining use of the Subject Property would be inappropriate or incompatible with the surrounding area.

The remainder of the Board's bases for its Findings and Conclusions, Subsection C.1.l.-v., are Land Development Code (LDC), regulations not Comprehensive Plan provisions. As required by Chapter 163, those regulations also must be consistent with the comprehensive plan. The cited regulations deal with the specific IPD proposed operations, and not *per se* incompatibility of a mining use at the Subject site. Like Goal 10 and Policy 10.1.4, and Goal 5, Policy 5.1.5, the listed LDC sections logically refer to specific "conditions" or limitations proposed to minimize any adverse effects caused by the Plaintiff's proposed mining use.

Conclusions of Law

The decision, reached by the Board in its *quasi-judicial* rezoning capacity, that any mining use would be incompatible with surrounding lands conflicts with the 2007 Board's *legislative* determination that "*natural resource extraction*" is an ultimately acceptable and compatible land use for the Subject Property. Lee Plan, Policy 1.4.5 and Map 1, page 1 and Policy 2.2.2.

Nuisance, under Florida law, is within the Legislature's power to declare. 38 Fla. Jur. 2d "Nuisance" § 12, although ultimately the matter is a judicial question. *Id.* No evidence has been presented to the Court in this proceeding, or referenced from the administrative hearings below, that any active mine in Lee County has been declared a "nuisance," regardless of the proximity of residential uses. The question of "nuisance" is not simply whether the neighbor is annoyed and disturbed, the issue is whether there is an injury to a neighbor's substantial legal right. 38 Fla. Jur. 2d "Nuisance," § 21.

Insofar as the Resolution determines that a mine at the Subject site is simply incompatible with the current and future residential uses nearby, the Resolution is inconsistent with the intent of Florida's Community Planning Act. The Act requires that each local government "shall establish meaningful and predictable standards for the use and development of land. Section 163.3177(1).

The Act requires a community plan to be based upon "relevant and appropriate data and analysis" and that the future land use element therein be premised upon "surveys, studies and data regarding the area." Sections 163.3177(1)(f) and 163.3177(6)(a)2. The future land use map for each category of land use is mandated to depict the "distribution, location, and extent of the various categories . . . ." 163.3177(6)(a)1. The Act pointedly requires that the local

government include criteria to "provide for the compatibility of land uses." 163.3177(6)(a)3.g.

The Lee Plan in 2007 adhered to the Act's requirements, the Plan specifically intends that growth patterns will be "dictated" by a Future Land Use Map that "will not change dramatically during the time frame of this plan" (2030). Lee Plan I-1. The "Planning Communities," integral to the Plan, are "designed" to capture the unique character of each community. Lee Plan, I-8.

The Planning Community for the Subject Property is Planning Community 18 – Southeast Lee County. Community 18, unlike any other of the 22 communities, expressly describes "mining operations" as part of the character of that community.

Goal 1 provides that the Future Land Use Map is maintained and enforced showing the proposed distinct location, type and intensity of land uses within that category depicted on the Map. Lee Plan II-1. Policy 1.1.1 adopts the Future Land Use Map (Map 1) as the "pattern for future development . . ." Lee Plan II_1.

Policy 1.4.5 describes the Non-Urban future land use category of DR/GR. That category clearly and expressly states that "permitted land uses include among others, both "natural resource extraction" and "residential uses" at one per ten

acres. Policy 2.2.2, just as clearly, states that Map 1, the Future Land Use Map indicates the uses "that will ultimately be permitted on a given parcel."

In short, the Board may not disregard the plain language of Chapter 163; nor may it recede from its own 2007 Lee Plan, which specifically permits a mining use on the location of Subject Property. That use need not be immediate. It may not be at the same level of intensity that the landowner desires, but as recognized by the Supreme Court "the use would be acceptable at some point in the future." Snyder, 627 So.2d at 476. Emphasis, this Court's).

> We do not believe the Growth Management Act was intended to preclude development but only to insure that it proceed in an orderly manner.
>
> *Id.* at 476.

The Board's Resolution, insofar as it declares that a mining use at that location is simply impermissible, is inconsistent with the overall Lee Plan.

The Hearing Examiner and the Board were legitimately concerned about the surrounding property and, specifically, the possibility of 24-hour operations; vibrations from blasting; and noise and dust from increased truck traffic servicing the mine. Both the Applicant and Staff addressed each of those concerns in their proposed "conditions." However, the Hearing Examiner and the Board found those conditions "*inadequate*" to protect the surrounding neighborhood. No reasons for these findings were advanced by the Board. Nevertheless, this Court

will not substitute its judgment on those issues for that of the Board of County Commissioners. The Applicant's rezoning request, though strictly consistent with the future land use of the Subject Property regarding a mining use, is inconsistent with overall the Lee Plan, regarding its currently proposed conditions.

The Applicant, however, is entitled to consideration by an impartial Hearing Examiner and by the Board, regarding the adequacy of the operational conditions of the mine. The Board is free to impose those conditions it objectively deems appropriate, as long as the conditions are reasonable and neither arbitrary, nor confiscatory. If, after full evidentiary hearing on the issue of appropriate conditions, the Board finds that, based upon the competent substantial evidence provided at the evidentiary hearing, that there are no conditions that could be devised to protect the nearby landowners, the Board may exercise its judgment accordingly. However, the Board must apply this reasoning evenly and consistently with the conditioned approvals granted previously to other similarly situated mines.

WHEREFORE, the Court having granted Plaintiff's Second Amended Motion for Summary Judgment, the Court makes the following declarations and provides the following relief to Plaintiff:

1. Florida Community Planning Act, Section 163.3161, *et seq.*, requires local governments to adopt comprehensive plans, containing Future Land Use Maps, which specify the locations of various categories of future land use. The Act further requires that the Future Land Use Elements, within the comprehensive plan use objective data to provide meaningful and predicable guidance regarding the nature of the future land uses so-designated.

2. The 2007 Lee Plan, within its Future Land Use category of Density Reduction/Groundwater Resource (DR/GR), Policy 1.4.5, states unequivocally that natural resource extraction will be a permitted use at some time in the planning horizon of the plan. The "planning horizon" for the 2007 Lee Plan was 2030.

3. The Lee County Board of County Commissioner's Resolution Z-18-008, Section 1, denying Plaintiff's application for rezoning, did dispositively conclude that a natural resource extraction land use on the site of the Subject Property will not be permitted due to the Board's finding of the incompatibility of such a use with nearby current and future land uses. As a result, said Resolution is inconsistent with the 2007 Lee Plan, violates the consistency mandate of Section 163.3194(1)(1), and is invalid as a matter of law.

4. Corkscrew Grove's Application for rezoning is consistent with the 2007 Lee Plan, insofar as the Application seeks a rezoning for a land use expressly permitted by that comprehensive plan. However, the Plaintiff's Application for

rezoning is inconsistent with the applicable Lee Plan, in that the IPD application does not propose conditions the Board found to be adequate to protect surrounding land uses.

5. The Plaintiff, though is not required by this ruling, may re-submit its current rezoning application to Lee County within a reasonable time, without further Staff reviews. The County must then provide a timely hearing before a Hearing Examiner on the sole issue of conditions to be attached to the rezoning approval, which conditions would adequately protect the surrounding land uses of the Subject site. Such conditions must be reasonable; and be consistent, as applicable with other similar mining approvals under the 2007 Lee Plan.

6. The Board of County Commissioners, upon receipt of the Hearing Examiner's Recommendation as to adequate conditions for the proposed mining operation, shall timely proceed to final hearing according to the law as set out hereinabove.

7. Defendant, Lee County is legally responsible for Plaintiff, Corkscrew Grove's costs and attorneys fees associated with bringing the instant action. The Court reserves jurisdiction to set those reasonable costs and fees, upon motion by Plaintiff.

DONE AND ORDERED at Fort Myers, Lee County, Florida.

eSigned by Joseph Fuller 08/05/2021 13:55:35 B06I97hr

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

CORKSCREW GROVE LIMITED PARTNERSHIP, a Florida limited liability company,

Plaintiff,

vs. **CASE NO.: 2019-CA-008183**

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE, coming before the Court on Defendant, Lee County's (County) Motion for Summary Judgment as to Count I of Plaintiff's Second Amended Complaint and Alternative Motion for Judgment on the Pleadings ("Def.'s Motions"), the Court having considered the pleadings, motions, memoranda, material facts and authorities submitted by both Parties, and having heard extensive argument from Counsel, it is therefore,

ORDERED that Defendant's Motions are DENIED based on the following:

Plaintiff, Corkscrew Grove Limited Partnership (Corkscrew Grove) seeks in

2

Count I of its Second Amended Complaint a declaratory judgment declaring that the Lee County Board of County Commissioners ("Board" or "County") has violated its own Comprehensive Plan (Lee Plan) by its Resolution, Z-18-008, which denied Corkscrew Grove's application for rezoning. This alleged violation, in contravention of the "consistency" requirement of Section 163.3194(1)(a), Fla. Stat. (2019), according to the allegations in Count I, is due to the Board's alleged *de facto* "permanent" denial of the future land use potential of natural resource extraction imposed upon the potential of the Subject Property for that mining use. The future land use of "natural resource extraction" was a permitted use under the applicable 2007 Lee Plan (and earlier versions).

Statutory Interpretation of "Development Order"

Defendant's first two arguments in support of its Motions are inter-related. Defendant asserts that Plaintiff has failed to plead and prove that the Board's denial of Plaintiff's rezoning application met the precise jurisdictional requirements of subsection 163.3215(3). Specifically, Defendant contends that the Board's challenged action did not "*materially alter the use or density or intensity of use on [Plaintiffs] particular piece of property*," as allegedly required by that subsection. Defendant's Motions, paragraph 1.

Furthermore, Defendant's Motions assert that the Board's denial of

Plaintiff's rezoning application was not an "*action on a Development Order*," and thus does not qualify for a consistency challenge under the terms of subsection 163.3215(3). Defendant's Motions, paragraphs 10-14.

Neither contention by Defendant has merit. Section 163.3215 gives an "aggrieved" person the right to bring a "challenge to the consistency of a development order with the comprehensive plan adopted under this part." Section 163.3215(1).

When, as acknowledged herein by the County, the local government has failed to establish a (procedural) process consistent with the requirements of subsection (4), an "aggrieved" or "adversely affected" party may bring "a *de novo* action for declaratory, injunctive or other relief" challenging "any decision . . . granting or denying an application for . . . a development order, as defined in Section 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the [adopted comprehensive plan]." *Id.* (Emphasis, the Court's). The term "development order" is defined by Section 163.3164(15) as "any order granting, denying, or granting with conditions, an application for a development permit." (Emphasis, the Court's). Subsection 163.3215(2) defines "aggrieved" or "adversely affected party" as "any person or local government that will suffer an adverse effect to an

interest protected or furthered by the . . . comprehensive plan . . . ." The term expressly "includes the owner developer, or applicant for a development order." *Id.* Plaintiff is such a "person," and has adequately plead and proved its standing under the statutory terms.

Defendant's interpretive error, upon which it bases its first two summary judgment grounds, is in mis-characterizing the statutory definition of "development order," which includes "**denying . . . an application for**" a development permit. *Id.*

It would be illogical for the Legislature to on one hand grant standing for an owner-developer challenging a denial of an application for rezoning; but in the same section, foreclose that right because, in Defendant's words, "*it is impossible for Corkscrew to prove that the County's denial of Corkscrew's rezoning application 'materially alter[ed] the use or density or intensity of uses' of Corkscrew's property.*" Defendant's Motion for Summary Judgment, paragraph 9.

The Court notes that prior to 2002 an unsuccessful applicant for a development order was not permitted to bring a consistency challenge pursuant to 163.3215. The 2002 legislative changes specifically addressed that situation by amending 163.3215 and adding an "owner-developer-applicant" as an "aggrieved" party and expressly providing for the right to challenge a "denial" of an

"application for" a development order. Compare Subsection 163.3215 (Fla. Stat. 1991), as interpreted by *Parker v. Leon County*, 627 So.2d 476, 479-80 (Fla. 1993), with the 2002 version of the same section (and with the similar applicable 2019 version). The Court notes that the Senate Staff's analysis of the 2002 amendment to 163.3215 expressly referred to the *Parker*, *supra* case which had foreclosed an owner-developer from consistency challenges under the statute, thus creating the need for the 2002 amendments. Staff summary of CS/SB 190 and 550, March 5, 2002, pp. 4-5, and 9.

Defendant's citations of authority, *O'Neil v. Walton County*, 149 So.3d 699, 703 (Fla. 1st DCA 2014) and *Graves v. City of Pompano Beach, ex rel City Com'n*, 74 So.3d 595, 599 (Fla. 4th DCA 2011) are off-point. *O'Neil* dealt with a challenge to a 2013 order of Walton County confirming the owner's right to build new lots seaward of the coastal construction control line; but which lots had been previously approved by order in 2010. *O'Neil*, 149 So.3d at 701-02. Therefore, the 2013 order, challenged pursuant to Section 163.3215 did not "grant or deny" any material alteration of anything, since no new parcels were created by that order. *Id.* at 702. Walton County's 2013 order merely implemented its prior 2010 order.

Graves v. City of Pompano Beach, supra, is similarly inapposite. The

challenged order therein was a plat approval that allegedly permitted more extensive development than previously authorized by the City. The trial court granted the City's motion to dismiss based on the argument that a plat approval was not the equivalent of a development order. *Graves*, 74 So.3d at 597. The Fourth District Court of Appeals reversed, holding that Chapter 163's Community Planning Act is "to be 'construed broadly to accomplish its stated purposes and objectives.'" (Citing Section 163.3194(4)(b)), and therefore a "liberal interpretation of Chapter 163 must be given." *Id.* at 598. Plat approval met the broad intent of the statutory definition of "development order." *Id.* at 598-599.

The Consistency of Existing Zoning

Defendant's third argument in support of its motions contends that Plaintiff "*must also plead and prove under* ***strict scrutiny*** *that the existing zoning is inconsistent with the Comp. Plan.*" Defendant's Motion, paragraph 15. (Defendant's emphasis).

Defendant mis-perceives Plaintiff's Count I. The basis of Plaintiff's claim in Count I is not that its proposed use must be granted because that use is consistent with the Lee Plan. Such were the claims in the authorities cited by Defendant, *Board of County Com'n. of Brevard County v. Snyder*, 627 So.2d 469, 475 (Fla. 1993) and *Lee County v. Sunbelt Equities II Ltd. P'ship,* 619 So.2d 996,

1006 (Fla. 2d DCA 1993).

Instead, Plaintiff herein alleges that the Board's Resolution denying Corkscrew Grove's rezoning was, in effect, an order permanently declaring that a "permitted" future land use was not compatible or suitable at the Subject site for the foreseeable future, and therefore not permitted. As a result, Plaintiff alleges, the Board's Resolution was inconsistent with the applicable Lee Plan and a violation of State law. That issue was not directly before either Court in *Snyder* or in *Sunbelt Equities*. Defendant's statement of the law in its motion is correct, but inapplicable to Plaintiff's claims.

Accordingly, this Court rejects the grounds cited by Defendant in support of it Motions as to Count I.

DONE AND ORDERED at Fort Myers, Lee County, Florida.

eSigned by Joseph Fuller 08/05/2021 13:56:33 xh0j+s+1

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

CORKSCREW GROVE LIMITED PARTNERSHIP, a Florida limited liability company,

Plaintiff,

vs. **CASE NO.: 2019-CA-008183**

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT II OF PLAINTIFF'S SECOND AMENDED COMPLAINT AND ALTERNATIVE MOTION FOR JUDGMENT ON THE PLEADINGS

THIS CAUSE, coming before the Court on Defendant, Lee County's (County) Motions for Summary Judgment as to Count II of Plaintiff's Second Amended Complaint and Alternative Motion for Judgment on the Pleadings (Def.'s Motions as to Count II), the Court having considered the pleadings, motions, memoranda, material facts and authorities submitted by both Parties, and having heard argument from Counsel, it is therefore,

ORDERED that Defendant's Motions are DENIED based on the following:

Plaintiff, Corkscrew Grove Limited Partnership (Corkscrew Grove), seeks in

3

Count II of its Second Amended Complaint to have the Court declare that the Lee County Board of County Commissioners ("Board" or "County") action in adopting Resolution Z-18-008, Section 2, (the "Resolution") was a violation of Substantive Due Process of law. The essence of Plaintiff's argument in support of Count II is contained in paragraphs 29, 30 and 33 of the Second Amended Complaint.

Corkscrew Grove alleges in Count II and in its Motion for Summary Judgment, as to Count II, that the Board's determination in Section 2 of the Resolution that "*maintaining the existing agricultural zoning classification on the property accomplishes a public purpose by preserving and protecting land uses surrounding the site from uses potentially destructive to the residential environment*" was an illegitimate means to accomplish a public purpose. (Citing among other cases, *Joint Ventures, Inc. v. Dept. of Transp.*, 563 So.2d 622 (Fla. 1990) and *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994)). The Court notes that *Joint Ventures* and *A.G.W.S.* were decided on "Substantive Due Process" grounds.

Defendant's Motions assert two grounds. First, Defendant contends that Count II does not state a cause of action for declaratory relief. Defendant's Motions as to Count II, paragraph 1. Second, Defendant's Motions raises the defense of failure to join indispensable parties. *Id.*, paragraphs 9-12.

Regarding Defendant's first ground for summary judgment or judgment on pleadings, the County alleges that other than a "*conclusory allegation that it [Plaintiff] is in doubt about its rights under the Resolution Z-18-008, and under the related provisions of the Lee Plan and Chapter 163, Fla. Stat.,*" Plaintiff has not sufficiently asserted "*a doubt as to the existence or nonexistence of same right, status, immunity, power or privilege and that he is entitled to have such doubt removed.*" *Id.*, paragraph 4-5. (Citing *Golfrock v. Lee County*, 247 So.3d 37, 38 (Fla. 2d DCA 2018) and *May v. Homey*, 59 So.2d 636, 638-39 (Fla. 1952)). Defendant's Motions further asserts that a party "*must do more than simply show that there is some metaphysical doubt as to the material facts.*" (Citing *In re Amendments to Florida Bar Rule of Civil Procedure*, 1.510, 309 So.3d 192, 193 (Fla. 2020)). *Id.* Paragraph 5. The Court notes that the preceding decision has been modified regarding Florida's addition of the federal standard for summary judgments. *In re: Amendments to Florida Rule of Civil Procedure 1.510*, 2021 WL 1684095 (Fla. April 29, 2021).

The Court has reviewed the applicable statutes under which Plaintiff has brought Count II of the Second Amended Complaint, Sections 86.011, *et seq.* and 163.3215(1)(3), Fla. Stat. (2019). When comparing the requisites of those statutes with the allegations of the Second Amended Complaint, in particular paragraphs 1,

7-14, 29, 30 and 33, the Court finds that the Second Amended Complaint does fulfill the requirements of pleading relating to a claim for declaratory relief.

Plaintiff has adequately alleged an "interest" in the Lee County Resolution denying Corkscrew Grove's application for rezoning by reason of Plaintiff's ownership and control of the Subject Property. Second Amended Complaint, paragraphs 2, 4-6. Plaintiff has explicitly alleged a "*doubt about its rights under the Resolution*," as well as "a *bona fide, actual present practical need for a declaration*" and has properly alleged that it does not seek mere "*legal advice*," but seeks the declaration which is "*presently necessary to determine the Parties' rights and responsibilities with respect to the issues presented.*" *Id.*, paragraph 14. None of those allegations were made by the plaintiff in *Golfrock*, 247 So.3d at 38, 40.

Defendant's Motion additionally alleges that "*the actions of which the Plaintiff complains in Count II are the subject of another lawsuit currently pending before this Court.*" Motion, paragraph 7. The Court assumes Defendant is referring to Corkscrew Grove's Petition for Writ of Certiorari, Case No.: 2019-CA-008190. Defendant is mistaken. The only issue in that Certiorari action was whether the County's Resolution was based upon competent substantial evidence. Order Denying Petition for Writ of Certiorari, Case No.: 2019-CA-008190, paragraph 5. The Due Process Claim of Corkscrew Grove was not addressed by

the Court in its Order Denying Petition for Writ of Certiorari. *Id.* paragraph 7.

The last point Defendant's Motion makes with regard to its "*failure to state a claim*" defense is that "*Section 163.3215 confers jurisdiction only for a plaintiff to challenge the consistency of a development order with a comprehensive plan;*" and that "*Section 163.3215 confers no jurisdiction to declare violations of due process as is sought by this Plaintiff.*" Defendant's Motion, paragraph 8.

Defendant is mistaken in this argument for two reasons. First, Section 163.3215(3) provides: "any aggrieved or adversely affected party may maintain a *de novo* action for declarative, injunctive, or other relief against any local government to challenge any decision of local government granting or denying an application for . . . a development order, as defined in Section 163.3164 . . . ." That provision of law does not exclude a separate count for declaratory relief on another ground other than "consistency."

Second, the declaratory relief act itself Chapter 86, Fla. Stat., referenced in Section 163.3215(3), is designed as a vehicle to test the validity of statues, regulations, and ordinances. 19 Fla. Jur. 2d Declaratory Judgments, Section 24; *Chiles v. Children, A, B, C, D, E, and F*, 589 So.2d 260, 263 (Fla. 1991); *Royal Selections, Inc. v. Florida Dept. of Revenue*, 687 So.2d 893, 894 (Fla. 4th DCA 1997). Substantive Due Process is an appropriate ground to allege in a claim for

declaratory relief.

Plaintiff has stated a claim upon which relief may be granted.

Indispensable Parties

The second argument of Defendant in support of its Motion for Summary Judgment as to Count II raises the defense of failure to join indispensable parties. Defendant's Motion, paragraphs 9-10. This defense is applicable to both the Motion for Summary Judgment and the Motion for Judgment on the Pleadings.

Defendant asserts that Count II "*requires joinder of all owners*," (citing *Phillips v. Choate*, 456 So.2d 556, 557 (Fla. 4th DCA 1984). *Id.* paragraph 12.

The Second Amended Complaint alleges that "*Plaintiff is the fee owner of real property ('Subject Property') located in Southeast Lee County, Florida, more particularly described in the legal description contained in Exhibit 'A,' attached hereto.*" Second Amended Complaint, paragraph 2. Furthermore, in the initial affidavit of Mitchell A. Hutchcraft, contained in Appendix 3, filed in support of Plaintiff's Motion for Summary Judgment, Mr. Hutchcraft, as manager of Corkscrew Grove Management, LLC, the General Partner of Corkscrew Grove Limited Partnership (Plaintiff) deraigns the title of the Subject Property from Old Corkscrew Plantation, LLC through *mesne* conveyance, to Corkscrew Grove Limited Partnership, which became Assignee of all rights, title and interest from

Old Corkscrew Plantation, LLC. *Id.*

Mr. Hutchcraft's initial Affidavit #1 also attests to a "Cooperation Agreement" among Corkscrew Grove Limited Partnership and six minority owners (comprising 980 acres of the approximately 4,200-acre Subject Property. These minority owners and Plaintiff have joined together in the filing and processing of the application for a rezoning to IPD (for a limerock mining use) and for the litigation efforts of Plaintiff with Plaintiff as the lead party with "sole and exclusive discretion," in connection therewith. Hutchcraft initial Affidavit, Exhibit "D," thereto. The minority owners are therefore in privity with Corkscrew Grove Limited Partnership, and are bound by the Court's Orders in both the certiorari action and in the instant suit for declaratory relief.

Plaintiff's position as successor-in-interest to Old Corkscrew Plantation was confirmed by further affidavit and documentation in a second affidavit by Mr. Hutchcraft (Affidavit #2) filed February 10, 2021, in support of Plaintiff's Second Amended Motion for Final Judgment.

Accordingly, the Court finds ample record evidence the Plaintiff, Corkscrew Grove Limited Partnership is the "owner" entitled to bring the Second Amended Complaint, including both Count I and II therein and that the minority owners are not indispensable parties to the instant action.

In addition, the Court notes that it is undisputed that the County accepted Plaintiff as the proper rezoning applicant in 2016, processed Corkscrew Grove's application administratively, went to a full factual hearing before the Hearing Examiner in 2018, and heard the Corkscrew Grove's application at final hearing before the Board in 2019 – at all times accepting Corkscrew Grove Limited Partnership as the correct applicant. Defendant's tardy assertion now, long-after Plaintiff's application was accepted based on the 2011 initial filing, constitutes a waiver of this defense. Defendant has repeatedly acquiesced to the Plaintiff as the appropriate applicant during the rezoning process, and is estopped from raising the issue now. 22 Fla. Jur. 2d Estoppel and Waiver § 50, "Estoppel by Acquiescence" and § 51, "Estoppel Based on Delay;" § 59 "Judicial Estoppel," § 60 Judicial Estoppel – Application.

The holding in the decision cited by Defendant as its authority, *Phillips v. Choute, supra*, does not support Defendant's position. In that case, Phillips, the missing litigant was, on the facts, determined to be not indispensable to a resolution of the case for the policy reasons set out at 558-59 therein. Based on the undisputed facts presented in this action, the litigation may proceed without nominal joinder of the six minority owners, parties to the Cooperation Agreement with Plaintiff.

DONE AND ORDERED at Fort Myers, Lee County, Florida.

eSigned by Joseph Fuller 08/05/2021 13:56:50 vXRvqLr5

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

CORKSCREW GROVE LIMITED PARTNERSHIP, a Florida limited liability company,

Plaintiff,

vs. **CASE NO.: 2019-CA-008183**

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

ORDER DENYING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF PLAINTIFF'S SECOND AMENDED COMPLAINT

THIS CAUSE, coming before the Court on Defendant, Lee County's (County) Second Motion for Summary Judgment as to Count I of Plaintiff's Second Amended Complaint, the Court having considered the pleadings, motions, memoranda, material facts and authorities submitted by both Parties, and having heard argument from Counsel, it is therefore,

ORDERED that Defendant's Second Motion for Summary Judgment as to Count I of the Second Amended Complaint is DENIED based upon the following:

4

Allegations of *Res Judicata*, Collateral Estoppel and Law of the Case

Defendant's Second Motion for Summary Judgment directed to Count I of the Second Amended Complaint (Def.'s Second Motion) asserts that this Court's prior Order Denying Petition for Writ of Certiorari (Certiorari Order) in the certiorari action brought by Plaintiff, Corkscrew Grove Limited Partnership (Corkscrew Grove), Case No.: 19-CA-8190, is also dispositive of Plaintiff's separate consistency challenge in Count I of the instant action for Declaratory Relief.

Plaintiff seeks in Count I of its Second Amended Complaint a declaratory judgment that the Lee County Board of County Commissioners ("Board" or "County") has violated its own Comprehensive Plan ("Lee Plan") by its adoption of Resolution, Z-18-008, which denied Corkscrew Grove's application for rezoning. This alleged violation, in contravention of the "consistency" requirement of Section 163.3194(1)(a), Fla. Stat. (2019), according to the allegations in Count I, is due to the Board's alleged *de facto* "permanent" denial of the future land use potential of natural resource extraction imposed by the Board's Resolution upon the potential of the Subject Property for that mining use. The future land use of "natural resource extraction" was a permitted use under the applicable 2007 Lee Plan (and earlier versions).

Defendant argues that this Court's Certiorari Order was a review of "the factual determinations made by the Board [of County Commissioners]" and a determination by the Court "*that those facts supported the Board's denial of rezoning and* ***its conclusion the Plaintiff's proposed mine was inconsistent with the Comprehensive Plan and land development code***." Defendant's Second Motion, paragraph 5. (Emphasis, the Court's).

Based on this understanding of the Court's Certiorari Oder, Defendant then reaches the legal conclusion in its motion that "***As a result, this Court's conclusion that the facts underpinning the Board's actions were consistent with the Comprehensive Plan, Corkscrew Grove cannot prevail in this (Declaratory Relief) action which requires it to prove that the Board's actions were inconsistent with the comprehensive plan***." *Id.*, paragraph 7. (Emphasis, the Defendant's).

In support of its asserted conclusion, Defendant urges issue preclusion based on the doctrines of *res judicata*, collateral estoppel, and "law of the case." *Id.* paragraph 1. Defendant's underlying premise regarding this Court's Certiorari Order is incorrect. The Certiorari Order expressly and repeatedly excluded any legal conclusions on the issues of "consistency" with the Lee Plan and "compatibility," as related to Corkscrew Grove's consistency challenge. *See* Order

on Certiorari, paragraphs 5, 7, 13, 15, 22, 29, 31-32, 35-36, 37 and 40.

The doctrine of *res judicata* applies when four identities are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made. *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004). The underlying idea of this doctrine is that if a "matter" has already been decided, the petitioner/plaintiff has already had his or her day in Court, and that matter will not be reexamined in a later action. *Denson v. State*, 775 So.2d 288, 290 n.3 (Fla. 2000). However, in the joined actions between Corkscrew Grove and Lee County, the Petition for Writ of Certiorari (Petition) was heard and decided upon the sole issue of the existence of competent substantial evidence supporting the Board's Resolution denying Corkscrew Grove's rezoning application.

Under the provisions of Section 163.3215(3)(4), as agreed to by both parties, Corkscrew Grove's "consistency" challenge could not have been heard by petition of certiorari. The Declaratory Relief suit, joined for disposition with the Petition for Writ of Certiorari, is based upon an entirely different issue and a clearly distinct *de novo* cause of action. *Res judicata*, therefore, does not apply to bar Plaintiff's Count I in the instant action.

The doctrine of collateral estoppel is a related, but different, concept from

res judicata. This doctrine bars relitigation of the same issues between the same parties in connection with a different cause action. *Topps*, 865 So.2d at 1255 (involving whether a prior denial of an extraordinary writ is a bar to subsequent litigation. Points and questions – common to both the first suit and the second – must be "actually adjudicated in the prior litigation." *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952) and *Kent v. Sutker*, 40 So.2d 145, 149 (Fla. 1949).

The issues before the Court in the two actions brought by Corkscrew Grove were clearly not the same. In fact, as noted above, this Court at the urging of both Parties and in adherence to Section 163.3215(3)(4), expressly declined to rule on "consistency" and related matters of "compatibility" in the certiorari action.

Differences in the burden of proof or persuasion between the initial proceeding and the subsequent action may also affect whether collateral will be applied. *Cook*, 921 So.2d at 635 (Fla. 2d DCA 2005). If the party against whom preclusion is sought (here, Corkscrew Grove) has a significantly heavier burden of persuasion as to the issue in the unsuccessful initial (certiorari) action than it had in the later suit, the first determination of an issue will not be given preclusive effect. *Cook*, 921 So.2d at 635.

Petitioner for a Writ of Certiorari has a much heavier burden to overcome a local government quasi-judicial action than Plaintiff has with a consistency

challenge to a development order. Compare the standard of review in *Dorian v. Davis*, 874 So.2d 661, 663 (Fla. 5th DCA 2004)(certiorari) with *Machado v. Musgrove*, 519 So.2d 629, 632-33 (Fla. 3d DCA 1987) and *Board of County Commissioners of Brevard County v. Snyder*, 627 So.2d 469, 475 (Fla. 1993)(involving challenges of a zoning resolution as inconsistent with a comprehensive plan). Collateral estoppel does not apply to bar Plaintiff's Count I herein.

The legal authority cited by Defendant regarding its "law of the case" defense in support for its Motion, *City National Bank of Florida v. City of Tampa*, 67 So.3d 293 (Fla. 2d DCA 2011) actually rejects a collateral estoppel claim which asserted that a certiorari ruling finding competent substantial evidence would be a bar to a subsequent equal protection claim. The collateral estoppel claim "applies to questions of law 'actually presented and considered on a former appeal . . .'" unless that issue was "implicitly addressed" or "necessarily considered." *City National Bank*, 67 So.3d at 299. (Emphasis, the Court's). *See City of Pembroke Pines v. Villasenor*, 894 So.2d 991 (Fla. 1st DCA 2005), also cited by Defendant, ruling that an "issue is law of the case only if it was actually considered and decided in a former appeal, or was implicitly addressed or necessarily considered . . . ." *Villasenor*, 894 So.2d at 995 (citing *Fla. Dept. of Transp. v.*

Juliano, 801 So.2d 101, 107 (Fla. 2001)). To like effect, *Dougherty ex rel. Eisenberg v. City of Miami*, 89 So.3d 963 (Fla. 3d DCA 2012)(finding the doctrine of law of the case applicable because the question of law at issue was "actually decided in the earlier appeal)" *Dougherty*, 89 So.3d at 996. Since "consistency" and related "compatibility" were not decided in the Certiorari Order, the doctrine of law of the case does not bar Count I herein.

Additionally, Lee County, through its attorneys, argued, to the contrary of its Second Motion for Summary Judgment as to Count I, in its Response to the Petition for Writ of Certiorari (Response of Respondent). The County the contended that Sections 163.3215(1)(3) and (4) provide that Corkscrew Grove's "*exclusive*" avenue for a consistency challenge was for a separate suit for declaratory relief. Response of Respondent, pages 10-15. Lee County also acknowledged in its Response that "*consistency and compatibility are closely related concepts*" and claims related to those concepts must be brought in "*separate actions for declaratory relief . . .*" *Id.*, page 14. Petitioner, Corkscrew Grove accepted the County's point in its Reply by Petitioner, paragraphs 1-3. The Court noted those positions of the County and Corkscrew Grove in its Order on Certiorari, paragraph 4-5, concluding in paragraph 7, therein:

> Given the above, the Court agrees that Petitioner's claim that the Board failed to observe the essential requirements of the law challenges the consistency of the Board's decision with the comprehensive plan, and is more properly brought in the declaratory action. **Thus, that claim will not be addressed in this order**. *Id.* (Emphasis supplied).

Defendant will not be permitted to take one legal position before the Court in the certiorari action, prevail; and then argue a diametrically contrary position in the declaratory relief suit. *Insko v. State,* 933 So.2d 679, 683 (Fla. 2d DCA 2006)(Justice Wallace, concurring); *McPhee v. State*, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971); 22 Fla. Jur. 2d Estoppel and Waiver §§ 59-60. Lee County's defenses raised in its Second Motion for Summary Judgment are DENIED.

Plaintiff's claim in Count I challenging the Board's Resolution on grounds of inconsistency with the 2007 Lee Plan is not precluded from decision in the instant declaratory relief action by this Court's certiorari Order. Lee County's defenses raised in its Second Motion for Summary Judgment as to Count I are DENIED.

DONE AND ORDERED at Fort Myers, Lee County, Florida.

eSigned by Joseph Fuller 08/05/2021 13:57:10 XFtrtpFS

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