Lee County Captiva Code Administrative Challenge

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Wed 5/29/2024 5:06 PM

To:John D. Agnew <john.agnew@mysanibel.com>

2 attachments (4 MB)

Initial Order.pdf; Amended Pet filed 5.28.24.pdf;

Hello Mr. Agnew,

I write on behalf of my client the Captiva Civic Association, Inc. regarding the formal administrative hearing challenge it has recently initiated against the Lee County Code changes to the density and height standards on Captiva Island. The matter has just been assigned an Administrative Law Judge (ALJ) from the Fla. Division of Administrative Hearings, and initial discussions among legal counsel suggest that the case may be tried in a formal administrative hearing in Lee County sometime in late July or early August, and likely take 4- 5 days to complete. I have attached that Initial Order for your information.

I have been informed that WS SSIR Owner, LLC, which is commonly known as Timbers and owns South Seas Island Resort, will be moving to intervene into the case, presumably on the side of the County. The CCA would welcome the intervention of the City of Sanibel in support of our position.

The issue to be decided in this proceeding is whether the referenced Code changes are inconsistent with the Lee County Comprehensive Plan, as the CCA has alleged in its Amended Petition, which I also attach. The case would involve pre-hearing discovery, and the presentation of evidence and the testimony of fact and expert witnesses as any party may be in a position to offer at the formal hearing before the ALJ.

I would of course be available at your convenience to discuss the matter further.

Thank you very much for your consideration.

RG

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAPTIVA CIVIC ASSOCIATION, INC.,

Petitioner,

vs.

Case No. 24-1951GM
Agency Case No.: COM-24-016

LEE COUNTY, FLORIDA AND FLORIDA DEPARTMENT OF COMMERCE,

Respondent.
_____/

INITIAL ORDER

1. Any document filed with DOAH by a party represented by a lawyer shall be filed electronically through eALJ located at www.doah.state.fl.us. Parties not represented by a lawyer may file electronically through eALJ. Documents filed through eALJ shall include the filing party's e-mail address and a copy shall be served upon all other parties. All documents must contain the DOAH style and case number.
2. **The agency or, where the agency is not a party, the Petitioner shall initiate communications and coordinate with all parties and provide the following information within seven days of the date of this Order.** However, regardless of how coordination is accomplished, all parties or parties' counsel are charged with the duty of conferring and providing a **joint** response to this Order. If coordination is not possible due to circumstances outside of the reasonable control of the parties, each party shall individually provide the information.
   a. Any related cases before DOAH, and, if so, the DOAH case number;
   b. Estimated length of time necessary to conduct the final hearing;
   c. Suggested geographic location for the final hearing. Any party may ask the judge to consider his or her preference for either an in-person hearing or a hearing conducted by Zoom conference;
   d. All dates more than 30 and less than 70 days from the date of this Order on which both parties are available for the final hearing; and
   e. Whether the parties are aware of any need for an ADA accommodation by any participant to the hearing, and, if so, the nature of the accommodation.
3. Parties not represented may file electronically through eALJ or mail. **Choose one method** of filing for each document.
4. **Every person filing a document at DOAH must ensure that no information protected by privacy or confidentiality laws is contained in any document that would be posted to DOAH's website in the regular course of business.**
5. **Failure to comply with the provisions of paragraph 2 shall waive venue rights, and the final hearing will be set at a time and place determined by the Judge**.

DONE AND ORDERED this 28th day of May, 2024, in Tallahassee, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
Administrative Law Judge
DOAH Tallahassee Office

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32301-3060
(850) 488-9675
www.doah.state.fl.us

SUMMARY OF PROCEDURES

This case has been filed with the Division of Administrative Hearings to conduct an evidentiary hearing governed by chapter 120, Florida Statutes, and Florida Administrative Code Chapter 28-106, Parts I and II.

THE PARTIES SHALL TAKE NOTICE THAT:

1. Parties that have not previously registered for electronic filing may register through eALJ at www.doah.state.fl.us. Once your registration has been submitted you will receive electronic notification within 24 hours that your account has been activated. **Your registration must be activated before you may file electronically.**
2. If a document is **not** electronically filed as provided on page one, **parties not represented by a lawyer** shall file the document on 8.5" x 11" paper at the address below the Judge's signature and serve a copy upon all other parties.
3. Discovery may be undertaken in the manner provided in the Florida Rules of Civil Procedure and, if desired, should be initiated immediately. Subpoenas may be obtained from the Judge by contacting (850) 488-9675, extension 5444. Registered e-filers shall obtain subpoenas electronically through the DOAH website under the eALJ link. Discovery must be completed five days before the date of the final hearing unless an extension of time for good cause is granted.
4. The government agency for which a hearing is conducted will make arrangements for preserving the testimony at the final hearing.
5. A party may appear personally or be represented by a lawyer or other qualified representative, pursuant to rule 28-106.106. *Self-represented litigants should review "Representing Yourself" located on the Division's website at www.doah.state.fl.us. Parties not represented by counsel are also notified of The Florida Bar's "Free Legal Answers" and other related resources, which are available at www.floridalawhelp.org.*
6. Rule 28-106.210 provides that requests for continuances must be filed with the Judge at least five days prior to the date of hearing, except in cases of extreme emergency, and will only be granted for good cause shown.
7. Parties will promptly notify the Judge in the event of a settlement or other development which might alter the scheduled hearing.
8. The parties are expected to discuss the possibility of settlement, enter into pre-hearing stipulations of fact and law, identify and limit issues, and exchange exhibit and witness lists prior to the hearing.
9. If all parties agree, this case may proceed as a summary hearing, without discovery, if requested by motion within 15 days from the date of this Order. A Final Order will be entered within 30 days after the hearing.

If you are a person with a disability who needs an accommodation in order to participate in a DOAH proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Judge's assistant at least seven days before your scheduled DOAH appearance, or immediately upon receiving this notification if less than seven days. The Judge's assistant may be reached by sending an email to AskDOAH@doah.state.fl.us or calling (850) 488-9675, via 1-800-955-8771 (TTY), 1-800-955-1339 (ASCII), or 1-800-955-8770 (Voice), or 844-963-9710 (Spanish) Florida Relay Service.

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BEFORE THE FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

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

Captiva Civic Association, Inc.,
Petitioner Commerce Case No.: COM-24-016
v.

Lee County, Fla., and Florida Department of Commerce

Respondents
_____/

AMENDED[1] SECTION 163.3213 (5)(a) PETITION REGARDING LEE COUNTY ORDINANCE 23-22

Petitioner, Captiva Civic Association, Inc. (CCA) files this petition for formal administrative hearing with the Division of Administrative Hearings pursuant to Sections 163.3213(5)(a), 120.569, and 120.57(1), Florida Statutes, and states:

STATEMENTS OF ULTIMATE FACT

Parties, Jurisdiction, and Venue

1. Petitioner, Captiva Civic Association, Inc., is a not-for-profit corporation with its principal place of business in Lee County, Florida. As shown below, it has met all statutory prerequisites to the initiation of this proceeding.

2. The affected state agency is the Respondent Florida Department of Commerce (the Department), 107 E. Madison Street, Caldwell Building, MSC 110, Tallahassee, Florida 32399-4128.

[1] This Amended Petition supersedes and replaces the Petition filed in this matter on May 24, 2024, specifically amending paragraphs 15, 19, 27a, and 28 as shown in strike – through / underline format.

3. Respondent, Lee County, Florida is a political subdivision of the State of Florida. and is the local government that adopted the land development regulation being challenged in this action.

4. This petition is filed pursuant to §§163.3213 (5)(a), Fla. Stat. to challenge Ordinance 23-22 adopted on September 5, 2023, as inconsistent with the Lee County Comprehensive Plan.

Petitioner's Substantial Interests Are Affected

5. Captiva Civic Association is a not-for-profit corporation created in 1936 and incorporated in 1959 for the benefit of the citizens of Captiva. CCA's mission is to "defend and preserve our comprehensive land use policy" and to "protect our residents' safety, the island ecology, and the unique island ambiance…." CCA's Land Use Policy provides that "CCA, in accordance with its mission, shall work with governmental authorities, property owners and other associations to: . . . Maintain the strict limits on density and height as currently stated in the Lee County Comprehensive Plan and . . . strictly enforce zoning and other regulations including those which have the effect of limiting traffic and excessive noise…."

6. CCA has approximately 400 members, of whom approximately 45 are property owners on South Seas Island Resort ("South Seas"). The 2020 census reported the Captiva population as 318, but the seasonal population of Captiva increases to approximately 3000 residents.

7. CCA is a substantially affected person pursuant to §163.3213 (1) and (2)(a), Fla. Stat. because CCA (1) owns real property very proximate to land that may now be approved for building heights, intensity of use 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, intensity of

use 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.

8. CCA has repeatedly and successfully brought legal actions on behalf of its members to accomplish its mission and purpose.

9. The injury in fact to be experienced by the Petitioner and a substantial number of its members include adverse impacts to the coastal barrier island community's natural resources, including potential increases in noise and light pollution impacts to surrounding natural areas, and potential structural damage to wetlands as a result of more and taller buildings being subject to storm damage, adverse changes to the historic low-density residential development pattern and unique neighborhood style commercial activities, reductions in their quality of life and community character from increased density and intensity of use, and in increase in traffic and evacuation times and reduction in public safety.

10. CCA itself owns and operates the Captiva Civic Center, the Captiva Library which it leases to the County for library services, and a residential dwelling unit which is leased to the Lee County Sheriff's Department as a residence for a Deputy Sheriff and his family. All three CCA-owned structures are directly affected by the amendments to the land development regulations.

11. In its written decision in this matter, the Department of Commerce correctly held that the CCA "has adequately demonstrated standing as a substantially affected person under section 163.3213(2)(a), Florida Statutes." (Attachment 1).

Captiva Island in Lee County

12. Captiva Island is a low–lying barrier island, comprised of approximately 725 acres. A single narrow, two-lane, constrained road, Captiva Drive, provides access to the mainland.

13. Captiva is within the Coastal High Hazard Area, the Level "A" evacuation zone, and located in one of the most vulnerable areas of southwest Florida for public safety and evacuation. It lies within an Area of Special Flood Hazard as indicated in the Flood Insurance Rate Maps. The island is subject to inundation due to storm surge and vulnerable to over wash in a Category 1 storm. The island of Captiva was seriously damaged by Hurricane Charley in 2004 and Hurricane Ian in 2022.

14. Captiva has a total of approximately 1650 hotel and residential dwelling units consisting of 887 units on South Seas Island Resort and approximately 760 units on the rest of Captiva Island.

15. South Seas is a 304-acre resort at the north end of Captiva Island in the unincorporated area of Lee County, Florida. South Seas was approved in 1973 as a resort and residential master planned development, and is currently almost completely developed, with a small number of residential units still remaining to be built, and with 247 units to be rebuilt - 107 hotel units demolished as a result of Hurricane Ian in 2022, and most of the 140 employee housing units as a result of pre-hurricane demolition.

16. In 2021, South Seas was purchased by Timbers Resorts, The Ronto Group and Wheelock Street Capital. The purchasers of South Seas own approximately 120 of the 304 total acreage of South Seas.

17. On November 20, 1973, a petition was filed with Lee County by the then owner/developer of South Seas to "down-zone" the density on the South Seas property from 3,900 units to 912 units, in return for small-scale clustering and site flexibility. The County adopted Resolution Z-73-202 (the "Resolution"), which rezoned South Seas to a 304-acre special zoning district, using a planned unit development ("PUD") concept plan, with the special limitation that South Seas'

density was specifically limited to three (3) units per acre. The Resolution limited the number of units at South Seas to 912, inclusive of hotel room units.

18. Since adoption of the Resolution in 1973, for more than 50 years of development and redevelopment, the County's zoning for South Seas has continuously and consistently limited the maximum number of hotel and residential units together at South Seas to 912. The South Seas property is a planned development subject to a master plan approved in 1973 which limits its development to a "a maximum limitation" of 912 units, inclusive of residences, condominiums and hotel rooms, characterized as a "a very low density, high quality resort community"

19. On July 30, 2002, the County issued Administrative Interpretation #2002-0098 (the "Administrative Interpretation") to document the "as built – as approved" status of development at South Seas and to clarify, guide and regulate future development at South Seas. The Administrative Interpretation confirms the 1973 zoning approval and expressly states that "current and future development" within South Seas will be limited to a "carefully planned and tightly controlled" development density of 912 units. The Administrative Interpretation also confirmed that building heights on South Seas were limited to the lesser of 35 feet above grade or 42 feet above sea level – the same as the rest of Captiva at that time.

20. South Seas has constructed or caused to be constructed 887 of the 912 approved units, but recently demolished 247 units, leaving no more than 272 units for which South Seas can obtain building permits to construct or reconstruct. The 247 units owned by South Seas that were demolished were approved and built at a height of the lesser of 35 feet above grade or 42 feet above sea level. Any other structures on South Seas that may be at a greater height were built before the turn of the century and are pre-Code and nonconforming structures.

21. The development pattern on Captiva Island is historically a low-density residential development pattern, characterized by one to two story residential and hotel units, at a maximum density of three (residential, condominium or hotel) units an acre.

The Challenged Land Development Code Amendments (Attachment 2)

22. On September 5, 2023 Lee County adopted Land Development Code ("LDC") amendments by Ordinance No. 23-22 which would permit a substantial increase in the number of dwelling units on South Seas beyond the 912 density-limit and repeal the long–standing classification of hotel units as dwelling units. The amendments also substantially increased the allowable building heights and the number of permissible habitable stories on Captiva both inside and outside of the gates of South Seas.

23. Ordinance 23-22 is a "land development regulation" as defined in §163.3213 (2)(b), Fla. Stat.

24. The Code amendments applicable to South Seas made by Ord. 23 -22 were developed at the behest of South Seas, but were erroneously designated as "county-initiated."

25. Ord. 23-22 radically changes the long-established density limitations on South Seas pursuant to the County land development regulations, and allow for significantly more units than permitted under the 1973 Resolution, the Administrative Interpretation 2002-0098 and the historic very low density residential development pattern on Captiva.

26. The relevant Amendments, set forth below, also specifically exempt South Seas from the hotel room density limits that would continue to apply to other properties and resorts on Captiva.

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, ~~T~~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~~ exceed~~s~~ 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.

27. These changes to the Lee County Land Development Code authorize an increase in building heights, density and the intensity of use on Captiva, and specifically authorize an increase in building heights and hotel unit density, for the express and sole benefit of South Seas. Specifically:

a. The amended Section 33-1611(e) exempts development at South Seas 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 (or now 35) 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 34-1805 exempts South Seas from the hotel density limitation of three units per acre on Captiva, thereby eliminating the 912-unit density limit and permitting 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.

c. The amended Section 33-1614 increases the area designated as South Seas 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.

d. 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.

e. Amended Section 34-2175(a)(2) exempts South Seas from the building height limitations on Captiva – inconsistent with the goal, objectives and policies of Chapter 23 of the Lee Plan.

28. Prior to adoption of Ord. 23-22, development within South Seas was exempt from Chapter 33 of the LDC under Section 33-1611(e) only if development on South Seas complied with Administrative Interpretation 2002-0098. Both Chapter 33 of the LDC and the Administrative Interpretation 2002-0098 set the cap for dwelling and hotel units at three units per acre.

29. Administrative Interpretation 2002-0098 guided and enforced development at South Seas in a manner consistent with, and reflective of, the regulations applicable to all of Captiva, which limits density to 3 units per acre for both hotel rooms and dwelling units, including condominiums and apartments. See, Land Development Code Sec. 33-1628(c).

30. Prior to the changes made by Ord. 23-22, South Seas was required to comply with Sec. 33-1628(c) of the Captiva regulations if the resort did not comply with Administrative Interpretation ADD2002-00098, which also limited density to 3 units per acre for both hotel rooms and dwelling units.

31. The deletion of the Administrative Interpretation compliance requirement allowed by Ord. 23-22, which amended Section 33-1611(e), coupled with Section 34-1805, as amended, which eliminated the three hotel units per acre cap on South Seas, means South Seas now has ***no*** density limitation on hotel units and therefore no cap of 912 units.

32. In an effort to take immediate advantage of the LDC Amendments, on December 18, 2023, South Seas submitted a Rezoning Application to the County, which seeks approval to construct 707 new units, thereby increasing density on South Seas from 912 units to 1,347 units –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. The application is pending and under review by Lee County staff.

33. The construction of the 707 new units would constitute a forty-eight percent (48%) increase in density on South Seas, and a two hundred and eighty-six percent (286%) increase in density on the 120 acres of property owned by the current developer.

The Department of Commerce Determination (Attachment 1)

34. In its written determination in this matter, the DOC correctly recognized that "the development standards set forth in the County's 2002 Administrative Interpretation identify the maximum density of [South Seas] as '912 residential units (304 acres at three units per acre) and five (5) acres of commercial development,'" that the new ordinance exempts South Seas from the density limitation of three units per acre for hotels and motels on Captiva, and that the new

ordinance also exempts South Seas from the maximum height limitation in effect everywhere else on Captiva. The DOC also acknowledged that the new ordinance "provides for the possibility [of South Seas] obtaining an allowance to develop" buildings as tall as 75 feet above base flood elevation.

35. The DOC also stated that "(t)he County considers the 2002 Interpretation as the controlling document that outlines the current standards and development potential of the South Seas Island Resort."

36. However, the DOC's written determination erroneously, and contrary to the explicit and repeated County formal interpretations that the 107 hotel units at South Seas were included within the 912 unit cap, found that the historic very low density development pattern on Captiva did not include hotel units within the 912 unit cap. Among other things, the initial 1973 zoning approval, the 2002 Administrative Interpretation, and the rezoning application recently submitted by South Seas concede that the current 912 unit cap includes hotel units. The DOC's statement that it is "unclear whether such (hotel) units were intended to be included in the 912 residential unit cap or possibly within the commercial use portion of the property" is clearly incorrect.

37. The DOC also accepted the County's claim that hotels on Captiva, other than South Seas, are not subject to the density limitation of three units per acre. However, Section 33-1628 of the Captiva Code provides that, "no building or development permits will be issued for development on Captiva Island at a density greater than the following: Three units per acre for motels or hotels." Any hotels or motels on Captiva at a density of greater than 3 units per acre are nonconforming, pre-Code construction.

38. The DOC's written determination also erroneously states that there is no evidence to suggest the increase to the height standard provided by Ord 23-22 would result in an additional

habitable floors or more units on South Seas. However, such evidence is provided in the current application by South Seas - tailored to comply with the very Code change the DOC stated would not allow an increase in habitable floors. The application proposes additional habitable stories and a 286 percent increase in units on the remaining 120 acres owned by South Seas -- an increase from 247 to 707 units.

39. Ultimately, the DOC determined, erroneously, "that there is at least fair debate on whether the challenged provisions of the ordinance are consistent with and further objectives and policies of the Plan", and that "(w)ithout additional information, it is difficult to determine conclusively whether the Ordinance alters the development pattern of South Seas Island Resort in a manner inconsistent with the Plan."

Additional Ultimate Facts Relevant to Comprehensive Plan Violations

40. The specific conditions unique to Captiva as a fragile barrier island as well as the Plan provisions designed to protect the barrier island were disregarded when building heights were changed outside the gate of South Seas to make them consistent with rest of Lee County and when building heights inside South Seas were changed to allow building heights there as tall as those allowed in the *Outlying Suburban* category on the County's mainland, and to allow hotel density there as dense as is allowed on *Outlying Suburban* lands on the mainland.

41. With a few limited, pre-Plan, grandfathered exceptions, the historic low-density residential development pattern of Captiva is clearly characterized by one to two story residential and hotel units, at a maximum density of three (residential, condominium or hotel) units an acre.

42. The historic low-density residential development pattern of South Seas is consistent with that of the rest of the Barrier Island. The South Seas property is a planned development subject to a master plan approved in 1973 which limits its development to a "a maximum limitation" of 912

units, inclusive of residences, condominiums and hotel rooms, characterized as a "a very low density, high quality resort community".

43. The densities now allowed as a result of Ordinance 23-22 do not maintain the historic low-density residential development pattern of Captiva, but instead dramatically increase residential, condominium and hotel room density beyond that historic pattern, and, for the first time, exclude hotel units from the density limits historically applied to South Seas (and which continue to apply to the rest of Captiva Island), increasing the number of allowable hotels on South Seas by an unlimited percentage (South Seas is currently requesting more than a 400 percent increase in their currently approved number of hotel rooms) and allowing building heights on South Seas up to between 45 and 75 feet above base flood elevation when they were historically limited to 35 feet above grade or 42 feet above mean sea level, whichever was lesser in height, and permitting an additional floor of construction outside of South Seas – up from 28 feet to 35 feet above base flood elevation increasing the intensity of use by 50 percent.

44. The provision in the Code change that allows the County to approve buildings as high as 45 to 75 feet above base flood elevation fails to account for the full extent of wind damage to which buildings that tall can be exposed on the Barrier Island of Captiva.

45. The density and height increase allowed by Ord. 23-22 will increase the vulnerability of development from the threats of natural and man-made hazards.

46. The County's current out of County hurricane evacuation for a Category 5 storm currently exceeds the timeframes referenced in the Statewide Regional Evacuation Study.

47. The density increase allowed by Ord. 23-22 moves the County away from, and is inconsistent with, attaining the referenced out of County hurricane evacuation time for a Category

5 storm event by substantially increasing that evacuation time by potentially authorizing an increase in development that could add 5 hours of time to such an evacuation.

48. Increased density and building heights will increase the incidence of building debris from major storms and hurricanes being deposited in, and having to be removed from and thus cause damage to environmentally sensitive areas.

Comprehensive Plan Violations

49. The changes to the Land Development Code adopted by Ord. 23-22 authorize an increase in building heights, permittable 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.

50. The goal, objectives and policies of Chapter 23 of the Lee Plan, 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.

51. Specifically, Ord. 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. **OBJECTIVE 72.2**: DEVELOPMENT REGULATIONS. Maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made hazards.

h. **OBJECTIVE 73.1:** EVACUATION. Work towards attaining out of County hurricane evacuation for a Category 5 storm event (Level E storm surge threat) that does not exceed the timeframes referenced in the Statewide Regional Evacuation Study. Lee County will work to improve clearance times by increasing shelter availability within the County, improving evacuation routes, and increasing public awareness and citizen preparedness.

i. **OBJECTIVE 23.1**: PROTECTION OF NATURAL RESOURCES. To continue the long-term protection and enhancement of wetland habitats, water quality, native upland habitats (including rare and unique habitats), and beaches on Captiva.

Procedural History and Compliance With Conditions Precedent (Appendix 3).

52. Petitioner has complied with the condition precedent to the institution of this proceeding pursuant to §163.3213 (3), Fla. Stat.

53. CCA filed a petition with Lee County on January 8, 2024 outlining the facts on which the petition is based and the reasons that CCA considered the land development regulation to be inconsistent with the local comprehensive plan.

54. On February 20, 2024 Petitioner filed with Lee County an amended petition concerning Ord. 23-22, which identified additional Comprehensive Plan inconsistencies.

55. Lee County responded in writing on February 6, 2024, rejecting the claims in CCA's January 7, 2024 petition.

56. Lee County did not respond to the amended petition CCA filed with the County on February 20, 2024.

57. The CCA filed a Petition with the Department of Commerce ("DOC") on March 7, 2024, followed by an Amended Petition filed on March 22, 2024. Both petitions were filed after providing Lee County with the statutory 30 day timeframe to respond to the Petition CCA had filed with the County, and both filed within the 30 day deadline for filing a Petition with the DOC after the County's response or upon the expiration of the County's allotted response period.

58. The Petitions CCA filed with the DOC requested that the Department conduct an informal administrative hearing in this matter, determine that the challenged land development regulation is inconsistent with the Lee County Comprehensive Plan, and seek the statutory remedy therefor.

59. The DOC held an informal hearing on April 4, 2024

60. On May 6, 2024 DOC issued a written decision, finding that the CCA has standing, but that the Code amendments were at least arguably consistent with the Plan.

61. This petition and request for a formal hearing before the Florida Division of Administrative Hearings is filed within 21 days of the rendition of the DOC's written determination on May 6, 2024.

Ultimate Legal Conclusions

62. 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. Ord. 23-22 violates this statute.

63. 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." Ord. 23-22 violates this statute.

64. The DOAH should enter a Final Order pursuant to §163.3213 (6), Fla. Stat. finding that Ord. 23-22 is inconsistent with the County's Comprehensive Plan.

WHEREFORE, CCA requests that the Division assign an Administrative Law Judge to preside over a formal administrative proceeding, and to enter a final order finding the Land Development Regulation to be inconsistent with the Lee County Comprehensive Plan;

Submitted this 28th day of May, 2024.

By: */s/ Richard Grosso*

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024 I e-filed the foregoing with the Division of Administrative Hearings and served a true and correct copy thereof on: Agency Clerk, Department of Commerce, Office of the General Counsel, 107 East Madison Street, MSC 110, Tallahassee, FL 32399-4128 via email to Agency.Clerk@commerce.fl.gov; and on attorneys for the Department and Lee County as identified below.

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Attachments:

Attachment 1

STATE OF FLORIDA
DEPARTMENT OF COMMERCE

Captiva Civic Association, Inc.,

Petitioner,

v.

COMMERCE CASE NO.: COM-24-016

Lee County, Florida,

Respondent.
_____/

WRITTEN DECISION OF LAND DEVELOPMENT REGULATION CONSISTENCY

This matter comes before the Florida Department of Commerce ("Department") upon a petition filed by Captiva Civic Association, Inc. ("Petitioner"), with the Department on March 7, 2024 ("Petition"). The Petition was filed under section 163.3213 of the Florida Statutes, and challenges Lee County Ordinance Number 23-22, adopted by the Respondent, Lee County, Florida ("County"), on September 5, 2023. The Petitioner alleges that Lee County Ordinance Number 23-22 is a land development regulation that is inconsistent with the goals, objectives, and policies within the Lee County Comprehensive Plan ("Plan").

Upon receipt of the Petition, the Department notified the County of the Petition and conducted an investigation into the matter as directed by section 163.3213(4), Florida Statutes. As part of the investigation, the Petitioner and the County were given the opportunity to submit written materials to the Department on or before April 1, 2024, and to present oral testimony on April 4, 2024. The Petitioner timely submitted two documents as written materials, entitled *Appendix* and *CCA Written Presentation to FDCO Re Lee County Ord 23-22.* The County chose not to submit written materials, as the County intended to rely on the County's written response which had already been provided to the Department as Attachment B to the Petition ("County's Response").

In addition to arguments made by legal counsel, both Parties presented oral testimony through witnesses. Jeffrey Alexander, David Mintz, and Charles Gauthier provided testimony on behalf of the Petitioner and Brandon Dunn presented testimony on behalf of the County.

Based on the information gathered during the investigation and the written materials submitted, the Department makes the following decision:

Issue

The issue to be determined is whether Lee County Ordinance Number 23-22 is consistent with the Lee County Comprehensive Plan. The Department is required to issue a written decision on consistency pursuant to section 163.3213(4), Florida Statutes.

Lee County Ordinance Number 23-22 (the "Ordinance")

1. The County adopted the Ordinance on September 5, 2023.

2. The Ordinance amends Chapters 30, 33, and 34 of the Lee County Land Development Code ("Code") to modify existing provisions related to nonconforming sign requirements, allowable building heights and exceptions to such height limitations, setback encroachments for certain stairways, parking requirements, zoning applications, and the rebuilding of structures located on Captiva Island. Specifically, the Ordinance makes changes to sections 30-55, 33-1087, 33-1458, 33-1611, 33-1614, 33-1627, 34-2, 34-201, 34-1805, 34-2011, 34-2171, 34-2172, 34-2174, 34-2175, 34-2191, and Appendix I of the Code.

3. The provisions within the Ordinance providing for the rebuilding of structures located on Captiva Island make specific reference to an area commonly known as the South Seas Island Resort.

4. The South Seas Island Resort was among the properties in the County that recently sustained damage by Hurricane Ian.

5. The Petitioner's challenge focuses on changes within the Ordinance to the South Seas Island Resort, particularly the changes made to sections 33-1611, 33-1614, 33-1627, 34-1805, and 34-2175 of the Code.

6. Development approvals for the South Seas Resort on Captiva Island date back to the year 1973, when the Lee County Board of County Commissioners initially approved a master development plan for the South Seas Resort. A summary of development approvals and modifications to the original development plan are outlined in the Lee County Administrative Interpretation 2002-00098 ("2002 Interpretation").

7. The development standards set forth in the 2002 Interpretation identify the maximum density of the South Seas Resort as "912 residential units (304 acres at three units per acre) and five (5) acres of commercial development." Further, on page 11, the 2002 Interpretation addresses the "912 residential units" by offering a tabulation of the number of "dwelling units" within South Seas. The building height threshold was set at the lesser result of 35 feet above grade or 42 feet above mean sea level. To revise the master development plan, the 2002 Interpretation provides that revisions are subject to the requirements of Section 34-1038 of the Code.

8. Prior to the Ordinance, section 33-1611 of the Code provided that the South Seas Resort was exempt from the provisions of Chapter 33 of the Code so long as the development complied with the 2002 Interpretation.

9. Chapter 33, Article IX of the Code sets forth development standards for Captiva Island such as the allowable building heights, density, and lot sizes.

10. The Ordinance makes the following changes to section 33-1611:

> (e) 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~~.

11. Under Section 33-1614 of the Code, the Ordinance adds a definition for the term "South Seas Island Resort," which is defined as "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." The Ordinance also makes changes to Appendix I, Map 18, to reflect the geographic boundary as newly defined.

12. The permitted density for hotels and motels on Captiva Island is established under Section 34-1805 of the Code as "three units per gross acre." The Ordinance exempts South Seas Island Resort from this provision.

13. Prior to the Ordinance, Section 33-1627 of the Code provided that building heights for Captiva Island were restricted to the lesser of 35-feet above the average grade of the lot in question or 42 feet above mean sea level measured to the peak of the roof; or 28-feet above grade the lowest horizontal member or below the lawful base flood elevation measured to the mean level between eaves and ridge for certain roofs. The Ordinance removed these restrictions and instead provides that the height of buildings and structures is subject to the requirements of Section 34-2175.

14. The Ordinance makes several changes to the provisions of Section 34-2175 of the Code, which establishes the height limitations for special areas and land use categories.

15. Under Section 34-2175(a)(2), the Ordinance excludes the South Seas Island Resort from the 35-foot maximum height limitation provided for the special area of Captiva Island. The Ordinance leaves unchanged the provision that prohibits properties on Captiva Island from exceeding this height limitation by variance or other deviation, such as the provisions of Section 34-2174(a) of the Code.

16. The Ordinance modifies Section 34-2175(b) of the Code to synthesize the building heights

for the Lee Plan land use categories under a new Table 34-2175(b) of the Code. The maximum building height for the Outlying Suburban land use category, which now applies to the South Seas Island Resort under the Ordinance, remains at 45-feet. However, the previously established cap of three habitable stories within the 45-foot height limitation is removed by the Ordinance along with the provision that previously allowed for buildings within this category to be as tall as 75-feet with no more than six habitable stories if certain criteria had been met.

17. However, under Note 2 of the new Table, the Ordinance provides for the possibility of obtaining an allowance to develop above the 45-foot height limitation. Specifically, Note 2, provides the following change:

> (2) Buildings may be as tall as 75 feet when the applicant demonstrates through a zoning action that the additional height is required to preserve ~~increase common open space for the purposes of preserving~~ environmentally sensitive land, ~~securing~~ secure areas of native vegetation and wildlife habitat, or ~~preserving~~ preserve historical, archaeological or scenic resources.

18. The effective date of the Ordinance is listed as "Any provision of this ordinance that is subject to the adoption of CPA2023-00004 amending the Lee Plan Goal 23 and Policy 23.2.3 will take effect only after final adoption of CPA2023-00004, as applicable. The remainder of this ordinance will take effect upon its filing with the Office of the Secretary of the Florida Department of State. The provisions of this ordinance will apply to all projects or applications subject to the LDC unless the development order application for such project is complete or the zoning request is found before the effective date."

Consistency of the Ordinance with the Plan

19. A land development regulation ("LDR") is defined by section 163.3213, Florida Statutes, as:

> [A]n ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree

> protection, or sign regulation or any other regulation concerning the development of land. This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553.

20. The Ordinance at issue is an LDR.

21. Comprehensive plans are implemented, in part, by the adoption and enforcement of appropriate LDRs. §§ 163.3201 and 163.3202, Fla. Stat.

22. All LDRs must be consistent with the local comprehensive plan. *See* §163.3194(1)(b) Fla. Stat.

23. An LDR is consistent "if the land uses, densities and intensities, and other aspects of development permitted by [the LDR] are compatible with and further the objectives, policies, land uses, and densities and intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government." § 163.3194(3)(a), Fla. Stat.

24. Section 163.3213(5), Florida Statutes, provides that the "adoption of a land development regulation by a local government is legislative in nature and shall not be found to be inconsistent with the local plan if it is fairly debatable that it is consistent with the plan."

25. The Florida Supreme Court described the fairly debatable standard of review as a "highly deferential standard requiring approval of a planning action if reasonable persons could differ as to its propriety." *Martin Cnty. v. Yusem,* 690 So. 2d 1288, 1295 (Fla. 1997). The Court in *Yusem* continued,"[i]n other words, "[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity." *Id.* (citing *City of Miami Beach v. Lachman,* 71 So.2d 148, 152 (Fla.1953)). Accordingly, if reasonable minds could differ on whether the land uses, densities and intensities, or other aspects of development permitted by the

Ordinance are consistent with the Plan, then the Department must conclude that the Ordinance is consistent with the Plan.

26. The Petitioner bears the burden of proving beyond fair debate that the challenged LDR is not consistent with the adopted Plan.

27. The Department's written decision is based on the challenged portions of the Ordinance as raised in the Petition.

28. Here, in paragraph 1 of the Petition, the Petitioner indicates that its allegations of inconsistency with the Plan are contingent upon the final adoption of Comprehensive Plan Amendment CPA2023-0004, which is referenced in the effective date of the Ordinance.[1]

29. The Petition challenges the Ordinance's provisions relating to the South Seas Island Resort under sections 33-1611, 33-1614, 33-1627(a), 34-1805, and 34-2175(a)(2) of the Code.

30. The Petitioner alleges that the modifications to these sections empower the South Seas Island Resort with a blanket exemption from the development standards that apply to other buildings and structures on Captiva Island, such as height restrictions, hotel density limitations, and minimum lot size regulations.

31. The Petitioner further argues that allowing for such an exemption creates an inconsistency with the following goals, objectives, and policies of the Plan: Policy 17.1.2, Policy 17.1.3, Goal 23, Objective 23.2, Policy 23.2.3, Policy 23.2.4, and Policy 23.2.5. The Petition specifically alleges inconsistency with Goal 23 and Policy 23.2.3, as modified by the County's adoption of Amendment CPA2023-0004. The alleged inconsistencies with Objective 23.2, and the other cited policies were not changed by Amendment CPA2023-0004.

[1] At the oral testimony presentation, both Parties indicated that the final adoption of CPA2023-0004 had occurred at some point after the County's adoption of the Ordinance and prior to the date of the Petition having been filed with the Department.

32. The Petitioner argues the Ordinance fails to adhere to the revised provisions of Goal 23, which provide the goal of protecting aspects of the Captiva community through "... environmental protections and land use regulations that ... enforce development standards that maintain the historic low-density residential development pattern of Captiva."

33. At the oral testimony presentations, Mr. Gauthier presented on behalf of the Petitioner. He summarized the historic development pattern of Captiva Island as being one that has aimed to limit growth through a combination of land use and zoning restrictions. Mr. Gauthier explained that the development of South Seas Resort in particular was intended to be limited to a maximum of 912 combined residential and hotel units and 5 acres of commercial use.

34. In his brief analysis of Policy 23.2.4 given at the oral testimony presentations, Mr. Gauthier provided that there were three prongs to be considered when determining consistency of the Ordinance with the historic development pattern on Captiva Island. He considered whether the Ordinance maintained the development pattern in relation to low-density residential units, minor commercial development, and the South Seas Island Resort. He stated that prongs one and two were adequately satisfied, but the Ordinance's changes to the South Seas Island Resort fail to maintain its historical development pattern by eliminating the density cap of 3-units per acre and increasing the potential building height to 75-feet. In his expert opinion, Mr. Gauthier concluded that the Ordinance is not compatible with, and does not further, the objectives, policies, land uses, and densities or intensities of the Plan.

35. Although the onus does not fall on the local government to prove consistency by citing specific provisions within the Plan during the adoption phase, clauses within the Ordinance specifically provide that the changes to the Code are consistent with Goal 72 and Objective 72.2 of the Plan, which require the County to establish LDRs that reduce the vulnerability of

development from threats of natural and man-made disasters.

36. Within the County's Response, the County heavily dismisses the merits of the Petition on the assumption that the Petitioner lacks standing to bring a challenge under section 163.3213, Florida Statutes. The County also argues that the Ordinance is not an LDR and, if the Ordinance is an LDR, that the Petition is untimely because the South Seas exemption was established 12 years ago and South Seas was not subject to the Captiva height and hotel density regulations under Chapter 33 of the Code prior to the Ordinance's adoption. Moreover, the County claims that even after the adoption of the Ordinance, South Seas is subject to the "…maximum permitted density of 3 units per acre, just like the limitations placed on Captiva."

37. Mr. Dunn is the Manager of the County's Planning Section and provided credible testimony on behalf of the County. Mr. Dunn stated that the Ordinance was the result of a comprehensive review of the Code for compliance with the 2022 FEMA changes and the purpose of the Ordinance was to allow for the rebuilding of structures throughout all of Captiva Island after recent storm damage.

38. Mr. Dunn explained that CPA2023-00004 and the Ordinance were deliberately considered and adopted by the County in tandem to avoid any inconsistencies between the Plan and the Code. In response to the allegations of inconsistency with Goal 23, Objective 23.2, and Policy 23.2.4, Mr. Dunn contended that development on South Seas Island Resort has been, and is still, subject to the provisions of the 2002 Interpretation.

39. The County considers the 2002 Interpretation as the controlling document that outlines the current standards and development potential of the South Seas Island Resort.

40. Mr. Dunn argued that the Ordinance maintains the historic development pattern of Captiva Island, and particularly South Seas Island Resort, because the established density is based on the

number of residential units rather than the combined number of motel/hotel and residential units and that the Ordinance does not allow for more than 912 residential units to be developed on South Seas Island Resort.

41. Mr. Dunn also rejected claims of inconsistency with Policy 23.2.5 as inapplicable because the Ordinance is not a development order or permit that approves development nor does the Ordinance alter the size of any lot.

42. Through legal counsel, the County also disagreed with Petitioner's contention that the Ordinance allows for a blanket exemption from all development standards. While the County maintains that development of the South Seas Island Resort is subject to the density, lot standards, and other development requirements provided by the 2002 Interpretation, the County highlighted that the South Seas Island Resort is also subject to Section 34-1038 of the Code regardless of the 2002 Administrative Interpretation.

43. The County elaborated on the argument that the 3 units per acre does not apply to hotel and motel units by stating that other hotels on Captiva Island are not subject to the density requirement, with reference to another hotel that is subject to a maximum density of 11.7-unit per acre.

44. Although the Petition alleges the Ordinance is inconsistent with Policies 17.1.2 and 17.1.3, these policies were not discussed during oral testimony presentations. The Department reviewed Goal 17 and its implementing objectives and policies, which direct the County to create community plans that address specific conditions unique to a defined area of the County. The County satisfied the requirements of Policies 17.1.2 and 17.1.3 by creating the Captiva Community Plan, which pertains to an area on Captiva Island, as depicted on the Lee Plan Future Land Use Map (Map 2-A). The Captiva Community Plan consists of Future Land Element Goal 23, Objective 23.1 (Policies 23.1.1 through 23.1.6), Objective 23.2 (Policies 23.2.1, 23.2.2, 23.2.3, 23.2.4, 23.2.5,

23.2.5, 23.2.6, 23.2.7, 23.2.8 and 23.2.9), Objective 23.3 (Policies 23.3.1 and 23.3.2), and Objective 23.4 (Policies 23.4.1and 23.4.2). Chapter 33 of the Code establishes LDRs for each planning community, including Article IX which pertains to the Captiva Community Plan. As a result, there is no basis for determining the Ordinance is inconsistent with Policies 17.1.2 and 17.1.3.

45. In explaining the historic development pattern of South Seas, both parties refer to the 2002 Interpretation as a vital document to determining compliance with Goal 23, Objective 23.2, and Policy 23.2.4 of the Plan. There is no specific reference within the interpretation to the density limitation for hotel or motel units, leaving it unclear whether such units were intended to be included in the 912 residential unit cap or possibly within the commercial use portion of the property. Neither party provided information to the Department as to the number or type of units that currently exist nor did they provide information as to the actual height of any existing structures on the South Seas Island Resort. There was also no information presented to the Department that demonstrated whether the South Seas Island Resort has been developed based on an established minimum lot size per unit. Without this additional information, it is difficult to determine conclusively whether the Ordinance alters the development pattern of South Seas Island Resort in a manner inconsistent with the Plan.

46. The Petitioner's assertions regarding building height rely a finding that the previously established height limitations on Captiva Island should be considered as part of the historic development pattern for Captiva Island. However, prior to the County's adoption of CPA2023-00004, Goal 23 aspired to enforce development standards that maintain one and two story building heights on Captiva Island separate from the low residential development pattern requirement. Additionally, Policy 23.2.3 had referenced specific numerical building height regulations that

needed to be maintained. CPA2023-00004 removed those height limitations. As a result, there are no provisions in the Plan that establish the number of stories for buildings on Captiva Island or South Seas Island Resort. There are also no numerical building height limitations remaining in the Plan for Captiva Island or South Seas Island Resort to allege an inconsistency with. Additionally, no evidence was presented to the Department to demonstrate that the height limitations within the Ordinance fail to account for barrier island conditions in a manner that is contrary to the requirements of Policy 23.2.3.

47. Despite the concerns raised by the Petitioner, there is no evidence to suggest the increase to the height standard provided by the Ordinance under sections 33-1627(a) and 34-2175(a) alone would result in an additional habitable floor or more units on the South Seas Island Resort property. If an owner within the South Seas Island Resort were to apply for an allowance to build beyond the 45-foot height limitation set forth by the Ordinance, the County assures that the Petitioner will have an opportunity to contest the County's issuance of such allowance at a later date.

48. Upon the written and oral testimony presented to the Department, the Department determines that there is at least fair debate on whether the challenged provisions of the Ordinance are consistent with and further the objectives and policies of the Plan. Specifically, the challenged provisions of the Ordinance are consistent with Policy 17.1.2, Policy 17.1.3, Policy 23.2.3 and fair debate exists on whether the challenged provisions of the Ordinance are consistent with Goal 23, Objective 23.2, Policy 23.2.4, and Policy 23.2.5.

Standing

While standing is generally acknowledged as a threshold matter to be determined at the outset of a chapter 120 administrative proceeding, the provisions of section 163.3213, Florida Statutes, lack guidance on whether the Department's written decision on consistency needs to

include any legal determination as to Petitioner's standing. And, if so, whether the Department makes that determination based on: (1) whether the Petitioner is entitled to bring a challenge under section 163.3213 and whether the Petitioner has fulfilled the statutory conditions precedent; or (2) whether the Department's decision must consider the criteria under (1) in addition to whether the petitioning party is a "substantially affected person," similar to how standing would be reviewed by an adjudicator of fact and law, presiding over a chapter 120 administrative proceeding. For purposes of this decision, in which the issue of Petitioner's standing is contested, the Department addresses both options as follows:

49. The legislative intent behind section 163.3213, Florida Statutes, is to afford substantially affected persons the right to assure that land development regulations implement and are consistent with the local government's comprehensive plan. *See* §163.3213(1), Fla. Stat.

50. Section 163.3213, Florida Statutes, sets forth the only framework available to individuals seeking an administrative proceeding under chapter 120, Florida Statutes, to challenge the consistency of a land development regulation with a local government's comprehensive plan. §163.3213(7), Fla. Sta.

51. However, prior to the initiation of an administrative proceeding conducted according to sections 120.569 and 120.57(1), Florida Statutes, the statutory framework of section 163.3213, Florida Statutes, imposes conditions precedent that a substantially affected person must complete.

52. Pursuant to section 163.3213(3), Florida Statutes, a substantially affected person must initiate the process by first filing a petition with the local government. The local government shall then have an opportunity to respond to the petition. Thereafter, the substantially affected person may continue toward an administrative proceeding by then filing a petition with the Department in its capacity as the state land planning agency. *See* § 163.3213(3), Fla. Stat.

53. Upon receipt of a petition, the Department is directed to notify the local government and give the substantially affected person an opportunity to present written or oral testimony on the issue and shall conduct any investigations that it deems necessary. The Department's review is limited in that any presentations or other investigations must be completed within the narrow timeframe by which the Department is mandated to issue a written determination on consistency, not later than sixty days nor earlier than thirty days from receipt of the petition. *See* § 163.3213(4), Fla. Stat. Further, the Department is statutorily precluded from conducting an administrative proceeding pursuant to chapter 120, Florida Statutes. *See* § 163.3213(4), Fla. Stat.[2]

54. However, section 163.3213(1)(a), Florida Statutes, defines the term "substantially affected person" as "a substantially affected person as provided pursuant to chapter 120." Notably, chapter 120, Florida Statutes, does not provide a definition for the term. For purposes of the Administrative Procedure Act, a person must show its substantial interests will be adversely impacted by the disputed action. § 120.52(12)(b), Fla. Stat. A "party" is defined, in pertinent part, as a person who "as a matter of ... provision of statute... is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." § 120.52(13), Fla. Stat.

55. Legal precedence provides guidance on determining whether a party is a substantially affected person that should be afforded standing in an administrative proceeding. As a general proposition, "[s]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006); *see also Hutchison v. Chase Manhattan Bank*, 922 So. 2d 311, 315 (Fla. 2d DCA 2006); *Gen. Dev. Corp.*

[2] For this reason, the Department declined a prospective party's request to intervene and numerous attempts by the Petitioner to file an amended petition with the Department.

v. Kirk, 251 So. 2d 284, 286 (Fla. 2d DCA 1971) ("Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it.").

56. In *Agrico*, the court established a two-prong test for standing in administrative proceedings, stating:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Agrico Chemical Co. v. Dept. of Envtl. Reg., 406 So.2d 478, at 482 (Fla. 2d DCA 1981)

57. The *Agrico* test is not intended as a barrier to participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, "[t]he intent of Agrico was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceeding." *Mid-Chattahoochee River Users v. Dep't of Env't Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006) (citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992).

58. More recent case law has refined the *Agrico* standing test, clarifying that:

> [s]tanding is a "forward-looking concept" and "cannot disappear" based on the ultimate outcome of the proceeding … . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests could reasonably be affected by … [the] proposed activities.

Emphasis added. *Palm Beach Cnty. Env't Coal.*, 14 So. 3d at 1078 (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009). *See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051 (Fla. 5th DCA 2011);

see also Reily Enters., LLC v. Dep't of Env't Prot., 990 So. 2d 1248 (Fla. 4th DCA 2008).

59. In *Veal,* James Veal and Kerry M. Culligan (referred to collectively as "the challengers"), brought a challenge under section 163.3213, Florida Statutes, contesting the consistency of a land development regulation with Escambia County's Comprehensive Plan. The challengers filed their initial petition with the state land planning agency without first filing a petition with the local government that adopted the contested land development regulation. After receipt of the petition, the state land planning agency notified the challengers of their failure to file the local-level petition and subsequently issued a written decision on consistency of the land development regulation without addressing the issue of standing. The written decision was then referred to the Division of Administrative Hearings (DOAH) with a request for a formal administrative proceeding on the matter.

60. A review of the record at DOAH indicates that Escambia County promptly filed a motion to dismiss the case on the basis that the challengers lacked standing under *Agrico*. The motion was granted, in part, and the petitioners were directed to file an amended petition. *See Order* dated July 18, 2000; DOAH Case No. 00-001189. After discovery had been initiated and a hearing date was scheduled, Escambia County filed a motion for summary final order, requesting dismissal of the case on the theory that the undisputed facts of record indicated that the challengers lacked standing. Based on an analysis of the full record, the administrative law judge concluded the challengers lacked standing due to an affirmative, without dispute, indication in the record that the challengers would not suffer an injury which was direct and immediate by virtue of the challenged regulations. The motion for summary order was granted and the case was dismissed. *See Order* dated December 5, 2000; DOAH Case No. 00-001189.

61. The summary order dismissing the DOAH case was upheld by the First District Court of

Appeal on the basis that the challengers had failed to meet the statutory condition precedent without reference to the challengers' alleged injuries. Failure to file the initial petition pursuant to section 163.3213(3) amounted to a failure to initiate the statutory review process and was an appropriate reason to dismiss the challengers' petition at DOAH. *Veal and Culligan v. Escambia County*, 773 So.2d 265. Neither the DOAH nor the appellate court decisions discussed whether the state land planning agency should have addressed the issue of standing when issuing its written decision of consistency.

62. Here, there is no dispute that the Petitioner satisfied the first statutory condition precedent established by section 163.3213(3), Florida Statutes, by filing a petition with the County on January 8, 2024 ("Local-level Petition").

63. On February 6, 2024, the County responded in writing to the Local-level Petition within the statutory timeframe provided of 30-days after the County's receipt of the petition. In the County's Response and during the oral testimony presentations, the County contests, among other issues, whether the Petitioner is a "substantially affected person," as defined by section 163.3213(2)(a), Florida Statues. The County argues that the Petition fails to allege sufficient facts to demonstrate standing and fails to allege any real or immediate injury to its interests as a direct result of the County's adoption of the Ordinance. The County believes the Petitioner's concerns are speculative and are not ripe for a proceeding. As such, the County requests that the Department make a legal determination as to Petitioner's lack of standing consistent with the standard set forth by *Agrico* and other formal administrative proceedings.

64. The Petitioner responds that it is a substantially affected person as a not-for-profit corporation, located in the State of Florida, who owns real property proximate to the land within the South Seas Island Resort that is subject to the challenged provisions of the Ordinance. As a

membership organization, many of the Petitioner's members reside in close proximity to the South Seas Island Resort. The Petitioner expresses concerns that the South Seas Island Resort may be reconstructed in a manner that will cause injury to the Petitioner and its members as a result of the County's adoption of the Ordinance. Although no development approvals had been issued to the South Seas Island Resort as of the date of the oral testimony presentations, the Petition provides that the South Seas Island Resort has applied for development approvals to increase the density to approximately 8.6 units per acre, and to build new structures as high as 64-feet tall. Mr. Mintz also presented oral testimony on behalf of Petitioner alleging that if such development were permitted, Captiva Island as a whole and members of Petitioner's organization would sustain negative impacts to septic, wastewater, and other infrastructure in addition to the potential increase in noise and light pollution.

65. The Petitioner contends that these concerns are sufficient to establish standing and that under the County's analysis of standing, it would be nearly impossible for any individual to initiate a challenge of a land development regulation under section 163.3213, Florida Statutes.

66. The intent of section 163.3213 is to provide individuals with the ability to maintain an administrative action for the purpose of assuring that adopted land development regulations are consistent with the Plan. The Petitioner satisfied the initial standing criteria set forth by section 163.3213 and *Veal* by first filing a petition with the County and allowing the County an opportunity to respond.

67. The Petitioner then timely filed the Petition with the Department to satisfy the next condition precedent.

68. The Department's written decision is the final condition precedent that must occur before the Petitioner may be afforded a chapter 120 administrative proceeding. The relevant statutes

provide no exception to the requirement that the Department must issue its written decision on consistency within 60 days of receiving the Petition. Thus, the matter of standing is presumably one that is most properly addressed if and when the Petition advances to the formal administrative process outlined in section 163.3213(5), Florida Statutes.

69. To the extent the Department is required to make a determination on standing beyond determining whether the statutory conditions precedent have been met, the Department finds that the Petitioner has alleged injuries that are reasonably foreseeable if the Ordinance were to be adopted and in effect, and that the statutory framework set forth by section 163.3213 is the sole proceeding available to the Petitioner to challenge the County's adoption of the Ordinance. Should this matter proceed to DOAH, the parties will likely be afforded additional opportunities to present further arguments on standing based on the entirety of the record and in accordance with the relevant legal precedence.

70. Accordingly, the Petitioner has adequately demonstrated standing as a substantially affected person under section 163.3213(2)(a), Florida Statutes.

Conclusion

Based on the foregoing, the Department determines that Lee County Ordinance Number 23-22 is consistent with the Lee County Comprehensive Plan.

Dated this 6th day of May, 2024.

Kate Doyle, Acting Deputy Secretary
Division of Community Development
Florida Department of Commerce

NOTICE OF RIGHTS

PURSUANT TO SECTION 163.3213(5)(a), FLORIDA STATUTES, ANY SUBSTANTIALLY AFFECTED PERSON WHO FILED THE PETITION WITH THE LOCAL GOVERNMENTAND THE DEPARTMENT MAY, WITHIN 21 DAYS FROM THE DATE OF THIS DECISION, REQUEST A HEARING FROM THE DIVISION OF ADMINISTRATIVE HEARINGS. REQUESTS SHOULD BE SENT TO THE DIVISION OF ADMINISTRATIVE HEARINGS, THE DESOTO BUILDING, 1230 APALACHEE PARKWAY, TALLAHASSEE FLORIDA 32399-3060.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that the original of the foregoing decision has been filed with the undersigned Agency Clerk, and that true and correct copies have been furnished to the following persons by the methods indicted this 6th day of May, 2024.

Christine Vowell for
Agency Clerk

By U.S. Mail:

Richard Grosso, Esq.
6919 West Broward Boulevard
Mail Box 142
Plantation, Florida 33317

Richard Wesch, Esq.
Michael Jacob, Esq.
P.O. Box 398
Fort Myers, FL 33902

Via Email:

richardgrosso1979@gmail.com

rwesch@leegov.com

mjacob@leegov.com

Attachment 2

LEE COUNTY ORDINANCE NO. 23-22

AN ORDINANCE AMENDING THE LEE COUNTY LAND DEVELOPMENT CODE, CHAPTERS 30 (SIGNS), 33 (PLANNING COMMUNITY REGULATIONS) AND 34 (ZONING); PERTAINING TO RELOCATION OF NONCONFORMING BILLBOARDS; UNIFORM CALCULATION OF BUILDING HEIGHT; EXCEPTIONS TO HEIGHT LIMITATIONS FOR THE PURPOSE OF RESILIENCY; PERMITTED SETBACK ENCROACHMENTS FOR EXTERIOR STAIRWAYS; PARKING REQUIREMENTS FOR RECONSTRUCTED BUILDINGS; ZONING APPLICATION REQUIREMENTS RELATED TO HOMEOWNERS' ASSOCIATIONS; ISSUES RELATED TO REBUILDING ON CAPTIVA ISLAND AND WITHIN SOUTH SEAS ISLAND RESORT; PROVIDING FOR MODIFICATIONS THAT MAY ARISE FROM CONSIDERATION AT PUBLIC HEARING; PROVIDING FOR CONFLICTS OF LAW, SEVERABILITY, CODIFICATION, INCLUSION IN CODE AND SCRIVENER'S ERRORS, AND AN EFFECTIVE DATE.

THE SPECIFIC LDC PROVISIONS THAT WILL BE AMENDED ARE: SEC. 30-55 (NONCONFORMING SIGNS); 33-1087 (MAXIMUM HEIGHT OF BUILDINGS AND STRUCTURES – GREATER PINE ISLAND); 33-1458 (BUILDING HEIGHT AND VERTICAL PLANE – MATLACHA RESIDENTIAL OVERLAY); 33-1611 (APPLICABILITY); 33-1614 (DEFINITIONS); 33-1627 (HEIGHT RESTRICTIONS ON CAPTIVA ISLAND); 34-2 (DEFINITIONS); 34-201 (APPLICATION REQUIREMENTS FOR PUBLIC HEARING AND ADMINISTRATIVE ACTIONS); 34-1805 (DENSITY LIMITATION FOR CAPTIVA ISLAND); 34-2011 (APPLICABILITY OF DIVISION); 34-2171 (MEASUREMENT); 34-2172 (EXCEPTIONS TO HEIGHT LIMITATIONS FOR RESILIENCY); 34-2174 (ADDITIONAL PERMITTED HEIGHT WHEN INCREASED SETBACKS PROVIDED); 34-2175 (HEIGHT LIMITATIONS FOR SPECIAL AREAS AND LEE PLAN LAND USE CATEGORIES); 34-2191 (MEASUREMENT; PERMITTED ENCROACHMENTS); APPENDIX I (PLANNING COMMUNITY AND REDEVELOPMENT OVERLAY DISTRICT BOUNDARIES AND LEGAL DESCRIPTIONS) MAP 18 (SOUTH SEAS ISLAND RESORT).

WHEREAS, Florida Statutes Section 125.01(1)(h) authorizes counties to establish, coordinate, and enforce zoning regulations necessary for the protection of the public; and,

WHEREAS, the Board of County Commissioners adopted the Lee County Comprehensive Plan (Lee Plan), as well as the Lee County Land Development Code (LDC) which contains regulations applicable to the development of land in Lee County; and,

WHEREAS, Goal 72 of the Lee Plan is to "Establish objectives and policies to help prevent and mitigate threats from natural disasters by reducing their potential impact on future development and responding efficiently to disasters and hazards after the fact;" and

WHEREAS, Objective 72.2 of the Lee Plan is to "Maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made hazards;" and

WHEREAS, the Land Development Code Advisory Committee (LDCAC) was created by the Board of County Commissioners to explore amendments to the LDC; and,

WHEREAS, the LDCAC has reviewed the proposed amendments to the LDC on April 14, 2023, and May 12, 2023, and recommended approval of the proposed amendments as modified; and,

WHEREAS, the Executive Regulatory Oversight Committee reviewed the proposed amendments to the Code on May 10, 2023, and recommended their adoption; and,

WHEREAS, the Local Planning Agency reviewed the proposed amendments on May 22, 2023, and found them consistent with the Lee Plan, as indicated.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA:

SECTION ONE: AMENDMENT TO LDC CHAPTER 30

Sec. 30-55. - Nonconforming signs.

(a) *Status.* Every sign, erected before August 21, 1985, which was ~~a~~ permitted ~~legally existing sign~~ is deemed a legal nonconforming sign. A permitted sign means a sign that was constructed or is in place with a valid permit from the county. All nonconforming signs are subject to the provisions of this section. All existing signs that are not legal nonconforming signs must comply with the terms of this chapter.

(1) A nonconforming sign may not be enlarged or altered in a way which increases its nonconformity.

(2) Nothing in this section shall relieve the owner or user of a legal nonconforming sign or owner of the property on which the legal nonconforming sign is located from the provisions of this chapter regarding safety, maintenance and repair of signs. Any repair or refurbishing of a sign that exceeds 25 percent of the value of the sign in its preexisting state shall be considered as an act of placing a new sign and not an act of customary maintenance. It shall be the responsibility of the ~~permittee~~ applicant to provide the ~~division of community development~~ Department of Community Development with adequate proof of the cost of such work in the form of an itemized statement of the direct repair cost, whenever such information is requested by the ~~division~~ Department.

(3) If any nonconforming sign is destroyed to an extent of 50 percent or more of its assessed value at the time of destruction, the sign shall not be replaced or repaired, in part or in full, except upon full compliance with this chapter.

(4) A ~~replacement~~ nonconforming billboard structure may be ~~rebuilt~~ replaced in its ~~present~~ existing location provided that the structure is in compliance with the following conditions:

a. Pursuant to the application for replacement, two legal nonconforming billboard structures shall be removed in exchange for the right to reconstruct one replacement billboard structure.

b. One of the structures which is to be removed must be located on the same site as the replacement billboard structure. If only one structure is located on the site of the replacement ~~sign~~ billboard structure, another nonconforming billboard structure must be removed from another location within the unincorporated area of the county.

c. The replacement billboard structure must meet all current county height, size and setback requirements.

d. The land use category in which the replacement ~~sign~~ billboard structure is to be erected must be the less restrictive of the two land use categories where the two removed nonconforming billboard structures were located. If the land use category is the same for both nonconforming billboard structures, the replacement structure may be located at either site. For purposes of this section, the following hierarchy of land use categories should be used to determine the least restrictive land use categories, with the most appropriate categories listed in descending order:

1. Intensive ~~d~~Development, ~~i~~Industrial D~~d~~evelopment, ~~t~~Tradeport and ~~i~~Interchange areas;
2. Central ~~u~~Urban and ~~u~~Urban ~~c~~Community;
3. Suburban and ~~o~~Outlying ~~s~~Suburban;
4. Rural, ~~o~~Outer ~~i~~Islands and ~~d~~Density ~~r~~Reduction/~~g~~Groundwater ~~r~~Resources; and
5. ~~Environmentally critical areas (resource protection area and transitional zones)~~ Wetlands, Conservation Lands Wetlands and Conservation Lands Upland.

e. Upon approval of the application for replacement and completion of the conditions specified in this subsection, the replacement billboard structure shall be ~~deemed in conformance with this chapter~~ afforded the same privileges as a conforming billboard structure and may be replaced in its present location.

f. No replacement billboard structure may be located in the locations designated in section 30-183(1)b.

g. Relocation. A replacement billboard structure permitted by this subsection may be relocated once provided the proposed location is:

1. On non-residentially-zoned property and outside of the barrier islands and Pine Island unless the replacement billboard structure originates from the respective island;

2. In the same or a less restrictive land use category according to the hierarchy established in section 30-55(a)(4)d;

3. Located along an arterial street where billboards are permitted in accordance with section 30-183(1)b;

4. Meeting the billboard structure separation requirements established in section 30-183(2). Where no distance separation is specified, the minimum required separation will be 1,000 feet from any other billboard on the same side of the street. The minimum required separation will be 2,640 feet from another billboard relocated in accordance with this subsection.

5. Legally described; and

6. Supported by a narrative statement declaring that the current billboard location has become unsuitable and verification that the proposed location meets the requirements of this subsection and will not encroach upon the conforming status of other billboards in proximity.

(b) *Loss of legal nonconformity.*

(1) through (4) unchanged.

SECTION TWO: AMENDMENT TO LDC CHAPTER 33

Lee County Land Development Code Chapter 33 is amended as follows with strike through identifying deleted text and underline identifying new text.

CHAPTER 33 – PLANNING COMMUNITY REGULATIONS
ARTICLE III. – GREATER PINE ISLAND
DIVISION 6. – DESIGN STANDARDS

Sec. 33-1087. Maximum height of buildings and structures. (Greater Pine Island)

The height of buildings and structures are subject to the requirements of section 34-2175.

~~No building or structure may be erected or altered so that the peak of the roof exceeds 38 feet above the average grade of the lot in question or 45 feet above mean sea level, whichever is lower~~.

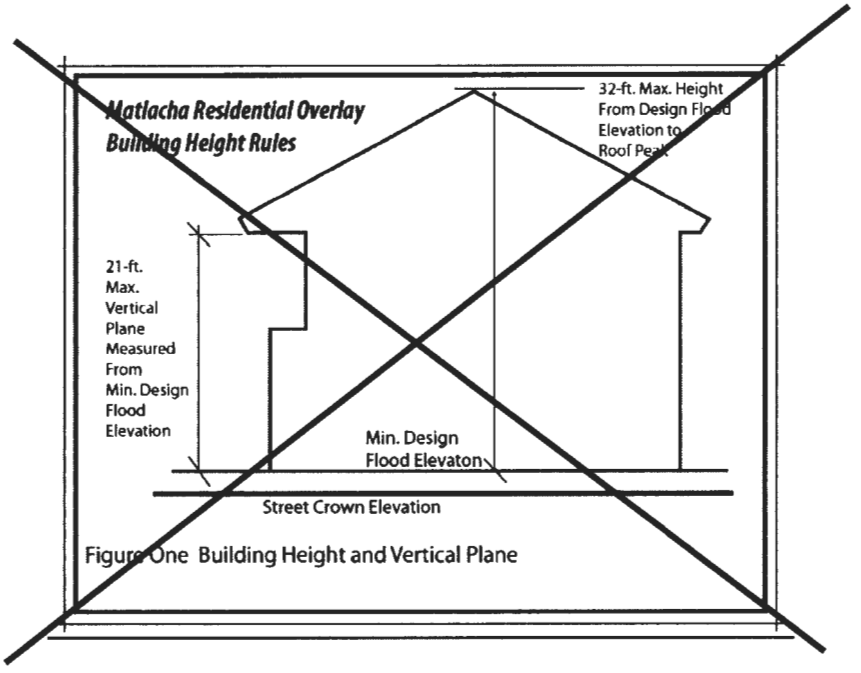
~~(a) The provisions of section 34-2171(a)(1) that allow the substitution of "minimum required flood elevation" for "average grade of the lot in question" do not apply to Greater Pine Island.~~
~~(b) The provisions of section 34-2174(a) that allow taller buildings in exchange for increased setbacks do not apply to Greater Pine Island.~~
~~(c) Structures without roofs will be measured to the highest point on the structure.~~
~~(d) No deviations from these height restrictions may be granted through the planned development process.~~
~~(e) Any variances from these height restrictions require all of the findings in section 34-145(b)(3), with the sole exception being where the relief is required to maintain or improve the health, safety, or welfare of the general public (not just the health, safety, or welfare of the owners, customers, occupants, or residents of the property in question).~~

ARTICLE VI. – MATLACHA RESIDENTIAL OVERLAY

DIVISION 2. – DEVELOPMENT STANDARDS AND SPECIFICATIONS

Sec. 33-1458. Building height and vertical plane.

The maximum vertical plane of a building may not exceed 21 feet, measured from the minimum design flood elevation (see Figure 1). The maximum building height of a building may not exceed 32 feet, as measured in accordance with section 34-2171 ~~from the design flood elevation to the roof peak~~. ~~See Figure 1~~.



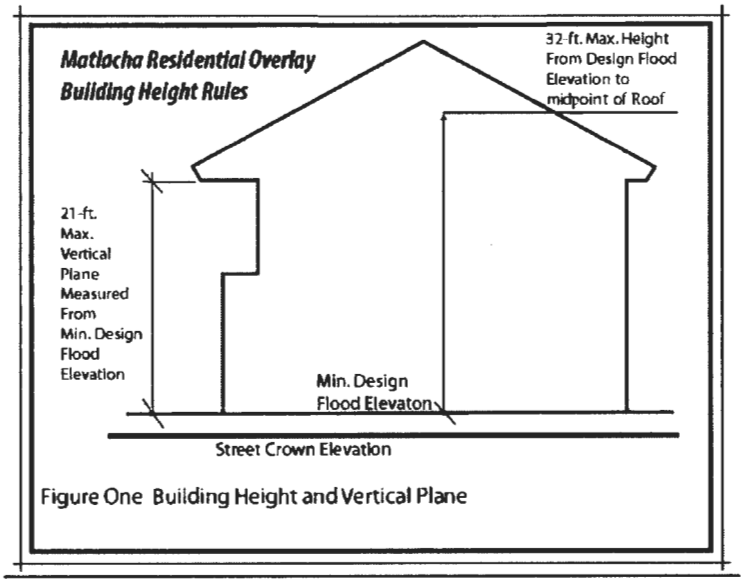


Figure 1 (Building Height and Vertical Plane)

ARTICLE IX. – CAPTIVA

DIVISION 3. – PROPERTY DEVELOPMENT REGULATIONS

Sec. 33-1611. Applicability.

(a) *Scope.* The provisions of article IX apply to development located on Captiva Island not specifically exempted under section 33-1613, "Existing development" below, as defined in Goal 23 of the Lee County Comprehensive Plan, but excluding Upper Captiva, Cayo Costa, Useppa, Buck Key, and Cabbage Key. This Article applies to development and redevelopment located on Captiva Island unless specifically stated otherwise.

(b) *Zoning.* This article applies to requests to rezone property on Captiva Island.

(c) *Development orders.* This article applies to development orders and limited review development orders described in sections 10-174(1), 10-174(2) and 10-174(4)a. that are requested on Captiva Island.

(d) *Demonstrating compliance.* Compliance with the standards set forth in this article must be demonstrated on the drawings or site development plans submitted in conjunction with an application for development order approval or with a building permit application if a development order is not required.

(e) 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~~.

Sec. 33-1614. – Definitions.

The following definitions are in addition to those set forth in other chapters of this LDC and are applicable to the provisions set forth in this article only. If, when construing the specific provisions contained in this article, these definitions conflict with definitions found elsewhere in this LDC, then the definitions set forth below will take precedence.

Beach furniture or equipment through *Roofline articulation* remain unchanged.

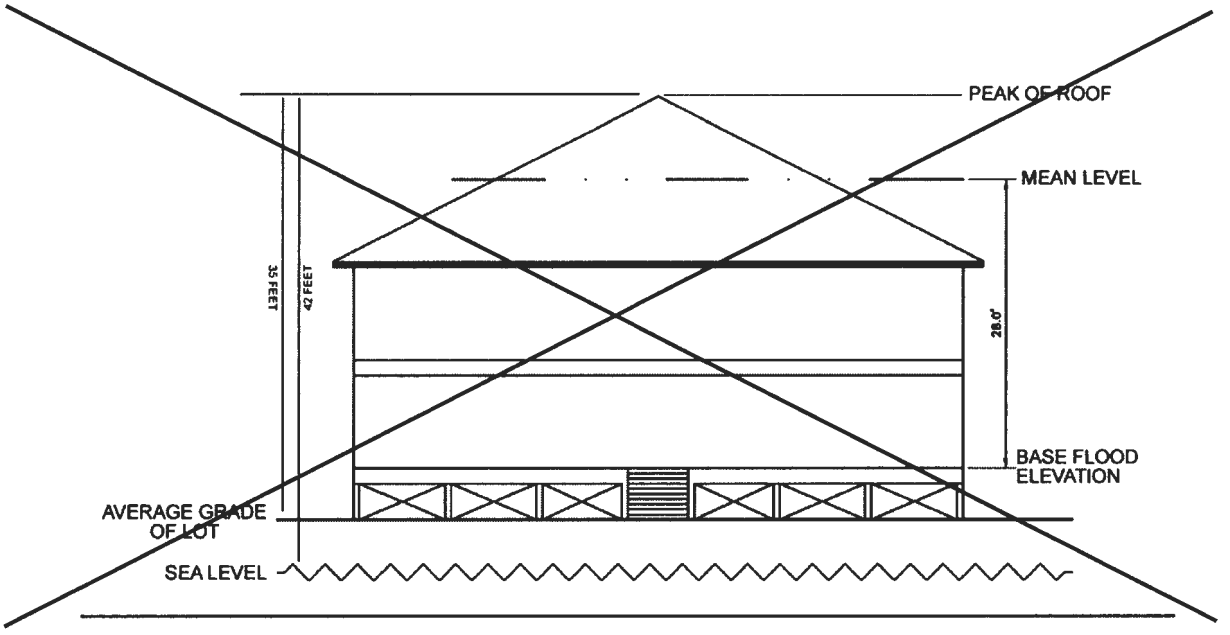
South Seas Island Resort means certain land generally lying north of Captiva Drive and bounded by the Gulf of Mexico, Red Fish Pass, and Pine Island Sound, commonly known as South Seas Island Resort, along with certain parcels lying south of and fronting Captiva Drive as depicted in Appendix I, Map 18.

Sec. 33-1627. 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 grade the lowest horizontal member at or below the lawful base flood elevation measured to the mean level between eaves and ridge in the case of gable, hip, 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 or less of the total roof area.~~

(b) The existing telecommunications tower facility located in the maintenance and engineering area of South Seas Island Resort may be replaced to a height not to exceed 170 feet, provided the new facility makes space available to the county for emergency communications service coverage for Captiva, as well as co-location capability for wireless carriers desirous of serving Captiva. Destruction of mangroves to build or operate a tower or related tower facilities is prohibited. The telecommunication tower will be a monopole, unless public safety is compromised.

SECTION THREE: AMENDMENT TO LDC CHAPTER 34

CHAPTER 34. – ZONING

ARTICLE I. – IN GENERAL

Sec. 34-2. Definitions.

The following words, terms and phrases, when used in this chapter, have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Abutting property through building, conventional remain unchanged.

Building~~,~~ height ~~of~~ means the vertical distance of a building or structure measured in accordance with section 34-2171. ~~from grade to the highest point of the roof surface of a flat or Bermuda roof, to the deck line of a mansard roof, and to the mean height level between eaves and ridge of gable, hip and gambrel roofs. Where minimum floor elevations in floodprone areas have been established by law, the building height will be measured from required minimum floor elevations (see article VII, division 30, subdivision II, of this chapter).~~

Building official through intensity remain unchanged.

Island means any piece of land that is surrounded completely by a natural body or natural bodies of water. Islands created through excavation or dredging activity or lands otherwise surrounded by water as a result of human activity will not be considered islands.

ARTICLE II. – ADMINISTRATION

DIVISION 6. - APPLICATIONS

Sec. 34-201. Application requirements for public hearing and administrative actions.

(a) Initiation of application. An application for a rezoning, mine excavation planned development under chapter 12, special exception, or variance may be initiated by:

(1) A landowner, or his authorized agent, for his own property~~;~~. Where there is more than one owner, either legal or equitable, then all owners must jointly initiate the application or petition. ~~p~~Provided, however, that:

~~a. Except as provided in subsections (a)(1)b. and c. of this section, where there is more than one owner, either legal or equitable, then all owners must jointly initiate the application or petition.~~

~~1~~a. This does not mean that both a husband and wife must initiate the application on private real property which is owned by them.

~~2~~b. Where the property is subject to a land trust agreement, the trustee may initiate the application.

~~3~~c. Where the fee owner is a corporation, any duly authorized corporate official may initiate the application.

~~4~~d. Where the fee owner is a partnership, a general partner may initiate the application.

~~5~~e. Where the property is a condominium, timeshare condominium, or homeowners' association as defined and regulated in F.S. chs. 718, 720, and 721, respectively, an application or petition applicable to association property including but not limited to common elements, common area, or future development, may be initiated by the association's president, manager or equivalent when authorized by a resolution of the association's governing body or by previously recorded association documents. ~~Where the fee owner is an association, the association or its governing body may appoint an agent to initiate the application on behalf of the association~~.

f. In addition to the authorization required under subsection e, applications that include property that is individually owned by homeowners, condominium unit owners, or timeshare unit owners must be accompanied by a letter of opinion from a licensed Florida attorney, who must attest that he has examined the declaration of condominium, the bylaws of the condominium or homeowners' association documents, and all other relevant legal documents or timeshare documents, as applicable, and concluded that the act of applying or petitioning to the County violates none of the provisions therein, or any federal or state law regulating condominiums, timeshare plans, or homeowners associations, or the rights of any of the unit/homeowners owners, as derived from such documents

and laws, and that approval of the requested act by the County would violate no such rights.

~~b. Where the property is a condominium, or a timeshare condominium, or homeowners' association as defined and regulated in F.S. chs. 718, 720, and 721, respectively, an application or petition applicable to property owned by the Association, including but not limited to common elements, future buildings, or future development phases, may be initiated by the Association's President, Manager or equivalent when authorized by a Resolution of the Association's governing body or by previously recorded Condominium documents.~~

~~In addition, applications that include property that is individually owned by homeowners, condominium unit owners, or timeshare unit owners must be approved by no less than 75 percent of the total number of individual unit owners condominium unit owners, or by both the owners' association and no less than 75 percent of timeshare condominium unit owners.~~

~~1. For purposes of this subsection, each individually owned condominium unit within the condominium complex and each individually owned timeshare unit as defined by F.S. ch. 721 counts as one unit, regardless of the number of individuals who jointly own the unit.~~
~~2. In order to verify ownership, the applicants must furnish the County, as part of their application, a complete list of all unit owners, identified by unit number and timeshare period, as applicable, along with proof that all unit owners who did not join in the application were given actual written notice thereof by the applicants, who must verify the list and fact of notice by sworn affidavit.~~
~~3. So as to protect the legal rights of nonparticipating unit owners, the application must be accompanied by a letter of opinion from a licensed Florida attorney, who must attest that he has examined the declaration of condominium, the bylaws of the condominium association, and all other relevant legal documents or timeshare documents, as applicable, and concluded that the act of applying or petitioning to the County violates none of the provisions therein, or any federal or state law regulating condominiums or timeshare plans, or the rights of any of the nonparticipating unit owners, as derived from such documents and laws, and that approval of the requested act by the County would violate no such rights.~~

~~c. Where the property is a Subdivision, an application or petition may be initiated by no less than 75 percent of the total number of lot or parcel owners and the homeowners' association, if applicable.~~

~~1. For purposes of this subsection, a subdivision is an area of property defined by a specific boundary in which lot divisions have been established on a plat that has been recorded in either a plat book or official records book whereby legal descriptions are referred to by lot or parcel number. This term may include any unit or phase of the subdivision and not the entire subdivision.~~
~~2. In order to verify ownership, the applicants must furnish the County, as part of their application, a complete list of all lot owners, identified by lot~~

~~number, along with proof that all lot owners who did not join in the application were given actual written notice thereof by the applicants, who must verify the list and fact of notice by sworn affidavit.~~

g. Where the application is applicable to property that is a subsequent phase or development tract located within a development, including but not limited to, a condominium, timeshare condominium, or homeowners' association as defined and regulated in F.S. chs. 718, 720, and 721, respectively, an application or petition may be initiated by the property owner(s) of the subsequent phase or development tract.

(2) The County, which for purposes of this section means the Board of County Commissioners.

(b) Abutting properties. All properties within a single application must be abutting unless the Director determines, in his or her sole discretion, that there is a rational relationship between the properties in question.

(c) Waivers. Upon written request, on a form prepared by the County, the Director may modify the submittal requirements where it can be demonstrated by the applicant that the submission will have no bearing on the review and processing of the application. The decision of the Director is discretionary and may not be appealed.

(d) Filing fee. All fees, in accordance with the County's External Fees and Charges Manual, must be paid in full at the time the application is submitted. No review of the application will commence until payment is received.

ARTICLE VII. – SUPPLEMENTARY DISTRICT REGULATIONS

DIVISION 19. – HOTELS AND MOTELS

Sec. 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, ~~T~~the maximum permitted density for hotels or motels on Captiva Island may not exceed three units per gross acre. The redevelopment of nonconforming hotels and 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.

DIVISION 26. – PARKING

Sec. 34-2011. Applicability of division.

(a) *New developments.* Residential and nonresidential uses must provide off-street parking spaces in accordance with the regulations in this division.

(b) *Existing developments.*

(1) Existing buildings and uses with existing off-street parking spaces may be modernized, altered or repaired without providing additional parking spaces, provided there is no increase in total floor area or capacity. ~~Buildings damaged in excess of 50 percent must comply with all applicable regulations.~~ Buildings which have been damaged by fire or other natural forces in excess of 50 percent and are reconstructed at (but not to exceed) the legally documented actual use, density, and intensity existing at the time of destruction must provide, no less than, the number of parking spaces existing prior to the date of destruction (if existing parking spaces are less than the amount of parking required under this Code). Any subsequent changes to the actual use or increases in density and intensity on the property will be required to provide additional parking spaces associated with the change of use or development increases. In calculating the required additional parking, the required additional spaces will be proportionate to the increase in density or intensity above the preexisting development intensities or densities.

(2) Existing buildings or uses enlarged in terms of floor area must provide additional parking spaces for the total floor area in accordance with this division.

(3) When the use of a building is changed to a use that is required to have more parking than exists, the additional parking must be provided.

(c) *Developments on islands without vehicular access to mainland.* Developments on islands where direct vehicular access to the mainland by bridge, causeway or street system is not available are exempt from this division.

DIVISION 30. – PROPERTY DEVELOPMENT REGULATIONS

SUBDIVISION II. - HEIGHT

Sec. 34-2171. Measurement.

(a) Except as provided in this subdivision, the height of a building or structure is measured as the vertical distance from grade* to the highest point of the roof surface of a flat ~~or Bermuda~~ roof, to the deck line of a mansard roof, and to the mean height level between eaves and ridge of gable, hip, shed, and gambrel roofs, and to the highest point of any other structure (excluding fences and walls).

* For purposes of this subdivision, grade is 12 inches above the average elevation of the street or streets abutting the property measured along the centerline of the streets, at the points of intersection of the streets with the side lot lines (as extended) and the midpoint of the lot frontage.

(b) ~~(1)~~ In areas within the Coastal Building Zone and other flood prone areas (as defined in Chapter 6 Articles III and IV of the LDC), height of a building is the vertical distance measured from ~~the minimum required flood elevation~~ the lowest minimum habitable floor elevation for which a building permit may be issued to the highest point of the roof surface of a flat ~~or Bermuda~~ roof, to the deck line of a mansard roof, or to the mean height level between the eaves and ridge of gable, hip, shed and gambrel roofs.

(c) ~~(2)~~ Fences, walls, and buffers are measured in accordance with section 34-1744 and section 10-416.

Sec. 34-2172. - Exceptions to height limitations for resiliency~~Reserved~~.

(a) Notwithstanding any other provision in this Code, buildings within a coastal high hazard area, as defined in section 6-479 ("V Zones"), or within a "Coastal A Zone," as defined by the Florida Building Code, may increase the height of the lowest minimum habitable floor for which a building permit may be issued by a maximum of four (4) feet and exceed the applicable height limitations established in this Code proportionally without deviation or variance approval from to provide for increased resiliency and protection from natural disasters.

(b) An increase in building height permitted herein is not subject to the requirements of section 34-2174.

(c) The provisions of this section do not apply to the Gasparilla Island Conservation District.

Sec. 34-2174. Additional permitted height when increased setbacks provided.

(a) Subject to conditions set forth in section 34-2175, any building or structure may be permitted to exceed the height limitations specified by the zoning district regulations in which the property is located provided every required street, side, waterbody, and rear setback is increased by one-half foot for every one foot by which the building or structure exceeds the specified height limitation.

(b) In zoning districts that do not specify a maximum height limitation, the increase to setbacks stated in this section will apply to all buildings or structures exceeding 35 feet in height.

~~(c) The height increases described in section 34-2174(a) and (b) may not be used in Greater Pine Island.~~

Sec. 34-2175. 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:

(a) *Special areas.*

(1) *Upper Captiva Island.* The height of a building or structure may not exceed 35 feet ~~above grade (base flood elevation)~~. The provisions of section 34-2174(a) do not apply to Upper Captiva Island. No variance or deviation from this height restriction ~~35-foot height restriction~~ may be granted.

~~In addition to compliance with all applicable building codes (including Fire and Life Safety Codes), any building with two or more stories or levels must provide an exterior stairway from the uppermost levels (including "widow's walks" or observation decks) to the ground OR a one-hour fire rated interior means of egress from the uppermost levels (including "widow's walks" or observation decks) to the ground.~~

(2) *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.

(3) *San Carlos Island.* The height of a building or structure may not exceed 35 feet, unless located within the Destination Resort Mixed Use Water Dependent (DRMUWD) future and use category. ~~above grade, except as provided for in section 34-2174. If seaward of the coastal construction control line, elevations may exceed the 35-foot limitation by three feet for nonconforming lots of record.~~

(4) *Gasparilla Island ~~c~~Conservation ~~d~~District.* No building or other structure may be erected or altered so that the peak of the roof is more than 38 feet above the average grade of the lot or parcel on which the building or structure is located, or is more than 42 feet above mean sea level, whichever is lower.

(5) *Greater Pine Island.* ~~See section 33-1087.~~ The height of a building or structure may not ~~be erected or altered so that the peak of the roof~~ exceeds ~~38~~ 33 feet ~~above grade~~.
   a. The provisions of section 34-2174(a) do not apply to Greater Pine Island.
   b. Structures without roofs will be measured to the highest point on the structure.
   c. No deviations from these height restrictions may be granted through the planned development process.
   d. Any variances from these height restrictions require all of the findings in section 34-145(b)(3), with the sole exception being where the relief is required to maintain or improve the health, safety, or welfare of the general public (not just the health, safety, or welfare of the owners, customers, occupants, or residents of the property in question).

(6) *Matlacha Residential Overlay.* See chapter 33, article VI.

~~(6)~~(7)*All other islands.* The height of a building or structure may not exceed 35 feet ~~above grade (base flood elevation)~~. Except as provided in subsections 34-2175(3)~~,~~ and (4), ~~and (5),~~ the provisions of section 34-2174(a) do not apply to islands. No variance or deviation from the 35-foot height restriction may be granted.

~~(7)~~(8) *Airport hazard areas ~~zone~~.* Height limitations for ~~the~~ airport hazard areas~~zone~~ are set forth in Article VI, Division 12~~article vi, division 10, subdivision III~~, of this chapter.

(b) *Lee Plan land use categories.* Except as otherwise provided herein, maximum building height is established by future land use category as follows:

TABLE 34-2175(b)
MAXIMUM BUILDING HEIGHT BY FUTURE LAND USE CATEGORY

Future Land Use Category	Notes	Maximum Building Height
Destination Resort Mixed Use Water Dependent		Per Lee Plan
Intensive Development		135 feet
Central Urban		
Urban Community		95 feet
Airport Lands	Note (1)	45 feet
Tradeport	Note (1)	
University Community		
University Village Interchange		
Commercial		75 feet
General Commercial Interchange		
General Interchange		
Industrial Commercial Interchange		
Industrial Development		
Industrial Interchange		
Density Reduction/Groundwater Resource		45 feet
Open Lands		
Outer Islands		
Outlying Suburban	Note (2)	
Public Facilities		
Rural	Note (2)	
Rural Community Preserve		
Sub-outlying Suburban	Note (2)	
Suburban	Note (2)	

Notes:

(1) With the consent of the Lee County Port Authority, the Board of County Commissioners may approve building heights up to 95 feet.

(2) Buildings may be as tall as 75 feet when the applicant demonstrates through a zoning action that the additional height is required to preserve ~~increase common open space for the purposes of preserving~~ environmentally sensitive land, ~~securing~~ secure areas of native vegetation and wildlife habitat, or ~~preserving~~ preserve historical, archaeological or scenic resources.

~~(1) *Intensive development and central urban land use categories.* Buildings may be as tall as 135 feet above minimum flood elevation with no more than 12 habitable stories.~~

~~(2) *Urban community land use category.* Buildings may be as tall as 95 feet above minimum flood elevation with no more than eight habitable stories.~~

~~(3) *Airport lands and tradeport land use categories.* Buildings may be as tall as 45 feet above minimum flood elevation with no more than three habitable stories. With the consent of the port authority, the Board of County Commissioners may approve building heights up to 95 feet above minimum flood elevation with no more than eight habitable stories.~~

~~(4) *Industrial interchange, industrial commercial interchange, general interchange and general commercial interchange land use categories.* Buildings may be as tall as 75 feet above minimum flood elevation with not more than six habitable stories.~~

~~(5) *Suburban, outlying suburban and rural land use categories.* Buildings may be as tall as 45 feet above minimum flood elevation with no more than three habitable stories, except that such buildings may be as tall as 75 feet above minimum flood elevation with no more than six habitable stories when the applicant demonstrates that the additional height is required to increase common open space for the purposes of preserving environmentally sensitive land, securing areas of native vegetation and wildlife habitat, or preserving historical, archaeological or scenic resources.~~

SUBDIVISION III. - Setbacks

Sec. 34-2191. Measurement; permitted encroachments.

Setbacks are measured from the property line to the nearest point of a building or structure. Encroachments into a required setback are permitted as provided below. Encroachments into easements are prohibited.

(1) *Wing walls.*

a. A wing wall which is part of a building may be permitted to encroach into a side or rear setback, provided that such encroachment is no higher than would be permitted for a fence or wall.

b. When measuring the setback for a wing wall, the setback shall be measured from the property line to the nearest point of the wing wall which meets the maximum height permitted for a fence or wall within the side or rear setback.

(2) *Overhangs.* An overhang which is part of a building may be permitted to encroach into any setback as long as the overhang does not extend more than three feet into the setback and does not permit any balcony, porch or living space to extend into the setback.

(3) *Shutters.* A shutter which is attached to a building may be permitted to encroach one foot into the setbacks.

(4) *Awnings and canopies.*

a. Awnings and canopies which are attached to a building may be permitted to encroach three feet into the setbacks, as long as their location does not interfere with traffic, ingress and egress, or life safety equipment.

b. For purposes of this section, awnings and canopies may be attached to a nonconforming building and shall not be considered an extension or enlargement of a nonconformity, as long as the building is properly zoned for its use and the conditions as set forth in this section are met.

(5) *Equipment ~~Pads~~/platforms.*

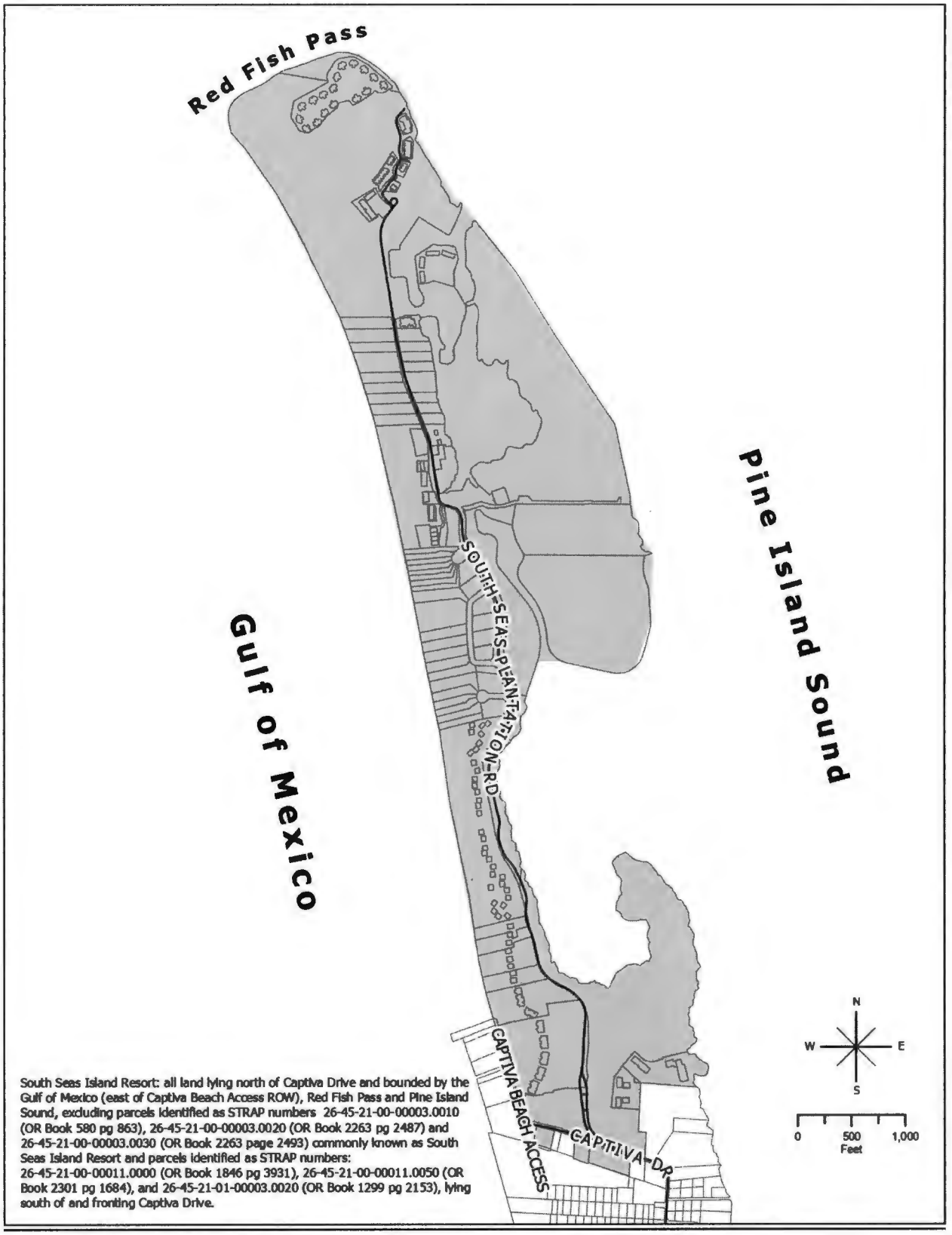
a. Equipment ~~pads/~~platforms, such as those for air conditioning and swimming pool equipment, may encroach up to three feet into side, rear or waterbody setbacks. The equipment ~~pad/~~platform may not interfere with ingress and egress, or through-access for life safety equipment.

b. Equipment ~~pads/~~platforms may be attached to a nonconforming building and will not be considered an extension or enlargement of a nonconformity as long as the building is properly zoned for its use and the requirements of section 34-2191(5)a. are met.

(6) *Exterior stairways.* Exterior stairways providing access to the main entrance of a dwelling unit or living unit may be permitted to encroach a maximum of three feet into a side setback, or a maximum of eight feet into a street setback, as long as its location does not interfere with traffic, ingress and egress, or life safety equipment.

APPENDIX I - PLANNING COMMUNITY AND REDEVELOPMENT OVERLAY DISTRICT BOUNDARIES AND LEGAL DESCRIPTIONS

Maps 3 through 17 remain unchanged



Map 18 – South Seas Island Resort

SECTION FOUR: CONFLICTS OF LAW

Whenever the requirements or provisions of this Ordinance are in conflict with the requirements or provisions of any other lawfully adopted ordinance or statute, the most restrictive requirements will apply.

SECTION FIVE: SEVERABILITY

It is the Board of County Commissioner's intent that if any section, subsection, clause or provision of this ordinance is deemed invalid or unconstitutional by a court of competent jurisdiction, such portion will become a separate provision and will not affect the remaining provisions of this ordinance. The Board of County Commissioners further declares its intent that this ordinance would have been adopted if such unconstitutional provision was not included.

SECTION SIX: CODIFICATION AND SCRIVENER'S ERRORS

The Board of County Commissioners intend that this ordinance will be made part of the Lee County Code. Sections of this ordinance can be renumbered or relettered and the word "ordinance" can be changed to "section", "article," or other appropriate word or phrase to accomplish codification, and regardless of whether this ordinance is ever codified, the ordinance can be renumbered or relettered and typographical errors that do not affect the intent can be corrected with the authorization of the County Administrator, County Manager or his designee, without the need for a public hearing.

SECTION SEVEN: MODIFICATION

It is the intent of the Board of County Commissioners that the provisions of this Ordinance may be modified as a result of consideration that may arise during Public Hearing(s). Such modifications shall be incorporated into the final version.

SECTION EIGHT: EFFECTIVE DATE

Any provision of this ordinance that is subject to adoption of CPA2023-00004 amending Lee Plan Goal 23 and Policy 23.2.3 will take effect only after final adoption of CPA2023-00004, as applicable. The remainder of this ordinance will take effect upon its filing with the Office of the Secretary of the Florida Department of State. The provisions of this ordinance will apply to all projects or applications subject to the LDC unless the development order application for such project is complete or the zoning request is found sufficient before the effective date.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

Commissioner Pendergrass made a motion to adopt the foregoing ordinance, seconded by Commissioner Sandelli. The vote was as follows:

Kevin Ruane	Nay
Cecil L Pendergrass	Aye
Raymond Sandelli	Aye
Brian Hamman	Aye
Mike Greenwell	Aye

DULY PASSED AND ADOPTED this 5th day of September, 2023.

ATTEST:
KEVIN C. KARNES
CLERK OF CIRCUIT COURT

BY: _____
Deputy Clerk

CHRIS JAGODZINSKI
DEPUTY CLERK

BOARD OF COUNTY COMMISSIONERS
OF LEE COUNTY, FLORIDA

BY: _____
Brian Hamman, Chair

APPROVED AS TO FORM FOR THE
RELIANCE OF LEE COUNTY ONLY

By: _____
Office of the County Attorney

FLORIDA DEPARTMENT of STATE

RON DESANTIS
Governor

CORD BYRD
Secretary of State

September 11, 2023

Honorable Kevin Karnes
Clerk of the Circuit Courts
Lee County
Post Office Box 2469
Fort Myers, Florida 33902-2469

Attn: Chris Jagodzinski

Dear Kevin Karnes:

Pursuant to the provisions of Section 125.66, Florida Statutes, this will acknowledge receipt of your electronic copy of Lee County Ordinance No. 23-22, which was filed in this office on September 8, 2023.

Sincerely,

Anya Owens
Administrative Code and Register Director

ACO/wlh

RECEIVED
By Chris Jagodzinski at 10:14 am, Sep 11, 2023

Attachment 3

BEFORE THE FLORIDA DEPARTMENT OF COMMERCE

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

Captiva Civic Association, Inc.,
Petitioner
v.

Lee County, Fla.,
Respondent
_____/

AMENDED[1] SECTION 163.3213 (3) PETITION REGARDING ORDINANCE 23-22

The Captiva Civic Association files this Petition with the state land planning agency, the Florida Department of Commerce, and alleges as follows:

1. This Amended petition is filed pursuant to §§163.3213 (3) and (4), 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. Petitioner has complied with the condition precedent to the institution of this proceeding by filing a petition with Lee County on January 8, 2024 outlining the facts on which the petition is based and the reasons that the Petitioner considers the land development regulation to be inconsistent with the local comprehensive plan. (Attachment A). On

[1] This Amended Petition amends and supersedes the Petition filed with the Department on March 7, 2024, and follows and carries forward the allegations in the amended petition filed by CCA on February 20, 2024 with the County concerning the subject land development regulation, and the expiration of the statutory timeframe for the County to reply to that petition. Changes to the original Petition submitted to the Department on March 7, 2024 are shown in ~~strike – though~~ and underline format.

February 20, 2024 Petitioner filed with Lee County an amended petition concerning the subject land development regulation that raised as additional Comprehensive Plan inconsistencies the Lee Plan provisions alleged in paragraph 18 h-j below. (Attachment C)

3. Lee County responded in writing to the Petitioner on February 6, 2024, rejecting the Petitioner's claims in its January 7, 2024 petition. (Attachment B). As of March 21, Lee County did not respond to the amended petition CCA filed with the County on February 20, 2024. This Amended Petition is filed with the Department within 30 days of the expiration of the timeframe provided by section 163.3213, Fla. Stat. for any response by the County to that amended petition.
4. This Amended Petition is filed within the 30 – day statutory period after the closure of the County's statutory response period, pursuant to §163.3213 (3), Fla. Stat.
5. Ordinance 23-22 is a "land development regulation" as defined in §163.3213 (2)(b), Fla. Stat.
6. 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. The injury in fact to be experienced by the Petitioner and a substantial number of its members include adverse impacts to the coastal barrier island

community's natural resources, including potential increases in noise and light pollution impacts to surrounding natural areas, and potential structural damage to wetlands as a result of more and taller buildings being subject to storm damage, adverse changes to the historic low-density residential development pattern and unique neighborhood style commercial activities, reductions in their quality of life and community character from increased density and intensity of use, and in increase in traffic and evacuation times and reduction in public safety.

7. 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.

8. 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."

9. 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:[2]

    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~~

[2] All strike-through and underlining in this paragraph are as in the original Petition filed with the Department, showing the changes made to the County Code by the subject land development regulation, and are not changes to the original Petition filed with the Department.

~~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, ~~T~~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~~ exceed~~s~~ 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.

10. 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.

11. The changes to the Land Development Code adopted by Ordinance 23-22 authorize an increase in permittable 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.

12. 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.
13. 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.
14. 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.

15. 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.
16. 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.

17. 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."

18. 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)

h. **OBJECTIVE 72.2**: DEVELOPMENT REGULATIONS. Maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made hazards.

i. **OBJECTIVE 73.1:** EVACUATION. Work towards attaining out of County hurricane evacuation for a Category 5 storm event (Level E storm surge threat) that does not exceed the timeframes referenced in the Statewide Regional Evacuation Study. Lee County will work to improve clearance times by increasing shelter availability within the County, improving evacuation routes, and increasing public awareness and citizen preparedness.

j. **OBJECTIVE 23.1**: PROTECTION OF NATURAL RESOURCES. To continue the long-term protection and enhancement of wetland habitats, water quality, native upland habitats (including rare and unique habitats), and beaches on Captiva.

19. 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.

20. Pursuant to §§163.3213 (4), and (5) Fla. Stat., Petitioner requests that the Department conduct an informal administrative hearing in this matter, determine that the challenged land development regulation is inconsistent with the Lee County Comprehensive Plan, and seek the statutory remedy therefor.

Submitted this 22nd day of March, 2024.

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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 this 22nd day of March, 2024.

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Michael Jacob, Deputy County Attorney (mjacob@leegov.com)

ATTACHMENT A

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, ~~T~~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~~ exceed~~s~~ 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 permittable 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.

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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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ATTACHMENT B

MEMORANDUM
FROM THE
OFFICE OF COUNTY ATTORNEY

VIA EMAIL ONLY

DATE: February 6, 2024

TO: Richard Grosso

FROM: Michael D. Jacob
Deputy County Attorney

RE: Lee County's Response to Request for Relief Under § 163.3213, Fla. Stat.

In Response to Captiva Civic Association's ("CCA") Petition dated January 8, 2024, Lee County hereby provides the following response:

I. Request for Relief

Pursuant to §163.3213(3), Fla. Stat., a Petition for Relief under §163.3213 must provide "*the facts on which the petition is based and the reasons that the substantially affected person considers the land development regulation to be inconsistent with the local comprehensive plan.*" To that end, Petitioner's main assertion is that the Ordinance provisions "*radically increased heights and hotel room density on Captiva.*" Specifically, the Petitioner alleges the Land Development Code ("LDC") revisions to sections 33-1611(e) (Applicability), 33-1614 (Definitions), 33-1627(a) (Height Restrictions on Captiva Island), 34-1805 (Density Limitations for Captiva Island), and 34-2175(a)(2) (Height limitations for special areas and Lee Plan Land Use Categories) are inconsistent with the Lee Plan. Petitioner argues the LDC provisions are inconsistent with Lee Plan provisions Policy 17.1.2, Policy 17.1.3, Goal 23, Objective 23.2, Policy 23.2.3, Policy 23.2.4, and Policy 23.2.5.

A. Standard of Review

A Land Development Regulation is consistent "*if the land uses, densities and intensities, and other aspects of development permitted by the land development regulations are compatible with and further the objectives, policies, land uses, and densities and intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.*" §163.3194(3)(a), Fla. Stat. Section 163.3213(5), Fla. Stat., provides that "*the adoption of a land development regulation by a local government is legislative in nature and* ***shall not be found to be inconsistent*** *with the local plan if it is fairly debatable that it is consistent with the plan.*" The fairly debatable standard of review is a highly deferential standard requiring approval of a planning action if reasonable persons could differ to its propriety. Stated another way, if reasonable minds could differ to whether the land uses, densities and intensities or other aspects of development permitted by the Ordinance are consistent with the Plan, then the Ordinance must be found consistent with the Lee Plan. The Petitioner bears the burden of proving beyond fair debate that the challenged land development regulations are not consistent with the adopted Plan. The onus does not fall on the local government to prove consistency.

B. Standing

Pursuant to §163.3231(3), Fla. Stat., only a substantially affected person may challenge a land development regulation on the basis that it is inconsistent with the local comprehensive plan. Pursuant to §163.3231(2)(a), substantially affected person "*means a substantially affected person as provided pursuant to chapter 120.*"

To establish standing under the "substantially affected" test under Chapter 120, Fla. Stat., a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. *See* Off. of Ins. Regul. & Fin. Servs. Comm'n v. Secure Enterprises, LLC, 124 So. 3d 332, 336 (Fla. Dist. Ct. App. 2013)(citing *Jacoby v. Fla. Bd. of Med.,* 917 So.2d 358, 360 (Fla. 1st DCA 2005) Agrico Chem. Co. v. Dep't of Envir. Prot., 406 So.2d 478, 482 (Fla. 2nd DCA 1981); *See also* Veal v. Department of Community Affairs, Case No. 00-1189GM, State of Florida Division of Administrative Hearings (applying stricter substantially affected person test under Agrico to challenges filed under §163.3213, Fla. Stat.). To satisfy the sufficiently real and immediate injury in fact element under Chapter 120, an injury must not be based on pure speculation or conjecture. *See* Off. of Ins. Regul. & Fin. Servs. Comm'n v. Secure Enterprises, LLC, 124 So. 3d 332, 336 (Fla. Dist. Ct. App. 2013)(citing Lanoue v. Fla. Dept. of Law Enforcement, 751 So.2d 94, 97 (Fla. 1st DCA 1999)). Village Park Mobile Home Assn, Inc. v. State Dept. of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987). The Petition fails to allege sufficient facts to demonstrate the CCA is a "substantially affected person" and has standing to file this Petition.[1]

The Petition's sole stated basis for its allegation that the CCA is a substantially affected person is because CCA owns real property, or its members own property, adjacent to, or very proximate to, "*land that may now be approved for building heights and hotel room density under the subject land development regulations that is greater than that allowed prior to the adoption of the land development regulation.*" Owning property alone is insufficient to establish that CCA is a substantially affected person and entitled to standing to file this request. *See* Agrico Chemical Co. v. Department of Environmental Protection, 406 So.2d 478 (Fla. 2d DCA 1981) *See also* Veal v. Department of Community Affairs, Case No. 00-1189GM, State of Florida Division of Administrative Hearings (Summary final order was appropriate when Petitioner's only basis for standing was property ownership).

Nowhere within the Petition does the Petitioner allege any real or immediate injury to its interests as a direct result from adoption of the Ordinance. To the extent that the Petition may be read to assert that the potential rezoning of the South Seas property to allow for greater building heights and more hotel rooms creates an injury, the Petition fails to identify what that injury is and how the Ordinance in question created that injury.

Petitioner is fully aware that required development and zoning approvals have not been granted and were not approved through adoption of the Ordinance. The Petition is replete with statements indicating that the additional heights and hotel rooms were not approved by the Ordinance, but "*may now be approved*" on the South Seas's property through a future rezoning

[1] Attempting to assert standing based on nothing more than the mere ownership of land and allegations based on nothing more than speculation is ripe for sanctions. *See* Martin County Conservation Alliance v. Martin County, 73 So3d 856 (Fla. 1st DCA 2011)(Sanctions imposed against legal counsel (*R. Grosso*) and his clients for failure to assert or establish material facts and controlling law demonstrating they are an adversely affected party).

process. Simply put, while the Petition fails to allege any real or immediate harm, to the extent that any allegation within the Petition may be read to assert a potential future harm resulting from potential rezoning actions on South Seas property, that assertion is impermissibly based on pure speculation or conjecture.

In Village Park Mobile Home Assn, Inc. v. State Dept. of Business Regulation, 506 So.2d 426 (Fla. 1st DCA 1987), the Court rejected similar standing arguments raised by the CCA. In upholding the Divisions denial based on lack of standing, the Court found that the appellants did not meet the standards outlined under Agrico.

In Village Park, appellants argued that they had standing because the terms of the proposed prospectus could greatly increase the cost of a residence at the park, substantially reduce services previously provided by the park owner, and greatly modifies the terms under which appellants had previously resided in the park. The Court found that these potential future harms alleged by appellants did not demonstrate any immediate injury in fact.

In analyzing the Appellant's alleged injury under Agrico, the First DCA found that the approval of the prospectus "*does not automatically result in the [alleged injuries]. Rather, it is the implementation of the provisions of the prospectus by the park owner which may result in the [alleged injuries].*" Id. at 433. Therefore, the Court found that any alleged harm would result from the implementation of the provisions contained in the prospectus and not from the agency's approval of the prospectus. The Court concluded by ruling that appellants did not have standing because their "*threat of injury*" was a "*matter of speculation and conjecture*" and not "*of sufficient immediacy and reality to warrant invocation of the administrative review process*" under §163.3213, Fla. Stat.

In the present case, Petitioner alleges that the Ordinance authorizes South Seas or other property owners to file a rezoning application that may be approved by the Board. A plain reading of the Ordinance and the County's existing Land Development Code clearly indicates that the Ordinance does not automatically result in any changes of use, height increases, additional hotel units, or any additional development within the South Seas Resort. Whether a future rezoning application will be approved in a manner that "*radically increase[s] heights and hotel room density on Captiva*" is speculative. Whether that future rezoning application will be approved in a manner that will be inconsistent with the Lee Plan is conjecture at best. According to the Petition, those anticipated future rezoning application will be approved by the Board in a manner that is inconsistent with the cited Lee Plan provisions. And, in so doing, the future "inconsistent approval" would make the adopted Ordinance itself inconsistent with the cited Lee Plan provisions and, in some undisclosed way injure the CCA and its members.

If such speculation were an appropriate basis for standing, an argument could be raised that every LDC amendment could be challenged by anyone simply based on the possibility that a future application may be approved in a manner that is inconsistent with the Lee Plan. As was stated in Village Park, "*attempting to anticipate whether and when these events will transpire takes us into the area of speculation and conjecture*" and is not "*of sufficient immediacy and reality to warrant invocation of the administrative review process.*" Inexcusably, this nearly identical argument was raised by Petitioner's legal counsel in a previous case and was vehemently struck down by the Court and lead to Petitioner's counsel being sanctioned for raising such an

argument.[2] *See* Martin County Conservation Alliance v. Martin County, 73 So3d 856 (Fla. 1st DCA 2011)(rejected Appellant's standing argument under §120.68, Fla. Stat., based on a mere claim that future courts or political decisions could adversely affect the Appellant.) Similar to *Martin County*, this Petition is based on speculation that the Board's future decisions could have an adverse affect on the CCA. Petitioner has failed to establish any material facts demonstrating a real or immediate injury to the CCA or its membership's interests resulting from adoption of the Ordinance. Any alleged future injury attached to events that have not occurred are speculative at best. Therefore, CCA has failed to demonstrate that it is a substantially affected person that has standing to request relief under §163.3213, Fla. Stat.

C. Land Development Regulations subject to review under 163.3213

Section 163.3213(3), Fla. Stat., authorizes a substantially affected person to challenge the adoption of a land development regulation on the basis that the land development regulation is inconsistent with the local comprehensive plan. That authority is not without limitations. Not all local government actions are subject to challenge under §163.3213, Fla. Stat.

A petition filed under §163.3212, Fla. Stat., must be rejected if the action being challenged does not qualify as a land development regulation. Section 163.3213(2)(b), Fla. Stat., defines "land development regulation" as:

> *an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land.* ***This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land****, or any building construction standard adopted pursuant to and in compliance with the provisions of chapter 553.*

The Ordinance included various amendments to the LDC; however, not every provision is a land development regulation as defined under Chapter 163, Fla. Stat. The specific provisions asserted by the Petitioner as inconsistent with the Lee Plan are outside the scope of §163.3213, or, even if they could have been initially subject to challenge under §163.3213, they are no longer subject to challenge.

(1) South Seas Exemption Provisions

The Petition includes a plethora of assertions concerning the South Seas Resort and what South Seas may do today compared to what it may have done prior to adoption of the Ordinance. Petitioner conveniently ignores the fact that South Seas is exempt and has always been exempt from the Captiva regulations. To the extent that Petitioner's allegations of inconsistency are based on South Seas' exemptions to the Captiva Land Development Code provisions, and by extension somehow that exemption is inconsistent with the Lee Plan, Petitioner is precluded from raising that issue under §163.3213, Fla. Stat., for multiple reasons.

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[2] The Court, on its own motion, sanctioned Petitioner's legal counsel and clients for raising the same standing argument.

First, the South Seas exemption under the LDC was created by the CCA twelve years ago as a part of, and concurrent with, the adoption of the very Lee Plan provisions referenced in the Petition. The Captiva Civic Association, as part of its Community Planning effort, was responsible for creating and requesting approval of the South Seas exemption in 2012. *See* Lee County Ordinance 12-19. Even if the South Seas exemption was subject to administrative review, Petitioner is precluded from challenging that exemption as inconsistent with the Lee Plan 12 years later. If a land development regulation is not challenged within 12 months, it shall be deemed to be consistent with the adopted local plan. *See* §163.3213(6), Fla. Stat.

Secondly, the South Seas exemption provisions are not a Land Development Regulation as defined under §163.3213(2)(b), Fla. Stat. The Exemption is a specific provision applicable to a particularly defined property. It is not a general zoning code. Furthermore, the exemption itself does not regulate "*development*" as that term is defined under Chapter 163, Fla. Stat. Before and after adoption of the Ordinance, the development regulations applicable to South Seas were found elsewhere in the Code or its Administrative Interpretation.

(2) The Ordinance does not approve development

The Petition asserts that the Ordinance is inconsistent with provisions of the Lee Plan because the changes to the Land Development Code ("LDC"), adopted by the Ordinance authorizes "*an increase in permittable habitable floors and an increase in hotel unit density compared to the Code just prior to the Amendment...*"[3] However, the Petition contradicts itself by indicating that additional heights and units "*may now be approved.*"

Petitioner's assertions are not consistent with the actual language of the adopted Ordinance or the current Land Development Code. The Ordinance does not, in and of itself, approve South Seas Resort to increase its height or hotel "density." The Ordinance did not rezone the South Seas property. While some jurisdictions on the East Coast of Florida may rezone property via adoption of an Ordinance, in Lee County, adoption of an Ordinance does not rezone property. There is a different process for approving rezoning applications.[4]

Land Development regulations applicable to Captiva Island that restrict hotel "density" to 3 units per acre remains unchanged by the Ordinance and remains untouched within Chapter 33 of the Land Development Code. South Seas was never subject to those limitations. The residential density limitations of 3 units per acre applicable to Captiva Island remains within Chapter 33 of the Land Development Code and has not been changed by the Ordinance. South Seas was never subject to those limitations. Notwithstanding, even after adoption of the Ordinance South Seas maximum permitted density is 3 units per acre, just like the limitations placed on Captiva.

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[3] At no time "prior to the Amendment" was South Seas subject to the Captiva height and hotel "density" regulations referenced in the Petition.

[4] Throughout the Public meetings for adoption of the Ordinance and Comprehensive Plan Amendments, the County has unequivocally stated that the Ordinance does not authorize South Seas to violate its existing zoning approvals. County regulations require South Seas to seek rezoning approvals before any changes in height, density, or hotel units may occur. Until such time, the entire South Seas development will remain subject to its existing zoning approvals under the South Seas Administrative Interpretation (ADD2002-00098).

(3) Zoning Actions are not Subject to Administrative Review

Nearly all, if not all, assertions of any sort of "inconsistency" refer back to South Seas and some potential future rezoning approvals by the County for development of the South Seas Resort. Conversely, the Petition also alleges that these changes were authorized by the Ordinance. Notwithstanding the glaringly obvious, Petitioner asserts that because the Ordinance ***may*** authorize those changes on South Seas property that makes the Ordinance inconsistent with the Lee Plan (although nowhere within the Petition does Petitioner actually state how the Ordinance is inconsistent).

As stated above, the Ordinance and the County's existing Land Development Code do not approve any changes of use, height increases, additional hotel units, or any additional development within the South Seas Resort. However, for argument's sake, even if we take the Petitioner's assertion as true (i.e., that the Ordinance increased the habitable floors and increased the South Seas hotel units, etc.), then the Petition still fails.

Section 163.3213, Fla. Stat., explicitly states that the land development regulations subject to challenge may not include "*an action which results in zoning or rezoning of land.*" If, as Petitioner asserts, the Ordinance did in fact result in the zoning changes to the South Seas parcel, then challenging those provisions of the Ordinance would be prohibited under §163.3213, Fla. Stat. The Statute is clear that administrative review of Land Development Regulations under §163.3213, Fla. Stat., does not apply to zoning actions and may not be used to circumvent the sole process to challenge the consistency of development order approvals under Chapter 163, Fla. Stat.

D. Petitioner has failed to demonstrate beyond fair debate that the County's Land Development Regulation is Inconsistent with the Lee Plan.

Section 163.3213(5), Fla. Stat., provides that "*the adoption of a land development regulation by a local government is legislative in nature and* ***shall not be found to be inconsistent*** *with the local plan if it is fairly debatable that it is consistent with the plan.*" A Land development regulation is consistent "*if the land uses, densities and intensities, and other aspects of development permitted by the land development regulations are compatible with and further the objectives, policies, land uses, and densities and intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.*" §163.3194(3)(a), Fla. Stat.

Petitioner's main assertion is that the Ordinance provisions increase permittable building heights and hotel density. Petitioner further asserts that the amendments to these provisions permit "*radically increased heights and hotel room density on Captiva.*" Petitioner fails to cite to any provision within the Ordinance that actually does either of these. Nothing within the Petition identifies how the adopted Ordinance does not "*further the objectives, policies, land uses, and densities and intensities in the comprehensive plan.*" Inconceivably, nowhere within the Petition does Petitioner actually identify how these provisions are inconsistent with the Lee Plan. The Petition merely provides conclusory statements that the Ordinance provisions are inconsistent with certain Lee Plan provisions, nothing more.

To meet its burden, Petition must demonstrate beyond fair debate that the Ordinance provisions are inconsistent with the Lee Plan. The Petition fails to meet even the minimum

pleading requirements for relief under §163.3213, Fla. Stat., let alone meet the fairly debatable standard. General, vague and conclusory statements are insufficient to meet Petitioner's burden under §163.3213, Fla. Stat.

E. Relief Requested is not authorized under §163.3213(6), Fla. Stat.:

Paragraph 17 of the Petition states "*Petitioner requests that the County repeal the Code Amendments identified in paragraph 6.*" The Petition alleges that the Ordinance is inconsistent with several Goals, Policies and Objectives (Policy 17.1.2, Policy 17.1.3, Goal 23, Objective 23.2, Policy 23.2.3, Policy 23.2.4, and Policy 23.2.5). None of these cited Goals, Policies, or Objectives are mandatory elements required to be within the Lee Plan under Chapter 163.

Pursuant to §163.3213(6), Fla. Stat., if, and only if, the Administrative Law Judge and Administration Commission agree with the Petitioner, the Administration Commission may only impose the sanctions described in §§ 163.3184(8)(a) or (b)1, or 2. Fla. Stat.[5] Section 163.3184(8)(a) provides that the Administration Commission may "*specify remedial actions that would **bring the comprehensive plan** or plan amendment **into compliance**.*" These remedial actions, if imposed, would presumably identify which provisions are inconsistent with the Lee Plan and include requirements to bring ***the Lee Plan*** into compliance.

Any remedial actions would result in either (1) amendment to the cited Lee Plan provisions or (2) the County's complete removal of the inconsistent language from the Lee Plan altogether. Remedial action would NOT include repealing the Ordinance or any of its provisions. Neither the Florida Commerce Commission, the Administrative Law Judge, or the Administration Commission is authorized under §163.3213, Fla. Stat., to order Lee County to repeal the Ordinance.

No other relief was requested within the Petition. Therefore, the sole relief requested by the Petitioner is not available and is inconsistent with the relief that may be granted by any reviewing Agency or Commission under §163.3213(6), Fla. Stat. For the reasons outlined herein, the Petition fails to meet the minimum statutory requirements to grant the relief sought under §163.3213(3), Fla. Stat., and is hereby denied.

[5] Sanctions under §163.3184(8)(b), are only applicable if the County decides to ignore the Administration Commission or does not amend its Comprehensive Plan to remove the inconsistencies.

ATTACHMENT C

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

_____/

AMENDED[1] 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

[1] Additions to the original Petition submitted on Jan. 8, 2024 are to paragraphs 3 and 15 and are shown in underline format.

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. The injury in fact to be experienced by the Petitioner and a substantial number of its members include adverse impacts to the coastal barrier island community's natural resources, including potential increases in noise and light pollution impacts to surrounding natural areas, and potential structural damage to wetlands as a result of more and taller buildings being subject to storm damage, adverse changes to the historic low-density residential development pattern and unique neighborhood style commercial activities, reductions in their quality of life and community character from increased density and intensity of use, and in increase in traffic and evacuation times and reduction in public safety.

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, ~~T~~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~~ exceed~~s~~ 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 permittable 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)

h. OBJECTIVE 72.2: DEVELOPMENT REGULATIONS. Maintain land development regulations that reduce the vulnerability of development from the threats of natural and man-made hazards.

i. OBJECTIVE 73.1: EVACUATION. Work towards attaining out of County hurricane evacuation for a Category 5 storm event (Level E storm surge threat) that does not exceed the timeframes referenced in the Statewide Regional Evacuation Study. Lee County will work to improve clearance times by increasing shelter availability within the County, improving evacuation routes, and increasing public awareness and citizen preparedness.

j. OBJECTIVE 23.1: PROTECTION OF NATURAL RESOURCES. To continue the long-term protection and enhancement of wetland habitats, water quality, native upland habitats (including rare and unique habitats), and beaches on Captiva.

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 20th day of February, 2024.

By: */s/ Richard Grosso*

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CERTIFICATE OF SERVICE

I certify that the foregoing has been submitted via email on Feb. 20, 2024 to the following persons on the Service List.

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