IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2017-CA-000213-XXXX-MB-AN

FORBOCA.ORG, INC., a Florida not-for-profit corporation,

Plaintiff,

vs.

CITY OF BOCA RATON, a Florida municipal corporation,

Defendant.
_____/

THE CITY OF BOCA RATON'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, the City of Boca Raton, Florida (the "City"), through its undersigned attorneys and pursuant to rule 1.140, Florida Rules of Civil Procedure, respectfully requests that this Court enter an order dismissing the entirety of the Complaint brought by Plaintiff, ForBoca.org, Inc. ("Plaintiff"), with prejudice, for the reasons stated below.

INTRODUCTION

This lawsuit asks the Court to invalidate an initiative ordinance passed by public referendum of the City's voters in November 2016 which directs the City to use City-owned land adjacent to the Intracoastal Waterway for "public recreation, public boating access, public streets, and [C]ity-stormwater uses only" (the "Initiative Ordinance"). Unfortunately, the Complaint is filled with conclusory and inconsistent allegations. Accordingly, this motion addresses the arguments made by Plaintiff as well as those suggested in the Complaint (although not sufficiently pled).

Count I is a declaratory judgment action alleging both: (1) that the Initiative Ordinance is a "land development regulation" that is inconsistent with the City's Comprehensive Plan, in violation of section 163.3194(1)(b), Florida Statutes; and (2) that the Initiative Ordinance is a "development order," the enactment of which violated section 163.3167(8), Florida Statutes, which prohibits "[a]n initiative or referendum process in regard to any development order." Count III[1] seeks supplemental relief on account of these alleged legal violations.

The Court should dismiss the Complaint because neither of the legal arguments in Count I state a cause of action upon which relief can be granted. These separate contentions within the single cause of action are premised upon the unsupported and mistaken legal conclusions that the Initiative Ordinance is a "land development regulation" or a "development order." In fact, the Initiative Ordinance is neither; instead, it is an administrative directive establishing how the City will operate and manage its own lands and facilities in its proprietary capacity as a governmental landowner.

The Initiative Ordinance is not a "land development regulation" as defined by statute. Even if it was, the Court does not have jurisdiction to hear this type of consistency challenge, as the statute mandates it be brought before an administrative law judge. Similarly, the Initiative Ordinance is not a "development order" as defined by statute. Further, it does not have the characteristics Florida courts ascribe to a development order (i.e., a site-specific development authorization). The Initiative Ordinance is directed only to public lands and does not affect any private property rights. Moreover, even if the Initiative Ordinance is a "development order" and the Complaint may be read to assert that it is inconsistent with the City's Comprehensive Plan,

[1] There is no Count II.

such a claim would be statutorily time-barred. Finally, the Complaint should be dismissed in its entirety because Plaintiff does not have standing to assert either argument.

FACTUAL BACKGROUND[2]

1. The City is a municipal corporation located in Palm Beach County, Florida. Compl. at ¶ 2.

2. Plaintiff is a Florida not-for-profit corporation with a principal place of business in Tallahassee, Florida. *Id.* at ¶ 1. The Complaint alleges that Plaintiff is "committed to social welfare and protecting private property rights in Boca Raton," and that it engages in a variety of activities within the City to fulfill these commitments. *Id.* (emphasis added).

3. On November 8, 2016, the citizens of the City voted to approve an initiative/public referendum to amend section 28-1308 of the City's Code of Ordinances. Compl. at ¶ 5.[3] The Initiative Ordinance provides:

> All city-owned land adjacent to the intracoastal waterway shall only be used for public recreation, public boating access, public streets, and city stormwater uses only.

Id. (emphasis added).

4. The Complaint alleges that the Initiative Ordinance "directly impacted private property located on coastal waterways in Boca Raton." *Id.* at ¶ 6 (emphasis added). The Complaint contains no allegations explaining how an ordinance that addresses the use of "city-owned land" has impacted private property.

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[2] The City accepts, for the limited purposes of this Motion only, the facts as alleged in the Complaint.

[3] In fact, the initiative did not "amend" section 28-1308 of the City's Code of Ordinances, as that provision did not exist at the time of the public referendum. Instead, the initiative added this provision as a new section located within Chapter 28, Article XV, Division 1, City Code of Ordinances.

5. Although the Complaint alleges that the Initiative Ordinance "severely restricts" the "land use rights" of Plaintiff and other entities "using the land subject to" that ordinance, it does not allege that Plaintiff owns or has any interest in the City-owned land affected by the Initiative Ordinance, that it owns or has any interest in any land in the City (let alone any private interest in City-owned land), or that it even uses the lands affected by the Initiative Ordinance. *Id.* at ¶ 21. In addition, the Complaint contains no allegations concerning the identity of Plaintiff's members or officers, or whether any of Plaintiff's members or officers own property allegedly impacted by the Initiative Ordinance.

6. The Complaint contains two counts. "Count I, for "Declaratory Relief," presents two arguments that mischaracterize the Initiative Ordinance in an attempt to persuade this Court to declare it unlawful pursuant to Florida Statutes. *Id.* at ¶¶ 9-25.

7. First, the Complaint concludes that the Initiative Ordinance is a "land development regulation" that is purportedly inconsistent with the City's Comprehensive Plan because it allegedly "rezoned various properties" located within "the Commercial 'C' land use category of the [City's] Comprehensive Plan." *Id.* at ¶¶ 10-12. The Complaint states that the City "violated Section 163.3194(1)(b), Florida Statutes, when, by initiative/referendum, it passed City Ordinance 28-1308 Ordinance, as amended." *Id.* at ¶ 13.

8. Second, the Complaint concludes the Initiative Ordinance is a "development order" (as that term is defined in section 163.3164(15), Florida Statutes), and contends, as a result, that passage of the Initiative Ordinance by initiative/referendum violated section 163.3167(8), Florida Statutes, which prohibits "[a]n initiative or referendum process in regard to any development order." *Id.* at ¶¶ 14-18.

9. Based on the foregoing legal arguments, Plaintiff requests the Court enter a final judgment declaring that the Initiative Ordinance "is unlawful pursuant to Florida Statutes." *Id.*

10. Count III is a "Request for Supplemental Relief." *Id.* at ¶¶ 26-28. Plaintiff concedes that it may only receive supplemental relief if its "request for declaratory relief judgment is granted." *Id.* at ¶ 27.

11. Plaintiff alleges that "[a]ll conditions precedent to filing this action have occurred, have been performed, or have been waived, including but not limited to the exhaustion of all administrative remedies," but provides no factual basis to support this statement.

ARGUMENT

I. STANDARD OF REVIEW.

"For purposes of a motion to dismiss, all well pleaded allegations are deemed admitted and the trial court must assume all facts alleged in the complaint as true." *Adams v. Kent, Ins. Co.*, 431 So. 2d 335, 336 (Fla. 4th DCA 1983). However, the same need not be said of allegations that are merely conclusions. The Florida Supreme Court has held that, when evaluating a motion to dismiss, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Ellison v. City of Fort Lauderdale*, 175 So. 2d 198, 200 (Fla. 1965). Similarly, in *Bohannon v. Shands Teaching Hosp. and Clinics, Inc.*, 983 So. 2d 717 (Fla. 1st DCA 2008), the court concluded that a complaint failed to state a cause of action premised upon a Florida statute because it failed to set forth *factual* allegations demonstrating that the plaintiff was entitled to relief under the statute. The complaint's allegations were deemed insufficient because "for the most part, [they] were mere conclusions tracking the language of the statutory definitions, unsupported by facts, and are legally insufficient." *Id.* at 721 (emphasis supplied). *See also Bliss v. Carmona*, 418 So.

2d 1017, 1019 (Fla. 3d DCA 1982) ("[P]leading conclusions of law unsupported by allegations of ultimate fact is legally insufficient."); *Coral Ridge Golf Course, Inc. v. City of Fort Lauderdale*, 253 So. 2d 485, 487 (Fla. 4th DCA 1971) (affirming decision to dismiss a claim for injunction where there were insufficient facts to establish why provisions of a city's zoning ordinance caused irreparable injury and were unconstitutional). Additionally, although "courts must liberally construe, and accept as true, factual allegations in a complaint and reasonably deductible inferences therefrom, there is no obligation to accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *Shands Teaching Hosp. & Clinics, Inc. v. Estate of Lawson ex rel. Lawson*, 175 So. 3d 327, 331 (Fla. 1st DCA 2015) (emphasis supplied). Where a complaint fails to allege sufficient well-pleaded facts to state a cause of action, it should be dismissed. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996).

II. THE INCONSISTENT ALLEGATIONS IN THE COMPLAINT FAIL TO STATE A CAUSE OF ACTION FOR VIOLATION OF ANY PROVISION OF CHAPTER 163 BECAUSE THE INITIATIVE ORDINANCE IS AN ADMINISTRATIVE DIRECTIVE TO USE GOVERNMENT-OWNED LAND FOR CERTAIN SPECIFIED PUBLIC PURPOSES.

A. The Complaint mischaracterizes the Initiative Ordinance, which does not regulate or authorize development, but is instead an administrative directive for the City's use of its own property.

Count I is based on the allegation that the Initiative Ordinance is either a "development order" or a "land development regulation." Factual Background ("Facts") at ¶¶ 6-9. In fact, the Initiative Ordinance is neither; instead, it establishes a policy regarding the use of City-owned lands, adopted by Ordinance, and codified in the City's Code of Ordinances. The Initiative Ordinance is an administrative directive establishing how the City will operate its own land and facilities in its proprietary capacity (on behalf of the public) as a governmental landowner.

Specifically, the Initiative Ordinance instructs the City, and the City only, that "[a]ll city-owned land adjacent to the intracoastal waterway shall only be used for public recreation, public boating access, public streets, and city stormwater uses only." *See* Facts at ¶ 3. Therefore, the Initiative Ordinance is akin to a self-imposed use restriction by a property owner, not a "regulation" or an "order" that the City imposes upon others in its regulatory capacity.

The Initiative Ordinance reflects a municipal decision relating to certain administrative operations and decisions to which chapter 163 simply does not apply. Municipal administrative functions range in scope and significance from day-to-day operational functions (such as the hours of operation for municipal parks and libraries) to organizational decisions such as the types of departments municipalities choose to establish. These administrative decisions take different forms: some are adopted by ordinance, some by policy, and some informally. Regardless of how established, Chapter 163 does not address municipal operations and administrative policy, nor authorize challenges to these types of decisions, whether or not adopted by ordinance.

The Initiative Ordinance also cannot be either a "land development regulation" or a "development order" because it does not concern "development" as that term is defined for purposes of chapter 163, Florida Statutes. Section 163.3164(6), Florida Statutes, provides that "development" has the meaning specified in section 380.04, Florida Statutes. That provision defines development as "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels." §380.04(1), Fla. Stat. (emphasis supplied). The Initiative Ordinance, which dictates how the City may use certain of its own properties (for public recreation and other specified public purposes), does not fit into any of these definitions. The Initiative Ordinance does not mandate that the City undertake any of the development actions

described in section 380.04(1). Accordingly, the Court should conclude that the Initiative Ordinance is neither a "land development regulation" nor a "development order," but is an administrative directive that is not challengeable under the statutes referenced in the Complaint.

B. The Court should reject the Complaint's conclusory labels that the Initiative Ordinance is a "land development regulation" or a "development order."

In the first part of Count I, Plaintiff alleges that the Initiative Ordinance is a "land development regulation," while in the second, it alleges that the Initiative Ordinance is a "development order." Facts at ¶¶ 6-9. The Plaintiff is mistaken as discussed, *supra*. The various provisions of chapter 163 make clear that land development regulations and development orders are distinct types of governmental actions. A land development regulation "regulat[es] any aspect of development," and is typified by a "general zoning code." § 163.3213(2)(b), Fla. Stat. A land development regulation is a legislative action that sets policy within a municipality regarding the development of land. *See Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 164 (Fla. 5th DCA 2003) (explaining that a "land development regulation" is legislatively-adopted by the governing body to broadly define "what can be built on land"). A development order, by contrast, is issued when the government applies its land development regulations to a landowner's specific request to "permit [or deny] the development of land." §§ 163.3164(15), (16), Fla. Stat. A development order implements policy, usually through quasi-judicial proceedings. *See Board of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469 (Fla. 1993) (highlighting the distinction between a comprehensive rezoning affecting a large portion of the public and a rezoning on a particular parcel, which applies land use policies in response to an individual application). "Land development regulations" and "development orders" are terms of art, with precise (and different) meanings and legal effects.

The distinction between land development regulations and development orders is further demonstrated by their unique appellate procedures. For example, if an aggrieved or adversely affected party seeks to challenge the consistency of a *development order* with a comprehensive plan, they are limited to the methods provided in section 163.3215, Florida Statutes. A challenge to the adoption of a development order (not related to a comprehensive plan) is limited to the filing of a petition for writ of certiorari which may only review (based on the record) whether the development order is supported by competent, substantial evidence, complies with the essential requirements of law, and provided due process to the applicant. By contrast, if a party seeks to challenge a *land development regulation* as inconsistent with an adopted comprehensive plan, they must follow the procedures in section 163.3194, Florida Statutes. A challenge to the adoption of a land development regulation is by original action (instead of by appeal), generally evaluated under a "rational basis" standard of review. These distinct procedures underscore the differences between "land development regulations" and "development orders."

Fundamentally, a government action cannot be *both* a "land development regulation" *and* a "development order" – the statutory definitions and case law provide that they are mutually exclusive government actions.[4] As discussed herein, the Initiative Ordinance is neither. Furthermore, the Court is under "no obligation to accept" either of Plaintiff's allegations as they reflect "internally inconsistent factual claims" and "mere legal conclusions" unsupported by any facts. *Shands Teaching Hosp. & Clinics, Inc.*, 175 So. 3d at 331 (quashing an order that denied a motion to dismiss because it was based on conclusory allegations that the claim was for ordinary negligence when the Complaint contained internally inconsistent factual claims indicating that it was, in fact, a medical negligence claim). The Plaintiff's allegations that the Initiative Ordinance

[4] The Complaint does not plead these mutually exclusive theories in the alternative. They are contained within the same count and incorporate all of the same factual allegations.

is either a "land development regulation" or a "development order" are little more than statutory recitations devoid of factual allegations and are, therefore, "mere legal conclusions." The Court should therefore conclude that the Initiative Ordinance is an administrative directive that cannot be challenged by either of the legal theories contained in the Complaint.

III. THE CLAIM THAT THE INITIATIVE ORDINANCE IS A LAND DEVELOPMENT REGULATION THAT IS INCONSISTENT WITH THE CITY'S COMPREHENSIVE PLAN SHOULD BE DISMISSED.

The first of the two legal arguments in Count I is that the Initiative Ordinance is a "land development regulation" that is purportedly inconsistent with the City's Comprehensive Plan.[5] Facts at ¶ 7. This argument should be dismissed because the Initiative Ordinance is not a "land development regulation" as that term is defined by Florida Statutes and case law. Moreover, even if the Initiative Ordinance was a "land development regulation" (which it is not), this claim should still be dismissed because the Court lacks jurisdiction to consider consistency challenges to land development regulations.

A. Count I fails to allege a cause of action for violation of section 163.3194(1)(b), Florida Statutes, because the Initiative Ordinance is not a "land development regulation."

The Complaint alleges that the Initiative Ordinance is a "land development regulation" which is inconsistent with City's Comprehensive Plan, in violation of section 163.3194(1)(b) (Complaint, ¶¶ 12-13). As shown above, the Initiative Ordinance cannot be a "land development regulation" because it does not regulate development, but instead provides administrative direction regarding how the City may use certain City-owned property. Furthermore, the Initiative Ordinance is not a "land development regulation" because it does not meet the statutory definition. The Florida Legislature has defined "land development regulation" as:

[5] The claim is simply false. Every zoning district in the City allows parks, park facilities, and utilities infrastructure, and the commercial zoning districts allow any City building, facility or use. *See 15h*Sec. 28-1305, City Code of Ordinances.

> an ordinance enacted by a local governing body for the regulation of any aspect of development, including a subdivision, building construction, landscaping, tree protection, or sign regulation or any other regulation concerning the development of land. This term shall include a general zoning code, but shall not include a zoning map, an action which results in zoning or rezoning of land[.]

§ 163.3213(2)(b), Fla. Stat. The Initiative Ordinance is not captured by the above definition. Further, the Initiative Ordinance is not a "land development regulation" because the Initiative Ordinance does not impose any legislative (or policy-setting) parameters on how property can be developed (nor on how private landowners may develop their own properties). A government "regulates" when it imposes rules on others; administrative or proprietary decisions (i.e., decisions which derive from one's interest as an owner or operator) are not "regulations."

B. Even if the Initiative Ordinance is a "land development regulation" (which it is not), the Complaint must be dismissed because this Court lacks jurisdiction to consider such a consistency challenge.

Should the Court conclude that the Initiative Ordinance is a "land development regulation" (which it should not), section 163.3213, Florida Statutes, prescribes that any claim that a land development regulation is inconsistent with an adopted comprehensive plan must be brought in an administrative proceeding before an administrative law judge. Such an administrative proceeding is the sole proceeding available to challenge consistency. The statutory-directive could not be clearer:

> An administrative proceeding under this section **shall** be the **sole proceeding** available to challenge the consistency of a land development regulation with a comprehensive plan adopted under this part."[6]

[6] Plaintiff does not allege, let alone provide a single reason why the mandatory procedure for administrative review of land development regulations that are alleged to be inconsistent with the local comprehensive plan outlined in section 163.3213 is inapplicable. *See South Lake Worth Inlet Distr. v. Town of Ocean Ridge*, 633 So. 2d 79, 90 (Fla. 4th DCA 1994) (stating that when "the legislature decides in an enactment to infuse an executive department with primary jurisdiction to regulate a specific subject, . . . special expertise is required . . . [.] It would effectively nullify our lawmakers' policy decision if . . . parties could simply reject the statutorily imposed responsibility and instead have the courts make the determinations that have been given exclusively to the executive to make").

§163.3213(7), Fla. Stat. (emphasis added). The plain language of the statute establishes jurisdiction for such an action before an administrative law judge pursuant to chapter 120, clearly divesting the circuit court of jurisdiction. The Court should follow the Fourth District's holding in *South Lake Worth Inlet Dist.* 633 So. 2d at 90, and conclude that the administrative law judge has "primary jurisdiction" over the consistency challenge to administratively determine whether "land development regulations" are consistent with a comprehensive plan. Therefore, even if the Initiative Ordinance is a "land development regulation" (which it is not), the Court does not have jurisdiction to hear Plaintiff's claim that the Initiative Ordinance is inconsistent with the City's Comprehensive Plan and such claim should be dismissed.[7]

IV. THE CLAIM THAT THE INITIATIVE ORDINANCE IS A "DEVELOPMENT ORDER" THAT WAS UNLAWFULLY PASSED BY INITIATIVE/REFERENDUM SHOULD BE DISMISSED.

The second of the two legal arguments in Count I is that the Initiative Ordinance is a "development order" and therefore cannot be adopted through the initiative/referendum process. The Plaintiff argues that by adopting the Initiative Ordinance through the process of initiative (directing that certain City-owned lands will only be used for public recreation and other specified public uses), the City violated section 163.3167(8) (which prohibits "[a]n initiative or referendum process in regard to any development order"). Facts at ¶ 8. This claim, which is factually inconsistent with the claim that the Initiative Ordinance is a "land development regulation," should be dismissed because the Initiative Ordinance is not a "development order." Even if the Initiative Ordinance is a "development order" (which it is not), and to the extent that

[7] Although it is beyond the purview of this Motion, it is important to note that the Initiative Ordinance is wholly consistent with the policy goals and objectives contained within the City's Comprehensive Plan. The City's Comprehensive Plan addresses a multitude of issues, including land use, recreation and open space, and infrastructure, which elements are read together to further the City's policy goals and objectives.

the Complaint may be read to allege that the Initiative Ordinance is a "development order" that is inconsistent with the City's Comprehensive Plan, such a claim would be time-barred.

A. Count I fails to allege a cause of action for violation of section 163.3167(8), Florida Statutes, because the Initiative Ordinance is not a "development order."

Section 163.3167(8) prohibits referenda regarding, *inter alia*, "development orders." Because the Initiative Ordinance is not a "development order," the claim should be dismissed.

As shown above, the Initiative Ordinance cannot be a "development order" because it does not concern development; rather it provides administrative direction regarding the City's use of certain City-owned property. In addition, the Initiative Ordinance is not a "development order" as defined by statute. Specifically, a "development order" is "any order, denying or granting with conditions an application for a development permit." § 163.3164(15), Fla. Stat. (emphasis added). A "development permit" is defined as "any building permit, zoning permit, subdivision approval, rezoning, … or any other official action of local government having the effect of permitting the development of land." §163.3164(16), Fla. Stat. (emphasis added). These statutory definitions require a "development order" to address a specific "application" to develop property (in the form of an "order" permitting or denying the requested development on a particular parcel of land).

None of these characteristics apply to the Initiative Ordinance. First, the Initiative Ordinance is not an "order," which is commonly defined as a "written direction or command delivered by a government official, esp. a court or judge." Black's Law Dictionary (10th ed. 2014). Second, it does not grant or deny any "application for a development permit," as there is no allegation that the Initiative Ordinance granted or denied any such application. Third, the Initiative Ordinance does not "permit the development of land" but instead instructs that certain City-owned land "shall only be used for public recreation, public boating access, public streets,

and city stormwater uses." Facts at ¶ 5 (emphasis added). Indeed, the Initiative Ordinance does not attach to "land" at all. It is simply a directive regarding how the City must/must not use certain City-owned lands while the City owns them. If the City acquires a new parcel that is "adjacent to the intracoastal waterway," then this administrative directive would control the City's use of such property; and if the City ceased to own such a parcel, the administrative directive would no longer have any meaning with respect to that parcel. This is not how development orders operate. Development orders "run with the land," and authorize, or restrict, specific development proposals regardless of ownership.[8]

Moreover, a development order is, by definition, specific to proposed development on a particular parcel of land and is, therefore, a site-specific approval. *See Snyder*, 627 So. 2d at 474 (concluding that an order issued by a city commission in response to an application by a "landowner seeking to rezone property" on a particular parcel was a "development order"). The Initiative Ordinance is not a site-specific development authorization and has no impact on private property owners and their "right to use [their] property subject only to government regulation" – the very right that the Fourth District has explained that section 163.3167(8), is intended to protect. *Preserve Palm Beach Political Action Comm. v. Town of Palm Beach*, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010) (holding that section 163.3167(8) "rightfully protects the small landowner from having to submit her development plans to the general public and ensures that those plans will be approved or not, instead. . . in a quasi-judicial process."). As in *City of Riviera Beach v. Riviera Beach Citizens Task Force*, 87 So. 3d 18, 20-24 (Fla. 4th DCA 2012), where the citizens of a city amended their charter to provide that the use of city-owned submerged lands "be limited to municipal park and recreational purposes," the Initiative

[8] This point is also applicable to land development regulations, which similarly touch and concern lands based upon the language of the regulation (such as lands within one zoning district). Land development regulations do not vary based upon ownership of land.

Ordinance is not "in regard to any development order or in regard to any local comprehensive plan amendment or map amendment;" therefore, "section 163.3167 is irrelevant."

City of Boca Raton v. Siml, 96 So. 3d 1140 (Fla. 4th DCA 2012), a case which considered a ballot initiative related to public lands, is also instructive. In *Siml*, the proposed ballot initiative stated that certain "public-owned lands owned by the City . . . shall be limited to public uses and public services." *Id.* at 1141. In concluding that the question was appropriate for initiative, the Court held, by implication, that an initiative restricting the use of public land, like the Initiative Ordinance, was not a regulation on land development, but rather an administrative directive regarding the use of City-owned land. Likewise, the Initiative Ordinance applies only to City-owned land (and simply directs that City-owned land be used for public recreation and other specified public purposes), it does not qualify as a "land development regulation" under the statute.

Based on the above arguments, because the Initiative Ordinance is not a "development order," the Initiative Ordinance is not prohibited by section 163.3167(8), and therefore Count I fails to state a cause of action for violation of that statutory provision.

B. Even if the Initiative Ordinance is a "development order" (which it is not) and the Complaint may be read to assert that it is inconsistent with the City's Comprehensive Plan, such a claim would be time-barred.

In one part of Count I, the Complaint alleges that the Initiative Ordinance is a "development order," while in another, it alleges that it is a "land development regulation" that is inconsistent with the City's Comprehensive Plan. Facts at ¶¶ 6-9. The Complaint does not, however, allege that the Initiative Ordinance is a "development order" that is inconsistent with the City's Comprehensive Plan in violation of section 163.3215, Florida Statutes. The reason is clear. If the Complaint were to make this allegation, it would be dismissed because it is time-

barred. Section 163.3215 provides "the exclusive methods for an aggrieved party or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan adopted under this part." Under that statute, any de novo action by an aggrieved or adversely affected party "must be filed no later than 30 days following rendition of a development order." § 163.3215(3)-(4), Fla. Stat. A development order is "rendered" when it is entered by the City Clerk. *See 5220 Biscayne Blvd., LLC v. Stebbins*, 837 So. 2d 1189, 1190 (Fla. 3d DCA 2006).

Should the Court conclude that the Initiative Ordinance is a development order (which it should not), its rendition date would presumably be the election date (or, the date of the supervisor of elections' certification of the election results). The election took place on November 8, 2016, and the election results (including the Initiative Ordinance) were certified by the Palm Beach County Supervisor of Elections on November 21, 2016 (a fact of which this Court may take judicial notice). Plaintiff did not file the Complaint until January 9, 2017, well over thirty days after either date. Accordingly, any claim that the Initiative Ordinance is a "development order" that is inconsistent with the City's Comprehensive Plan is time-barred and should be dismissed with prejudice.

V. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILS TO ESTABLISH THAT IT HAS STANDING.

Plaintiff's declaratory judgment action is predicated wholly on two arguments which each posit, in different ways, that the City is violating rights shared by all citizens: (i) by allegedly adopting a land development regulation that is not consistent with the City's Comprehensive Plan; and (ii) by allowing the Initiative Ordinance, an alleged "development order," to be adopted by an initiative/referendum process in violation of State law. *See* Facts at ¶¶ 6-9. Plaintiff does not have standing to assert either challenge. The Plaintiff does not have

standing to challenge an administrative directive adopted by City voters to provide for public recreation and other specified public uses on certain City-owned lands. This is so because Plaintiff has not suffered any special injury. Also, even if the Initiative Ordinance is a "land development regulation" (which it is not) or a "development order" (which it is not), the Complaint must still be dismissed because Plaintiff lacks standing to raise either of these claims.

A. The Complaint fails to allege that Plaintiff has suffered a special injury providing it with standing to challenge the Initiative Ordinance's consistency with the City's comprehensive plan or the process used to enact the Initiative Ordinance.

To establish standing, Plaintiff must allege that it has "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Elston/Leetsdale, LLC v. CWCapital Asset Mgmt. LLC*, 87 So. 3d 14, 16 (Fla. 4th DCA 2012). Moreover, because Plaintiff is a private plaintiff seeking to enforce a public right, it may only establish standing if it alleges that it "will suffer a [s]pecial injury" or that it "has a [s]pecial interest in the outcome of this action. In order to maintain this kind of action . . . it is well settled that a plaintiff must allege that his injury would be different in degree and kind from that suffered by the community at large." *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9, 12 (Fla. 1974) (quoting *Sarasota County Anglers Club, Inc. v. Burns*, 193 So. 2d 691 (Fla. 1st DCA 1967)); *see also Herbits v. City of Miami*, 41 Fla. L. Weekly D2408 (Fla. 3d DCA Oct. 26, 2016) ("[T]he Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers.") (citation omitted).[9]

[9] For example, in *Burns*, a county anglers club and a private citizen challenged the dredging and filling of bottom lands owned by the county. 193 So. 2d at 629. The First District affirmed an order dismissing the complaint because plaintiffs "failed to show in what manner

The Complaint contains no allegation that Plaintiff will suffer any kind of special injury as a result of the Initiative Ordinance or that the Initiative Ordinance violates the Florida Constitution. Furthermore, based on the Complaint, the Plaintiff cannot allege a special injury sufficient to establish standing. Importantly, Plaintiff admits that the alleged restrictions on their "land use rights" are no different from those that will be allegedly suffered by "any entity using the land subject to City Ordinance 28-1308." Compl. at ¶ 21. These vague, conclusory allegations are indistinguishable from inadequate standing allegations in similar cases. *See Solares v. City of Miami*, 166 So. 3d 887, 887 (Fla. 3d DCA 2015) (holding that a citizen-activist did not have standing to challenge a city's allegedly unlawful lease of public lands because the plaintiff admitted that "she had no special injury, different from the injury to other citizens or taxpayers, and that her claim was not based on the violation of a provision of the Constitution that governs the taxing and spending powers"); *Burns*, 193 So. 2d at 692 (affirming dismissal of a complaint alleging that public's right to enjoy public lands was violated because of an organization's failure to allege a special injury different from that suffered by the general public). Since Plaintiff does not allege that it will suffer any concrete injury as a result of the Initiative Ordinance, let alone the "special injury" that is required for a private plaintiff to enforce a public right, the Complaint should be dismissed for lack of standing.

B. Plaintiff does not have standing even under the more liberal standard applicable in administrative proceedings.

Even under the more liberal standing rules applicable in administrative consistency challenges, the Court must still conclude that the Complaint contains insufficient allegations to establish that Plaintiff has standing to bring this cause of action. Section 162.3213 authorizes the

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they have been damaged as private citizens differing in kind from the general public and therefore have no right to sue." *Id*. at 693.

filing of an action by any "substantially affected person" who wishes to "challenge a land development regulation on the basis that it is inconsistent with the local comprehensive plan[.]" Under the "substantially affected" test, a Plaintiff must show: "(1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture." *Office of Ins. Reg. & Fin. Servs. Comm'n v. Secure Enters., LLC*, 124 So. 3d 332, 336 (Fla. 1st DCA 2013) (citations omitted).

The Complaint does not contain allegations sufficient to confer standing on Plaintiff even under the more expansive "substantially affected" test. The Complaint contains no factual allegations establishing that Plaintiff, a not-for-profit organization with its principal place of business in Tallahassee, Florida, possesses "land use rights" of any kind; nor does it allege how such rights, if they exist, might be affected by the Initiative Ordinance – again, the Initiative Ordinance only affects City-owned lands and directs those lands be used for public recreation and other specified public purposes. Plaintiff's allegations are that it is an organization committed to "protecting <u>private</u> property rights in Boca Raton." Facts at ¶ 2 (emphasis added).

In short, the Complaint contains no factual allegations demonstrating why the Initiative Ordinance "will result in a real or immediate injury in fact" to Plaintiff; instead, the injuries alleged are based on "pure speculation or conjecture." *See Secure Enters.*, 124 So. 3d at 336-39. Similarly, because the Complaint contains no allegations or factual basis for how the Initiative Ordinance affects Plaintiff's "land use rights," Plaintiff also fails to establish that its "alleged interest is within the zone of interest to be protected or regulated" by the Initiative Ordinance. *Id*. at 336, 339-40. Accordingly, even under the "substantially affected" test for standing in

section 162.3213, Plaintiff still lacks standing to challenge the Initiative Ordinance as inconsistent with the City's Comprehensive Plan (and would similarly lack standing under this more liberal standard to challenge the Initiative Ordinance as violative of section 163.3167(8)).

CONCLUSION

As demonstrated above, neither of the legal arguments in Count I state a cause of action upon which relief can be granted. The Initiative Ordinance is an administrative directive regarding the City's use of certain City-owned lands for public recreation or other specified public uses and is not subject to chapter 163. Moreover, even if the Initiative Ordinance is considered a "land development regulation" or a "development order," the legal claims Plaintiff advances are either jurisdictionally barred or time-barred. Finally, the Complaint is subject to dismissal because Plaintiff lacks standing.

WHEREFORE, for the foregoing reasons, the City respectfully requests that that Court enter an order dismissing the Complaint with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via E-Mail via State Court E-Portal on the 30th day of January, 2017 to: **Gerald F. Richman, Esq.** and **Adam M. Myron, Esq.** (grichman@richmangreer.com; amyron@richmangreer.com), Richman Greer, P.A., One Clearlake Centre, Suite 1504, 250 Australian Avenue South, West Palm Beach, FL 33401, *Attorneys for Plaintiff*.

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