ORIGINAL

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.

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

Defendants.

FLORIDA WILDLIFE FEDERATION, INC., and **COLLIER COUNTY AUDUBON SOCIETY, INC.**,

Interveners.
/

Case No.: 08-6933-CA
Consolidated with
Case No. 08-6988-CA

FILED 35
COLLIER COUNTY, FL
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D.C.

SEAN HUSSEY, JR., Successor Trustee to Jose Lombillo, Trustee, and **EDUARDO PEREIRO**, Trustee,

Plaintiffs,

vs.

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

Defendants.

FLORIDA WILDLIFE FEDERATION, INC., and **COLLIER COUNTY AUDUBON SOCIETY, INC.**,

Interveners.
/

Case No.: 08-7025-CA

ORDER DENYING APPROVAL OF JOINT SETTLEMENT AGREEMENT

THIS CAUSE comes before the Court on the "Joint Motion for Court Approval of Settlement Agreement, Pursuant to Florida Statutes 70.001(4)(d)(2)," filed by Plaintiffs Francis D. Hussey, Jr., and Mary P. Hussey, husband and wife; Winchester Lakes Corporation, a Florida corporation; and Sean Hussey, Seccessor Trustee to Jose Lombillo, Trustee and Eduardo Pereiro, Trustee; and Defendant Board of County Commissioners of Collier County, Florida. The joint motion was filed on April 26, 2013, and pursuant to the Bert J. Harris, Jr., Private Property Rights Protection Act, section 70.001 of the Florida Statutes, (hereinafter "Bert Harris Act"). Having reviewed the joint motion; Intervenors' response to the motion filed on May 20, 2013; Intervenors' memorandum of law filed on August 9, 2013; Plaintiffs' and Defendants' joint reply memorandum of law in support of Settlement Agreement filed on August 20, 2013; the case file; applicable law; and having conducted an oral arguments hearing on August 26, 2013; the Court finds as follows:

BACKGROUND

1. Plaintiffs alleged that Collier County effected a regulatory taking of their real property by preventing them from deriving any economic benefit therefrom, and a complete taking of their subsurface rights. In September 2008, Plaintiffs initiated separate lawsuits, later consolidated, in this Court and brought (1) a claim for damages under the Bert Harris Act and (2) an inverse-condemnation claim for compensation for the alleged regulatory taking, pursuant to Article X, Section 6(a) of the Florida Constitution.

2. Plaintiffs own approximately 1,000 acres of undeveloped real property in the North Belle Meade area of the County's Rural Fringe Mixed Use District. Plaintiffs alleged that their property could be successfully mined for limestone, and they applied for a conditional-use permit to conduct mining. Further, according to Plaintiffs, Collier County through the "Rural Fringe Amendments" amended its Growth Management Plan in 2002. These amendments

prohibited earth mining on certain property ("Sending Lands") within North Belle Meade, while allowing mining on other property ("Receiving Lands") under certain conditions.

3. As a result of the Rural Fringe Amendments, Plaintiffs alleged that all of their property was designated as Sending Lands, and that this designation:

a. Precluded all rock-mining rights on the Husseys' property;

b. Reduced residential development from one unit per five acres with clustering and planned development rights to one unit per forty acres without clustering and planned development rights; and

c. Prohibited the extension of County water and sewer services to the Hussey property.

These changes, the Plaintiffs alleged, made any reasonable economic use of their land unfeasible. These are the bases of Plaintiffs' Bert Harris Act claim and their claim for inverse condemnation.

4. The Florida Wildlife Federation, Inc., and the Collier County Audubon Society, Inc., sought to intervene. In an order rendered May 14, 2009, the Court granted in part the Intervenors' motion to intervene "within the parameters / guidelines contained within the County's memo of 08 April 09." According to the memorandum submitted by the County,

> the intervention must be limited to only a right to monitor the litigation as a spectator and must preclude their participation in these proceedings in any way, most importantly in discovery, other than to make appropriate motions to protect their interests. They should only be granted the right to be heard prior to the distribution of any judgment or settlement and may appeal those decisions.

"Defendant, Collier County's Joinder and Memorandum of Law in Support of Motion for Leave to Intervene Filed by Florida Wildlife Federation and Collier County Audubon Society, Inc.," p. 2 (Apr. 9, 2009).

5. The record reflects that Plaintiffs' Second Amended Complaint was dismissed

with prejudice by an order of this Court rendered February 15, 2011. Plaintiffs appealed the February 15, 2011, order of this Court to the Second District Court of Appeal in case numbers 2D11-1223 and 2D11-1224.

6. During the pendency of the appeals, Plaintiffs and Collier County negotiated a potential settlement, which was approved by the Collier County Board of County Commissioners at a regularly scheduled Board meeting on February 12, 2013.

7. On February 20, 2013, Plaintiffs and Collier County filed with the Second District Court of Appeal unopposed motions for remand. The parties informed the Second District Court of Appeal that they had reached a settlement and that the settlement was contingent upon the approval by the Twentieth Judicial Circuit Court for Collier County. The parties asked the Second District Court of Appeal to remand the case to this Court for the limited purpose of approval of the potential Settlement Agreement and for the entry of further orders contemplated by the proposed settlement.

8. On March 5, 2013, the Second District Court of Appeal issued an order on the motions for remand. The Second District Court of Appeal treated the motions for remand as motions to relinquish jurisdiction to the trial court. These motions were granted, and jurisdiction was relinquished for forty-five days to this Court to consider approval of the proposed Settlement Agreement. On July 15, 2013, the relinquishment of jurisdiction was extended to September 20.

9. On April 26, 2013, Plaintiffs and Collier County filed a joint motion for approval of the Settlement Agreement. The Intervenors opposed the proposed Settlement Agreement. On August 26, 2013, the Court conducted a hearing on the question whether to approve the proposed Settlement Agreement.

10. The Settlement Agreement seeks:

a. the designation of the northerly 578 acres of real property owned by Francis D. Hussey, Jr. and Mary P. Hussey ("Hussey Lands") will be changed from Sending Lands to Receiving Lands;

b. the remainder of the Hussey Lands will remain designated as Sending Lands;

c. the designation of 578 acres of other real property, known as the "SR 846 Lands," will be changed from Receiving Lands to Sending Lands;

d. within 180 days following the effective date of the Settlement Agreement, Francis D. Hussey, Jr. and Mary P. Hussey shall deed to Collier County 180 feet of right-of-way for the future Wilson Boulevard Extension;

e. to exchange 22.318 acres of road right-of-way for $55,795 of transportation impact fees;

f. to reduce the Collier Plan vegetation preservation requirements on Plaintiffs North Belle Meade property;

g. to waive the current 25-year prohibition on transferred development rights being generated by the Plaintiffs North Belle Meade property due to the Plaintiffs recent land clearing activities;

h. to grant the Plaintiffs access to at least two locations to the future Wilson Boulevard Extension;

i. to waive the current native vegetation baseline date of June 19, 2002, for the vegetation on the Plaintiffs' North Belle Meade property; and

j. to grant the northern SR 846 Lands parcel the right to be developed as a Planned Unit Development (PUD).

11. The Settlement Agreement seeks to make the following Collier Plan amendments:

a. Amendments of the Collier Plan Future Land Use Map designations for two distinct separate parcels of land of 578 acres each;

b. Alteration of the land clearing restriction on the Plaintiffs property in North Belle Meade; and

c. Amendment of the Collier Plan Transportation Map with regard to the location of the Wilson Boulevard Extension and a new road in the SR 846 Lands.

The terms of the Settlement Agreement are a bilateral agreement with reciprocal obligations—Collier Plan amendments and transportation impact fee credits in exchange for land deeds for right-of-way and dismissal of the Plaintiffs' taking claims.

JURISDICTION TO HEAR SECTION 70.001(4)(D) ACTION

12. The Plaintiffs and the County seek approval of the Settlement Agreement pursuant to the Bert Harris Act, and this Court is cognizant of the fact that a dismissal of the claims with prejudice for failing to state a viable cause of action pursuant to the Act has been issued. The Court's dismissal with prejudice of the Plaintiffs' Second Amended Complaint for failing to state a cause of action presents a dilemma as to whether this Court has jurisdiction to conduct a Section 70.001(4)(d) action to review the subject Settlement Agreement.

13. Notably, the Second District Court of Appeal did not relinquish jurisdiction to this Court to reconsider the February 15, 2011, order which dismissed with prejudice the Plaintiffs' Second Amended Complaint, including the Plaintiffs' Bert Harris Act causes of action. No motion of the parties is pending before this Court to reconsider the dismissal with prejudice. (For a more detailed procedural history of these proceedings, the Court has attached Exhibit A prepared by Intervenors).

14. The Bert Harris Act provides the legal authority and a cause of action by which a real property owner may seek compensatory monetary damages from decisions made by a government entity that inordinately burdens, restricts, or limits an existing use, vested interest, or reasonably foreseeable nonspeculative land use of the property in question without amounting to a taking under the Florida or federal constitutions. § 70.001, Fla. Stat. (2012); *Holmes v. Marion County*, 960 So. 2d 828 (Fla. 5th DCA 2007), *reh'g denied*; *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988 (Fla. 4th DCA 2006), *review denied* 929 So. 2d 1053 (Fla. 2006); *Sosa v. City of West Palm Beach*, 762 So. 2d 981 (Fla. 4th DCA 2000), *reh'g denied.* Pursuant to the Bert Harris Act, the circuit court where the subject real property is located is required to approve a proposed Settlement Agreement between the property's owner and a governmental entity when the agreement

> [W]ould have the effect of contravening the application of a statute as it would otherwise apply to the subject real property . . . 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.

§ 70.001(4)(d)(2), Fla. Stat. (2012). The real property at issue in the proposed Settlement Agreement is located within the jurisdiction of this Court, and Plaintiffs and Collier County have agreed that this Court has jurisdiction for this purpose.

15. Parties cannot stipulate to jurisdiction over subject matter 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). Subject matter jurisdiction to conduct a Section 70.001(4)(d) action is dependent upon the Plaintiffs having stated a Bert Harris Act cause of action, which the Court held in its February 15, 2011, order that the Plaintiffs failed to state. Although a real property owner is not required to file a lawsuit under the Bert Harris Act to settle a claim under the Act, the intention to

settle the claim under the Act must be determined from the pleadings. *Charlotte County Park of Commerce, LLC v. Charlotte County*, 927 So. 2d 236, 239 (Fla. 2d DCA 2006) (holding that the fact that the owner did not file a lawsuit under Bert Harris Act did not preclude it and county from settling the claim under the Act, but the issues of whether the parties' intentions were to settle the claim under the Act could not be determined from the pleadings). Even though the Second District Court of Appeal has not reversed or vacated this Court's order dismissing the Plaintiffs' Bert Harris Act causes of action with prejudice, it is clear that the parties are attempting to settle the claims pursuant to the Act. As such, the Court will address the Settlement Agreement on the merits.

SECTION 70.001(4)(D)

16. The Bert Harris Act provides in pertinent part:

> 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.

§ 70.001(4)(d)(2), Fla. Stat. (2012) (emphasis added).

17. Section 70.001(4)(d)(2) mandates that this Court "ensure" that approval of the Settlement Agreement protects the public interest served by the applicable statutes that effect the subject property which includes the Endangered Species Act (ESA) (16 U.S.C. §§ 1531, et seq.); Chapter 163, Part II, of the Florida Statutes; and "contract zoning" that effects the interested public's due process guarantees and protections granted by the federal and state constitutions.

18. Even though this Court has dismissed with prejudice the Plaintiffs' Bert Harris Act and state constitutional takings claims against the County, it contends approval of the

Settlement Agreement is in the public interest because the Settlement Agreement resolves the potential threat of liability exceeding $91,000,000 it is facing due to the Plaintiffs' litigation. This argument misapplies the statutory standard. If the public interest standard of Section 70.001(4)(d) 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." *Chisholm Props. South Beach, Inc. v. City of Miami Beach*, 8 Fla. L. Weekly Supp. 689b (Fla. 11th Cir. Ct. 2001), *cert. denied and reh'g denied en banc*, 830 So. 2d 842 (Fla. 3d DCA 2002) (holding that a variance applicant seeking a prohibited land use is not a "reasonably foreseeable" use and is "speculative" in nature). The public interest is that which is served by the regulations the Settlement Agreement seeks to contravene and not the potential financial exposure due to litigation claims.

COUNTY'S OBLIGATION TO APPLY THE ENDANGERED SPECIES ACT

19. In 1973, Congress enacted the Endangered Species Act (ESA). 16 U.S.C. §§ 1531-1544. Because endangered and threatened species reside in the County, the County is 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.

> 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.

16 U.S.C. § 1535(f). Accordingly, the ESA preempts and supercedes all Florida laws that are less restrictive than the prohibitions of the ESA and its implementing regulations.

20. No County authorization by ordinance or a Bert Harris Act settlement agreement may be less restrictive than the prohibitions of the ESA. The ESA outlaws a "take" of an

endangered species without express authorization. 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 prohibition on a "take" of an endangered species includes reasonably foreseeable takes incidental to otherwise lawful activity. *See Loggerhead Turtle v. County Council of Volusia County, Fla.*, 148 F.3d 1231, 1253 (11th Cir. 1998); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064 (9th Cir. 1996). The term "harm" is further defined to encompass habitat modification or degradation that injures an endangered species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (2006). 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." *Id.* The ESA prohibits not only past actions, it also applies to wholly-future threat of ESA prohibited harm to endangered and threatened species. *Marbled Murrelet*, 83 F.3d at 1064-65 (threat of future harm related to harvesting trees is grounds for court issuance of ESA based injunction).

21. In 1982, Congress amended the ESA to add the Section 10 Habitat Conservation Plan (HTP) and Incidental Take Permit (ITP) provision 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 Cmtys. for a Great Oregon*, 515 U.S. 687, 700-01 (1995). Actions by a governmental entity that authorize land uses and activities which create a reasonably certain threat of future harm or harassment to endangered or threatened species are prohibited by the ESA unless the governmental entity has obtained a HCP and ITP from the United States Fish and Wildlife Service (FWS). *See Loggerhead Turtle*, 148 F.3d at 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 Murrelet*, 83 F.3d at 1064-65 (reasonably certain threat of future harm to listed species, based upon preponderance of evidence, is a Section 9 take).

22. It has been argued that the non-federal activities and authorizations of the County as set forth in the Settlement Agreement may "take" endangered or threatened species. Each proponent in this case takes a different position on the settlement's endangerment of protected species. No record evidence has been submitted, and it appears undisputed, that the County has not obtained federal permits pursuant to HCP or ITP from the FWS concerning the proposed actions set forth in the Settlement Agreement. The County argues that the tradeoff in land designations will strengthen the habitats of certain protected species. Based upon the record before this Court, the Court cannot make a finding that the Settlement Agreement protects the public interest served by the ESA, and this Court does not have the authority to contravene the application of the ESA to the subject property.

CH. 163, PART II, FLA. STAT.

23. Plaintiffs and the County contend that Section 70.001(4)(c) of the Florida Statutes authorizes the amendment of local government comprehensive land use plans by means of a Bert Harris Act settlement agreement. Plaintiffs and the County further contend that Section 70.001(4)(d)(2) of the Florida Statutes authorizes circuit courts to approve settlement agreements which have the effect of contravening the procedure and standards for amending comprehensive land use plans as outlined in Chapter 163, Part II, of the Florida Statutes. The Court declines to accept this proposition.

24. Section 70.001(4)(c) does not specifically authorize amendments of comprehensive land use plans.[1] The phrase comprehensive land use plan does not appear in Section 70.001(4)(c). Section 70.001(4)(c) references written settlement offers to effectuate land use modifications by issuing variances, special exceptions, or other extraordinary relief or appropriate methods. The Bert Harris Act does not specifically authorize settlement agreements that amend comprehensive land use plans by contravening amendment procedures and compliance criteria pursuant to Chapter 163, Part II, of the Florida Statutes.

25. The Section 70.001(4)(d)(2) phrase: "effect of contravening the application of a statute as it would otherwise apply to the subject property," must be cautiously interpreted in order to avoid a violation of separation of powers. "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." Art. II, § 3, Fla. Const.

26. To determine legislative intent, a court should look first to the plain text of the statute; however, if a section of a statute seems to have a clear meaning when examined alone but that meaning is inconsistent with other sections, a court should "examine the entire act and those in pari materia in order to ascertain the overall legislative intent." *E.A.R.*, 4 So. 3d at 629

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[1] The Bert Harris Act authorizes governmental entities the ability to make written settlement offers to effectuate:

> An adjustment of land development or permit standards or other provisions controlling the development or use of land. Increases or modifications in the density, intensity, or use of areas of development. The transfer of developmental rights. Land swaps or exchanges. Mitigation, including payments in lieu of onsite mitigation. Location on the least sensitive portion of the property. Conditioning the amount of development or use permitted. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development. Issuance of the development order, a variance, special exception, or other extraordinary relief. Purchase of the real property, or an interest therein, by an appropriate governmental entity or payment of compensation. No changes to the action of the governmental entity.

§ 70.001(4)(c)(1-11), Fla. Stat. (2012). A variance is defined as "[a] license or official authorization to depart from a zoning law." BLACK'S LAW DICTIONARY 1588 (8th ed. 2004).

(quoting *Fla. Dep't of Envtl. Prot. v. Contractpoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265-66 (Fla. 2008)). In pari materia is a tenet of statutory construction which requires statutes relating to the same subject matter to be considered together to "harmonize the statutes and to give effect to the [L]egislature's intent." *Id.* (quoting *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005)). Courts are not permitted to "add or delete provisions from plain statutory text" when interpreting statutes. *Limbaugh v. State*, 887 So. 2d 387, 395 (Fla. 4th DCA 2004) (citing *McLaughlin v. State*, 721 So. 2d 1170, 1172 (Fla. 1998)).

27. Section 70.001(4)(c) and 70.001(4)(d)(2) of the Bert Harris Act were enacted by the Florida Legislature in 1995. The Community Planning Act states that when its provisions conflict with any other provisions of law, the provisions of the Community Planning Act "shall govern unless the provisions of this act are met or exceeded by such other provision or provisions of law . . . ." § 163.3211, Fla. Stat. (2013). Section 163.3184 sets forth the process for adoption of comprehensive plan amendments, and Section 163.3184(10) mandates that the process for amending comprehensive land use plans is the sole and exclusive process.[2]

28. Based on the procedural requirements of Chapter 163, Part II, of the Florida Statutes, it does not appear that the Florida Legislature intended for community plans to be supplanted by negotiated settlement agreements pursuant the Bert Harris Act.

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[2] The following is a definitive description of the relationship between a comprehensive land use plan and zoning regulations:

> A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The comprehensive plan is similar to a constitution for all future development within the governmental boundary. Zoning, or, in this case, the County's LDC, is the means by which the Plan is implemented. Zoning involves the exercise of discretionary powers within limits imposed by the comprehensive plan. A zoning action that is not in accordance with the comprehensive plan is unlawful. 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 that plan.

Citrus County v. Halls River Dev., Inc., 8 So. 3d 413, 420-21 (Fla. 5th DCA 2009) (internal citations omitted).

CONTRACT PLANNING AND DUE PROCESS

29. The proposed Settlement Agreement on its face is an ultra vires contract planning or zoning agreement. A city does not have the authority to enter into a zoning contract where a property owner agrees to certain conditions in exchange for rezoning or a promise to rezone because the agreement effectively contracts away the exercise of its police power. *See Chung v. Sarasota County*, 686 So. 2d 1358, 1359 (Fla. 2d DCA 1996). 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" a comprehensive land use plan amendment requested by the land owner. *See Hartnett v. Austin*, 93 So. 2d 86, 89-90 (Fla. 1956) ("adoption of an ordinance is the exercise of municipal legislative power" and a city "cannot legislate by contract"); *Chung*, 686 So. 2d at 1360 (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 Co., Inc. v. Orange County*, 818 So. 2d 640, 643 (Fla. 5th DCA 2002) (illegal contract zoning exists even if the development agreement only requires the county "support" an application for development); *see also City of Safety Harbor v. City of Clearwater*, 330 So. 2d 840, 842 (Fla. 2d DCA 1976) ("Simply stated, the power to annex is governmental and such a power cannot be contracted away."); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 741 (Fla. 2d 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, 345 (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); *see also City of Miami Beach v. Chisholm Props. South Beach, Inc.*, 830 So. 2d 842, 843 (Fla. 3d DCA 2002) (Schwartz, J. concurring) (the settlement agreement with the City was a "sweetheart' settlement of a spurious action" under the Bert Harris Act).

30. Interpretation of the public interest standard in Section 70.001(4)(d) must be consistent with the following:

> 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 adoption 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.

Hartnett, 93 So. 2d at 89-90.

CONCLUSION

31. The Court finds that the Settlement Agreement between the parties in the case at bar and pursuant to the Bert Harris Act would contravene that application of laws and regulations and does not protect the public interests served by such laws and regulations. Accordingly, it is

ORDERED AND ADJUDGED that the "Joint Motion for Court Approval of Settlement Agreement, Pursuant to Florida Statutes 70.001(4)(d)(2)" is DENIED.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida, this 19 day of September, 2013.

Cynthia A. Pivacek
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to:

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this 19 day of Sept, 2013.

By: [signature] - names with X
Judicial Assistant Other copies sent by email from clerk

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.