

MAR 4, 2014 R-2
PROVIDED BY JOHN WEAVER

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.

RESIDENTS FOR RESPONSIBLE
GROWTH, LLC, a Florida Limited
Liability Company, and CENTRAL
BEACH ALLIANCE OF FORT
LAUDERDALE, INC., a Florida
Not-For-Profit Corporation,

Plaintiffs,

v.

CITY OF FORT LAUDERDALE,
FLORIDA, by and through its City
Commission, a Florida municipality,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, RESIDENTS FOR RESPONSIBLE GROWTH, LLC ("RRG") and CENTRAL BEACH ALLIANCE OF FORT LAUDERDALE, INC. (the "CBA") (together, the "Plaintiffs"), by and through their undersigned counsel and pursuant to Section 163.3215(3), Florida Statutes, hereby bring this action for declaratory and injunctive relief against Defendant CITY OF FORT LAUDERDALE, FLORIDA, a Florida municipality (the "City"), and state as follows:

INTRODUCTION

1. Section 163.3215(3) authorizes actions for declaratory relief, injunctive relief and other relief relating to the issuance of "development orders" (as defined by Section 163.3164, Florida Statutes) that are inconsistent with a local government's adopted comprehensive plan.

2. A complaint for declaratory, injunctive relief or other relief is the sole method for challenging a development order issued by a local government on the basis that it is “not consistent” with that local government’s adopted comprehensive plan. Fla. Stat. §163.3215(3).

3. On April 16, 2013, the City Commission of the City adopted Resolution No. 13-65 (the “Resolution”) approving the issuance of a Site Plan Level IV Development Permit to Grand Birch, LLC for the development of an 11-story, 22-unit residential condominium located at 321 North Birch Road in the Central Beach Area of the City of Fort Lauderdale (the “Grand Birch Condominium”). (A copy of the Resolution is annexed hereto as Exhibit “A”).

4. The Resolution is a “development order” within the meaning of Section 163.3164, Florida Statutes, and, thus, may be challenged on the ground that it is “not consistent” with the City’s Comprehensive Plan.

5. This Court has subject matter jurisdiction over this matter pursuant to Fla. Stat. §§26.012, 86.011, and 163.3215(3).

6. Venue is proper in this Court because the actions or inactions giving rise to this action are alleged to have occurred within Broward County, Florida. Fla. Stat. § 163.3215(5) (2012).

7. This Court has jurisdiction over the parties because the City is a municipality located in, and having offices and agents in the Seventeenth Judicial Circuit of Florida, and the proposed development being challenged herein is situated in Broward County, Florida.

THE PARTIES

8. Plaintiff RRG is a not-for-profit limited liability company organized and existing under the laws of the States of Florida, with its principal offices in Broward County, Florida. RRG represents the interests of hundreds of residents (including condominium associations) and

local businesses¹ located in the Central Beach Area that will be directly and adversely impacted by the Project. Each of these residents and businesses own property or transact business within close proximity (less than 1000 feet) of the site of the proposed development, and several of its members, including the Birch Pointe Condominium Association and the Cormona Apartments (a historic landmark in the City of Fort Lauderdale) are located directly adjacent to the project site.

9. RRG's primary purpose is to preserve the unique character and architectural design of the Central Beach Area. One of its main objectives is to ensure that future land development and building in the Central Beach Area complies with the City's Comprehensive Plan. In furtherance of this objective, RRG has met with local politicians (including members of the City Commission) and real estate developers (including Grand Birch, LLC) in an effort to ensure that future land development is compatible with the existing buildings and architecture in the Central Beach Area and is otherwise consistent with the City's Comprehensive Plan. RRG's substantial interest in preserving the unique character and architecture of the Central Beach Area is also evidenced by its participation in the underlying quasi-judicial proceedings at which the site plan for the Grand Birch Condominium Project was approved. At that hearing, RRG presented substantial evidence, including expert testimony, in opposition to the site plan.

10. Plaintiff CBA is a Florida not-for-profit corporation organized and existing under the laws of the States of Florida, with its principal offices in Broward County, Florida. The CBA was formed in 1999, and represents the interests of residents, businesses, property owners, and condominium associations located throughout the Central Beach Area. It currently has approximately 400 members/associations. The associations represent approximately 3000 unit

¹ The list of constituent members at the time of the hearings below included Birch Pointe Condominium Association, Cormona Apartments, Alhambra Place Condominium Association, Lauderdale Surf Club Apartments, The Seasons of Fort Lauderdale Condominium Association, Granada Inn Luxury Bed & Breakfast, 3000 Granada Inn, La Costa Del Mar, Coconut Cove Guest House, and Versailles Cooperative Association.

owners. The specific objectives and purposes of the CBA are to represent its member associations and individual residents, whether or not they belong to condominium or cooperative associations, to protect their interests, to aid and advance responsible development within and around the Central Beach Area, and to promote a better neighborhood and community through group action.

11. Plaintiffs are "aggrieved or adversely" affected parties within the meaning of Section 163.3215(2), Florida Statutes, because its constituents reside and/or operate businesses within close proximity of the proposed development and will suffer a materially adverse effect to interests protected or furthered by the City's Comprehensive Plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. Plaintiffs and their constituent members will suffer numerous adverse effects from the proposed development, including, *inter alia*, (a) a decrease in property values (due to the closeness, unsightly nature, and grand scale of the proposed development); (b) the loss and/or significant impairment of water views; (c) increased traffic hazards and congestion; (d) decreased availability of parking; (e) increased traffic, noise, odors, shadow, scale, visual nuisances and pollution; (f) increased demands relating to the delivery of emergency and essential services; (g) a decrease in the availability of emergency evacuation routes; and (h) a manifest reduction in physical safety. These are interests protected or furthered by the City's Comprehensive Plan. Plaintiffs will be harmed to a degree that exceeds the harm caused to the public in general because of their direct involvement in the local government process (including participating in the quasi-judicial hearings below relating to the proposed development and site plan) and because of their members' close proximity to the project site.

12. Defendant City is a duly-constituted municipal corporation of the State of Florida located in Broward County. The City is subject to the requirements of the Local Government Comprehensive Planning and Land Development Act, Chapter 163, Part II (the "Act"), which obligates local governments to adopt comprehensive land use plans to guide and control future land development. Pursuant to the Act, the City has adopted the City of Fort Lauderdale Comprehensive Plan, which governs future land development within the City's boundaries.

FACTUAL AND PROCEDURAL BACKGROUND

13. On July 6, 2012, Grand Birch, LLC (the "Applicant") submitted a site plan application to the City requesting site plan approval for a nearly 13-story, 22-unit condominium building located at 321 North Birch Road in the Central Beach Area of the City of Fort Lauderdale (the "Project").² The height of the proposed structure is 129.2 feet (inclusive of utility towers and elevator equipment to be located on the top of the structure), and includes two levels of parking on the second and third floors and residential units on the remaining floors above. The site plan depicts a total of 48 parking spaces, most of which are only 8 feet wide. Moreover, there are only three parking spaces for guests, and only one for building employees.

14. The Applicant requested that the Project be approved as a "development of significant impact" and that the application for site plan approval be reviewed as a "Site Plan Level IV" pursuant to Sections 47-12.5(D)(1)(d)(i)(iii) and 47-12.6 of the City's Unified Land Development Regulations ("ULDR"), which serves as the City's zoning code.

15. The Project is located in the Central Beach Area of Fort Lauderdale. The Central Beach Area, also referred to as the "CBA," is defined as "the area lying south of Sunrise

² The Project site is only slightly more than a half-acre (0.63 acre), totaling approximately 25,000 square feet.

Boulevard, west of the Atlantic Ocean, east of the Intracoastal Waterway and north of the south boundary of the plat of Bahia Mar lying west of State Road A-1-A.” ULDR § 47-12.3

16. The Central Beach Area is divided into six zoning districts. The Project is located in the “Intracoastal Overlook Area (IOA)” zoning district. The IOA district was established for the purpose of “encouraging the preservation, maintenance and revitalization of existing structures and uses that front on the eastern Intracoastal Waterway.” ULDR § 47-12.1.A.4. “Existing residential uses and transient accommodations represent a substantial element of the central beach housing stock to be **protected, preserved and enhanced.**” *Id.* (emphasis added).

17. The IOA zoning district is comprised primarily of low-rise residential buildings and motels. For example, the Cormona Apartments, a historic building located directly adjacent to the proposed development, is only two stories tall. Similarly, the Little Paris Hotel and Apartments, located across the street from the proposed development, is only two stories tall.

18. The proposed structure will be built next door to the Birch Pointe Condominium (which is to its immediate south) and the Cormona Apartments (which is to its immediate north). However, there is only 60 feet of separation between the proposed structure and the Birch Pointe Condominium, and even less separation – 38 feet -- between the proposed structure and the Cormona Apartments. By contrast, there is a separation of 150 feet between the Birch Pointe Condominium and the building to its immediate south (the Versailles Cooperative Association).

19. On September 13, 2012, the Applicant presented the site plan to the Central Beach Alliance (the “CBA”), a local civic association consisting of affected property owners in the Central Beach Area. The CBA’s goals, as recommended to the City in 2008, state that future construction on undeveloped property in the IOA zoning district should not exceed 70 feet at its highest point in order to ensure compatibility with existing land uses in that zoning district.

20. During its presentation to the CBA, the Applicant represented that there was no opposition to the proposed development. Despite this representation (which was false), the CBA's membership voted overwhelmingly (170-11) against the proposed development.

21. On November 12, 2012, the site plan application was reviewed by the City's Planning & Zoning Board (the "P&Z Board). RRG participated in this quasi-judicial hearing through counsel, and presented argument and evidence in opposition to the proposed site plan. Despite this opposition, the P&Z Board recommended approval of the site plan by a 7-2 vote.

22. Following the P&Z Board's recommendation of approval, the proposed site plan was sent to the City Commission for review. On April 16, 2013, the City Commission held a public meeting to consider and vote on the site plan application. Both the Applicant and RRG (which objected to the proposed development) made presentations to the City Commission.

23. At the very end of the meeting, after all testimony and public comment had closed, and immediately before the vote on the site plan application was taken, Mayor Seiler (who presided over the meeting) asked the City Commissioners to disclose any ex parte communications which any of them may have had with the developer or other interested parties. Five of the City Commissioners, including Mayor Seiler, admitted to having ex parte communications with the developer and its representatives. However, none of the City Commissioners disclosed the subject matter of these ex parte communications, only that they had occurred. (A copy of the transcript of the City Commission meeting is attached as Exhibit "B").

24. Immediately following the disclosure of these ex parte communications, and without affording Plaintiffs or other opponents of the Project an opportunity to make any inquiry regarding their substance, the City Commission voted to approve the site plan application.

25. The City Commission's approval of the site plan is memorialized in Resolution No. 13-65, which was signed by the City's Mayor, John P. Seiler, on April 16, 2013.

26. All conditions precedent to the filing and maintenance of this action have been satisfied or their performance has been waived by the actions of the City.

27. Pursuant to Section 163.3215(3), Florida Statutes, an "aggrieved or adversely affected party" has thirty (30) days from the rendition of a development order to judicially challenge it on the ground that it is not consistent with a local government's comprehensive plan.

28. This action is timely because it is being filed no later than 30 days following the City's rendition of the subject development order, which occurred on April 16, 2013.

COUNT I

DECLARATORY JUDGMENT (Inconsistency with Comprehensive Plan)

29. Plaintiffs reallege and incorporate paragraphs 1-28 above as if fully set forth herein.

30. This is an action for declaratory relief pursuant to Fla. Stat. §§ 86.021 and 163.3215(3).

31. The issue before this Court is whether the approved site plan, as embodied by Resolution No. 13-65, is consistent with the City's Comprehensive Plan.

32. Chapter 163, Part II, Florida Statutes, the Local Government Comprehensive Planning and Land Development Regulation Act (the "Act") requires local governments to prepare and to adopt a local comprehensive plan to regulate and to govern future land uses and other land planning issues. The Act sets forth the required and optional elements that must be contained in a local government's comprehensive plan.

33. The City has adopted a comprehensive plan, as required under the Act.

34. Section 163.3194(1)(a), Florida Statutes, expressly requires that after the adoption of the comprehensive plan, all actions taken by a local government in regard to development orders must be “consistent with” its adopted comprehensive plan and each of its elements.

35. The City’s Comprehensive Plan identifies the following goals, policies and objectives that are pertinent to the site plan for the Grand Birch Condominium Project:

- (a) FUTURE LAND USE ELEMENT, GOAL 1: Promote the distribution of land uses that will preserve and enhance the character of Fort Lauderdale by establishing land development guides designed to promote environmental protection, meet social and economic needs, provide for adequate services and facilities, conserve natural resources, and ensure compatibility of land uses.
- (b) FUTURE LAND USE ELEMENT, POLICY 1.1.1: The City shall continue to ensure that adequate facilities and services are in place to accommodate proposed development and to access the impacts which proposed development will have on existing public services and facilities and monitor ongoing concurrency findings for cumulative impacts on public services and facilities.
- (c) FUTURE LAND USE ELEMENT, POLICY 1.1.4: Through the development review process, ensure safe and convenient on-site vehicular movement, off-street parking, pedestrian safety measures and adequate access for service and emergency vehicles are provided. Such improvements shall not impede flow on adjacent rights-of-way.
- (d) FUTURE LAND USE ELEMENT, OBJECTIVE 1.4: The development review process shall continue to be used to review development permits in accordance with adopted goals, objectives, and policies of the Plan to ensure that new developments are compatible with surrounding land uses and provide for adequate municipal services to mitigate any development related impacts.
- (e) FUTURE LAND USE ELEMENT, OBJECTIVE 1.9: Continue to ensure that development of the Central Beach Regional Activity Center (Central Beach – RAC), which was identified as a blighted area, will be consistent with the Community Redevelopment Area Plan, established for the designated beach redevelopment area.
- (f) FUTURE LAND USE ELEMENT, OBJECTIVE 1.11.3: Enhance views of the oceanfront and Intracoastal Waterway within the Central Beach – RAC.

- (g) FUTURE LAND USE ELEMENT, POLICY 1.12.1: Central Beach – RAC zoning districts shall require land uses consistent with the adopted Central Beach Revitalization Plan
- (h) FUTURE LAND USE ELEMENT, OBJECTIVE 1.19: In existing neighborhoods, development shall be compatible with present neighborhood density and specific plans for redevelopment and revitalization.
- (i) FUTURE LAND USE ELEMENT, POLICY 1.19.1: Facilitate the development of small Neighborhood Plans as a means to preserve and enhance the City's neighborhoods.
- (j) FUTURE LAND USE ELEMENT, POLICY 1.19.2: Respond to community desires and preserve neighborhood integrity through the master planning process.
- (k) FUTURE LAND USE ELEMENT, POLICY 1.19.3: Coordinate neighborhood area plans to ensure consistency with the City's adopted Comprehensive Plan.
- (l) FUTURE LAND USE ELEMENT, POLICY 1.19.7: Preserve the character of recently annexed areas by ensuring land use compatibility with existing neighborhoods.
- (m) FUTURE LAND USE ELEMENT, POLICY 1.19.8: The scale and mass of new development should be consistent with existing neighborhoods.
- (n) FUTURE LAND USE ELEMENT, POLICY 1.20.7: The ULDR shall protect whenever possible existing and planned residential areas, including single family neighborhoods, from disruptive land uses and nuisances.
- (o) FUTURE LAND USE ELEMENT, POLICY 1.22.3: Amend the ULDRs to include design criteria consistent with the Downtown Fort Lauderdale Master Plan. Criteria related to size and massing should include consideration of vicinity historical structures.
- (p) HOUSING ELEMENT, GOAL 1: Preserve, enhance, and revitalize the City's existing neighborhoods.
- (q) HOUSING ELEMENT, OBJECTIVE 1.1: Enhance neighborhood preservation goals.

- (r) HOUSING ELEMENT, POLICY 1.1.1: Continue to utilize community design standards to enhance housing characteristics and neighborhood preservation.
- (s) HOUSING ELEMENT, POLICY 1.1.5: Utilize the neighborhood compatibility criteria and other appropriate regulations to maintain or improve the quality of housing in established residential areas.
- (t) HOUSING ELEMENT, POLICY 2.6.1: Identify, conserve and protect historically significant housing and stabilized neighborhoods from the intrusion of incompatible land uses that would adversely affect neighborhood character or existing structures.
- (u) TRANSPORTATION ELEMENT, OBJECTIVE 1.5: When reviewing development proposals, provide for minimal negative impacts associated with access point locations, and provide for safe and efficient on-site traffic circulation and parking.
- (v) TRANSPORTATION ELEMENT, POLICY 1.5.1: Continue to develop and enforce improved roadway and parking lot designs, including minimum access spacing criteria, cross access easement requirements or other access controls, through local engineering and development review procedures.
- (w) TRANSPORTATION ELEMENT, POLICY 1.5.3: Ensure that development will take into consideration the character and integrity of residential neighborhoods, the Development Review Process shall address pedestrian and bicycle access and facilities, traffic improvements or modifications either on-site or within public rights-of-way, including but not limited to, sidewalks, pedestrian ways, bicycle parking, roadway adjustments, traffic control devices or mechanisms and access restrictions to control on-site traffic flow or divert traffic as needed to mitigate the negative impacts of development generated traffic on neighborhood streets as warranted, feasible and consistent with this Plan.

36. The site plan approved by the City is inconsistent with these and other goals, elements and policies contained in the City's Comprehensive Plan. Most significantly, the proposed development is incompatible³ with the surrounding neighborhood – which is comprised

³ The objective of "Neighborhood Compatibility" is set forth in Objective 1.19 of the Future Land Use Element of the City's Comprehensive Plan. "Compatibility" is defined in the City's Comprehensive Plan as follows: "[a] condition in which land uses or conditions can coexist in relative proximity to each other in stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." City Comprehensive Plan, at p. 1-14.

primarily of low-rise buildings -- and it is inconsistent with the existing surrounding development pattern, and, therefore, does not promote use of land in a manner that will preserve and enhance the character of the City of Fort Lauderdale and enhance compatibility of land uses.

37. The proposed development (which is 129.2 feet tall, nearly 13 stories) represents an abrupt change in the development pattern of the surrounding neighborhood, and will cast a giant shadow over nearby properties, leading to the loss of water views and causing other significant adverse impacts such as increased traffic and noise. *See* Planning and Urban Design Standards, American Planning Association, published by John Wiley & Sons (Feb. 2006) (an “abrupt change in building scale creates an *inharmonious* environment that maximizes the *negative effects* of tall buildings on adjacent uses, such as loss of sunlight . . .”) (emphasis added)

38. The neighborhood residential areas, as well as the adjacent commercial areas, include buildings of a much lower mass and scale than the proposed project. For example, the buildings to the immediate north of the proposed project are only two to three stories in height. Further, the City’s Massing Study depicts a considerably smaller two-story building on the same site. The City has previously rejected similar development plans due to concerns about height. For example, in 2006, the developer of the Birch Pointe Condominium (located next door) had an option contract to purchase the subject property for \$11 million. He submitted development plans to the City’s Development Review Committee, which advised him that the proposed structure was too tall, had setbacks of only 30 feet, and had insufficient parking. The approved site plan calls for a structure that is even bigger than the project that the City had earlier rejected.

39. A look at other development projects approved by the City underscores the Project’s incomprehensibly large size. The proposed nearly 13-story structure, which sits on a parcel of only 0.61 acres, has a floor-area-ratio (“FAR”) of 5.9. This is the highest floor-area-

ratio on Fort Lauderdale Beach, and exceeds the FAR of some of the largest projects ever approved by the City, including, among others, Beach Place (4.14), Fortune House Resort Hotel (4.4), MLK Development (3.7), Las Olas Beach Club (5.61), Orion Resort (4.4), Stay Social Hotel (4.6), Ocean Wave (4.8), Yankee Trader -- North Bldg. (2.38) and Yankee Trader -- South Bldg. (2.84).

40. Additionally, the proposed development does not provide for safe and efficient on-site traffic circulation and parking, as mandated by Objective 1.5 and Policy 1.5.2 of the Transportation Element of the City's Comprehensive Plan. Among other things, the amount of on-site parking is woefully inadequate because the spaces are too narrow (only 8.8 feet wide), does not provide enough spaces for visitors, and does not include a loading area for deliveries. These conditions will lead to guests and delivery trucks parking on the adjacent roadway -- Birch Road -- thereby creating additional traffic impacts and hazards to residential neighbors. As depicted, the developer's site plan allows for only two to three vehicles to stack on Birch Road. Further, the site plan depicts insufficient bypass lanes for ingress and egress to the development.

41. The Resolution is also inconsistent with Objective 1.5 and Policy 1.5.3 of the Transportation Element of the City's Comprehensive Plan, in that development approved pursuant to the Resolution fails to minimize traffic impacts to residential neighbors.

42. Further, the Resolution is inconsistent with Objective 1.4 of the Future Land Use Element of the City's Comprehensive Plan, in that the proposed development fails to mitigate the negative effects of traffic, noise, shadow, odor and scale on adjacent neighborhoods.

43. In addition, the Resolution is inconsistent with Objective 1.20 and Policy 1.20.7 of the Future Land Use Element of the City's Comprehensive Plan, in that development

approved pursuant to the Resolution threatens the preservation of established residential neighborhoods.

44. Moreover, the Resolution is inconsistent with Policy 1.22.3 of the Future Land Use Element and Policy 2.6.1 of the Housing Element of the City's Comprehensive Plan, in that development allowed pursuant to the Resolution fails to protect historical properties.

45. A bona fide, actual and present practical need exists for this Court to consider and declare the rights and obligations of the parties, including the Plaintiffs and other members of the public, under the City's Comprehensive Plan.

46. By approving a site plan that is not consistent with its Comprehensive Plan, the City is creating a present ascertained or ascertainable state of facts or present controversy about a state of facts.

47. Given the City's conduct in this matter, Plaintiffs are in doubt as to their rights. Plaintiffs are affected by the City's failure to adhere to and enforce its own Comprehensive Plan. Plaintiffs are entitled a declaratory judgment construing the City's Comprehensive Plan and determining whether the approved site plan is consistent with the City's Comprehensive Plan.

48. The aforementioned actions of the City have resulted in irreparable harm to Plaintiffs and their constituent members through the granting of a development order (and development rights) that violates numerous provisions of the City's Comprehensive Plan.

49. No calculable monetary damages can be ascertained that would compensate for the City's decision to approve the site plan for the Grand Birch Condominium Project in contravention of its own Comprehensive Plan. Plaintiffs have no adequate remedy at law.

50. The granting of supplemental relief in the form of an injunction in this case will serve the public interest.

51. Accordingly, Plaintiffs are in need of a declaratory judgment construing the legal constraints and obligations of the City as set forth in the City's Comprehensive Plan and Fla. Stat. § 163.3215.

WHEREFORE, Plaintiffs request that this Court award Plaintiff the following relief:

- A. A declaratory judgment that the approved site plan embodied by Resolution No. 13-65 is not consistent with the City's Comprehensive Plan;
- B. A declaratory judgment that the City did not adhere to the requirements of law in approving the site plan for the Grand Birch Condominium Project with regard to consistency with the applicable Comprehensive Plan elements, objectives and policies, and was therefore unauthorized to approve a development order – the site plan approval – that is inconsistent with the City's Comprehensive Plan.
- C. Supplemental relief in the form of an Order directing the City to immediately rescind Resolution No. 13-65 and an injunction prohibiting the City from issuing any building or construction permits or recognizing any vested rights under the site plan, or allowing any further development on the subject property.
- D. Awarding the Plaintiffs their costs for bringing this action pursuant to Section 86.081, Florida Statutes, and ordering such other relief as this Court deems just and proper.

COUNT II

INJUNCTION

(Inconsistency with Comprehensive Plan)

52. Plaintiffs reallege and incorporate paragraphs 1-28 above as if fully set forth herein.

53. This is an action for permanent injunctive relief wherein Plaintiffs seek to permanently enjoin the City from certain actions with respect to the site plan approval for the Grand Birch Condominium Project in violation of the City's Comprehensive Plan.

54. In Count I, Plaintiffs have alleged a series of violations of state statutes pertaining to growth management. Upon prevailing on any portion of Count I, Plaintiffs are entitled to injunctive relief. In particular, Plaintiffs will also be irreparably harmed by the City's authorization of development that is in violation of the City's own Comprehensive Plan.

55. None of these foregoing violations is compensable with any form of monetary damages. Plaintiffs have no adequate remedy at law.

56. Any harm to the City in being required by injunction to follow the requirements of the law is outweighed by the harm to Plaintiffs and their constituent members in being adversely affected by a proposed development that is in violation of the City's Comprehensive Plan.

57. Upon prevailing on any portion of Count I, the issuance of a permanent injunction will serve the public interest.

WHEREFORE, Plaintiffs respectfully request that this Court issue a permanent injunction directing the City to rescind Resolution No. 13-65 and further prohibiting the City from issuing any building or construction permits or recognizing any vested rights under the site plan for the Golden Birch Condominium Project, or allowing any further development on the subject property.

COUNT III

EQUITABLE RELIEF (Improper Ex Parte Communications)

58. Plaintiffs reallege and incorporate paragraphs 1-28 above as if fully set forth herein.

59. This is an original equitable cause of action arising out of improper ex parte communications between the City and Applicant regarding the site plan application.

60. "Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings." *Jennings v. Dade County*, 589 So.2d 1337, 1341 (Fla. 3d DCA 1991)

61. In *Jennings*, the Third District Court held that "the allegation of a prejudicial ex parte communication in a quasi-judicial proceeding . . . will enable a party to maintain an **original equitable cause of action** to establish its claim." *Id.* at 1341-42 (emphasis added). To state a viable cause of action, a plaintiff need only allege that there was "prejudice" resulting from the ex parte contacts between an applicant and the municipal decision makers in a quasi-judicial proceeding. *Id.* at 1341 (holding that "the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action.")

62. In 1995, the Florida Legislature enacted Section 286.0115, Florida Statutes, in response to *Jennings*. Section 286.0115 still "requires public officials to disclose ex parte communications in order to assure an adverse party the opportunity to confront, respond, and rebut any such disclosures so as to prevent an appearance of impropriety." *City of Hollywood v. Hakanson*, 866 So.2d 106 (Fla. 4th DCA 2004). However, unlike *Jennings*, which created a rebuttable presumption of prejudice arising from an ex parte communication with a quasi-judicial officer, Section 286.0115 removes the prejudicial effect of such communication, but only "**if the subject of the communication** and the identity of the person, group, or entity with whom the

communication took place is **disclosed and made a part of the record.**” Fla. Stat. § 286.0115(c)(1) (emphasis added)

63. The City’s own municipal regulations provide further protection and safeguards against improper ex parte communications. Specifically, Section 47-1.13 of the ULDR [“Access to Public Officials”] provides that an “[a]n ex parte communication shall not be presumed to be prejudicial to the action taken by a public official, board or commission if the communication is disclosed as follows:

1. The public official in receipt of a verbal communication discloses the identity of the person, group or entity with whom the communication took place and makes such information part of the record of the quasi-judicial matter prior to final action being taken on the matter.
2. The public official in receipt of a written communication makes the written communication part of the record of the quasi-judicial matter prior to final action being taken on the matter. . . .
4. Disclosure made pursuant to this section shall be made before or during the public meeting at which a vote is taken on such matter so that persons who have opinions contrary to those expressed in the ex parte communication are given a reasonable opportunity to rebut or respond to the communication.

Thus, to avoid the “prejudicial” effect of an ex parte communication, the City’s own rules require **complete disclosure** on the record, and, further, at a point in time when opponents have an opportunity to rebut or respond to the communication.

64. Here, the City has failed to make the specific curative disclosures mandated by *Jennings*, Fla. Stat. § 286.0115, and ULDR § 47-1.13, in order to avoid the prejudicial effect of its city commission’s ex parte communications with the applicant’s representatives. At pages 191 through 193 of the hearing transcript, which contains the “disclosure” of all ex parte communications, the Commissioners make only vague references to the fact that they had ex

parte communications with the applicant and its representatives.⁴ However, none of the City Commissioners disclosed the **subject matter** of these ex parte communications, only that they had occurred. Such minimalist disclosures are not sufficient to avoid the prejudice caused by the commissioners' ex parte communications, particularly since these disclosures occurred *after* the public comment portion of the quasi-judicial hearing had closed,⁵ thereby depriving Plaintiffs and other opponents of the Project an opportunity to rebut or respond to these communications.

65. Plaintiffs have been prejudiced by these improper ex parte communications.

66. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request that this Court issue a permanent injunction directing the City to rescind Resolution No. 13-65 and further ordering the City to conduct a new and complete quasi-judicial hearing on the site plan application for the Grand Birch Project, together with such other and further relief as this Court deems equitable and just.

COUNT IV

DECLARATORY JUDGMENT

67. Plaintiff reallege and incorporate paragraphs 1-28 above as if fully set forth herein.

68. This is an action for declaratory relief pursuant to Fla. Stat. § 86.021.

69. The parties are in doubt as to whether the swimming pool depicted in the Applicant's site plan (the subject matter of this lawsuit) is a "structure" within the meaning of ULDR § 47-35.1. The term "structure" is specifically defined ULDR § 47-35.1 as follows:

Anything built or constructed or erected, the use of which requires more or less permanent location on the land, or attached to something having a permanent location on the land, or any

⁴ See Exhibit "B," at pp. 191:12-193:21

⁵ By contrast, at the earlier P&Z Board Meeting (involving the same site plan), the disclosures of ex parte communications occurred at the beginning of that meeting.

composition, artificially built up or composed of parts joined together in some definite manner or any rooflike structure or storage apparatus whether movable or nonmovable which may or may not be self-supporting or may or may not be affixed to a "structure," as defined herein, or to a building.

ULDR § 47-35.1 (emphasis added).

70. Plaintiffs contend that the swimming pool depicted in the site plan is a "structure" within the meaning of ULDR § 47-35.1 since it will be "built or constructed or erected" on land, and its use will require "more or less [a] permanent location on the land." Such an interpretation finds support in the case law. *See also Scott v. Board of Appeal of Wellesley*, 356 Mass. 159, 162, 248 N.E. 281, 283 (1969) (holding that below-ground swimming pool was a "structure" for purposes of town zoning by-law's setback requirements); *Greenberg v. Koslow*, 475 S.W.2d 434, 437 (Mo. App. 1971) (stating that "beyond doubt," the swimming pool is a "structure").

71. Defendant, on the other hand, maintains that the swimming pool is not a "structure" within the meaning ULDR § 47-35.1 because it is not elevated above ground.

72. If the swimming pool is determined to be a "structure, then it must be considered by the City in determining whether the Applicant's site plan meets the criteria in the ULDR regarding rear yard setbacks. ULDR§ 47-12.5.D.1.d.ii mandates that the minimum rear yard setback should be 20 feet, measured from the property line to the closest structure. If the swimming pool is a "structure," then its location, only 7 feet, ten inches from the property line, places it squarely within the 20-foot setback, requiring the denial of the Applicant's site plan.

73. Accordingly, there is a current and ripe dispute between the parties.

74. This action arises from a present, ascertained or ascertainable state of facts of a present controversy.

75. The parties have an actual, present, adverse and antagonistic interest in either law or fact in the subject matter of this action.

76. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs request that this Court enter a declaratory judgment that the swimming pool depicted in the Applicant's site plan is a "structure" within the meaning of ULDR § 47-35.1.

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Respectfully submitted,

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