IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

JENNIFER MCCOY PARKER,
and LINDA C. HEIN,

Plaintiffs,

v. Case No.: 2016-CA-004641

The CITY OF MADEIRA BEACH, a Municipal Government of the State of Florida,

Defendant.
_____/

MEMORANDUM OF LAW IN OPPOSITION TO
MOTION TO INTERVENE AS INDISPENSABLE PARTIES

Plaintiffs, JENNIFER MCCOY PARKER and LINDA C. HEIN, file this memorandum to oppose the Motion to Intervene filed by M.H.H ENTERPRISES, INC. and C & T ENTERPRISES, INC. (collectively, "INTERVENORS"), and in support thereof state as follows:

Introduction

INTERVENORS have sought to intervene in this case for the sole purpose of moving to disqualify the undersigned firm from representing Plaintiffs. This point is evident from the fact that INTERVENORS have made the far reaching, borderline frivolous argument, that they are indispensable parties to an action seeking to declare CITY OF MADEIRA BEACH (the "CITY") ordinances void. Despite the fact that case law on point dispels such a notion, procedural rules force INTERVENORS to argue against well-established case law. If INTERVENORS are not indispensable, then they must take the case as they find it, and are prevented from filing motions to disqualify counsel. Instead of using the Rules Regulating the Florida Bar to protect itself, INTERVENORS seek to join the action wielding the sword of an alleged prohibited conflict of

interest to force Plaintiffs to find new counsel. This Court should prevent INTERVENORS from using the intervention procedure for such improper purposes and find that INTERVENORS are not indispensable parties.

Procedural History

Plaintiffs initiated this action by filing a three count Complaint against the CITY which seeks to void two ordinances and two related development agreements. The ordinances at issue are Ordinance 2015-18 and Ordinance 2016-01. These ordinances rezone property owned by the INTERVENORS. The ordinances were eventually adopted by the CITY, but the enactment of the ordinances were subject to development agreements being entered into between the CITY and the INTERVENORS.

The Complaint alleges three bases for why the ordinances and associated development agreements should be void. Count I of the Complaint is a statutory cause of action under Fla. Stat. § 163.3215 that alleges the ordinances are void because they are inconsistent with the CITY's Comprehensive Plan. Count II is a declaratory judgment action that alleges the ordinances are void for failure to properly advertise the public hearings that were held to consider whether the ordinances should be adopted. Count III of the Complaint is a declaratory judgment action that alleges the ordinances are void for failure of the CITY to comply with its own ordinances that require a certain procedure be followed when enacting ordinances of the type at issue.

Approximately two weeks after the Complaint was filed, INTERVENORS filed their Motion to Intervene as Indispensable Parties. The motion argues that INTERVENORS are indispensable parties because "[i]f the rezoning ordinance is found to be invalid and/or void *ab initio*, as the Plaintiffs request, Intervenors will be unable to develop the Property for commercial and residential use." (Motion to Intervene; ¶ 15). INTERVENORS did not argue any other reason for why they

should be considered indispensable parties past this single sentence. Recognizing that a typical intervening party takes the case in subordination to and subject to the rights of the main parties, the INTERVENORS argue that they are indispensable parties so that they may file motions and take positions that only main parties may take. Thus, subsequent to the Motion to Intervene, INTERVENORS filed a verified motion to disqualify the undersigned firm from representing Plaintiffs.

Argument

Intervenors Are Not Indispensable Parties

Fla. R. Civ. P. 1.230 states that "[a]nyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion." This rule is different where the party seeking to intervene is an indisputable party. *Al Packer, Inc. v. First Union National Bank of Florida*, 650 So. 2d 165, 166 (Fla. 3d DCA 1995). When an indispensable party seeks to intervene, it occupies the same status as the main parties to the action and has the same privileges of filing motions and raising defenses as the main parties. *Id*.

"An indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action." *Florida Dept. of Revenue v. Cummings*, 930 So. 2d 604 (Fla. 2006). Indispensable parties are so essential to a suit that no final decision can be rendered without their joinder. *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 n. 3 (Fla. 1984).

When challenges are raised to the correctness of a local government's action involving the development of land, the property owner that stands to gain by the local government's action is not an indispensable party. *See Let Miami Beach Decide v. City of Miami Beach*, 120 So. 3d 1282 (Fla.

2013). In *Let Miami Beach Decide*, a Political Committee introduced an amendment to the City of Miami Beach's charter which would require a higher amount of voter approval (60% instead of 50%) before the City could enter into a certain type of lease. *Id*. at 1285. The amendment was put on the City's ballot for a vote, but the City made an addition to the ballot language introduced by the Political Committee. *Id*. at 1286. The Political Committee objected, and after the amendment ultimately passed, the City sued the Political Committee and sought a declaration that the ballot language was not confusing, and thus valid. *Id*. The Political Committee then filed a counter claim alleging that a second item on the ballot was not valid because of procedural reasons. *Id*. The second item attacked by the Political Committee was to decide whether to approve a lease between the City and a company called SBACE. *Id*. SBACE then intervened in the trial court to raise the defense never previously raised by the City, that the Political Committee lacked standing. *Id*. at 1288. After losing at the trial level for lack of standing to bring a counter claim, the Political Committee appealed. *Id*. at 1287.

The Third District Court of Appeal reversed the trial court because it found that SBACE was not an indispensable party that is allowed to intervene and raise a defense of lack of standing. *Id*. at 1288. As an intervenor, the Court ruled that SBACE had to take the case as it found it because the intervention was in subordination to, and in recognition of, the propriety of the main proceeding. *Id*. The Third District recognized the indispensable party exception to the rule, however, it ruled that such exception did not apply because the legality of two ballot provisions could be resolved whether SBACE was a party to the action or not. *Id*. SBACE's status as property owner and beneficiary of the challenged ballot item had not consequence on the appellate court's decision.

Other Florida cases have also ruled that property owners are not indispensable parties in writ of certiorari proceedings to challenge the enactment of zoning regulations. In *The City of St. Petersburg v. Marelli*, 728 So. 2d 1197 (Fla. 2d DCA 1999), a company that owned a laundromat

requested a variance for its property to allow it to have less than the required numbered of parking spaces. After the City approved the variance, the neighbors of the laundromat petitioned for a writ of certiorari to the Circuit Court. *Id*. at 1198. The Circuit Court found that the City's approval was not supported by competent, substantial evidence. *Id*. The City appealed, arguing in part that the Circuit Court erred because the neighbors failed to join the actual property owners that requested the variance. *Id*. Rejecting the argument, the Second District cited to a decision of the Florida Supreme Court that ruled that a party challenging an administrative action concerning a zoning change does not need to join the affected property owner. *Id*. (*citing to Brigham v. Dade County*, 305 So. 2d 756 (Fla. 1975)); *see also Concerned Citizens of Bayshore Community, Inc. v. Lee*, 923 So. 2d 521 (Fla. 2d DCA 2005) (ruling that, in a suit brought by a citizen group against a local government to void local government's decision to rezone property, the property owner of the rezoned property is not an indispensable party to review the local government's rezoning actions).

Similar to the above cited cases, INTERVENORS simply own property that is being rezoned by the ordinances. The causes of action as pled can easily be decided without need for INTERVENORS presence in the lawsuit. In the Motion to Intervene, INTERVENORS seem to lump all three of the causes of action in the Complaint together. Instead of giving such a cursory review to Plaintiffs' Complaint, this Court should review each of the three specific causes of action brought.

Count I of Plaintiffs' Complaint is a statutory cause of action that alleges the rezoning ordiances to be inconsistent with the CITY's Comprehensive Plan. The very statute which Plaintiffs have sued under does not require any person other than the local government to be joined as a party. Subsections (3) and (4) of Fla. Stat. § 163.3215(1) "provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency of a development order with a comprehensive plan adopted under this part." The same subsection then goes on to state that "[t]he

local government that issues the development order is to be named as a respondent in all proceedings under this section." Nowhere in the statute does the legislature require property owners to be joined. While it is true that INTERVENORS will be prohibited from developing its land if Plaintiffs were to ultimately prevail in the case, the inquiry required by Count I is very simple: whether the ordinances are consistent with a comprehensive plan.

Similarly, Count II only involves a challenge to the advertising procedures the CITY is required to follow in giving notice of local hearings on proposed rezoning ordinances. Such a cause of action can be disposed of simply by reviewing newspaper advertisements used by the CITY and determining whether the advertisements contain the substantive elements required under the CITY's local code.

Finally, Count III also involves an allegation that the CITY did not follow its own procedural requirements for enacting the rezoning ordinances. On this Count, the Complaint alleged that the CITY did not follow its own local codes by:

A. Failing to require a complete application;
B. Failing to approve a site plan prior to considering rezoning;
C. Failing to review the plans, drawings and schematics for the proposed development plan in detail;
D. Failing to make the plans, schematics, and conditions of the planned development part of the development order for the project;
E. Failing to state with specificity in the development order the development plan approved by the board of commissioners.

(Complaint; ¶ 36).

As with Counts I and II, the determination on Count III can be made by opening up the CITY's code of ordinances, reviewing the actions taken by the CITY, and deciding whether the CITY followed its own rules. Simply put, the INTERVENORS have nothing to add to such basic inquiries and this Court is well equipped to make the necessary findings without the presence of INTERVENORS.

Intervenors Are Using the Rules on Conflicts of Interest for an Improper Purpose

After a review of case law on intervention and indispensable parties is made, it becomes quite apparent that INTEVERNORS are only inputting themselves in the case to attempt to disqualify the undersigned firm. For purposes of clarity, it should be noted that INTERVENORS are not claiming that the undersigned firm is prevented from representing Plaintiffs because of a conflict with the CITY. Instead, INTERVENORS claim a conflict between themselves and the undersigned.

Disqualification of a party's counsel is an extraordinary remedy and should be resorted to sparingly." *Kaplan v. Divosta Homes, L.P.*, 20 So.3d 459, 461 (Fla. 2d DCA 2009). "Motions for disqualification are generally viewed with skepticism because disqualification of counsel impinges on a party's right to employ a layer of choice, *and such motions are often interposed for tactical purposes*." *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608 (Fla. 4th DCA 2004) (emphasis supplied); *see also Manning v. Waring, Cox, James, Sklar & Allen,* 849 F.2d 222, 224 (6th Cir.1988) (observing that "the ability to deny one's opponent the services of capable counsel, is a potent weapon").

If INTERVENORS joined the action as indispensable parties, the Motion to Disqualify is the only substantive motion that they could bring without either raising the same exact defenses that the CITY would raise or being the fallback party to make arguments and defenses the CITY fails to make (similar to what SBACE attempted in *Let Miami Beach Decide*). Thus, INTERVENORS have nothing of substance to add to this case and its sole purpose in intervening can only be to disqualify the undersigned firm.

Conclusion

This Court should find that INTERVENORS are not indispensable parties and strike their Motion to Disqualify Counsel.

CERTIFICATE OF SERVICE

I certify that I have filed this Memorandum on August 15, 2016 using Florida's E-Filing Portal, which will electronically serve a copy on William S. Galvano, Esq. of Grimes, Goebel, Grimes, Hawkins, Gladfelter & Galvano, P.L., 10230 Manatee Ave. W., Bradenton, FL 34205 at wgeservice@grimesgoebel.com and kmorrissey@grimesgoebel.com; and also on Andrew J. Salzman, Esq. of Unice, Salman, Jensen, P.A., 1815 Little Road, Trinity, FL 34655 at service@unicesalzman.com and mbocook@unicesalzman.com.

/s/*Paul M. Crochet*
Timothy W. Weber, Esq.
FBN: 086789
timothy.weber@webercrabb.com
lisa.willis@webercrabb.com
Paul M. Crochet, Esq.
FBN: 111942
Weber, Crabb & Wein, P.A.
Wittner Centre Office Building
5999 Central Avenue, #203
St. Petersburg, FL 33710
Phone No. (727) 828-9919
Fax No. (727) 828-9924

and

Kenneth L. Weiss, Esq.
FBN: 0159021
kweiss1@tampabay.rr.com
11085 – 9th Street E.
Treasure Island, FL 33706
Telephone: 727-415-3672
Attorneys for Plaintiffs