Case No. 2D21-2094

IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CONSERVANCY OF SOUTHWEST FLORIDA, INC.,

Plaintiff-Appellant,

v.

COLLIER COUNTY, FLORIDA *and*
COLLIER ENTERPRISES MANAGEMENT, INC.,

Defendants-Appellees.

Appeal from the Circuit Court of the Twentieth Judicial Circuit
in and for Collier County, Florida
Case No. 11-2020-CA-000780-0001-XX

INITIAL BRIEF OF APPELLANT

Geoffrey J. Michael
Florida Bar No. 86152
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Phone: (202) 942-5000
geoffrey.michael@arnoldporter.com

Lauren C. Daniel*
Brian D. Israel*
Ethan G. Shenkman*
Stephen K. Wirth*
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Phone: (202) 942-5000
** Admitted pro hac vice*

November 10, 2021

Counsel for the Conservancy of Southwest Florida, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES[1]

Page(s)

Cases

[1] Citations to the Record on Appeal appear as "R. [page]"; citations to the trial transcript appear as "T. [page]" and can be found in the record. Select record citations include a bracketed parallel cite in the form "App. [page]," which indicates the location in the appendix to this brief at which a copy of the cited material may be found. Selected excerpts of the trial transcript are at App. 92.

Statutes

STATEMENT OF THE CASE AND FACTS

All new land developments in Florida must be "consistent" with, and strictly adhere to, the local government's "comprehensive plan," which sets forth detailed requirements "'for the orderly and balanced future economic, social, physical, environmental, and fiscal development' of the local government's jurisdictional area." *Bd. of Cnty. Comm'rs v. Snyder*, 627 So. 2d 469, 473 (Fla. 1993) (quoting § 163.3177(1), Fla. Stat.). In order to ensure strict compliance with governing comprehensive plans, the Florida Legislature created a cause of action, codified at Section 163.3215, Florida Statutes, that empowers aggrieved parties to enforce the consistency requirement through de novo judicial review of orders approving new developments.

The trial court's decision under review completely upends this statutory scheme. The trial court held that Floridians' right to seek judicial review of even flagrant violations of a county's comprehensive plan is so narrow as to be virtually meaningless. Unless this Court reverses, the ability of Floridians to exercise the

sole method of challenging new developments' consistency with comprehensive plan requirements will be severely damaged.

The claims at issue in this lawsuit demonstrate the important role that Section 163.3215 challenges play in ensuring that developers and government officials follow the law. Defendant-Appellee Collier County authorized the development of a new 1,000-acre residential village called "Rivergrass Village" (or "Rivergrass") by Intervenor-Defendant Collier Enterprises Management, Inc. ("CEM") in the Rural Land Stewardship Area ("RLSA")—a protected area in Eastern Collier County that is home to abundant agricultural resources, natural habitat, and endangered species. Plaintiff-Appellant the Conservancy of Southwest Florida, Inc. (the "Conservancy"), brought this Section 3215 challenge alleging that Rivergrass fails to comply with several provisions of Collier County's comprehensive plan (also known as Collier County's "Growth Management Plan" or "GMP"). Among other claims, the Conservancy asserted the following:

- ***First***, the GMP requires that new residential developments in the RLSA be fiscally neutral or fiscally positive to Collier County. This means that the financial benefits to County

taxpayers (through taxes and fees) must be equal to, or greater than, the financial costs to those taxpayers. Simply put, growth must pay for growth. The Conservancy was fully prepared to present extensive evidence at trial that Rivergrass violates this legal requirement and, in fact, will cost Collier County taxpayers ***tens of millions*** of dollars.

- ***Second***, the GMP requires that new residential developments in the RLSA fully account for and mitigate their resulting traffic impact to ensure that traffic congestion—so endemic throughout the State—is not exacerbated by poorly designed growth. The Conservancy was fully prepared to present overwhelming evidence (including admissions from CEM) that Rivergrass fails to account for and mitigate significant traffic impacts.
- ***Third***, the GMP requires that new residential developments in the RLSA comply with a series of design criteria to ensure that future generations of Floridians are not burdened by urban sprawl caused by short-sighted decisions of today. Many of these legal requirements are set forth in clear provisions of the Collier County Land Development Code ("LDC"). Indeed,

compliance with the relevant provisions of the LDC is expressly required by the GMP. The Conservancy was prepared to present overwhelming evidence (including from the County itself) that Rivergrass fails to comply with numerous LDC provisions—the result being that Rivergrass is a typical "urban sprawl" planned urban development.

The trial court erroneously granted summary judgment to the Defendants on all three of these claims—not for want of record evidence supporting their factual bases, but based on the court's erroneous legal conclusion that each of these claims is ***categorically*** outside the scope of a Section 163.3215 challenge. The Conservancy's remaining claims (alleging that Rivergrass's design is inconsistent with other provisions of the GMP) proceeded to trial. But the trial court erroneously excluded critical evidence in support of those claims (including the County's own Staff's concerns that Rivergrass was inconsistent with the intent of the GMP). The result was a trial where both the claims and the evidence were severely and erroneously limited, leading to a judgment against the Conservancy that this Court should reverse.

But the implications of the trial court's ruling are not limited to the fiscal burdens, increased traffic, and other adverse impacts of this one development. The issues in this case go to the very heart of Florida's Community Planning Act. If the trial court is correct that the vast majority of a county's comprehensive plan is completely off limits from court review, the entire legislative scheme for enforcement of the Community Planning Act will be undone. On its face, Section 3215 is clearly intended to provide a de novo, strict scrutiny judicial check to ensure that development in the state of Florida complies with each county's respective comprehensive plan. If upheld, the decision below would eviscerate such review, potentially resulting in unchecked development not in compliance with the Community Planning Act occurring throughout the Second District.

The following sections provide additional background on (1) the Community Planning Act, Section 163.3215 claims, and this Court's decision in *Heine v. Lee County*, 221 So. 3d 1254 (Fla. 2d DCA 2017), regarding the permissible scope of such claims; (2) Collier County's GMP; (3) the Conservancy's claims; (4) the trial court's erroneous grant of partial summary judgment; (5) the trial

court's erroneous in limine rulings; and (6) the resulting trial, verdict, and judgment.

I. LEGAL BACKGROUND

A. Florida's Community Planning Act

Florida's Community Planning Act requires local governments to adopt and strictly adhere to comprehensive plans that outline their respective "principles, guidelines, standards, and strategies" for future land development. § 163.3177(1), Fla. Stat. The purpose of comprehensive planning is to "establish meaningful and predictable standards for the use and development of land." *Id.* To that end, each comprehensive plan must "provide the principles, guidelines, standards, and strategies for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the land within the local government's jurisdiction. *Id.* And each comprehensive plan must contain multiple detailed "elements," including capital improvements, *id.* (3)(a), future land use, *id.* (6)(a), transportation, *id.* (6)(b), sewer, *id.* (6)(c), conservation, *id.* (6)(d), recreation and open space, *id.* (6)(e), housing, *id.* (6)(f), coastal management, *id.* (6)(g), and intergovernmental coordination, *id.* (6)(h).

A comprehensive plan is essentially "a constitution for all future development within the governmental boundary." *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987). All development on land covered by a local government's comprehensive plan, and all action taken by the government regarding that development, must be "consistent" with the plan. § 163.3194(1)(a), Fla. Stat.; *see Dixon v. City of Jacksonville*, 774 So. 2d 763, 764 (Fla. 1st DCA 2000) ("It is well established that a development order ***shall be consistent*** with the government body's objectives, policies, land uses, etc., as provided in its comprehensive plan.").[2]

The Act, moreover, "sets a ***high and comprehensive bar*** for consistency." *Imhof v. Walton Cnty.*, No. 1D19-0980, 2021 WL 4189197, at *7 (Fla. 1st DCA Sept. 15, 2021). Section 163.3194(3)(a) provides:

> A development order or land development regulation shall be 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

[2] All emphasis supplied unless otherwise noted.

> plan and if it meets ***all other criteria*** enumerated by the local government.

§ 163.3194(3)(a), Fla. Stat.

That high standard is reflected throughout the Act's statements of purpose. The Act expresses in no uncertain terms the Legislature's expectation of ***complete*** consistency between a development order and the local comprehensive plan in all respects, stating: "It is the intent of this act . . . that ***no public or private development shall be permitted except in conformity with comprehensive plans*** . . . prepared and adopted in conformity with this act." § 163.3161(6), Fla. Stat. And the Legislature has further "declared" that complete conformity is the floor, not the ceiling: "The provisions of this act in their interpretation and application are declared to be the minimum requirements necessary to accomplish the stated intent, purposes, and objectives of this act." § 163.3161(8), Fla. Stat.

B. Section 163.3215 Provides a Cause of Action to Challenge the Consistency of a Development Order with a Local Comprehensive Plan

Section 163.3215 gives force to the Community Planning Act's requirements by establishing a cause of action by which community

members and other persons with standing may "appeal and challenge the consistency of a development order with a comprehensive plan adopted under [the Act]." § 163.3215(1), Fla. Stat.[3] This provision ensures that development orders—which often impose substantial burdens on government services and the public fisc—are subject to independent review by a neutral arbitrator, and it "demonstrate[s] a clear legislative policy in favor of the enforcement of comprehensive plans by persons adversely affected by local action." *Putnam Cnty. Env't Council, Inc. v. Bd. of Cnty. Comm'rs*, 757 So. 2d 590, 593 (Fla. 5th DCA 2000). Indeed, Section 163.3215 provides "the ***exclusive*** methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan." § 163.3215(1), Fla. Stat.; *see Bd. of Trs. of Internal Improv. Trust Fund v. Key W. Conch Harbor, Inc.*, 623 So. 2d 593, 595 (Fla. 1st DCA 1993).

Relevant here, Section 163.3215(3) creates a cause of action for private parties to sue local governments that issue development

[3] A "development order" is "any order granting, denying, or granting with conditions an application for a development permit." § 163.3164(15), Fla. Stat.

orders that are "not consistent with the comprehensive plan." It provides:

> Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order, as defined in s. 163.3214, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under [the Act].

§ 163.3215(3), Fla. Stat.

In Section 163.3215 actions, "the burden is on the developer to show . . . that the development ***conforms strictly*** to the [comprehensive plan], its elements, and objectives." *White v. Metro. Dade Cnty.*, 563 So. 2d 117, 128 (Fla. 3d DCA 1990). Moreover, the proceeding is a de novo action, meaning that no deference is given to the local government's interpretation of its comprehensive plan. *See 1000 Friends of Fla., Inc. v. Palm Beach Cnty.*, 69 So. 3d 1123, 1125–26 (Fla. 4th DCA 2011). Instead, reviewing courts must apply a "strict scrutiny" standard of review, "a process which involves a detailed examination of the development order for ***exact***

compliance with, or adherence to, the comprehensive plan." *Dixon*, 774 So. 2d at 765.

C. This Court's Decision in *Heine*

In *Heine v. Lee County*, 221 So. 3d 1254 (Fla. 2d DCA 2017), this Court held that a broad range of comprehensive plan provisions—including those that will materially impact local services and facilities (at taxpayer expense)—are enforceable in a challenge brought under Section 163.3215. *Heine* establishes a two-pronged framework to determine whether a development order's claimed inconsistency with a comprehensive plan is actionable. First, the challenged development order must "materially alter[] the use or density or intensity of use on a particular piece of property." *Id.* at 1257. Second, the alleged inconsistency—*i.e.*, the provision of the comprehensive plan with which the development order is allegedly inconsistent—must relate to land "use," "density," or "intensity of use," *id.* at 1257–58.[4]

[4] The First District in *Imhof v. Walton County*, No. 1D19-0980, 2021 WL 4189197 (Sept. 15, 2021), disagreed with *Heine*'s framework and certified conflict to the Florida Supreme Court. That case is discussed in detail below. *See* Argument Section I.D, *infra*.

If a claim challenges an alleged inconsistency that relates to any one of these three terms, then under the *Heine* framework, Section 163.3215(3) permits any "aggrieved or adversely affected party" to bring a de novo challenge in Florida's courts. These terms—"use," "density," and "intensity of use"—are each defined by statute and to be given their full meaning as assigned by the Legislature. *See* Argument Section I.B.1, *infra*. Particularly relevant here, "intensity" is defined to include "the measurement of the use of or demand on facilities and services." § 163.3164(22), Fla. Stat.

II. COLLIER COUNTY'S GROWTH MANAGEMENT PLAN

Collier County has adopted a comprehensive plan known as the GMP. Collier County, Fla., Code of Ordinances ch. 106, art. II, § 106-34(8).[5] As mandated by the Community Planning Act, the GMP has multiple elements, including a future land use element ("FLUE"), a transportation element ("TE"), and a capital improvements element ("CIE"), among others.[6]

---

[5] Collier County's Code of Ordinances is available at https://library.municode.com/fl/collier_county/codes/code_of_ordinances?nodeId=COLAORCOCOFL.

[6] The full GMP is available at https://www.colliercountyfl.gov/government/growth-management/divisions/planning-and-zoning-

Key here, the GMP's FLUE established a program known as the RLSA Overlay. *See* Ordinance No. 2002-54 (R. 1061). The program created a special zoning district (the RLSA) encompassing approximately 195,000 acres of rural lands in eastern Collier County. Am. Compl. ¶ 49 (R. 273). These lands are home to at least 17 endangered and threatened animal species. *Id.* ¶¶ 53–54 (R. 273–74).

The RLSA Overlay program is designed to "guide concentrated population growth and intensive land development away from areas of great sensitivity and toward areas more tolerant to development." GMP FLUE § I.C (R. 688) [App. 70]. Under the RLSA Overlay program, lands may be designated as Stewardship Receiving Areas ("SRAs")—areas where future development exceeding the baseline zoning can be proposed—in exchange for credits earned through the designation of Stewardship Sending Areas ("SSAs")—areas deemed too environmentally sensitive for development. Am. Compl. ¶¶ 55–56 (R. 274). For example, a developer may generate credits by setting aside land within the RLSA for preservation (such land

---

division/comprehensive-planning-section/growth-management-plan.

would be an SSA) and then spend those credits to develop other lands within the RLSA (such land would be an SRA).

Policies in the GMP's RLSA Overlay create strict guidelines and criteria for the designation of SRAs. *See* RLSA Overlay Group 4 Policies (R. 1015–22) [App. 72–79]. These policies outline numerous requirements for SRAs relating to land use, density, and/or intensity of uses (including simple numeric caps on maximum size and density, as well as non-numeric, qualitative standards governing how new villages must be designed), and requirements relating to an SRA's demand on facilities and services.

For instance, RLSA Overlay Policy 4.2 (R. 1015) [App. 72] "requires SRAs to be compact, mixed-use and self-sufficient in the provision of services, facilities and infrastructure." Other mandatory land use policies include: RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74], which requires SRA Villages to have a "diversity of housing types and mix of uses," "a mixed-use village center to serve as the focal point for the community's support services and facilities," and a design that encourages "pedestrian and bicycle circulation by including an interconnected sidewalk and pathway system serving all residential neighborhoods"; and RLSA Overlay Policy 4.11 (R.

1019) [App. 76], which requires that the perimeter of an SRA be designed "to provide a transition from higher density and intensity uses within the SRA to lower density and intensity uses on adjoining property."

Additional requirements are found in Attachment C to the RLSA Overlay, which lists characteristics and required uses for each type of development that can be built in an SRA. Relevant here, Attachment C creates additional requirements for villages, which are developments between 100 and 1,000 acres in size. *See* Attachment C, Collier County RLSA Overlay Stewardship Receiving Area Characteristics (R. 1036) [App. 80].

Furthermore, the RLSA Overlay includes several requirements relating to an SRA's demand on facilities and services, including:

> **RLSA Overlay Policy 4.14:** "No SRA shall be approved unless the capacity of the County collector or arterial road(s) serving the SRA is demonstrated to be adequate."
>
> **RLSA Overlay Policy 4.16:** "An SRA shall have adequate infrastructure available to serve the proposed development, or such infrastructure must be provided concurrently with the demand."
>
> **RLSA Overlay Policy 4.18:** "The SRA will be planned and designed to be fiscally neutral or

> positive to Collier County at the horizon year based on a public facilities impact assessment, as identified in LDC 4.08.07.K. . . . At a minimum, the assessment shall consider the following public facilities and services: transportation, potable water, wastewater, irrigation water, stormwater management, solid waste, parks, law enforcement, and schools. Development phasing, developer contributions and mitigation, and other public/private partnerships shall address any potential adverse impacts to adopted levels of service standards."

(R. 1019–21) [App. 76–78].

SRAs must also comply with the specific regulations in section 4.08.00 of the Collier County Land Development Code ("LDC"),[7] a part of the LDC that is also referred to as the "LDC Stewardship District."[8] LDC § 4.08.00 *et seq.* Like the RLSA Overlay policies, these LDC provisions set forth numerous requirements relating to land uses, densities, and/or intensities for SRA villages. *See, e.g.*, LDC §§ 4.08.07.J.2.b, 4.08.07.J.3.b (requiring transportation network with "high level of mobility") (R. 1052, 1055) [App. 82–83].

---

[7] Collier County's Land Development Code is available at https://library.municode.com/fl/collier_county/codes/land_development_code.

[8] *See* Mulhere Dep. 21:20–22:2 (S.R. 14990–91); Jan. 22, 2020 Staff Report at 7 (R. 4864); Jenkins Dep. 144:20–24 (S.R. 14873).

To achieve consistency with the GMP, a proposed development in an SRA must comply with both the RLSA Overlay policies and the LDC. This is because the GMP expressly incorporates the RLSA Overlay, and RLSA Overlay Policies 4.3 and 4.5 expressly require compliance with the LDC Stewardship District regulations as a condition of approval of an SRA. Specifically, RLSA Overlay Policy 4.3 (R. 1016) [App. 73] states "[t]he basis for approval shall be a finding of consistency with the policies of the Overlay[,] . . . ***compliance with the LDC Stewardship District***, and assurance that the applicant [has acquired sufficient credits]." RLSA Overlay Policy 4.5 (R. 1016) [App. 73] provides that an SRA's master plan "will demonstrate that the SRA complies with ***all applicable policies of the Overlay and the LDC Stewardship District***." Other GMP policies similarly require compliance with the specific provisions in the LDC as a condition for SRA approval, including RLSA Overlay Policy 4.18 (R. 1021) [App. 78] (requiring compliance with § LDC 4.08.07.K) and Transportation Element Policy 8.2 (requiring compliance with LDC §§ 6.02.00 *et seq.* & 10.02.07).

III. THE CONSERVANCY'S CLAIMS

The Conservancy of Southwest Florida is a 50-year-old nonprofit organization that has been engaged for decades in efforts to protect Southwest Florida's unique habitats, wildlife, and community. It brought this action under Section 163.3215(3), Florida Statutes, against Collier County to challenge the Collier County Board of County Commissioners' ("BCC") approval of Rivergrass Village's SRA application. *See* Am. Compl. (R. 262–305). Rivergrass's developer, CEM, intervened as a defendant. *See* Order Granting Mot. to Intervene (R. 228).

Rivergrass Village is a proposed development of approximately 1,000 acres in the RLSA. The land is presently undeveloped agricultural land. Rivergrass will include up to 2,500 homes, additional commercial development, and a golf course. The BCC approved Rivergrass by passing Resolution 20-24 (the "Development Order").

The BCC approved Rivergrass after an approximately yearlong, multi-tiered review by Collier County's Growth Management Department. During the review, County Planning Staff repeatedly expressed concerns regarding Rivergrass's inconsistencies with the

GMP and LDC. *See generally* Am. Compl. ¶¶ 82–223 (R. 280–303). For instance, in their final Staff Report to the BCC, Planning Staff concluded as follows:

> The Rivergrass Village SRA does not fully meet the minimum intent of the policies in the RLSA [Overlay] pertaining to innovative design, compactness, housing diversity, walkability, mix of uses, use density/intensity continuum or gradient, interconnectedness, etc. In staff's view, this SRA is, with some exceptions, a suburban development plan typical of that in the coastal urban area placed in the RLSA and ***is contrary to what is intended in the RLSA***.

Jan. 22, 2020 Staff Report at 7 (R. 4864) (underlining in original).

Likewise, the Collier County Planning Commission, the County's local land planning agency, voted 4–1 to recommend denial of Rivergrass. Am. Compl. ¶¶ 77–79 (R. 279). The Planning Commission determined that Rivergrass was fundamentally incompatible with multiple requirements of the GMP for several reasons including Rivergrass's: (i) failure to move from greater urban density to lesser, more rural density; (ii) lack of vehicular connectivity (including the presence of 18 to 20 cul-de-sacs); (iii) poor accessibility; (iv) failure to be walkable; (v) failure to be innovative; (vi) insufficient housing diversity; (vii) lack of affordable

housing; and (viii) failure to provide the required documentation demonstrating the Village's fiscal neutrality. *Id.* (R. 279).

Nevertheless, the BCC voted three-to-two to approve Rivergrass. *Id.* ¶¶ 80–81 (R. 280). The BCC provided no official explanation for its departure from the Planning Commission's recommendation.

The Conservancy brought several claims under Section 163.3215(3) based on Rivergrass's noncompliance with a slew of GMP provisions related to land use, density, and intensity of use. *See* Joint Pretrial Stipulation (R. 3097) [App. 58]. The Conservancy alleged that Rivergrass materially alters the use, density, and intensity of use of land, and that it does so in a manner that is inconsistent with the Collier County GMP.

The Conservancy raised three claims on which the trial court granted summary judgment for Defendants—a ruling that the Conservancy challenges in its first two points of error in this appeal. ***First***, the Conservancy alleged that Rivergrass is inconsistent with the GMP because it does not comply with GMP's requirements regarding traffic impacts (the "Traffic Claim"):

> Rivergrass fails to comply with the GMP's traffic impact requirements. (RLSA Overlay Policies 4.14, 4.16; Transportation Element Policies 5.1, 5.18; Capital Improvements Element Policy 1.2).

See id. at 9 (R. 3105) [App. 66].

Second, the Conservancy alleged that Rivergrass is inconsistent with the GMP because it does not comply with GMP's requirement that developments in the RLSA be fiscally neutral (the "Fiscal Neutrality Claim"):

> Rivergrass fails to comply with the GMP's fiscal neutrality requirements. (RLSA Overlay Policy 4.18).

See id. at 8 (R. 3104) [App. 65].

Third, the Conservancy alleged that Rivergrass is inconsistent with the GMP because it does not comply with requirements of the LDC (the "LDC Claim"):

> Rivergrass was approved without demonstrating compliance with LDC Stewardship District provisions relating to use, density, and/or intensity. (RLSA Overlay Policies 4.3 and 4.5).

See id. at 7–8 (R. 3103–04) [App. 64–65].

The Conservancy brought several other claims alleging that Rivergrass is inconsistent with the GMP because its design does not

comply with various GMP requirements (the "Design Claims"). These claims included, for example, that Rivergrass does not include "an interconnected sidewalk and pathway system serving all residential neighborhoods" and is not "designed to encourage pedestrian and bicycle circulation," RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]; Rivergrass lacks a "mixed-use village center to serve as the focal point for the community's support services and facilities," RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]; Rivergrass is not "compact," RLSA Overlay Policies 4.2 and 1.2 (R. 1015–16) [App. 72–73]; and Rivergrass fails to provide "a diversity of housing types," RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]. *See* Joint Pretrial Stipulation 5–9 (R. 3101–05) [App. 62–66].

As discussed below, the Design Claims proceeded to trial, but the trial court excluded critical evidence through in limine rulings that the Conservancy challenges in its third point of error in this appeal.

IV. THE TRIAL COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT AGAINST THE CONSERVANCY ON ITS TRAFFIC, FISCAL NEUTRALITY, AND LDC CLAIMS

CEM moved for summary judgment on the basis that "[n]one of [the Conservancy's] claims allege that [Rivergrass], as approved,

is inconsistent with the [GMP's] policies related to use, density, or intensity of use," as required by *Heine*. CEM's Mot. for Summ. J. Regarding Consistency 1 (R. 530). Relevant here, CEM specifically sought judgment on the Conservancy's Traffic and Fiscal Neutrality Claims on that basis. *Id.* at 35–40 (R. 564–69). And CEM sought summary judgment on the Conservancy's LDC Claim on the additional ground that violations of the LDC did not rise to the level of violations of the GMP. *Id.* at 11–19 (R. 540–48). Collier County joined CEM's motion. *See* Collier County's Notice of Joinder (R. 3085).

The Conservancy responded that Section 163.3215, even as construed in *Heine*, permits broad challenges to developments orders for consistency with local comprehensive plans. *See* Conservancy's Opp'n to Mot. for Summ. J. Regarding Consistency 15–25 (R. 4722–32). And the Conservancy argued that its traffic and fiscal neutrality claims easily fit within the scope of permissible challenges because they relate to intensity of use as defined under Florida law. *See id.* at 32–43 (R. 4739–50). With respect to the LDC, the Conservancy explained that the GMP expressly requires compliance with the LDC Stewardship District, and thus that

violations of the LDC Stewardship District render Rivergrass inconsistent with the GMP. *See id.* at 29–30 (R. 4736–37).

A. Judge Brodie Denies CEM's Motion

CEM's motion for summary judgment was heard by Judge Lauren Brodie, who reserved ruling at the end of the hearing. Hr'g Tr. 67 (Jan. 5, 2021) (R. 6036) [App. 86]. A day later, Judge Brodie's judicial assistant advised counsel for the parties via email that "[t]he Court is denying [CEM's Motion for Summary Judgment] as there are disputed issues of material fact regarding whether the Development Order is consistent with the County's Comprehensive Plan." CEM's Mot. for Reconsideration, Ex. 3 (R. 5686). The email also directed the Conservancy's counsel to submit a proposed order. *Id.* (R. 5686). The docket reflects that the motion was denied, *see* Dkt. Entry 304, but Judge Brodie ultimately did not sign a written order. Instead, Judge Brodie *sua sponte* recused herself, *see* Order of Recusal (R. 5568), and the case was reassigned to Judge Hugh Hayes.

B. Judge Hayes Reconsiders CEM's Motion and Grants Summary Judgment Against the Conservancy on Its Traffic, Fiscal Neutrality, and LDC Claims

CEM moved for reconsideration, raising the same arguments as before, *see* CEM's Mot. for Reconsideration (R. 5571), and again the County joined the motion, *see* Collier County's Notice of Joinder (R. 5687). This time, Defendants were partially successful, with Judge Hayes granting summary judgment to Defendants on three of the Conservancy's claims. Relying on *Heine*, Judge Hayes wrote that "a plaintiff may only assert [Section 163.3215(3)] claims that allege inconsistency of the development order with a provision in the GMP related to the use or density or intensity of use on a particular piece of property." Order Granting Defs.' Mot. for Summ. J. Regarding Consistency 3 (R. 5826) [App. 38]. With respect to the Conservancy's Traffic and Fiscal Neutrality Claims, Judge Hayes concluded, without analysis, that "they do not relate to use, density, or intensity of use and are thus not within the scope of Section 163.3215(3)." *Id.* at 4 (R. 5827) [App. 39]. As for the Conservancy's LDC Claim, he held that "the LDC . . . [is] not incorporated into the GMP, and an alleged violation of the LDC is

not within the scope of Section 163.3215(3)." *Id.* at 3 (R. 5826) [App. 38] (citation omitted).

V. THE TRIAL COURT'S EXCLUSION OF KEY EVIDENCE AS IRRELEVANT TO A SECTION 163.3215 PROCEEDING

Following the grant of partial summary judgment in CEM's favor, only the Conservancy's Design Claims remained to be tried. *See* Am. Order on Pl's Mot. for Rehearing (R. 7147) [App. 42]. CEM moved in limine to exclude a variety of categories of evidence as irrelevant, arguing that the trial court's task was limited to comparing *only two documents*: the Development Order and the GMP. *See* CEM's Mot. in Limine 17 (R. 5051). Specifically, CEM contended that the determination of whether Rivergrass is "consistent with the comprehensive plan" under Section 163.3215(3) must be made only by comparing the contents of the Development Order as passed by the BCC with the text of the GMP. *Id.* (R. 5051). As relevant to this appeal, CEM sought to exclude two categories of evidence on the ground that they were extrinsic to those documents.

First, CEM sought to exclude all reports, memoranda, and communications by Collier County Staff regarding Rivergrass. CEM

reasoned that because this was a de novo review as opposed to a review of the sufficiency of the evidence supporting the BCC's decision, "any actions taken, or decisions made, in the course of approving the Development Order are completely irrelevant." *Id.* at 16–17, 19–21 (R. 5050–51, 5053–55). The evidence included County Staff recommendations to the BCC that Rivergrass is inconsistent with the intent of the GMP because of, among other things, its "[l]ack of vehicular connectivity," "[f]ailure to be walkable," and "[f]ailure to be innovative," *see* Executive Summary (R. 6588–89, 9758–59), that Rivergrass "may not be deemed consistent" with the GMP because it "does not provide the characteristic land uses and threshold requirements for a 'Village,' and deviates from providing a full range of mixed uses, Mar. 7, 2019 Consistency Review Mem. at 11, 15 (R. 6646, 6650, 11369, 11373) (emphasis omitted), and that Rivergrass "is not proposed with a meaningful mix between single-family and multi-family residential dwelling units." Sept. 10, 2019 Staff Report at 9 (R. 6295, 11676); *see also, e.g.*, *id.* at 26 (R. 6312, 11693); Sept. 10, 2019 Consistency Review Mem. (R. 4925, 11708); Nov. 19, 2019 Consistency Review Mem. at 6, 13 (R. 4947, 4954, 12234, 12241).

Second, CEM moved to exclude Collier County's Community Character Plan ("CCP") as "undisputedly extrinsic to the GMP." CEM's Mot. in Limine 10, 12, 14 (R. 5044, 5046, 5048). Collier County created the CCP in the early 2000s, after the BCC commissioned the plan. Hr'g Tr. 50–51 (Apr. 28, 2021) (R. 13059–60) [App. 88–89]. The BCC accepted the CCP in 2001. *Id.* (R. 13059–60) [App. 88–89]. The CCP is a "culmination of a year of intensive examination of the County's current policies and future direction in land use, transportation, and green open spaces." CCP Introduction (R. 10296). The CCP provides the views of Collier County on issues such as compactness, intensity of uses, and walkability. *See, e.g.*, CCP at 2.8–2.9 (R. 10321–22) (discussing "[m]ak[ing] the neighborhoods the right size," "[c]reat[ing] walkable block sizes" and "[d]esignat[ing] areas within the neighborhood for different intensities of use"). The CCP also served as a basis for the GMP amendments that created the RLSA Overlay program. Hr'g Tr. 51 (Apr. 28, 2021) (R. 13060) [App. 89]. And Collier County Staff relied on the CCP in their consistency review. *See* Mar. 7, 2019 Consistency Review Mem. at 18 (R. 6653, 11376) ("Generally follow

the Toward Better Places, The Community Character Plan for Collier County").

In response, the Conservancy argued that the categories CEM sought to exclude were relevant and that nothing prohibited courts from considering evidence other than the GMP and the Development Order in a Section 163.3215 action (including the fact that the court was conducting a de novo review). Conservancy's Opp'n to CEM's Mot. in Limine 18–22 (R. 6612–16).

At the end of the hearing on CEM's motion, the court granted it in full. The court did not give a rationale, other than stating that "we're still in the focus of determining whether the Development Order is consistent with the development plan, and that's really the issue." Hr'g Tr. 116–117 (Apr. 28, 2021) (R. 13125–26) [App. 90–91]. The court also entered a written order that granted CEM's motion without further explanation. Order Granting CEM's Mot. in Limine 1–4 (R. 7339–42) [App. 45–48]. The order excluded over 100 documents in total. *Id.* at 6–13 (R. 7344–51) [App. 50–57].

VI. TRIAL PROCEEDINGS AND THE RESULTING JUDGMENT

The trial court held a one-week bench trial on the Conservancy's Design Claims. Because Defendants had the burden

of proving that Rivergrass is consistent with the GMP, Judge Hayes allowed Defendants to present their case-in-chief first. *See* Order on Order of Presentation (R. 6933). The County called its representative, Jeremy Frantz, who testified that Rivergrass's design as reflected in the Development Order complies with the GMP. *See generally* T. 114–92. CEM called its corporate representative Patrick Utter and a hybrid expert and fact witness, Robert Mulhere, who testified similarly. *See generally* T. 196–247 (Utter); T. 260–464 (Mulhere). The Conservancy called two expert witnesses: Charles Gauthier, an expert in growth management and land planning, and Joseph Minicozzi, an expert in urban design. Each testified that Rivergrass's design was not consistent with GMP requirements for villages within the RLSA. *See generally* T. 553–915 (Gauthier); T. 930–1059 (Minicozzi). The Conservancy asked the court during trial to admit certain evidence that had been excluded in limine and proffered such evidence into the record; Judge Hayes maintained his prior ruling. *See, e.g.*, T. 178, 450, 632, 906, 1419 [App. 93, 95, 97, 99, 112]; Dkts. 661–726.

At the conclusion of trial, Judge Hayes ruled from the bench in favor of Defendants. T. 1407–17 [App. 101–11]. CEM thereafter

drafted an order and judgment in Defendants' favor, which Judge Hayes entered. Final Judgment for Defs. (R. 13289) [App. 7].

SUMMARY OF ARGUMENT

I. The trial court granted partial summary judgment to the Defendants, holding—as a matter of law—that the Conservancy's claims that Rivergrass is inconsistent with the GMP's provisions regarding traffic and fiscal neutrality are not cognizable in a Section 163.3215(3) challenge. That was error. This Court held in *Heine v. Lee County*, 221 So. 3d 1254 (2017), that Section 163.3215(3) authorizes claims that a development order is inconsistent with any provisions of a comprehensive plan related to land "use," "density," or "intensity" of land use. The Conservancy's Traffic and Fiscal Neutrality Claims fall squarely within the statutory definition of "intensity," which includes "the measurement of the use of or demand on facilities and services." § 163.3164(22), Fla. Stat.

Start with the Conservancy's Traffic Claim. The GMP contains numerous provisions that require the County and developers to properly measure and account for the demands that a development will have on "public facilities" and "services," which by definition include roads and transportation. The intensity of Rivergrass's

demand on those facilities and services is the core of the Conservancy's claim, putting it squarely within *Heine*. Likewise, the GMP contains several provisions requiring developers to demonstrate fiscal neutrality by measuring the proposed development's demand on the County's public facilities and services to ensure that the costs of the development to the County are offset by revenue gains. Again, the Conservancy's Fiscal Neutrality Claim is that Rivergrass failed to satisfy these provisions—and hence that Rivergrass is inconsistent with GMP provisions related to intensity of use. *Heine* requires nothing more. The trial court erred when it refused to allow the Conservancy's Traffic and Fiscal Neutrality Claims to proceed to trial.

If the Court were to find that these claims are barred by *Heine*, the Conservancy preserves its position that *Heine* was wrongly decided. The First District recently held in *Imhof v. Walton County*, No. 1D19-0980, 2021 WL 4189197 (Fla. 2d DCA Sept. 15, 2021), that as long as a development order materially alters the use or density or intensity of use on a particular piece of property, a Section 163.3215 consistency challenge can be based on a claim that the order violates *any* aspect of the comprehensive plan (not

just those related to use, density, or intensity of use). The First District certified an express and direct conflict with *Heine*. If the Court were to agree with the trial court that the Conservancy's claims are barred by *Heine*, it should therefore certify conflict with *Imhof*.

II. The trial court erred by granting summary judgment to the Defendants on the Conservancy's LDC Claim. The court held that the Conservancy's claim Rivergrass does not comply with numerous LDC provisions are not within the scope of Section 163.3215 because the LDC is "not incorporated into the GMP." Order Granting Defs.' Mot. for Summ. J. Regarding Consistency 3 (R. 5826) [App. 38]. But whether the GMP technically incorporates the LDC is irrelevant. The question is whether the Conservancy's LDC Claim alleges inconsistencies with the GMP, and the answer is indisputably *yes*. The GMP requires that all new developments in the RLSA comply with the Stewardship District of the LDC as a condition of approval. The Conservancy's claim that Rivergrass violates the LDC thus raises a direct inconsistency with the GMP.

III. The trial court erred in excluding critical evidence in support of the Conservancy's claims that did proceed to trial (its

Design Claims), including (1) reports, memoranda, and communications of Collier County Staff and (2) the Collier County Community Character Plan. The trial court excluded this evidence on the erroneous legal premise that all fact evidence extrinsic to the Development Order approving Rivergrass and the GMP is irrelevant in a Section 163.3215 action. That is incorrect as a matter of law. Nothing in the Community Planning Act limits courts in Section 163.3215 claims, as Defendants argued, to a ministerial comparison of the GMP with the four corners of the development order document. Instead, as mandated by the Evidence Code and precedent, courts must receive and consider all relevant evidence regarding whether the two are consistent. It is easy to see why: In a Section 163.3125 case, the court must make a de novo determination of whether the development order satisfies the mandatory standards set forth in the comprehensive plan. Any evidence tending to prove inconsistency between the development order and the comprehensive plan is relevant and therefore admissible under Sections 90.401 and 90.402, Florida Statutes.

Here, the Conservancy's excluded evidence plainly tended to prove the Conservancy's claims of inconsistency. The excluded

reports, memoranda, and communications of Collier County Staff stated in various ways and to various degrees that Rivergrass is inconsistent with the GMP. And the Collier County Community Character Plan tended to prove how various provisions of the GMP are interpreted, which was critical to understanding why Rivergrass is inconsistent with the GMP provisions.

Defendants will not be able to demonstrate that the exclusion of this evidence was harmless. As an initial matter, it bears noting that Defendants had the burden of proving consistency. *See White*, 563 So. 2d at 128. This evidence would have severely undercut their ability to meet that burden. For example, the evidence consisted of damning documents wherein the County's own Staff in charge of reviewing Rivergrass agreed with the Conservancy's position that Rivergrass is inconsistent with the intent of the GMP. There is more than a reasonable possibility that exclusion of such evidence impacted the ultimate decision. *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1253 (Fla. 2014).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE CONSERVANCY'S TRAFFIC AND FISCAL NEUTRALITY CLAIMS

A. The Standard of Review Is De Novo

"A trial court's ruling on a motion for summary judgment posing a pure question of law is subject to de novo review." *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2004). Likewise, "[q]uestions of statutory interpretation are reviewed de novo." *Eustache v. State*, 248 So. 3d 1097, 1100 (Fla. 2018).

B. The Conservancy's Traffic and Fiscal Neutrality Claims Relate to Intensity of Use and Therefore Are Cognizable Under *Heine*

In *Heine*, this Court held that Section 163.3215(3) claims can be based on any alleged inconsistencies with GMP provisions that relate to land "use," "density," or "intensity of use." 221 So. 3d at 1257–58. Here, the trial court erred by summarily holding, without explanation, that the Conservancy's Traffic and Fiscal Neutrality Claims fail to satisfy *Heine*'s requirement. Order Granting Defs.' Mot. for Summ. J. Regarding Consistency 4 (R. 5827) [App. 39]. The Conservancy's Traffic and Fiscal Neutrality Claims fall squarely within the plain text of the statutory definition of "intensity" of use,

i.e., the "demand on facilities and services." § 163.3164(22), Fla. Stat. This conclusion is further supported by the context of the term in the Comprehensive Planning Act and the Act's express statements of legislative purpose. The trial court therefore should have permitted those claims to go to trial.

1. The Statutory Definition of Intensity of Use

"When the language of [a] statute is clear and unambiguous and conveys a clear and definite meaning, . . . the statute must be given its plain and obvious meaning." *Wright v. City of Miami Gardens*, 200 So. 3d 765, 770 (Fla. 2016); *see Heine*, 221 So. 3d at 1257. ("[T]he statute's plain and ordinary meaning must control."). Here, the term "intensity of use" in Section 163.3215(3) has a broad meaning under the plain text of the Community Planning Act. "Intensity" is defined to mean, in relevant part, "the measurement of the use of or demand on ***facilities*** and ***services***." § 163.3164(22), Fla. Stat.

The Act in turn defines "public ***facilities***" as "mean[ing] major capital improvements, including ***transportation***, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational facilities." § 163.3164(39), Fla. Stat. Similarly, the GMP

defines "***facilities***" as "including arterial and collector ***roads***, stormwater management systems, potable water systems, wastewater treatment systems, solid waste disposal facilities, parks and recreation facilities, and public school facilities." CIE Policy 1.1.

The Act also provides that "public ***services***" include "water, wastewater, ***transportation***, schools, and recreation facilities." § 163.3164(4)(d), Fla. Stat. And the GMP expressly states that "***facilities and services***" together include "***transportation***, potable water, wastewater, irrigation water, stormwater management, solid waste, parks, law enforcement, and schools," RLSA Overlay Policy 4.18 (R. 1021) [App. 78], as well as "emergency and other essential services, and improvements to the existing ***road network***," FLUE § I.C (R. 689) [App. 71].

2. The Traffic Claim Relates to "Intensity of Use" Because It Addresses Rivergrass's Impact on Public Roads and Transportation Services

The Conservancy's Traffic Claim plainly alleges that Rivergrass is inconsistent with GMP provisions relating to "the measurement of the use of or demand on facilities and services" under the above statutory definitions. The Traffic Claim alleges four theories why

Rivergrass is inconsistent with GMP provisions, each of which relate to Rivergrass's "demand on facilities and services."

First, the Conservancy claimed that the Rivergrass Development Order fails to demonstrate that the transportation network would be adequate to serve the development. *See* Rivergrass TIS at 20–23 (R. 1675–1678) (identifying four roadway segments that will be inadequate to serve the Rivergrass Development at buildout). The GMP requires that there be an "adequate infrastructure available to serve the proposed development," that "[t]he capacity of infrastructure necessary to serve the SRA at buildout must be demonstrated during the SRA designation process," and that the "[i]nfrastructure to be analyzed includes transportation." RLSA Overlay Policy 4.16 (R. 1020–21) [App. 77–78]. The GMP further provides that "[n]o SRA shall be approved unless the capacity of County collector or arterial road(s) serving the SRA is demonstrated to be adequate in accordance with the Collier County Concurrency Management System." RLSA Overlay Policy 4.14 (R. 1019–20) [App. 76–77]. The Concurrency Management System is part of the GMP and requires that the County "ensure that the ***necessary public facilities and services***

to maintain the adopted level of service standards are available when the impacts of development occur." CIE Policy 5. 1.

In short, the GMP requires that Rivergrass demonstrate that the road network would be adequate to serve it. The Conservancy's allegation that Rivergrass does not make such a demonstration plainly relates to "the measurement of the use of or demand on facilities and services" and thus "intensity of use."

Second, the Conservancy claimed that the Rivergrass Development Order fails to demonstrate that it meets the traffic mitigation requirements of the GMP—a fact that CME's own witnesses admitted. *See* Trebilcock Dep. 145:7–146:23 (Sept. 23, 2020) (S.R. 14222–23); Root Dep. 101:8–16 (S.R. 15179) ("Q. Were specific mitigating stipulations approved for purposes of the Rivergrass application? A. I would say no."). The GMP prohibits the County from approving an SRA application if it would "significantly impact[]" a roadway segment "that is currently operating and/or is projected to operate below an adopted Level of Service Standard within the five year . . . planning period, unless specific mitigating stipulations are also approved." TE Policy 5.1. The GMP likewise prohibits the County from approving an SRA designation if the

development "significantly impacts" a "deficient roadway segment" unless (among other options not relevant here) "[s]pecific mitigating stipulations are approved in conjunction with the rezone or SRA designation resolution . . . to restore or maintain the Level of Service on the impacted roadway segment." CIE Policy 1.2.

The Conservancy alleged that Rivergrass is inconsistent with these GMP requirements because Rivergrass's own Traffic Impact Statement ("TIS") identifies roadways that would be deficient and significantly impacted but does not include any specific mitigating provisions. *See* Rivergrass TIS at 23 (R. 1678). This theory plainly alleges an inconsistency with the GMP relating to the development's "demand on facilities and services" and thus "intensity of use."

Third, the Conservancy claimed that the Rivergrass Development Order's TIS is inconsistent with other applicable GMP requirements. *See e.g.,* Trebilcock Dep. 160:3–11, 176:21–178:9 (Sept. 23, 2020) (S.R. 14226, 14230–31); *id.* at 183:8–188:5, 192:25–193:20 (Nov. 13, 2020) (S.R. 14318–19, 14320) (Defendant's own traffic expert admitting that Rivergrass failed to follow the required mitigation methods and calculations). To demonstrate the adequacy of the transportation network, the GMP requires an SRA

applicant to submit a TIS. *See* TE Policy 8.2; RLSA Overlay Policy 4.14 (R. 1019–20) [App. 76–77]. The GMP further requires that the TIS be completed "in accordance with the Collier County Adequate Public Facilities Ordinance (Land Development Code Sections 6.02.00)." TE Policy 8.2. In turn, the Public Facilities Ordinance requires that the TIS be consistent with the Collier County TIS Guidelines. LDC § 6.02.03 ("All developments that impact the traffic network shall be evaluated in accordance with the Traffic Impact Study (TIS) Guidelines and Procedures"). Therefore, and as many of the County's and CEM's witnesses testified during discovery, if a development is inconsistent with the TIS Guidelines, it is inconsistent with the GMP. Trebilcock Dep. 285:16-286:11 (Nov. 13, 2020) (S.R. 14343–44) (compliance with TIS Guidelines is required to comply with the GMP); see also Scott Dep. 160:16-20 (S.R. 14057); Sawyer Dep. 24:5-19 (S.R. 14129). The Conservancy's claim that Rivergrass is inconsistent with the TIS Guidelines thus plainly relates to "the measurement of the use of or demand on facilities and services" and thus "intensity of use."

Fourth, the Conservancy claimed that Rivergrass's TIS is not consistent with Section 163.3180, Florida Statutes (the

"Concurrency Statute"), which requires that the local government have enough infrastructure capacity to serve each proposed development, including roads and transportation facilities. *See* Trebilcock Dep. 187:5–188:5 (Nov. 13, 2020) (S.R. 14319) (The developer's traffic expert admitting that calculations in the Rivergrass TIS failed to comply with the Concurrency Statute). The GMP requires in multiple provisions that a proposed development's TIS be consistent the Concurrency Statute. *See* TE Policy 8.2 (requiring that the TIS be submitted in accordance with Section 163.3180); TE Policy 5.8 (requiring that proportionate share payments to mitigate traffic impacts "be calculated using the formula established in Section 163.3180(5)(h)"); *see also* TIS Guidelines at 14 (R. 2012) (fair share mitigation payments must follow this formula). Indeed, the record below included testimony by multiple County and CEM witnesses that compliance with the proportionate-share-payment formula prescribed by Section 163.3180 is required to comply with the GMP. *See* Scott Dep. 160:16-20; 248:21–249:11 (S.R. 14057, 14079) (proportionate-share payments are "dictated by State Statute 163.3180"); Bise Dep. 292:17–293:8 (S.R. 14673–74) (admitting that failure to adhere

to the correct formula results in a lack of fiscal neutrality); Trebilcock Dep. 285:16-286:11 (Nov. 13, 2020) (S.R. 14343–44) (compliance with TIS Guidelines is required to comply with the GMP); Sawyer Dep. 24:5-19 (S.R. 14129). The Conservancy's claim that Rivergrass's TIS fails to comply with these requirements plainly concerns the development's "demand on facilities and services" and thus "intensity of use."

In sum, the GMP is littered with provisions requiring the County and developers to properly measure and account for the demands that a development will have on public facilities and services, including roads and other transportation services. The Conservancy's Traffic Claim alleges that the Rivergrass is inconsistent with those GMP provisions. That is all *Heine* requires, and the trial court erred in granting summary judgment.

3. The Fiscal Neutrality Claim Relates to "Intensity of Use" Because It Addresses Rivergrass's Demand on Public Facilities and Services

The GMP requires that an SRA be "fiscally neutral," meaning that an SRA's projected revenues to the County must offset its costs to the County. This is an especially important requirement because if the development will *not* be fiscally neutral, it is taxpayers who

will incur the shortfall. The Conservancy's evidence showed that, far from being fiscally neutral, Rivergrass would cost the County tens of millions of dollars in water and wastewater impacts alone. *See* Minicozzi Dep. 423:10–425:12, 429:8–430:3; 444:17–445:4 (R. 6766–68, 6771).

Rivergrass's failure to be fiscally neutral relates to the development's "measurement of the use of or demand on facilities and services," and thus to its intensity of use. § 163.3164(22), Fla. Stat. Indeed, the GMP requires that an SRA "be planned and designed to be fiscally neutral or positive to Collier County at the horizon year based on a public ***facilities*** impact assessment [*i.e.*, fiscal neutrality study]." RLSA Overlay Policy 4.18 (R. 1021) [App. 78]; *see also* LDC § 4.08.07.K (R. 1059) [App. 84] (describing a public facility's impact assessment as measuring "the SRA generated impacts on public facilities" in order to "evaluate the self-sufficiency of the proposed SRA with respect to these public facilities"). The GMP also requires that the fiscal neutrality study include, at minimum, an assessment of the SRA's demands on the following "public ***facilities and services***": "transportation, potable water, wastewater, irrigation water, stormwater management, solid

waste, parks, law enforcement, and schools." RLSA Overlay Policy 4.18 (R. 1021) [App. 78].

Again, the statutory definition of "intensity" is "the measurement of the use of or demand on facilities and services." § 163.3164(22), Fla. Stat. That definition settles the matter, for that is precisely what fiscal neutrality is: a measurement that balances the demand a development will have on the County's public facilities and services with any potential revenue or other offsets. The Conservancy's claim that the Rivergrass Development Order is not fiscally neutral therefore necessarily relates to the development's intensity of use. And, for these reasons, the Conservancy's claim that Rivergrass is inconsistent with the GMP's fiscal neutrality requirement plainly satisfies *Heine* and the trial court erred by granting summary judgment.

4. Context and Purpose Support Giving the Term "Intensity of Use" in Section 3215(3) Its Full Statutory Meaning

If there were any doubt that the Conservancy's Traffic and Fiscal Neutrality Claims relate to intensity of use under the plain statutory definition of "intensity," it must be resolved in the Conservancy's favor. Both the context of the term in the Community

Planning Act and the Act's stated purpose support giving the term its full statutory meaning.

"[W]ords are given meaning by their context, and context includes the purpose of the text." *Imhof*, 2021 WL 4189197, at *7 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)). To that end, courts "look at surrounding provisions in the same statute, and at related statutes that are part of the same Act," to ensure that their construction of a specific term or provision "is consistent and compatible with [related] provisions and the Act as a whole." *Id.* Key to determining a statute's purpose are express statements of purpose enacted by the Legislature. *See* Scalia & Garner, *supra*, at 56–57.

Here, the Act's express statements of purpose confirm that Section 163.3215 is designed to authorize a broad range of challenges, requiring that the terms use, density, and intensity of use be given their full statutory meaning. "The Act in several places makes clear that it has a purpose to ensure that local development is in strict and *complete* compliance with a duly adopted comprehensive plan." *Imhof*, 2021 WL 4189197, *7 (citing §§ 163.3161(6), (8), 163.3194(1)(a), Fla. Stat.) (emphasis in original).

The Act states that "this act shall be construed broadly to accomplish its stated purposes and objectives." § 163.3194(4)(b), Fla. Stat. And those purposes are themselves broad: "It is the intent of this act . . . that ***no public or private development shall be permitted except in conformity with comprehensive plans*** . . . prepared and adopted in conformity with this act." § 163.3161(6), Fla. Stat. Likewise, the statute provides: "[A]ll development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by [a comprehensive] plan or element ***shall be consistent*** with such plan or element as adopted." § 163.3194(1)(a), Fla. Stat.

C. Alternatively, *Heine* Was Incorrectly Decided and the Court Should Certify Conflict

For the reasons stated above, the Conservancy's Traffic and Fiscal Neutrality Claims easily fall within *Heine*'s construction of Section 163.3215. But if this Court reads *Heine* to foreclose those claims, the Conservancy preserves the argument that *Heine* was wrongly decided for the reasons outlined by the First District in its recent decision in *Imhof v. Walton County*, No. 1D19-0980, 2021 WL 4189197 (Sept. 15, 2021).

The plaintiffs in *Imhof* brought a variety of challenges to a development order by Walton County that approved a new development abutting a conservation zone. 2021 WL 4189197, at *1. The trial court, applying *Heine*, limited its review to the plaintiffs' claims that expressly related to the development's density and intensity of use. *Id.* at *1–*2.

The First District reversed. Based on an exceptionally thorough analysis of the text, structure, and purpose of the statute, the First District held that as long as the development order materially alters the use or density or intensity of use on a particular piece of property, a consistency challenge can be based on a claim that the order violates *any* aspect of the comprehensive plan (not just those related to land use, density, or intensity of use). *See id.* *4–*11. And the First District certified conflict with *Heine*. *Id.* at *1, *13.

Again, the Conservancy believes that its claims easily satisfy *Heine* because they relate to intensity of use as defined by statute. But should this Court disagree, it should certify conflict with *Imhof*.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE CONSERVANCY'S CLAIMS BASED ON THE LAND DEVELOPMENT CODE

A. The Standard of Review Is De Novo

As noted above, orders granting summary judgment are reviewed de novo. *See* Argument Section I.A, *supra*. Moreover, whether the GMP requires compliance with provisions of the LDC is a question of statutory interpretation, which is reviewed de novo. *Eustache*, 248 So. 3d at 1100. *See also Realty Assocs. Fund IX, L.P. v. Town of Cutler Bay*, 208 So. 3d 735, 738 (Fla. 3d DCA 2016) ("The trial court's interpretation of a comprehensive plan is reviewed de novo."); *Dixon*, 774 So. 2d at 765 ("It is well established that the construction of statutes, ordinances, contracts, or other written instruments is a question of law that is reviewable *de novo*, unless their meaning is ambiguous.").

B. The Growth Management Plan Requires that Rivergrass Comply with the Land Development Code

The trial court also erred by granting summary judgment on the Conservancy's LDC Claim, which was based on copious expert and fact testimony that Rivergrass was inconsistent with the GMP because it did not comply with numerous requirements of the LDC. *See, e.g.*, Charles Gauthier Expert Report (R. 4770).

The GMP requires Rivergrass, as a condition of approval, to comply with specified LDC provisions in two separate places. First, the GMP states that a requisite "basis of approval" of an SRA application is "compliance with the LDC Stewardship District." RLSA Overlay Policy 4.3 (R. 1016) [App. 73]. Second, the GMP states that an SRA application must "demonstrate that the SRA complies with all applicable policies of the [RLSA] Overlay and the LDC Stewardship District." RLSA Overlay Policy 4.5 (R. 1016) [App. 73]. In two other places, the GMP requires compliance with specific LDC provisions as a condition of SRA approval. *See* RLSA Overlay Policy 4.18 (R. 1021) [App. 78] (requiring compliance with LDC § 4.08.07.K); TE Policy 8.2 (requiring compliance with LDC §§ 6.02.00 *et seq.* & 10.02.07).

The trial court below granted summary judgment on the Conservancy's LDC Claim based on the reasoning that "the LDC . . . [is] not incorporated into the GMP, and an alleged violation of the LDC is not within the scope of Section 163.3215(3)." Order Granting Defs.' Mot. for Summ. J. Regarding Consistency 3 (R. 5826) [App. 38] (citation omitted). But whether the GMP expressly "incorporates" the LDC is irrelevant. The GMP can require

compliance with an external standard without expressly incorporating it, just as a law requiring motorists to observe the posted speed limit need not expressly incorporate the speed limits for individual roads. As demonstrated above, and as multiple witnesses testified, the GMP requires that proposed developments like Rivergrass comply with the LDC as a condition of approval. *See also* Gauthier Dep. 25–26 (S.R. 13601–02); Jenkins Dep. 145 (S.R. 14873); Mulhere Dep. 111–113 (S.R. 15013). Therefore, the Conservancy's claims that Rivergrass fails to comply with the LDC constitutes a claim that Rivergrass is inconsistent with the GMP.

CEM tied itself in knots below in its attempts to escape this simple logic. But no case or statute that CEM cited prohibits a comprehensive plan from requiring compliance with particular land development regulations or any other external standard. CEM below relied on *Little Club Condominium Ass'n v. Martin County*, 259 So. 3d 864 (Fla. 4th DCA 2018), and *Buck Lake Alliance, Inc. v. Board of County Commissioners*, 765 So. 2d 124 (Fla. 1st DCA 2000). *See* CEM's Mot. for Summ. J. Regarding Consistency 11–12 (R. 540–41). But both cases are plainly distinguishable because the comprehensive plans at issue in those cases did not require

compliance with specific LDC provisions as a condition of approval. And neither case holds, nor even suggests, that a comprehensive plan *cannot* require compliance with particular land development regulations as a condition of approval like Collier County's GMP does.

In *Little Club Condominium Ass'n*, the Fourth District rejected the plaintiff's challenge to the proposed construction of a cell phone tower on the ground that it was not sufficiently "stealth" as required by land development regulations. 259 So. 3d at 867–68. But the comprehensive plan in that case contained no requirement that the construction be "stealth," and there was similarly no requirement that the plan comply with the relevant land development regulations. *Id.* at 868. Similarly, in *Buck Lake Alliance, Inc.*, the First District reversed the trial court because it "incorrectly concluded that . . . consistency with the comprehensive plan was to be determined by reference to whether the implementing ordinances had been complied with, rather than to whether the policies, goals, and objectives of the plan, itself, had been met." 765 So. 2d at 128. But, again, in that case the comprehensive plan did not require that a proposed development demonstrate compliance with those other

ordinances. And nothing in either case (nor Florida law more broadly) prevents a comprehensive plan from requiring compliance with specified land development regulations as part of its "policies, goals, and objectives."

Indeed, there is nothing improper about Collier County's GMP requiring compliance with other land use regulations. CEM argued below that a comprehensive plan cannot require compliance with the LDC because the LDC can be changed through procedures less onerous than those required for an amendment of a comprehensive plan. CEM's Mot. for Summ. J. Regarding Consistency 16–19 (R. 545–48). CEM reasoned that a GMP constructed in such a manner would create an end-around of the amendment procedures for comprehensive plans required by the Florida Legislature. But in *Nassau County v. Willis*, 41 So. 3d 270 (Fla. 1st DCA 2010), the First District upheld a similarly designed comprehensive plan against a similar challenge. In that case, the plaintiffs argued that a comprehensive plan was invalid because it allowed county officials to adjust wetlands determinations based on the findings of another agency. Specifically, the plaintiffs argued that the plan improperly allowed officials to "significantly change[] the land use

designation[s] . . . from wetlands to uplands" without amending the comprehensive plan. *Id.* at 278. The court rejected that argument. The court recognized that "the plain language of the Comprehensive Plan's provision provides for this expected result." *Id.* When making such a change, the county officials were not "amending" the plan, but "executing" it. *Id.* at 279. So too here. The GMP explicitly requires compliance with the Stewardship District section of the LDC. The expected result is that any development order that does not comply with that section of the LDC is inconsistent with the GMP.[9]

Because the GMP requires compliance with specified provisions of the LDC as a condition of approval for an SRA, a challenge to a development order for failing to comply with those provisions is a challenge based on inconsistency with the GMP and

[9] The GMP also requires compliance with a host of other specific LDC provisions unrelated to the Conservancy's claims. *See* Conservancy's Opp'n to Mot. for Summ. J. Regarding Consistency 27 n.11 (R. 4734). Adopting CEM's argument that a comprehensive plan cannot lawfully require compliance with land development regulations would thus result in the invalidation of many other provisions of Collier County's GMP.

thus properly raised in a Section 163.3215(3) action. It was error for the trial court to hold otherwise.

III. THE TRIAL COURT ERRONEOUSLY NARROWED THE SCOPE OF EVIDENCE ADMISSIBLE IN A SECTION 163.3215 PROCEEDING

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007). But that "discretion is limited by the rules of evidence, and a trial court abuses its discretion if its ruling is based on an 'erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Patrick v. State*, 104 So. 3d 1046, 1056 (Fla. 2012) (citation omitted).

B. The Trial Court Erred by Excluding County Staff Documents and the Community Character Plan

"All relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. Relevant evidence is thus admissible unless it is "excluded by [the Evidence] code, by the Rules of Civil or Criminal Procedure, by other acts of the United States Congress or the Florida Legislature, or by constitutional considerations." *Id.*, Law Revision Council Note (1976). Evidence is relevant if it "tends to prove or disprove a material fact." *Green v. State*, 27 So. 3d 731,

737 (Fla. 2d DCA 2010); *see also id.* ("[R]elevant evidence has a tendency to establish a fact in controversy or to render a proposition in issue more or less probable." (quotation marks omitted)).

The excluded materials here were relevant because they tended to prove the Conservancy's remaining claims at trial that Rivergrass is inconsistent with the GMP. The excluded reports, memoranda, and communications include statements by County employees that Rivergrass does not fully comply with the intent of the GMP. What could be more relevant than admissions by employees of a Defendant whose job it was to review Rivergrass agreeing with the Conservancy's Design Claims?

No other section of the Evidence Code precluded the admission of this critical evidence. And, contrary to CEM's assertion, CEM's Mot. in Limine at 16-17 (R. 5050–51), nothing in Section 163.3215 prohibits a court from considering all relevant evidence in this type of proceeding. CEM's position was that the only relevant documents were the GMP and the Rivergrass Development Order. *Id.* at 17 (R. 5051). Under its view, the court should merely compare the two to make a consistency

determination. But this Court has held that Section 163.3215(3) requires that the trial court hold "an evidentiary hearing." *Howell v. Pasco Cnty.*, 165 So. 3d 12, 15 (Fla. 2d DCA 2015). Obviously, an evidentiary hearing contemplates the admission of fact and documentary evidence, and not just a ministerial comparison of the law (*i.e.*, the GMP) with the four corners of the Development Order. And the Fourth District has found that Section 163.3215 establishes "a suit or action clearly contemplating an evidentiary hearing before the court to determine the consistency issue on its merits in the light of the proceedings below but ***not confined to the matters of record in such proceedings***." *Poulos v. Martin Cnty.*, 700 So. 2d 163, 166 n.3 (Fla. 4th DCA 1997) (citing § 163.3215(3), Fla. Stat.). Thus, although the purpose of a Section 163.3215 proceeding is to determine whether a proposed development is consistent with the GMP, courts may consider all relevant evidence apart from the development order and the GMP itself in making that determination.

That a Section 163.3215 action is a de novo proceeding does not mean (as CEM argued below) that all materials created during the process of approving the development order are irrelevant. A de

novo proceeding simply means that the trial court owes no deference to the decision of county officials, *see Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 197–98 (Fla. 4th DCA 2001); it has nothing to do with the universe of evidence that the court may consider.

Nevertheless, as pertinent to this appeal, the trial court accepted CEM's incredibly narrow understanding of Section 163.3215(3) and excluded the following evidence from trial as irrelevant because this was a de novo proceeding: (1) reports, memoranda, and communications of Collier County Staff regarding Rivergrass and (2) the Collier County Community Character Plan. *See* Order Granting CEM's Motion in Limine 4 (R. 7342) [App. 48]. This evidence was relevant and admissible.

1. Reports, Memoranda, and Communications

Reports, memoranda, and communications by the County Staff were relevant to a consistency determination on the Conservancy's Design Claims because they contain admissions by County employees that Rivergrass is inconsistent with the GMP. In their final Staff Report to the Board of County Commissioners, Planning Staff concluded as follows:

> The Rivergrass Village SRA does not fully meet the minimum intent of the policies in the RLSA [Overlay] pertaining to innovative design, compactness, housing diversity, walkability, mix of uses, use density/intensity continuum or gradient, interconnectedness, etc. In staff's view, this SRA is, with some exceptions, a suburban development plan typical of that in the coastal urban area placed in the RLSA and ***is contrary to what is intended in the RLSA***.

Jan. 22, 2020 Staff Report at 7 (R. 4864) (underlining in original).

Beyond that, the Conservancy identified numerous reports, memoranda, and communications by Planning Staff that support the Conservancy's claims. The Conservancy alleges that Rivergrass does not include "an interconnected sidewalk and pathway system serving all residential neighborhoods" and is not "designed to encourage pedestrian and bicycle circulation." RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]. County Staff similarly determined that Rivergrass is inconsistent with the GMP because of, among other things, its "[l]ack of vehicular connectivity," "[f]ailure to be walkable," and "[f]ailure to be innovative," *see* Executive Summary (R. 6588–89, 9758–59).

Another of the Conservancy's Design Claims alleges that Rivergrass fails to provide the required uses and a "mix of uses."

RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]. County Staff admitted that Rivergrass "does not provide the characteristic land uses and threshold requirements for a 'Village,' and deviates from providing a full range of mixed uses." Mar. 7, 2019 Consistency Review Mem. at 11 (R. 6646, 11369) (emphasis omitted).

The Conservancy also alleges that Rivergrass fails to provide "a diversity of housing types." RLSA Overlay Policy 4.7.2 (R. 1017) [App. 74]. County Staff similarly concluded that Rivergrass "is not proposed with a meaningful mix between single-family and multi-family residential dwelling units." Sept. 10, 2019 Staff Report at 9 (R. 6295, 11676).

The trial court granted CEM's in limine request to exclude all of these materials as "outside the scope of a de novo review and therefore irrelevant." CEM's Mot. in Limine 17–18 (R. 5051–52). But, as explained above, de novo review simply means that the trial court owed no deference to the views of Collier County Staff—it does not limit the universe of materials that the court could consider. Indeed, what could be more relevant in any civil case than admissions by a defendant's own employees that agree with the basis of the plaintiff's claims? By adopting CEM's flawed

understanding of the scope of evidence permissible in a Section 163.3215 proceeding, the trial court excluded reports, memoranda, and communications by the County Staff that were plainly relevant and admissible. *See* Notice of Filing of Proffer Ex. List and Proffer Exs. (R. 8701–12882) (Ex. List is found at R. 9501–09).

2. The Community Character Plan

The Collier County Community Character Plan was likewise relevant to determining whether Rivergrass is consistent with the GMP and thus should have been admissible.

As an initial matter, the Conservancy's experts relied on the Plan and thus should have been permitted to testify about the CCP regardless of its admissibility as substantive evidence. Under Florida's Evidence Code, if the "facts or data upon which an expert bases an opinion or inference . . . are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence." Fla. Evid. Code § 90.704. And an expert may testify as to how this evidence formed "the basis and data he used in formulating his opinion" without becoming "a conduit for inadmissible [evidence]." *Houghton v. Bond*, 680 So. 2d 514, 522 (Fla. 1st DCA 1996) (no error in

permitting expert to rely on inadmissible governmental study produced by the National Highway Traffic Safety Administration); *see also Schwarz v. State*, 695 So. 2d 452, 454–55 (Fla. 4th DCA 1997) ("[E]xperts may testify as to the things on which they rely.") (citing 3 J. Weinstein & M. Berger's *Weinstein's Evidence* ¶ 703[03] (1982)).

But the CCP was also admissible as substantive evidence regarding the interpretation and application of GMP provisions. As described above, the CCP provides the views of Collier County and its Staff on issues such as compactness, intensity of uses, and walkability. Admission of the CCP would have therefore tended to prove the Conservancy's claims that Rivergrass is inconsistent with multiple GMP requirements relating to those same subjects. Indeed, the CCP was created as the guiding document for enacting the very GMP policies at issue in this case. *See* Minicozzi Dep. 103:16-104:12 (R. 6686). And County's Staff themselves relied on the CCP during their review of whether the Rivergrass proposal was consistent with the GMP. Mar. 7, 2019 Consistency Review Mem. at 17-18 (R. 6652–53, 11375–76).

As discussed above, contrary to CEM's narrow interpretation, nothing in Section 163.3215 prohibits courts from considering so-called "extrinsic" material. The CCP was relevant to elucidating land use planning concepts in the GMP, and the trial court erred in excluding evidence of the Plan from trial.

C. The Conservancy Is Entitled to a New Trial

As the Florida Supreme Court has clarified, where there has been an error in a civil case, the beneficiary of an error—in this case, Defendants—has the burden of showing that there is "no reasonable possibility that the error complained of contributed to the verdict":

> We hold that the test for harmless error requires the beneficiary of the error to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error complained of contributed to the verdict.

Special, 160 So. 3d at 1253; *accord id.* at 1256–57 ("Unless the beneficiary of the error proves that there is no reasonable possibility that the error contributed to the verdict, the error is harmful.").

Here, the trial court erred in impermissibly limiting the scope of evidence admissible in a Section 163.3215 proceeding and

excluding evidence that was relevant to the court's consistency determination. Defendants cannot "prove that there is no reasonable possibility that the error contributed to the" final judgment. *Id.* Specifically, the excluded evidence was powerful proof that Rivergrass is inconsistent with the GMP and would have significantly undermined Defendants' ability to meet their burden of proving consistency, as required in a Section 163.3215 proceeding. *See White*, 563 So. 2d at 128. And the Conservancy would have used the excluded evidence both to cross-examine Defendants' witnesses and affirmatively in its case-in-chief to establish that Rivergrass is inconsistent with the GMP. Thus, had the Conservancy been permitted to present this evidence, there is at least a "reasonable possibility" that the trial court's final judgment would have been different. A new trial on the Conservancy's Design Claims is warranted.

CONCLUSION

For all the reasons stated herein, this Court should reverse the trial court's judgment.

Dated: November 10, 2021

Respectfully submitted,

/s/ Geoffrey J. Michael

Geoffrey J. Michael
Florida Bar No. 86152
Brian D. Israel*
Ethan G. Shenkman*
Lauren C. Daniel*
Stephen K. Wirth*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
Phone: (202) 942-5000
Geoffrey.Michael@arnoldporter.com

** Admitted pro hac vice*

Counsel for the Conservancy of Southwest Florida, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following was filed using the Florida Courts E-Filing Portal and served by Electronic Mail to all counsel listed below this 10th day of November, 2021.

/s/ Geoffrey J. Michael
Geoffrey J. Michael

Counsel for the Conservancy of Southwest Florida Inc.

SERVICE LIST

Counsel for Collier County, Florida:

Sally A. Ashkar, Esq.
Jeffrey A. Klatzkow, Esq.
Colleen Greene, Esq.
COLLIER ATTORNEY'S OFFICE
3299 Tamiami Trail E.
Suite 800
Naples, FL 34112
Phone: (239) 252-8400
Sally.Ashkar@colliercountyfl.gov
Jeff.Klatzkow@colliercountyfl.gov
Colleen.Greene@colliercountyfl.gov
Marian.Rhyne@colliercountyfl.gov

Gregory N. Woods, Esq.
Jessica F. Tolin, Esq.
WOODS, WEIDENMILLER,
MICHETTI & RUDNICK LLP
9045 Strada Stell Court
Suite 400
Naples, FL 34109
Phone: (239) 325-4070
gwoods@lawfirmnaples.com
jtolin@lawfirmnaples.com

Counsel for Collier Enterprises Management, Inc.:

Glenn Burhans, Jr., Esq.
Reggie Bouthillier, Jr., Esq.
Bridget Smitha, Esq.
STEARNS, WEAVER, MILLER,
WEISSLER ALHADEFF &
SITTERSON, P.A.
106 East College Avenue
Suite 700
Tallahassee, FL 32301
Phone: (850) 329-4850
gburhans@stearnsweaver.com
rbouthillier@stearnsweaver.com
bsmitha@stearnsweaver.com
cabbuhl@stearnsweaver.com

Jacob T. Cremer, Esq.
Sharon Britton, Esq.
STEARNS, WEAVER, MILLER,
WEISSLER ALHADEFF &
SITTERSON, P.A.
401 E. Jackson Street
Suite 2100
Tampa, FL 33602
Phone: (813) 223-4800
jcrember@stearnsweaver.com
sbritton@stearnsweaver.com
mhernandez@stearnsweaver.com

Richard D. Yovanovich, Esq.
COLEMAN, YOVANOVICH &
KOESTER, P.A.
4001 Tamiami Trail North
Suite 300
Naples, FL 34103
Phone: (239) 435-3535
ryovanovich@cyklawfirm.com
dquintanilla@cyklawfirm.com

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.045(b), counsel for Appellant hereby certifies that the foregoing brief complies with the applicable font requirements because it is written in 14-point Bookman Old Style font. Pursuant to Florida Rule of Appellate Procedure 9.045(e), counsel for Appellant further certifies that the foregoing brief contains 12,435 words, excluding the parts of the brief exempted from the word count by Rule 9.045(e).

Dated: November 10, 2021

/s/ Geoffrey J. Michael
Geoffrey J. Michael

Counsel for the Conservancy of Southwest Florida Inc.