

BEFORE THE LEE COUNTY COMMISSION, LEE COUNTY, FLORIDA

In Re: Section 163.3213 (3) Petition Regarding Ordinance 23-22

Captiva Civic Association, Inc.,

Petitioner

v.

Lee County, Fla.,

Respondent

_____ /

SECTION 163.3213 (3) PETITION REGARDING ORDINANCE 23-22

The Captiva Civic Association files this Petition with Lee County and alleges as follows:

1. This petition is filed with Lee County pursuant to §163.3213 (3), Fla. Stat. to challenge Ordinance 23-22 adopted on September 5, 2023, contingent upon the final adoption of Comprehensive Plan Amendment CPA2023-00004 as inconsistent with the Lee County Comprehensive Plan.
2. Ordinance 23-22 is a “land development regulation” as defined in §163.3213 (2)(b), Fla. Stat.
3. The Captiva Civic Association is a substantially affected person pursuant to §163.3213 (1) and (2)(a), Fla. Stat. because the CCA (1) owns real property very proximate to land that may now be approved for building heights and hotel room density under the subject land development regulation that is greater than that allowed prior to the adoption of the land development regulation, and (2) as a membership organization, a substantial number of CCA’s members live and or own property adjacent, or very proximate, to land that may

now be approved for building heights and hotel room density under the subject land development regulation that is greater than that allowed prior to the adoption of the land development regulation.

4. Section 163.3194 (1)(b), Fla. Stat. requires that all land development regulations enacted or amended shall be consistent with the adopted comprehensive plan, or element or portion thereof.
5. Section 163.3194 (3)(a), Fla. Stat. states that a land development regulation is consistent with the comprehensive plan “if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.”
6. On September 5, 2023, under the guise of resiliency, the County adopted the following provisions of the Land Development Code as amended by Ordinance No. 23-22 which increase building heights and hotel density unrelated to resiliency and are not consistent with the Comprehensive Plan:

a. Section 33-1611(e). Applicability.

Unless specifically provided herein, development within the area defined as South Seas Island Resort, as defined herein, is exempt from this article, ~~so long as the development complies with the Administrative Interpretation, ADD2002-00098, adopted by the Board of County Commissioners in 2002.~~

b. Section 33-1614. Definitions.

South Seas Island Resort means certain land generally lying north of Captiva Drive and bounded by the Gulf of Mexico, Red Fish Pass, and Pine Island Sound, commonly known as South Seas Island Resort, along with certain parcels lying south of and fronting Captiva Drive as depicted in Appendix I, Map 18.

c. Section 33-1627(a). Height Restrictions on Captiva Island.

(a) The height of buildings and structures is subject to the requirements of section 34-2175. ~~may not exceed the least restrictive of the two following options:~~

~~(1) Thirty five feet above the average grade of the lot in question or 42 feet above mean sea level measured to the peak of the roof, whichever is lower; or~~

~~(2) Twenty eight feet above the lowest horizontal member at or below the lawful base flood elevation measured to the mean level between eaves and ridges in the case of gable, hop and gambrel roofs. If the lowest horizontal member is set above the base flood elevation, the 28 foot measurement will be measured starting from the base flood elevation. Notwithstanding the above height limitations, purely ornamental structural appurtenances and appurtenances necessary for mechanical or structural functions may extend an additional four feet above the roof peak or eight feet above the mean height level in the case of gable, hip, and gambrel roofs, whichever is lower, so long as these elements equal 20 percent of the total roof area.~~

d. Section 34-1805. Density Limitation for Captiva Island

The permitted density for hotels and motels as set forth in this division will not apply to any hotel or motel units on Captiva Island. With the exception of the South Seas Island Resort, ~~the~~ maximum permitted density for hotels or motels on Captiva Island may not exceed three units per gross acre. The redevelopment of nonconforming hotels or motels on Captiva Island will be governed by the provisions of section 33-1628(b). That section will be interpreted to prohibit an increase in the number of rental units and to establish a maximum average unit size of 550 square feet.

e. Section 34-2175(a)(2). Height Limitations for Special Areas and Lee Plan Land Use Categories.

The following areas have special maximum height limitations applicable to all conventional and planned development districts.

Captiva Island, except South Seas Island Resort. ~~No~~ The height of a building or structure may not be erected or altered so that the peak of the roof exceeds 35 feet above the average grade of the lot in question or 42 feet above mean sea level, whichever is lower. The provisions of section 34-2174(a) do not apply to Captiva Island. No variance or deviation from this height restriction may be granted; provided however, one

communication tower, not to exceed 170 feet in height, may be constructed in accord with section 33-1627 Lee Plan Policy 23.2.3.

Notwithstanding the above height limitations, purely ornamental structural appurtenances and appurtenances necessary for mechanical or structural functions may extend ~~an additional four feet~~ above the roof peak ~~or eight feet above the mean height level in the case of gable, hip, and gambrel roofs, whichever is lower, so long as~~ provided that the total area dedicated to the exceedance of these elements, as measured by drawing a rectangle around the perimeter of the area(s) of the exceedances, equals 20 percent or less of the total roof area.

7. The Code amendments were developed at the behest of South Seas Island Resort, were erroneously designated as “county-initiated,” and were not fully and accurately described to the County’s Land Development Code Advisory Committee prior to adoption.
8. The changes to the Land Development Code adopted by Ordinance 23-22 authorize an increase in permissible habitable floors and an increase in hotel unit density compared to the Code just prior to the Amendment -- inconsistent with Chapter 23 and other goals, objectives and policies of the Lee Plan. Specifically:
 - a. The amended Section 33-1611(e) exempts South Seas Island Resort from all provisions of the Captiva Code (Chapter 33 of the Land Development Code) including, but not limited to, the Height Restrictions on Captiva Island (Section 33-1627(a)), the Hotel Density Limitations (Section 33-1628(c)), the minimum lot size per unit regulations (Section 33-1628(e)) and the Deviations and Variances Restrictions (Section 33-1615), thereby permitting radically increased building heights (from 28 feet above base flood elevation to between 45 to 75 feet above base flood elevation) and hotel room density (from 3 hotel units per acre to being subject to no hotel unit density limitations) on Captiva -- inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.

- b. The amended Section 33-1614 increases the area designated as South Seas Island Resort by approximately three acres, thereby exempting those acres from the height and density regulations of the Captiva Code (Chapter 33 of the Land Development Code) – inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.
 - c. The amended Section 33-1627(a), in conjunction with the amended Section 34-2175(a)(2), permits a third habitable floor on Captiva structures thereby increasing the building heights and intensity of use – inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.
 - d. The amended Section 34-1805 exempts South Seas Island Resort from the hotel density limitation of three units per acre on Captiva, and permits a number of hotel units unencumbered by any specific density limitation– inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.
 - e. The amended Section 34-2175(a)(2) exempts South Seas Island Resort from the building height limitations on Captiva – inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.
9. The goal, objectives and policies of Chapter 23 of the Lee Plan, in effect since March 23, 2018, are to protect the coastal barrier island of Captiva, to enforce land use regulations and development standards that maintain the historic low-density residential development patterns of Captiva, to continue existing land use patterns, to maintain building height regulations that account for barrier island conditions, to limit development to that which is in keeping with the historic development pattern on Captiva, and to prohibit the reduction

of the minimum lot size per unit under the parcel's current zoning category or under any other zoning category.

10. The Plan Amendments adopted on December 6, 2023 did not change the goal, objectives and policies of Chapter 23 of the Lee Plan with respect to the allowable amount of useable living space above base flood elevation, or density for hotel and residential dwelling units on Captiva – by their terms and as evidenced by the County's published and testimonial interpretation of its own amendments.
11. On January 17, 2023, the Board of County Commissioners directed staff to identify regulatory constraints faced by applicants seeking redevelopment to accommodate increased resiliency to future natural disasters. Based on this direction, staff analyzed the entire Lee Plan and found two restrictions that limit maximum height without allowing for increases to state and federal minimum flood elevations. The Comprehensive Plan amendment adoption hearing on December 6, 2023 amended Goal 23 and Policy 23.2.3 to remove language that prevents redevelopment of existing structures to base flood elevation while maintaining previous usable space. According to County staff, the intent of the amendments was to accommodate increased resiliency to flooding, while minimizing changes to height that would be inconsistent with the character of the surrounding community.
12. According to County staff, Goal 23 was amended to eliminate ambiguity in "one and two story building heights" because it did not define a starting point for the "one and two story building heights" or clarify if areas within a structure but below the base flood elevation would be considered one of the allowable two stories. Without a clear definition of "one and two story building heights," County staff was concerned that landowners seeking to

make their properties more resilient would be left with limited ability to rebuild their properties while retaining the same amount of useable living space within the structure. According to County staff, the community character of Captiva will continue to be enforced through specific height limitations within the Land Development Code.

13. According to County staff, Policy 23.2.3 was amended to permit residents and business owners who had structures damaged by Hurricane Ian to rebuild within federal and state flood regulations while maintaining previously approved usable living space. The original Captiva Plan provided guidance for heights allowed in the Community Plan Area with the purpose of limiting density on the island that provided a maximum height of 35 feet above grade or 42 feet above sea level, whichever is lower. This guidance was later updated by Ordinance 11-19 (CPA2010-00015), which added an option to have a maximum height of 28 feet above the lowest horizontal member at or below the lawful base flood elevation, a height limitation in effect on March 23, 2018 which was memorialized in the Plan. According the County staff, the amendment to Policy 23.2.3 deletes a specific date that does not allow for updates to state or federal requirements. According to County staff, Captiva’s community character and low density will continue to be maintained by Policy 23.2.4 and Policy 23.2.5. Policy 23.2.4 states that development on Captiva is limited to the historic development pattern, which is “comprised of low-density residential dwelling units.” Policy 23.2.5 prohibits certain rezonings that reduce the minimum lot size per unit, aiding in the protection of the low-density character of the island. County staff finds the potential change in character resulting from the proposed amendments is minimal and is consistent with the intent of the Policy. According to County staff, the proposed amendments will impact the Captiva Community Plan Area only by providing for

consistent treatment of structures that require elevation and removing ambiguous language from the community plan. County staff states that these amendments will not impact the community plan's intent to retain low-density development.

14. The Plan amendments were considered by the Board of County Commissioners at two public hearings on September 6, 2023 and December 6, 2023, respectively. On September 6, 2023, the Deputy County Attorney advised the Board that the Plan amendments will not increase density within the Captiva Community Plan area or at South Seas. On December 6, 2023, the County's Planning Manager represented in his power-point presentation that Goal 23 and the "intent of the Captiva plan will remain intact" and that Objective 23.2 protects "existing land use patterns" and that "density and intensity will remain limited." The Deputy County Attorney also advised the Board that the Plan amendments were not changing density – and that the hotel cap on Captiva remains the same, that has not been changed; and the density cap on Captiva remains the same – that has not been changed. And on October 20, 2023, in a letter to James D. Stansbury, Chief of the Bureau of Community Planning and Growth for the State of Florida, the Deputy County Attorney stated that "[n]othing within the comprehensive plan amendment that your Department reviewed concerned density of hotel units."

15. Specifically, Ordinance 23-22, amending the Land Development Code, is inconsistent with the following provisions of the Lee Plan:

- a. **POLICY 17.1.2:** Community plans must address **specific conditions unique to a defined area of the County**. Conditions may be physical, architectural, historical, environmental or economic in nature. (Ord. No. 18-18) (emphasis added)
- b. **POLICY 17.1.3:** "Community plans should consist of long term objectives and policies that are not regulatory in nature. **If needed, land development regulations may be adopted to implement the community plan.** (Ord. No. 18-18) (emphasis added)

- c. **GOAL 23: CAPTIVA COMMUNITY PLAN.** The goal of the Captiva Community Plan is to protect the coastal barrier island community’s natural resources such as beaches, waterways, wildlife, vegetation, water quality, dark skies and history. **This goal will be achieved through environmental protections and land use regulations** that preserve shoreline and natural habitats, enhance water quality, encourage the use of native vegetation, maintain the mangrove fringe, limit noise, light, water, and air pollution, create mixed use development of traditionally commercial properties, and **enforce development standards that maintain the historic low-density residential development pattern of Captiva.** (Ord. No. 03-01, 18-04, 18-18) (emphasis added)
- d. **OBJECTIVE 23.2: PROTECTION OF COMMUNITY RESOURCES.** To **continue the long-term protection and enhancement of** community facilities, **existing land use patterns**, unique neighborhood style commercial activities, infrastructure capacity, and historically significant features on Captiva. (Ord. No. 03-02, 18-04, 18-18) (emphasis added)
- e. **POLICY 23.2.3: Building Heights.** **Maintain building height regulations that account for barrier island conditions, such as mandatory flood elevation and mean-high sea level, for measuring height of buildings and structures.** (emphasis added)
- f. **POLICY 23.2.4: Historic Development Pattern.** **Limit development to that which is in keeping with the historic development pattern on Captiva** including the designation of historic resources and the rehabilitation or reconstruction of historic structures. **The historic development pattern on Captiva is comprised of low-density residential dwelling units, as defined in LDC, Chapter 10, minor commercial development and South Seas Island Resort.** (Ord. No. 18-04, 18-18) (emphasis added)
- g. **POLICY 23.2.5: Lot Size per Unit.** Development orders or development permits that would **result in a reduction of the minimum lot size per unit permitted on a parcel under the parcel's current zoning category or under any other zoning category that would result in a reduction of the minimum lot size per unit on that parcel (as of March 23, 2018) are prohibited.** (Ord. No. 18-04, 18-18) (emphasis added)

16. In an effort to take immediate advantage of the Land Development Code amendments that are inconsistent with the Lee Plan, South Seas Island Resort submitted a Plan Application that increases density from 247 units to 707 units – increasing density from 3 units per acre

to approximately 8.6 units per acre, with new buildings as high as 64 feet – almost twice as high as currently permitted on South Seas and almost 50 percent higher than allowable building heights on Captiva.

17. Petitioner requests that the County repeal the Code amendments identified in paragraph 6.

18. Pursuant to §163.3213 (3), Fla. Stat., Lee County shall have 30 days after the receipt of the petition to respond. Thereafter, the CCA may petition the state land planning agency not later than 30 days after the local government has responded or at the expiration of the 30-day period which the local government has to respond.

Submitted this 8th day of January, 2024.

By: /s/ Richard Grosso

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CERTIFICATE OF SERVICE

I certify that the foregoing has been submitted via email to the following persons on the Service List.

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