CLARK PARTINGTON HART
LARRY BOND & STACKHOUSE

ATTORNEYS AT LAW

Pensacola • Destin

Kenneth B. Bell
Direct (850) 208-7025
kenbell@cphlaw.com

December 23, 2010

Jeffrey Klatzkow, Esq.
Jacqueline Hubbard, Esq.
OFFICE OF THE COUNTY ATTORNEY
3299 Eat Tamiami Trail, Ste. 800
Naples, FL 34112
Attorney for Collier County

Michael Pettit, Esq.
CHEFFY PASSIDOMO, P.A.
821 5th Avenue South
Naples, FL 34102
Attorney for Eastern Collier County Property Owners

RE: Collier County v Eastern Collier County Property Owners
Our File No. 10-1218

Dear Counsel:

It has been an honor and pleasure to serve as your arbitrator. As counsel, you both served your clients very well.

Enclosed you will find my decision on the very narrow issue presented. If I need to clarify my decision in any way, please let me know.

I deeply appreciate you selecting me to help you address this narrow but important issue.

Sincerely,

Kenneth B. Bell

KBB/rap
Enclosures
A0777634.DOC

IN AND FOR COLLIER COUNTY, FLORIDA
(VOLUNTARY NONBINDNIG ARBITRATION)

ARBITRATOR'S DECISION
(December 24, 2010)

Issue Presented (restated): Does the creation or amendment of a Stewardship Receiving Area (SRA) in a Development of Regional Impact in the Rural Land Stewardship Area (RLSA) require an affirmative vote of three (3) or four (4) members of the Collier County's Board of County Commissioners ("the Board")?

Abstract of Decision: The designation or amendment of an SRA in a DRI in the RLSA requires an affirmative vote of a simple majority of the Board members. No special act or ordinance provides otherwise. *Ord. Sec. 2-36(f)-(g).* The SRA designation (or amendment) is not a supplement or amendment of the regulations and districts fixed by the Land Development Code ("the LDC"). Instead, the SRA designation (or amendment) simply specifies the area within the RLSA where the land uses permissible in an SRA may be enjoyed. Therefore, the four-fifths (4/5s) affirmative vote mandated by Sec. 11 of Chapter 67-1246 is inapplicable. The LDC itself does not require a four-fifths (4/5s) vote.

I. The Pith of the Parties' Positions

A. Collier County: The creation or amendment of an SRA is **"a zoning action."** As a zoning action, both the Special Act, Ch. 67-1246, Laws of Florida, as amended ("The 1967 Special Act"), and the Collier County Land Development Code ("the LDC") require a four-fifths affirmative vote of the Board. At a minimum, the establishment of an SRA is a supplement to the existing RLSA Zoning Overlay District, as well as the creation of a new zoning district, thus requiring a four-fifths affirmative vote.

B. Eastern Collier Property Owners: The designation or amendment of a Stewardship Receiving Area within a previously created RLSA Zoning District is **not "a change in a zoning ordinance."** It does not change either (a) the zoning ordinance that created the RLSA Zoning District or (b) the regulations and districts fixed by the LDC. Therefore, the super-majority requirement in The 1967 Special Act is inapplicable. The LDC itself does not

require a four-fifths (4/5s) vote. With no applicable law or ordinance specifying a super-majority vote, an affirmative vote of three (3) members of the Board is required.

II. Relevant Findings of Fact and Law

By local ordinance, a majority of the Board constitutes a quorum; and, generally, if there is a quorum, an affirmative vote of a majority of the Board's members present is required for it to act. A four-fifths (4/5s) vote of the full membership of the Board is only necessary when "a general law, special law, ordinance, or as specified by resolution adopted by a majority of the full membership of the BOCC so requires. *Collier County Code of Ordinances Sec. 2-36(f)-(g).*[1] The County relies upon Section 11 of The 1967 Special Act and the LDC as the special law and the requiring four affirmative votes of the Board. These two enactments will be briefly addressed.

A. The 1967 Special Act and an SRA Designation

The cornerstone of the County's position is that Section 11 of The 1967 Special Act mandates a four-fifths (4/5s) vote when an SRA is designated with the RLSA Zoning Overlay District. As the County writes it, this special law "is the controlling legislation on this issue presented."

Section 11 of The 1967 Special Act (as amended) provides:

---

[1] Collier County Code of Ordinances Sections 2-36 (f) and (g) provides:

> *(f)* *Quorum.* A majority of the Board shall constitute a quorum. No resolution, legally binding document or motion shall be adopted by the Board without the affirmative vote of the majority of all members present.
>
> *(g)* *Super-Majority Exception.* Whenever provided by general law, special law, ordinance, or as specified by resolution adopted by a majority of the full membership of the Board, and notwithstanding subsection (f), a motion, ordinance, legally binding document or resolution may be required to be adopted by an affirmative vote of four-fifths (4/5) of the full membership of the Board.

"Section 11. **Supplementing and amending the zoning ordinance. The governing body may from time to time amend or supplement the regulations and districts fixed by any zoning ordinance adopted pursuant to this act.** Proposed changes may be suggested by the governing body, by the planning commission, by the hearing examiner, or by petition of the owners of fifty per cent (50%) or more of the area involved in the proposed change. In the latter case, the petitioner or petitioners may be required to assume the cost of public notice and other costs incidental to the hearings.

The planning commission, regardless of the source of the proposal for change, shall hold a public hearing or hearings thereon, with due public notice, and submit its recommendation on the proposed change to the governing body, except that **the county planning commission may only render recommendations for those proposed changes which pertain to the county and which would change the actual list of permitted, conditional, or prohibited uses within a zoning category, or otherwise would alter or amend provisions of the county's codified land development regulations.** The governing body shall hold a public hearing or hearings thereon, and shall act on the recommendation. ***No change in the zoning ordinance*** **shall become effective except by an affirmative vote of four fifths (4/5's) of the full membership of the governing body."** (Emphasis added). *Laws of Fla. Ch. 67-1246, 5C 11; Laws of Fla. Ch. 2001-344, §1.*

The plain, unambiguous language of this special law provides the following:

1. The Board may from time to time supplement or amend **"the regulations and districts fixed by a zoning ordinance** adopted pursuant to" the Special Act;

2. The Board, the planning commission or, by petition, at least 50% of the owners in the area involved may propose such an amendment or supplementation;

3. The planning commission must hold public hearings on the proposed changes and submit its recommendations to the Board;

4. The only **changes** the planning commission may recommend to the Board are those **that "would change the actual list of permitted, conditional, or prohibited uses within a zoning category, or otherwise would alter or amend provisions of the county's codified land development regulations;**

5. The planning commission's recommendations must be presented to the Board for action; and,

6. No change **in the zoning ordinance** is effective without an affirmative

four-fifths (4/5's) vote of the full membership of the Board.

The four-fifths (4/5's) affirmative vote mandated by Section 11 is not directed to "zoning actions," as the County argues. Instead, the act speaks to changes to the zoning ordinance itself. Specifically, the act speaks to supplements or additions to "the regulations and districts fixed by a zoning ordinance." The act refines its intended scope by defining what changes to the zoning ordinance the planning commission can recommend to the Board. These recommended changes to a zoning ordinance are limited to those supplementations or amendments that **"change the actual list of permitted, conditional, or prohibited uses within a zoning category or otherwise would alter or amend provisions of the county's codified land development regulations."**

Because Section 11 speaks to changes in the zoning ordinance, not "zoning actions," the question that must be answered is whether or not an SRA designation (or amendment) within an existing RLSA Zoning Overlay District constitutes such a change in the LDC itself. The question is not whether the SRA designation (or amendment) is a "zoning action."

This distinction between a legislative-type action that changes the zoning ordinance itself and the implementation of an existing ordinance is pivotal to deciding the issue presented. The County does not argue that the SRA designation actually alters or changes the existing LDC (except for the argument related to changes in the atlas discussed later). It's position is that "the establishment of an SRA, which resulted in the creation of an entire town, is at the very minimum a supplement to the existing RSLA Overlay District, as well as the creation of a new zoning district," thus requiring a four-fifths (4/5s) vote under The 1967 Special Act.

Because Section 11 speaks to changes to the LDC itself and not "zoning actions," the County's argument fails. Clearly, the SRA designation in the RLSA does not alter or change any

regulation or zoning district of the LDC. The SRA designation simply implements the "RLSA Program" regulations within the existing RLSA Zoning Overlay District.

The LDC's use of the term "designation" when referencing the establishment of an SRA (or SSA) is instructive. To "designate" simply means "to indicate or specify."[2] In the context of the RLSA Program, the SRA designation is simply the implementation of the RLSA Program by specifying the particular area within the existing RLSA Zoning Overlay District where the exhaustively detailed permissive uses within an SRA are officially sanctioned. State otherwise, no regulation or zoning district fixed by the LDC is created, supplemented or amended when an SRA is designated. Instead, a land use already allowed within the RSLA Zoning Overlay District is sanctioned by the designation.

To elaborate, the RSLA Zoning Overlay District regulations encompass two types of land uses, including the SRA designation. As Sec. 4.08.02 (Establishment of land uses allowed in the RLSA District) provides:

> "Land uses allowed within the RLSA District are of two types: those allowed in the baseline standards prior to designation of SSAs and SRAs, **and** those uses provided in SSAs and SRAs after designation." (Emphasis added).

As stated, the SRA (and SSA) uses are land uses allowed by the LDC within the unique RLSA Zoning Overlay District. The land uses allowed in an SRA (and SSA) simply must be designated by the Board before they can be enjoyed.

To summarize, because the land uses allowed within the existing RLSA District expressly include "the uses provided in . . . SRAs after designation," the Board's designation or amendment of an SRA within a previously created RLSA Zoning District is not a change in the

---

[2] American Heritage Dictionary 386 (2nd College Edition 1976)

zoning ordinance within the meaning of Section 11 of the 1967 Special Act. The SRA (and SSA) designation does not "supplement or add to the regulations and districts fixed by" the LDC. This designation does not (1) change the actual list of permitted, conditional, or prohibited uses within the RLSA Zoning District, or (2) otherwise alter or amend provisions of the county's codified land development regulations. Consequently, the four-fifths (4/5's) affirmative vote requirement in Section 11 of The 1967 Special Act is inapplicable to an SRA designation that is consistent with the extensive regulations within the RLSA portion of the LDC.

B. <u>The LDC</u>

The County's secondary argument is that the LDC itself requires an affirmative vote of four members of the Board.

No express provision of the LDC requires a four-fifths (4/5s) affirmative vote of the Board when it designates an SRA in the RLSA Zoning Overlay District. SSAs are expressly designated by a simple majority vote of the Board. But, the LDC is silent on the number of votes required to designate an SRA.

With no express provision mandating a four-fifths (4/5s) affirmative vote to designate an SRA, the County argues that the mandate to reflect the SRA designation on the Official Zoning Atlas is a zoning change that requires a four-fifths vote. Its reasoning is:

1. LDC Sec. 2.7.2, which deals with zoning amendments, provides that "(t)his zoning code and the official zoning atlas may, from time to time, be amended, supplemented, changed or repealed;

2. According to LDC Sec. 2.7.2.10.1, ". . . all proposed changes or amendments . . . shall not be adopted except by the affirmative vote of four members of the " Board. And, this

phrase "all proposed changes or amendments" includes all required changes or amendments to the official zoning atlas;

3. When the SRA designation process was first adopted as Sec. 2.2.27.10, subsection F required that "following the approval of the SRA, the county shall update the official zoning atlas to reflect the designation of the SRA"; and,

4. Both the SRA and the SSA designations require an amendment to the official zoning atlas. LDC Sec. 47.08.07.F.3. However, the SSA is expressly achieved by a majority vote while the SRA designation is silent on the number of votes required; therefore,

5. "Since the SRA designation expressly provides for the amendment of the official zoning map, but (unlike the SSA designation) is silent as to the number of votes, *ergo* Sec. 2.7.2.10.1 applies and the SRA designation requires the affirmative vote of four members of the Board of County Commissioners."

This reasoning is not persuasive. The fact that the official zoning atlas is updated after designation to add "SRA" (or SSA or DRI) and the LDC is silent on the number of votes needed to designate an SRA, does not yield a mandate in the LDC that the SRA designation itself must be by a four-fifths (4/5s) vote.[3] As the Eastern Collier Property Owners note, neither "SRA" nor "DRI" are defined in the LDC as distinct zoning districts or zoning categories. The zoning district for an SRA (and SSA) remains RLSA after designation and, in fact, the notation on the atlas remains RLSA. The SSA, SRA or DRI designations are simply additional notations to the pre-existing RLSA Zoning Overlay District.

Finally, the custom and practice of the County belies its own argument. Board

[3] Indeed, the atlas denotes numerous items unrelated to LDC zoning districts or categories. It denotes wind and flood zones as established by FEMA, Areas of Critical Concern established by the Florida Legislature, Airport Noise Boundaries, Corridor management areas, etc.

ordinances rezoning property state in their titles that the rezoning approval requires an amendment to the atlas map reflecting the change in the zoning category. Yet, the two resolutions approving the one SRA designated to date do not have the terms of art used to approve an amendment to a zoning ordinance or a change to the atlas to reflect a rezone. Instead, both SRA resolutions approve designation based on application of the RLSA zoning criteria without referencing any zoning change or atlas amendment.

C. **Additional Findings**

Though the above text-based discussion is sufficient to decide the issue presented, additional findings will be noted to provide relevant context for this decision.

On October 22, 2002, the County adopted Ordinance 2002-54. This ordinance amended the County's Growth Management Plan ("RLSA GMP Amendment"). Among other things, the RLSA GMP Amendment modified the Future Land Use Element of the Collier County Growth Management Plan to establish the Rural Lands Stewardship Area Overlay and Goals, Objectives and Policies, and provided for the creation of Stewardship Sending Areas (SSA's) and Stewardship Receiving Areas (SRA's).

In the summer of 2003, the Board adopted Ordinance 2003-27 which implemented the RLSA GMP Amendment by amending the Collier County Land Development Code (hereinafter referred to as the "RLSA LDC Amendment"). It was this ordinance that created the "Rural Land Stewardship Area (RLSA) Zoning Overlay District" (the RLSA Zoning Overlay District). This ordinance was a true change in a zoning ordinance as contemplated by The 1967 Special Act. So, it was properly adopted by a four-fifths (4/5s) vote of the Board. And, in order to become effective, this ordinance was filed with the Department of State, as

required for all zoning ordinances.[4] In the 2004 re-codification of the LDC, the Rural Land Stewardship Area Overlay was moved from Section 2.2.27 of the LDC entitled "Zoning" to Section 4.08.00 of the LDC entitled, "Rural Lands Stewardship Area Zoning Overlay District Standards and Procedures."

The RLSA GMP Amendment and the RLSA LDC Amendment regulations established a sophisticated mechanism for the creation and transfer of development rights. Simply put, a land owner in the RLSA can strip off layers of development rights from a defined area within the RLSA, leaving only conservation and agricultural uses through the recordation of a restrictive easement. In exchange, the land owner receives stewardship credits. This area stripped of its development rights is known as a Stewardship Sending Area ("SSA"). The stewardship credits created by the SSA designation may be transferred to other properties in the RLSA. This transfer is accomplished when the Board designates a Stewardship Receiving Area ("SRA"). The SRA designation allows for a higher density and intensity of uses, thereby avoiding urban sprawl and protecting the environment, sensitive lands and endangered wildlife. Both the SSA and the SRA designation processes require public hearings and culminate with the Board's designation. And, as noted earlier, the designation of an SSA is expressly achieved by a simple majority vote of the Board. Through an apparent drafting oversight, the vote required by the Board for designation of an SRA is not stated.

Those most intimately involved in crafting the RLSA Program never contemplated that the designation of an SRA would be subject to a super-majority vote. Indeed, their testimony

[4] Art. VIII, § 1((i), Fla. Const. is implement by §125.66, Fla. Stat. (2003), which provides that ordinances or resolutions that "change the actual zoning map designation of a parcel of land" must be filed with the Department of State to become effective.

was clear that imposing such a requirement would significantly damage the efficacy of this voluntary program.

Additional extra-textual evidence supporting the conclusion that the designation of an SRA is not a "change in a zoning ordinance" requiring a four-fifths (4/5s) vote is how the County itself has applied its LDC in designating the only SRA created to date. As described by the County:

> In a two-step process, the Board unanimously approved one SRA known as the Town of Ave Maria SRA by Resolution 2004-89 . . . and Resolution 2005-234A) . . . . The SRA encompasses 5,027 acres and was assigned 28,658.4 Stewardship Credits. The SRA Development Document and Master Plan define the location of permitted uses and set forth the design standards for the SRA. . . These documents were approved by the Board when the SRA Resolution was adopted. The base density of one residential dwelling unit per five acres plus the Stewardship Credits allows the Town of Ave Maria SRA to develop approximately 11,000 residential dwelling units, 690,000 square feet of retail/service space, 510,000 square feet of office, 400 hotel rooms, a 6,600 student university, 450 assisted living units, 148,500 square feet of civic/community facilities, 35,000 square feet of medical facilities, a public school (K-8) and private school (K-12) and recreational facilities and parks.

The Eastern Collier Property Owner's shed important additional light on this SRA designation:

> Furthermore, we know from precedent in Collier County that the designation or amendment of an SRA is not deemed to be a zoning ordinance. We know this because zoning ordinances require not only a super-majority vote but must be filed with the Department of State in order to be effective, and the sole existing SRA in Collier County (the Ave Maria SRA) was designated years ago by two separate resolutions, and neither resolution was filed with the Department of State. Moreover, the two resolutions state that they were "adopted after motion, second, **and majority vote**." . . . This quoted language is not hidden deep within the text of the subject resolutions. Instead, it appears within inches of (and on the same page as) the Board chairman's signature line, as well as the County Attorney signature line approving the resolution "as to form and legal sufficiency." In sharp contrast, ordinances approving rezones (which do, in fact, require a 4/5 Board vote for approval), contain the following language: "approved after motion, second, **and super-majority vote."**

Without belaboring the point, this extra-textual evidence supports the textual-based findings made above.

To conclude, Collier County always enacts zoning changes by ordinance adopted by a super-majority vote of the Board. The Board has never made a zoning change by resolution or a simple majority vote. Consistent with this custom, the county adopted the RSLA Zoning Overlay District (a clear zoning change) by an ordinance expressly agreed to by a super-majority of the Board. On the other hand, the Board adopted the Ave Maria SRA by resolution that expressly states it was adopted by a majority of the Board. The RLSA LDC Amendment was filed with the State. The Ava Maria SRA was not filed with the State. These Board actions are consistent with the text of Section 11 of The 1967 Special Act and the LDC.

CONCLUSION

Based on the above findings of fact and law, this arbitrator respectfully concludes that the creation or amendment of a Stewardship Receiving Area (SRA) in a Development of Regional Impact in the Rural Land Stewardship Area (RLSA) requires a simple majority vote of the Collier County's Board of County Commissioners.

A0777948.DOC