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

FRANCIS D. HUSSEY, JR. , and MARY P. HUSSEY, husband and wife; and WINCHESTER LAKES CORPORATION, a Florida corporation,
Plaintiffs,

vs.

Case No. 08-6933-CA
Consolidated with
Case No. 08-7025-CA

COLLIER COUNTY, a political subdivision of the State of Florida; THE HONORABLE RICK SCOTT, Governor of the State of Florida; and FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY,
Defendants,

FLORIDA WILDLIFE FEDERATION, INC., and COLLIER COUNTY AUDUBON SOCIETY, INC.,
Intervener.
_____/

SEAN HUSSEY, Successor Trustee to JOSE LOMBILLO, Trustee, and EDUADRDO PEREIRO, Trustee,
Plaintiffs,

Case No. 08-7025-CA

vs.

COLLIER COUNTY, a political subdivision of the State of Florida; THE HONORABLE RICK SCOTT, Governor of the State of Florida; and FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY,
Defendants.

FLORIDA WILDLIFE FEDERATION, INC., and COLLIER COUNTY AUDUBON SOCIETY, INC.,
Intervener.
_____/

INTERVENERS' PROPOSED ORDER DENYING
APPROVAL OF SETTLEMENT AGREEMENT

Pursuant to the August 26, 2013 order of the court, the Interveners submit this proposed

order denying approval of the February 12, 2013 Settlement Agreement between Defendant, Collier County, Florida and Plaintiffs, Francis D. Hussey, Jr., Mary P. Hussey, Sean Hussey, and Winchester Lakes Corporation.

PROPOSED ORDER DENYING
APPROVAL OF SETTLEMENT AGREEMENT

The Second District Court of Appeal has relinquished jurisdiction to this court for consideration pursuant to Section 70.001(4)(b)(2), Fla. Stat. of a settlement agreement ("the Settlement Agreement") signed by Plaintiffs, Francis D. Hussey, Jr., Mary P. Hussey, Sean Hussey, and Winchester Lakes Corporation ("the Plaintiffs"), and Defendant, Collier County, Florida ("the County"). The Settlement Agreement was not signed by Interveners, Florida Wildlife Federation and Collier County Audubon Society, Inc. ("the Interveners").

On April 26, 2013, the Plaintiffs and the County filed with the court a "Joint Motion For Court Approval of Settlement Agreement Pursuant to Florida Statutes 70.001(4)(b)(2) (sic)." (Joint Motion). The Joint Motion attached a copy of the Settlement Agreement and requested the court approve the Settlement Agreement and "make a finding that the Settlement Agreement protects the public interest." The Joint Motion further requested a hearing because the Intervener opposed the Settlement Agreement.

On August 22, 2013, the County filed a motion to strike the Intervener' filing of U.S. FWS August 15, 2013 letter to the County and the Interveners' August 21, 2013 federal Endangered Species Act (ESA) (16 U.S.C. §§ 1531, et seq.) federal court complaint against the County.

The Joint Motion and the County's motion to strike request the court contravene the

effect of three laws: (1) the procedural and compliance requirements of the Chapter 163, Part II, Fla. Stat.; (2) the requirements of the ESA; (3) and the due process restrictions on contract planning by means of the settlement agreements. The Joint Motion did not request the court modify or revise the court's dismissal with prejudice of the Plaintiff's Second Amended Complaint.

Based on the detailed analysis below, the Joint Motion to approve the Settlement Agreement is denied for failure to meet the two independent standards of Section 70.001(4)(b)(2) for a valid Bert Harris Act settlement agreement. First, the County's regulation of the Plaintiffs' real property has not been adjudicated as "inordinately burdening" the property, thus, there is no inordinate burden for which it is appropriate to provide relief. Second, the relief proposed by the Settlement Agreement does not protect the public interests served by the ESA, Chapter 163, Part II, Fla. Stat., and due process restrictions on contract planning by means of settlement agreements. See, Chislom Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689b (Circuit Court Appellate Div., 11th Cir. in and for Miami-Dade County 2001), aff'd, 830 So.2d 842 (Fla. 3rd DCA 2002)(Bert Harris Act settlement agreement is not "necessary" without adjudication of inordinate burden; height limit reduction from unlimited to 5 stories or 50 feet was not an inordinate burden under the Bert Harris Act); Citrus County, Florida v. Halls River Development, Inc., 9 S.3d 413, 421 (Fla. 5th DCA 2009) (comprehensive land use plan amendment which reduced land uses from 20 units per acre to 1 dwelling units per 20 acres was not actionable under Bert Harris Act); Turkali v. City of Safety Harbor, 93 So.2d 493, 494 (Fla. 2nd DCA 2012) (amendment comprehensive land use plan designation of a parcel from a retail/office/service without residential density limitations to single-family detached

dwellings– Bert Harris claim denied).

DISCUSSION

Jurisdiction to hear Section 70.001(4)(b)(2) action

The court's dismissal with prejudice of the Plaintiffs' Second Amended Complaint places in question whether the court has jurisdiction to conduct a Section 70.001(4)(b)(2) action to review the subject Settlement Agreement. Parties cannot stipulate subject jurisdiction by means of settlement agreements. See, Polk County v. Sofka, 702 So.2d 1243, 1245 (Fla. 1997)(subject matter is conferred by constitution or statute, subject matter jurisdiction cannot be conferred by agreement of parties).

The appellate court did not relinquish jurisdiction to the court to reconsider the court's February 15, 2011 orders which dismissed with prejudice the Plaintiffs' Second Amended Complaints, including the Plaintiffs' Bert J. Harris, Jr. Private Property Rights Protection Act (Bert Harris Act) (Section 70.001, et seq., Fla. Stat.) causes of action. No motion of the parties is pending before the court to reconsider the dismissal with prejudice. (The procedural history of these proceedings is set forth on Exhibit A attached hereto).

Subject matter jurisdiction to conduct a Section 70.001(4)(b)(2) action is dependent upon the Plaintiffs having stated a Bert Harris Act cause of action, which the court has held the Plaintiffs have failed to state. The Second District Court of Appeal has not reversed or vacated the court's dismissals with prejudice of the Plaintiffs Bert Harris Act causes of action. The Plaintiffs and the County cannot stipulate Section 70.001(4)(b)(2) subject matter jurisdiction by means of the Settlement Agreement, nor can they stipulate that the County's Collier Plan land use designation is "inordinately burdening" the Plaintiffs' real property.

Details of the Settlement Agreement

The Settlement Agreement seeks: (1) to make several amendments the Collier Plan, (2) to exchange 22.318 acres of road right of way (ROW) for $55,795 of transportation impact fees, (3) to reduce the Collier Plan vegetation preservation requirements on Plaintiffs NBM property, (4) to waive the current 25 year prohibition on transferred development rights (TDR) being generated by the Plaintiffs NBM property due to the Plaintiffs recent land clearing activities, (5) to grant the Plaintiffs access at least two locations to the future Wilson Boulevard Extension, (6) to waive the current native vegetation baseline date of June 19, 2002 for the vegetation on the Plaintiffs' NBM property, and (7) to grant the northern SR 846 Lands parcel the right to be developed as a Planned Unit Development (PUD).

The Collier Plan amendments which the Settlement Agreement seeks to make include: (1) amendments of the Collier Plan Future Land Use Map (FLUM) designations for two distinct separate parcels of land of 578 acres each, (2) alteration of the land clearing restriction on the Plaintiffs property in North Belle Meade, and (3) amendment of the Collier Plan Transportation Map with regard to the location of the Wilson Boulevard Extension and an new road in the SR 846 Lands.

The terms of the Settlement Agreement are a bilateral agreement with reciprocal obligations in the nature of quid pro quo, Collier Plan amendments and transportation impact fee credits in exchange for land deeds for ROW and dismissal of the Plaintiffs taking claims.

FWF and CCAS intervention rights

The Plaintiffs have argued the Intervener do not have standing to oppose the Settlement Agreement, citing to standing cases. The Plaintiffs are in error.

Under Fla.R.Civ.P. 1.230, the interests of the FWF and CCAS in these two takings actions need not be standing nor a property interest. Rather, the interests of the FWF and CCAS need only be an interest affected by the litigation, including interests involving access to public resources, the enforcement of statutory rights conferred by Congress such as the ESA, or the interests of the FWF and CCAS to enforce their numerous prior Collier Plan litigation rights and interests. See, Klamath Irrigation District, et al. v. The United States, Case No. 01-591 L (U.S. Court of Federal Claims) (fisherman's association granted intervention as matter of right in a Court of Federal Claims takings case; intervention was not based upon a property interest, rather it was based upon economic and business interests, interests involving access to public resources, and the enforcement of statutory rights conferred by Congress).

Under Section 163.31984(1)(a), Fla. Stat., the Florida Legislature has granted the FWF and CCAS standing to litigate regarding amendments of the Collier Plan, which FWF and CCAS have done. Fla.R.Civ.P. 1.230 provides for FWF and CCAS to intervene in this Section 70.001(4)(b)(2) proceeding to protect their interests before the court concerning significant amendments to the Collier Plan which are the result of their prior litigation.

The court previously granted the FWF and CCAS the right to intervene in these two cases to present argument to protect their interests. That intervention includes the right to present objections and affirmative defenses regarding the Settlement Agreement. (The relevant Collier Plan history is attached hereto as Exhibit B).

Florida courts have allowed entities to intervene in land use settlement agreement litigation. In Chung v. Sarasota County, 686 So.2d 1358 (Fla. 2d DCA 1996), the circuit court granted the Holiday Harbor Homeowners Association the right to intervene and move to vacate a

stipulated final judgment concerning rezoning of approximately 11 acres of land, and to challenge the constitutionality of a settlement agreement which was found to be contract zoning. In Chislom Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689b (Circuit Court Appellate, 11th Cir. in and for Miami-Dade County 2001), aff'd, 830 So.2d 842 (Fla. 3rd DCA 2002), the circuit court granted intervention of Juan Jover and the Decoplage Condominium Association, Inc. into the Section 70.001(4)(b)(2) action for the purpose of opposing a Bert Harris Act settlement agreement.

As Intervener in these two actions, the FWF and CCAS have the right to protect their interests by opposing the Settlement Agreement in this Section 70.001(4)(b)(2) action.

Section 70.001(4)(b)(2)

Section 70.001(4)(b)(2), Fla. Stat. reads as follows.

> "(2) Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the government entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property." (e.s.).

Section 70.001(4)(b)(2) mandates the court "ensure" that approval of the Settlement Agreement, and the Collier Plan amendment set forth in the Settlement Agreement, protect the public interest served by the statutes at issue, namely, the ESA, Chapter 163, Part II, and due process guarantees and protections.

The County contends approval of the Settlement Agreement is in the public interest because the Settlement Agreement resolves the potential financial exposure the County is facing

due to the Plaintiffs litigation, even though the court has dismissed with prejudice the Plaintiffs' Bert Harris Act and state constitutional takings claims against the County. This argument misinterprets the standards in Section 70.001(4)(b)(2).

As the three judge appellate decision insightfully noted in Chislom Properties South Beach, Inc. v. City of Miami Beach, 8 Fla. L. Weekly Supp. 689b (Circuit Court Appellate Div., 11th Cir. in and for Miami-Dade County 2001), aff'd, 830 So.2d 842 (Fla. 3rd DCA 2002), if the public interest standard of Section 70.001(4)(b)(2) is interpreted to include potential financial exposure of the local government, then "every Harris Act settlement would, by definition, serve a public interest by resolving pending litigation and avoiding further litigation." That is not the public interest standard of Section 70.001(4)(b)(2). The public interest standard is the public interest served by the regulation which the Settlement Agreement seeks to contravene, which in this case is the ESA, Chapter 163, Part II, Fla. Stat. procedure and criteria, and due process, not potential financial exposure due to takings claim litigation.

Interpretation of the public interest standard in Section 70.001(4)(b)(2) must be consistent with the following well reasoned Florida Supreme Court ruling in Harnett v. Austin, 93 So.2d 86, 89 (Fla. 1956) .

> "If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The residential owner would never know when he was protected against commercial encroachment... The application of an ordinance is the exercise of municipal legislative power. In the exercise of this governmental function a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body."

It is not in the public interest for local governments to legislate comprehensive land use

planning by individual settlement agreements based upon the best deal land owners can make to dismiss spurious litigation against local governments.

County's Obligation to Apply the ESA

In 1973 Congress enacted the Endangered Species Act (ESA) (16 U.S.C. §§ 1531, et seq.). Because endangered and threatened species reside in the County, at all times since 1973, the County has been required, and remains required, to comply with the ESA when enacting land use and zoning laws which authorize activities which are likely to take endangered or threatened species, including modification of their habitat.[1]

The ESA preempts and supercedes all Florida laws that are less restrictive than the prohibitions of the ESA and its implementing regulations. See, 16 U.S.C. Section 1535(f)(2). No County authorization by ordinance or Bert Harris Act settlement agreement can be less restrictive than the prohibitions of the ESA.

16 U.S.C. Section 1535(f)(2) reads as follows.

> " Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." (e.s.).

Section 9 of the ESA outlaws the "take" an endangered species without express authorization from FWS. 16 U.S.C. § 1538(a)(1). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The Section 9 prohibition on a "take" of a endangered species includes

[1]The Plaintiffs did not begin purchasing the subject North Belle Meade lands until 1979, after the ESA was enacted. In 1979 the Plaintiffs had no existing or vested right to mine the subject North Belle Meade lands.

reasonably foreseeable takes incidental to otherwise lawful activity. See, Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231, 1253 (11th Cir. 1998); Marbled Murrel v. Pacific Lumber Co., 83 F.3d 1060 (9th Cir. 1996).

The term "harm" is further defined by FWS regulations to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. See, 50 C.F.R. §17.3.

The term "harass" is defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering."

Section 9 of the ESA prohibits not only past actions, it also applies to wholly-future threat of ESA prohibited harm to endangered and threatened species. Marbled Murrel v. Pacific Lumber Co., 83 F.3d 1060, 1064-65 (9th Cir. 1996) (Threat of future harm related to harvesting trees is grounds for court issuance of ESA based injunction). In 1982 Congress amended the ESA to add the Section 10 HCP and ITP provision that supports the FWS regulations which provide that non-federal activities "not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them." Babbitt v. Sweet Home Chapter of Chapters for a Great Or., 515 U.S. 687, 70-01(1995).

Actions by the County which authorize land uses and activities which create a reasonably certain threat of future harm or harassment to endangered or threatened species are prohibited by Section 9 of the ESA unless the County has obtained an ESA Section 10 Habitat Conservation Plan (HCP) and Incidental Take Permit (ITP) from the United States Fish and Wildlife Service (FWS). See, Loggerhead Turtle v. County Council of Volusia County, Florida, 148 F.3d 1231,

1253 (11th Cir. 1998)(Volusia County's authorization of beach driving and beach lighting was causally related to ESA Section 9 take of Loggerhead Turtles without HCP and ITP); Marbled Murrel v. Pacific Lumber Co., 83 F.3d 1060, 1064-65 (9th Cir. 1996) (reasonably certain threat of future harm to listed species, based upon preponderance of evidence, is a Section 9 take).

The non-federal activities and authorizations of the County set forth in the Settlement Agreement are likely to incidentally take endangered or threatened species, and such likely takes of endangered species are unlawful unless the County has applied for and obtained a Section 10 HCP and ITP from the FWS. See, 50 U.S.C. §1539(a)(1)(B). The County has not obtained a Section 10 HCP and ITP from the FWS concerning the proposed actions set forth in the Settlement Agreement.

The Section 10 ITP process was enacted by Congress in the 1982 amendments to the ESA to "reduce conflicts between species threatened with extinction and economic development activities, and to encourage 'creative partnerships' between government and private sectors." Animal Welfare Institute v. Beech Ridge Energy, LLC, 675 F.Supp. 540 (D. Md. 2009) (defendant enjoined from constructing wind turbines until Beech Ridge Energy obtained a Section 10 ITP from the FWS).

A Section 10 HCP and ITP may only be issued by the FWS if the FWS finds, after an opportunity for public comment, that: (i) the taking will incidental, (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking, (iii) the applicant will ensure adequate funding for the HCP will be provided, (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and (v) the measures the FWS may require as being necessary or appropriate for the purposes of the HCP will be met.

See, 50 U.S.C. §1539(a)(2)(B)(I)-(v); 50 C.F.R. §17.22(b).

On August 15, 2013, the FWS sent the County a letter advising Collier County that the:

> "Loss of habitat associated with the Hussey agricultural clearing and proposed mining project has likely and may result in "take" of panthers, red-cockaded woodpeckers, and possibly other State and federally listed species in the form of harm through temporary and permanent loss of both panther and red-cockaded woodpecker habitat and reduction in the spatial extent of available habitat. Florida panthers, red-cockaded woodpeckers and other State and federally listed species may also be taken in the form of harassment during mine operations, as panthers and red cockaded woodpeckers may be disturbed by these activities and leave or avoid the area. Additionally, the project may result in the lethal take of panthers and red-cockaded woodpeckers in the form of vehicle collisions as a result of project-generated traffic."
>
> * * *
>
> "We are communicating these concerns in an effort to assist Collier County from incurring further potential legal liability under the Act for agricultural clearing and timbering activities that they approved to occur on the referenced site, and any potential new liability for proposed mining actions for which the county maintains jurisdiction. As a party to these actions, Collier County could be subject to legal penalty and prosecution by the Service, or subject to third party lawsuits. We request the County refrain from permitting, approving, or otherwise conducting any activities that could result in the take of federally listed species on the subject property until the applicants have demonstrated they have received incidental take authorization under the Act."

At the August 26, 2013 hearing before the court, counsel for the County stated the County intended to move forward with the Settlement Agreement regardless of the FWS request for the County to refrain from "permitting, approving, or otherwise conducting any activities that could result in the take of federally listed species on the subject property" before obtaining FWS authorization.

As a matter of law, the Settlement Agreement does not protect the public interest served by the ESA, and the court does not have the authority to contravene the application of the ESA to the subject property, or ignore the ESA requirements.

Chapter 163, Part II, Fla. Stat.

The Plaintiffs and the County contend Section 70.001(4)(c), Fla. Stat. authorizes amendment of local government comprehensive land use plans by means of Bert Harris Act settlement agreements, and that Section 70.001(4)(b)(2), Fla. Stat. authorizes circuit courts to approve settlement agreements which have the effect of contravening the application of a Chapter 163, Part II, Fla. Stat. with regard to the procedure and standards for amending comprehensive land use plans. The Plaintiffs and the County are in error.

Section 70.001(4)(c) does not specifically authorize amendments of comprehensive land use plans. The phrase comprehensive land use plan does not appear in Section 70.001(4)(c). The Section 70.001(4)(b)(2) phrase references written settlement offers to effectuate land use modifications, not settlement agreement which amend comprehensive land use plans by contravening the Chapter 163, Part II amendment procedures and compliance criteria.

The Section 70.001(4)(b)(2) phrase "effect of contravening the application of a statute as it would be otherwise apply to the subject property" must be cautiously interpreted in order not to violate the separation of powers provision of Art. II, Section 3 of the Fla. Const., which reads as follows.

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

Section 70.001(4)(c) and 70.001(4)(b)(2) of the Bert Harris Act were enacted by the Florida Legislature in 1995. In 2011, the Florida Legislature enacted a complete rewrite of Chapter 163, Part II, Fla. Stat. which regulates growth management and comprehensive land use

planning. The name of the act was changed from "Local Government Comprehensive Land Use Planning and Land Development Regulation Act" to the "Community Planning Act," and the process for comprehensive land use plan amendments was substantially changed.

The 2011Community Planning Act unequivocally states in Section 163.3211, Fla. Stat. (2013) that when the provisions of Community Planning Act conflict with any other provision(s) of law, the provisions of the Community Planning Act "shall govern unless the provisions of the Act are met or exceeded by such other provisions of law."

Section 163.3184, Fla. Stat (2013) sets forth the process for adoption of comprehensive plan amendments, and Section 163.3184(10) mandates that the Section 163.3184 process for amending comprehensive land use plans is the sole and exclusive process. Section 163.3184(10), Fla. Stat. (2013) reads as follows.

> "(10) EXCLUSIVE PROCEEDINGS.- The proceedings under this section shall be the sole proceeding or action for determination of whether a local government's plan, element, or amendment is in compliance with the act."

As a matter of law, the Florida Legislature clearly spoke. The procedure in Chapter 70.001(4)(b)(2), Fla. Stat. does not meet the procedure of Community Planning Act for the adoption of an amendment to the Collier Plan. The procedures in the Community Planning Act preempt and take precedence over the procedure in Section 70.001(4)(b)(2), Fla. Stat.

Contract Planning and Due Process

The proposed Settlement Agreement on its face is an ultra vires contract planning agreement. Florida case law has long held that local governments cannot enter into a settlement which commits the local government to "supporting" a land owners comprehensive land use plan amendment, much less "committing contractually to enact" an comprehensive land use plan

amendment requested by the land owner. See, Hartnett v Austin, 93 So. 2d 86, 89 (Fla. 1956) ("adoption of an ordinance is the exercise of municipal legislative power" and a city "cannot legislate by contract"); Chung v. Sarasota County, 686 So. 2d 1358 (Fla. 2d DCA 1996) (holding that an improper settlement agreement to rezone was not cured by a provision requiring the parties to follow the formal requirements to rezone, because the county already obligated itself to a decision); Morgran Company, Inc. v. Orange County, 818 So. 2d 640, (5th DCA Fla. 2002) (illegal contract zoning exists even if the development agreement only requires the county "support" an application for development); City of Safety Harbor v. City of Clearwater, 330 So.2d 840 (Fla. 2d DCA 1976) ("Simply stated, the power to annex is governmental and such a power cannot be contracted away."); P.C.B. Partnership v. City of Largo, 549 So. 2d 738 (Fla. 2nd DCA 1989) (agreement was ultra vires and unenforceable because it purported to restrict the City's ability to decide whether to build a road, install a traffic device and permit the development of a parking lot and a storm drain connection...the city did not have the authority to contract away the exercise of its police powers); County of Volusia v. City of Deltona, 925 So. 2d 340, (Fla. 5th DCA 2006) ("an agreement effectively contracting away a city's exercise of its police power is unenforceable"). See also, Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1049 (11th Cir. 2008) (agreement with the city unenforceable under Florida law).

Judge Schwartz's special concurring opinion to the denial of the rehearing en banc in City of Miami Beach v. Chisholm Properties South Beach, Inc., 830 So.2d 842 (Fla. 3rd DCA 2002), correctly observed the settlement of the Bert Harris Act action against the City was a "sweetheart' settlement of a spurious action under the Bert Harris Act.

The ultra vires contract planning proposed by the Settlement Agreement deny the FWF,

CCAS, and other Collier County citizens their procedural due process rights and their constitutional rights to petition their elected Collier County Commissioners concerning the amendments to the Collier Plan. The purpose of Florida's Community Planning Act is to broaden public participation in the comprehensive planning process, not to exclude them by Bert Harris Act settlement agreement which amendment comprehensive land use plans. It is not in the public interest for the court to contravene Florida's common law contract planning standards.

ORDERED AND ADJUDGED:

The Joint Motion for approval of the Settlement Agreement is denied.

DONE AND ORDERED in chambers at Naples, Collier County, Florida, this _____ day of September, 2013.

_____
Honorable Cynthia A. Pivacek
Circuit Judge

cc: John G. Vega, Esq.
Thomas W. Reese, Esq.
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This draft Order is respectfully submitted this 5th day of September, 2013.

/S/ Thomas W. Reese
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Certificate of Service

I certify that a copy of the above has been served by email upon the individuals listed below this 5th day of September, 2013.

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EXHIBIT A

Procedural History of this litigation

On September 12, 2008, the initial complaint in this action was filed by Plaintiffs, Francis D. Hussey, Jr., et al. in Case No. 08-6988-CA. On September 15, 2008, the initial complaint was filed by Sean Hussey, et al. in Case No. 08-7025-CA. The complaints alleged the Plaintiffs first began purchasing the subject lands in 1979, over 6 years after enactment of the ESA.

The Intervener filed motions to intervene which raised affirmative defenses of: (1) Section 70.001(12), Fla. Stat. exempts the County's "Sending Lands" designation from the Plaintiffs' Chapter 70.001, Fla. Stat. cause of action because the designation was applying the federal Endangered Species Act (ESA); (2) Section 70.001(3)(e)(2), Fla. Stat. exempts the County's "Sending Lands" designation from the Plaintiffs' Chapter 70.001, Fla. Stat. cause of action because the designation was abating Florida common law public nuisances to occupied endangered species and their habitats; and (3) the Plaintiffs' proposed residential and mining use of the subject property are not existing or vested uses under Chapter 70.001, Fla. Stat..

On May 14, 2009, this court granted FWF and CCAS the motion to intervene as Defendants-in-Intervention in Case Nos. 08-6933-CA and 08-7025-CA , recognizing the legal interests of the FWF and CCAS at issue in the proceedings, and granting FWF and CCAS the right to protect their legal interests by making arguments, filing motions, and filing an appeal if necessary.

On February 15, 2011, the court entered written orders in both cases which granted the County's motion to dismiss for failure to state a cause, and dismissed Plaintiffs' Second

Amended Complaints with prejudice.

On March 5, 2013, the Second District Court of Appeal relinquished jurisdiction in the appeals in Case Nos. 2D11-1223 and 2D11-1224 to this court for forty-five (45) days for the court to conduct a Section 70.001(4)(b)(2), Fla. Stat. action concerning the February 12, 2013 Settlement Agreement between the Plaintiffs and the County.

On April 12, 2013, the Second District Court of Appeal entered an order which kept the relinquishment of jurisdiction in place and ordered the Plaintiffs to file a status report within forty-five days of April 12, 2013.

On April 26, 2013, the Plaintiffs and the County filed Joint Motion.

On May 20, 2013, the Interveners filed a fifty-six (56) page document entitled "Objections and Affirmative Defenses of Intervener Florida Wildlife Federation and Collier County Audubon Society, Inc. to Motion for Approval of Settlement Agreement." The document set forth backgrounds facts regarding Florida panthers, Red-cockaded woodpeckers, the Collier County Comprehensive Land Use Plan (Collier Plan), past litigation concerning the County designation in the Collier Plan of the Plaintiffs property a "Sending Lands," the history of these two pending cases, details of the Settlement Agreement, analysis of the Joint Motion, and the Intervener six affirmatives defenses. The document also requested Fla.R.Civ.P. 1.200(a) case management conference.

On May 31, 2013, the Interveners filed a Fla.R.Civ.P. Rule 1.071 notice that their affirmative defenses included a challenge to the constitutionality of Section 70.001(4)(b)(2), Fla. Stat.

On June 3, 2013, the Plaintiffs filed an expert witness affidavit in support of the Joint

Motion.

On July 2, 2013, the Attorney General of Florida moved to intervene solely with regard to the constitutionality challenge by the FWF and CCAS to Section 70.001(4)(b)(2), Fla. Stat.

On July 8, 2013 the court held a case management conference which resulted in an order which directed the Intervener to file a summary of their objections and affirmative defenses by August 9, and for the Plaintiffs and the County to file briefs of their position by August 19. The Order scheduled a two hour August 26 hearing to address the Intervener legal defenses except for the Intervener' constitutional challenges to Section 70.001(4)(b)(2), Fla. Stat.

On July 15, 2013, in light of the Plaintiffs status report which included this court's order on case management, the Second District Court of Appeal extended relinquishment to this court until September 20, 2013, by which time the Plaintiffs shall file a status report.

On August 6, 2013, the court granted the motion to intervene of the Attorney General of Florida.

On August 9, 2013, the Interveners filed two documents: (1) Affirmatives Defenses to the Plaintiff's Second Amended Complaints, and (2) a memorandum of law on their legal defenses, except for constitutional issues.

On August 16, 2013, the Interveners filed a letter dated August 15, 2013 from the United States Fish and Wildlife Service (US FWS) to the County concerning likely ESA violations due to the County's land use authorizations, including the subject Settlement Agreement.

On August 20, 2013 the County and the Plaintiffs filed a joint memorandum of law in support of the Settlement Agreement with two attached exhibits.

On August 21, 2013, the Interveners filed two documents: (1) an expert witness affidavit

in opposition to the Settlement Agreement, and (2) the Intervener ESA suit against the County and four Commissioners filed in the federal district court in Ft. Myers on August 21, 2013.

On August 22, 2013, the County filed a motion to strike the Intervener' filing of U.S. FWS letter and the Interveners' federal ESA federal court complaint.

On August 26, 2013, a two hours oral argument hearing was held on the Interveners' legal defenses, except for constitutional issues.

On August 28, 2013, the Interveners filed their response to the County's motion to strike.

EXHIBIT B

Relevant Collier Plan History

In 1989 the County adopted the County comprehensive land use plan (Collier Plan) required by Chapter 163, Part II, Fla. Stat.

On November 14, 1997, the County adopted numerous amendments to the Collier Plan. On December 24, 1997, the Florida Department of Community Affairs (DCA) challenged these amendments as being not "in compliance" as defined by Section 163.3184(1)(b), Fla. Stat. The FWF and CCAS were granted the right to intervene, and were granted the right to adopt and incorporate DCA issues, including the issue of the County's failure to protect panther habitat.

After a five day evidentiary hearing, DOAH ALJ Meale issued a 72 page Recommended Order finding in favor of the DCA, FWF and CCAS on all 16 issues, including Issue 6 concerning the land use designations of listed species. On June 22, 1999, the Administration Commission (then Governor Jeb Bush and the Florida Cabinet) approved a Final Order that adopted the RO in its entirety and directed the County to initiate an three year assessment of rural lands to direct incompatible land uses away from wetlands and upland habitat of listed species by means of creative planning techniques.

The County conducted the mandated three year assessment, and held multiple public hearings concerning the rural lands of the County located east of the urban boundary of the Collier Plan. The County's three year assessment divided its Agricultural/Rural designated areas into two subdistricts – the Rural Fringe and the Eastern Lands – for the purpose of the assessment and implementing plan amendments. These two subdistricts where the 196,000 acres surrounding Immokalee (Rural Lands Stewardship Area), and the 93,000 acre "Rural Fringe Mixed Use

District" area which included the 15,552 acre NBM area where the Plaintiffs' property is located.

In 2002, the County enacted Collier County Ordinance No. 02-32 which consisted of the comprehensive land use plan amendments known as the Rural Fringe Amendments for the North Belle Meade area. The Rural Fringe amendments directed incompatible land uses away from upland habitat of listed species, including the endangered Florida panther. The 2002 Rural Fringe amendments included the following Collier Plan text changes.

A. The new 2002 Coastal and Conservation Management Element (CCME) Objective 7.1 which mandated that the County "shall direct incompatible land uses away from listed species and their habitats," based upon the listing process of state and federal agencies.

B. The new 2002 CCME Policy 71.1 provided that incompatible land uses are directed away from listed species and their habitats by the designation on the Collier Plan FLUM of one of the five following Collier Plan land use designation categories, each of which is set forth in the Future Land Use Element (FLUE) of the Collier Plan. These five Collar Plan land use categories which direct incompatible land uses away from listed species and their habitats are: (1) the "Conservation" land use category, (2) the "Big Cypress Area of Critical State Concern Overlay" land use category, (3) the Natural Resource Protection Area "NRPA" land use category, (4) the "Sending Lands" land use category with transfer of development rights to the Receiving Lands, and (5) the "Habitat Stewardship Areas" land use category applicable to Rural Lands Stewardship Area of the Collier Plan in eastern Collier County (i.e., the Immokalee area located east of Northern Golden Gate Estates and north of the Florida Panther National Wildlife Refuge).

The 2002 Rural Fringe amendments defined "Sending Lands" as those lands "That have the highest degree of environmental value" and "are the principal target for preservation and

conservation." Collier Plan, FLUE. Residential use of "Sending Lands" is restricted to one dwelling unit per parcel which existed as of June 22, 1999, or one dwelling unit per 40 acres, whichever yields the greatest. Nonresidential uses other than agriculture are limited for the purpose of protecting native habitat, wildlife, wildlife habitat, and wetlands. Mining is prohibited on land designated as "Sending Lands."

The County's 2002 Rural Fringe Amendments to Collier Plan prohibited mining on "Sending Lands" and NRPA lands, and designated approximately 10,000 acres of NBM as "Sending Lands" and "NRPAs" where mining was prohibited, residential density was reduced, but provisions to transfer of development rights to designated "Receiving Lands" were enacted. Plaintiffs property in NBM was designated "Sending Lands."

The Collier Plan text specifically states that endangered and threatened species are located within land designated as "Sending Lands," and that the primary planning purpose of "Sending Lands" is protecting endangered and threatened species and their habitats. See, Collier Plan, Future Land Use Element, Implementation Strategy, Overlays and Special Features, North Belle Meade Overlay, Sending Lands. (Page 93 of Future Land Use Element). This County primary planning purpose of protecting endangered and threatened species was the application of the ESA, and thus exempt from Bert Harris Act claims pursuant to Section 70.001(12).

The Collier Plan designated the SR 846 Lands as "Receiving Lands" because the lands are encircled by moderate density development and are isolated from panther habitat lands by SR 846.

Dr. Francis D. Hussey and his wife Mary Pat Hussey (Husseys) challenged Collier County Ordinance No. 02-32 in a DOAH administrative hearing, specifically challenging the

"Sending Lands" designation of their NBM property (DOAH Case No. 02-3795GM). The FWF and CCAS were granted intervention in that proceeding to defend the Rural Fringe Amendments and the "Sending Lands" designation of the Husseys' property.

The issues litigated by the Husseys primarily included: (1) whether the County's designation of "Sending Lands" and "Receiving Lands" within NBM was based upon and reacted appropriately to the best available data, and (2) whether the County's TDR Program was based upon and reacted appropriately to the best available data, including whether the TDR program was feasible. See, Recommended Order paragraph 26, DOAH Case No. 02-3795GM.

At this administrative hearing the Hussey's argued and presented evidence that all of the land in NBM was important panther and wildlife habitat, and that protection of the entire NBM was the appropriate reaction to the best available data.

After eight days of evidentiary hearing, ALJ J. Lawrence Johnston entered a Recommended Order finding the Rural Fringe Amendments to be in compliance under Chapter 163, Part II, Fla. Stat. ALJ Johnston specifically held the land use amendments where based upon the best available evidence, and that the amendments reacted appropriately to the best available data and analysis. Designating land closer to NGGE as "Receiving Lands," rather than designating the Hussey's property as "Receiving Lands," was proper based upon listed species habitat issues, urban sprawl issues, and infrastructure issues. See, Recommended Order, paragraph 71, DOAH Case No. 02-3795GM.

The Hussey's filed exceptions to the ALJ's Recommended Order with the DCA. The DCA reviewed the Hussey's exceptions and entered a Final Order on July 22, 2003, which adopted ALJ J. Lawrence Johnston's Recommended Order and found the County's Ordinance

No. 02-32 amendments to the Collier Plan, including the "Sending Lands" designation of the Hussey's property, to be in compliance as defined Section 163.3184(1)(b), Fla. Stat. See, DCA Final Order, DCA Case No, 03-GM-137, 25 FALR 4410, DCA 2004).

Pursuant to Section 163.3189(2)(a), Fla. Stat. (2003), the Collier Plan amendment which designated the Plaintiffs property as "Sending Lands" because effective on July 22, 2003 when the DCA issued its final order. A copy of the DCA Final Order was mailed to John Vega, legal counsel of the Plaintiffs.

Effective July 22, 2003, the Collier Plan clearly and unequivocally prohibited mining of lands designated as "Sending Lands." This Collier Plan prohibition applied to the Plaintiffs property, and the County was prohibited by Section 163.3194(1), Fla. Stat. As the Fifth District Court of Appeal noted in Citrus County, Florida v. Halls River Development, Inc., 9 S.3d 413, 421 (Fla. 5th DCA 2009),

> "Once a comprehensive plan has been adopted pursuant to Chapter 163, Part II, 'all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan' must be Consistent with the plan. § 163.3194(1)(a), Fla. Stat. (2005); *see also* § 163.3164(7), Fla. Stat. (2005)."

The Collier Plan amendment prohibition on mining, as well as the reduction in residential density, was readily ascertainable to the Plaintiffs, and the Plaintiffs were on notice of the prohibition on mining and reduction on residential density.

Pursuant to Section 70.001(11), Fla. Stat. the Plaintiffs had one year from July 22, 2003, to file a Bert Harris Act claim against the County regarding the Collier Plan amendments. See, Section 70.001(11), Fla. Stat.; Turkali v. City of Safety Harbor, 93 So.2d 493, 494 (Fla. 2nd DCA 2012); Halls River Development, Inc., Supra. The time limit for Bert Harris Acts challenging

comprehensive land use plan amendments which impose clear density reductions and height limitations must be within one year of the date the comprehensive plan amendment becomes effective. Additionally, the owner must file a pre-suit notice to the political entity at least 180 days prior to filing the action. See, Section 70.001(4)(a), Fla. Stat. (2003). This notice must include a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property." Id. The fact the Collier Plan could have been modified, varied or altered did not preclude the impact of the Collier Plan amendments on the property from being clear or unequivocal. See, Section 70.001(11)(a)(1), Fla. Stat.

The Hussey's appealed the Final Order to the First District Court of Appeal, Hussey v. DCA, Case No. 1D03-3543, which entered an order that Per Curiam Affirmed the DCA's Final Order.

The Plaintiffs first filed a Bert Harris Act claim pre-suit appraisal on July 21, 2004, a filing which was untimely under the Bert Harris Act which required the appraisal be filed no more than 180 days after the Collier Plan amendment was first applied to the Plaintiffs property (i.e. no later than January 18, 2004). Not only was the Plaintiffs' appraisal untimely filed, the appraisal was not a bona fide, valid appraisal because it did not show the value of the parcel (entire property) on the date of enactment of the restrictions, and the value of parcel after enactment of the new Collier Plan criteria, including the value of transferred development rights. See, Turkali v. City of Safety Harbor, 93 So.2d 493, 495 (Fla. 2nd DCA 2012) (appraisal was deficient because it did not provide opinions as to the value of parcel as of the date of enactment and the value of the parcel after enactment).

The Plaintiffs did not file their Bert Harris Act claim until September 12, 2008, over five

years after the County's Collier Plan amendments, including the land use designation of the Plaintiffs' land, went into effect.