



MEMORANDUM

Office of the City Attorney

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TO: Mayor and City Commissioners

DATE: December 2, 2010

FROM: City Attorney


CONSENT

SUBJECT: MOGAS INVESTMENTS, INC., NALBANDIAN PROPERTIES, LLC,
ROPEN NALBANDIAN V. CITY OF GAINESVILLE, A POLITICAL
SUBDIVISION OF THE STATE OF FLORIDA; EIGHTH JUDICIAL
CIRCUIT, CASE NO. 2010-CA-6285


Recommendation: The City Commission authorize the City Attorney to represent the City of Gainesville in the case styled Mogas Investments, Inc., Nalbandian Properties, LLC, Ropen Nalbandian v. City of Gainesville, a political subdivision of the State of Florida; Eighth Judicial Circuit, Case No. 2010-CA-6285.

On November 10, 2010, the City of Gainesville was served with a Summons and Complaint. The Petitioners seek to enjoin the City from rezoning a parcel of land intended for development of the Grace Marketplace from I-2 to Planned Development District. They ask the Court to declare the rezoning inconsistent with the City's Comprehensive Plan and enjoin the City from implementing the zoning.

Prepared by:


Elizabeth A. Waratuke,
Litigation Attorney

Submitted by:


Marion J. Radson
City Attorney

EAW/cgow

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

MOGAS INVESTMENTS, INC,
NALBANDIAN PROPERTIES,
LLC, ROPEN NALBANDIAN,
Petitioners,

v.

CASE NO.: 10-CA-6285
DIVISION: J

CITY OF GAINESVILLE, a political
subdivision of the State of
Florida,
Respondent.

**COMPLAINT SEEKING DECLARATORY AND
INJUNCTIVE RELIEF UNDER SECTION 163.3215, FLORIDA STATUTES**

Petitioners, MOGAS INVESTMENTS, INC, NALBANDIAN PROPERTIES, LLC, and ROPEN NALBANDIAN, by and through their undersigned counsel, hereby sue Respondent, CITY OF GAINESVILLE, a political subdivision of the State of Florida (the "City"), and state as follows:

1. This is an action for declaratory and injunctive relief pursuant to Section 163.3215, Florida Statutes, seeking to permanently enjoin the City's attempt to rezone a parcel of land located between an active cement mixing plant and automobile salvage yard, in contravention of the City's Comprehensive Plan.

2. Section 163.3215(3), Florida Statutes, provides:

Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting or denying an application for . . . a development order, as defined in s. 163.3164, which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part.

3. Petitioners challenge the City's ordinance number 090763 rezoning certain lands designated therein amending the Zoning Map Atlas from "I-2: General industrial district" to "Planned Development District," which lands are located in the vicinity of 820 N.W. 53rd Avenue, commonly known as "Grace Marketplace." A true and correct copy of ordinance number 090763, dated October 7, 2010, is attached hereto and incorporated by reference herein as **Exhibit "A."**

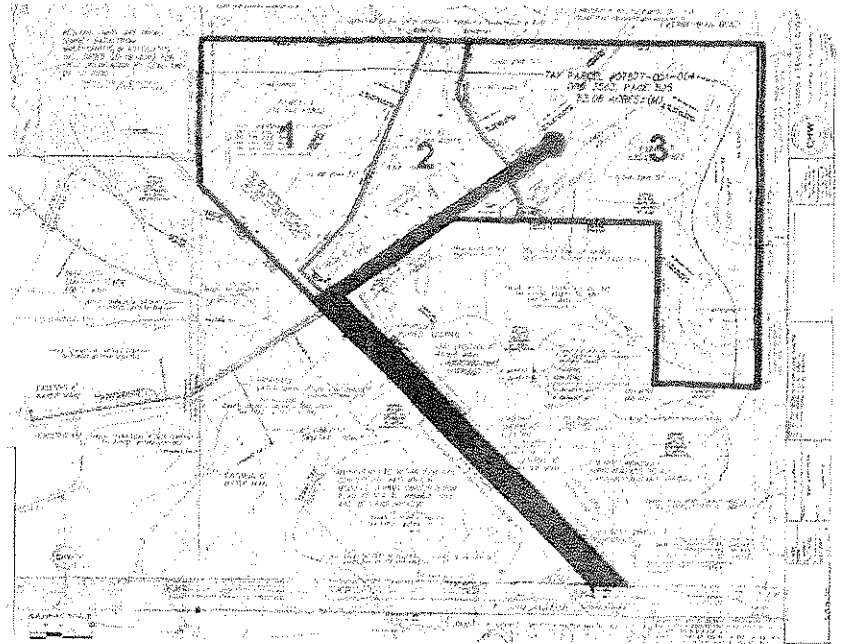
4. The ordinance rezoning certain lands is a "development order," as that term is defined in Section 163.3164, Florida Statutes. As such, it will be referred to herein as the "Development Order."

5. The Development Order amends the Zoning Map Atlas by rezoning the described property in Exhibit A hereto within the City from the zoning category of "I-2: General industrial district" to zoning category of "Planned Development District."

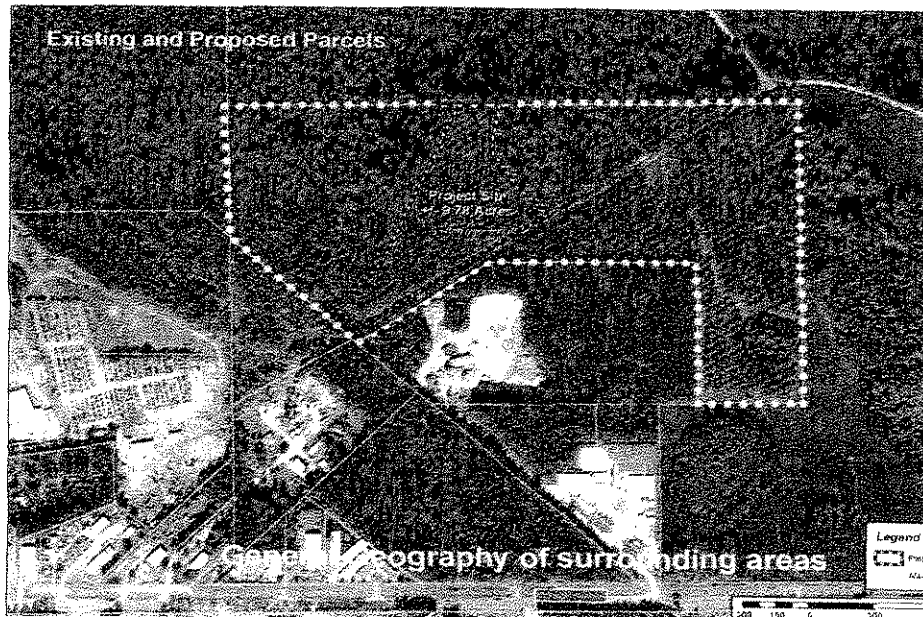
6. In anticipation of entry of the Development Order, the City approved its own application for a design plat that would allow for the subdivision of a 67.34 acre tract of land located in the vicinity of the 800 block of the north side of NW 53rd Avenue in Gainesville, Florida. The City's approval of the subdivision of the 67.34 tract is subject to a pending Chapter 163 action brought by the same petitioners of this extant action.

7. The 67.34-acre parent tract of land is, subject to that litigation, going to be subdivided into three lots and to provide legal access to a 9.78-acre parcel that the City proposes to purchase and rezone for development of the Homeless Center (the "Homeless Center Lot"). The remaining two lots will retain their existing zoning designation of General Industrial (I-2) and be available for future industrial development by their current or future private property owners. A survey and graphical depiction of the proposed subdivision, as presented by City Staff

at the quasi-judicial hearing before the City Commission, reflects the proposed parameters of the three parcels and new right-of-way connecting to 53rd Avenue, as follows:



8. The City's approval of the design plat application was a necessary prerequisite for the City to be able to rezone the Homeless Center Lot, as – without approval of the design plat – the Homeless Center Lot does not have legal access to NW 53rd Avenue via an adequately improved public right-of-way.



9. Chapter 163, Part II, Florida Statutes, the Local Government Comprehensive Planning and Land Development Act, (the “Local Comprehensive Planning Act”) requires each local government in Florida to prepare and adopt a local comprehensive plan containing mandatory elements that address important issues such as land use, traffic circulation, conservation, and the adequacy of facilities and infrastructure necessary to serve proposed development.

10. Once a local government has adopted its comprehensive plan, Section 163.3194(1)(a) of the Local Comprehensive Planning Act requires that *all* actions taken by the local government in regard to development orders be *consistent* with the duly-adopted local comprehensive plan.

11. Section 163.3194(3) defines “consistency” as follows:

(a) A development or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspect of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

(b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, or other aspects of the development are compatible with or further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

12. The Local Comprehensive Planning Act provide for citizen enforcement of the consistency requirement. Section 163.3215(1), Florida Statutes, provides that “any aggrieved or adversely affected party” may bring a civil action for injunctive or other relief against any local government to prevent the local government “from taking any action on a development order which materially alters the use or density or intensity of use” on a tract of property in a manner that is not consistent with the adopted local comprehensive plan.

13. Mogas Investments, Inc., is an “aggrieved or adversely affected party,” as that term is defined in Section 163.3215(2), Florida Statutes,” given its ownership of approximately 7.82 acres at 605 NW 53rd Avenue in Gainesville, Florida (the “Northwood Commercial Park”), located directly across the street from the entrance to the proposed Homeless Center.

14. Nalbandian Properties, LLC, is an “aggrieved or adversely affected party,” as that term is defined in Section 163.3215(2), Florida Statutes,” given its ownership of approximately 4.18 acres at 505 NW 53rd Avenue in Gainesville, Florida (the “Industrial Parcel”), located directly across the street from the entrance to the proposed Homeless Center.

15. Ropen Nalbandian is an “aggrieved or adversely affected party,” as that term is defined in Section 163.3215(2), Florida Statutes,” given his ownership interests in both Mogas Investments, Inc. and Nalbandian Properties, LLC.

16. The proximity of the proposed homeless center to the Petitioners’ properties will heighten the need to have safety measures in place for employees and invitees of the businesses located either in the Northwood Commercial Park or at the Industrial Parcel.

17. To wit, both the Northwood Commercial Park and the Industrial Park contain tenants, who have employees and invitees at the respective properties. Should the City develop a homeless center campus across the street, Petitioners' tenants are likely to either relocate or fail to renew their existing leases, due to the increased costs of added security measures and associated safety concerns.

18. As a result of the foregoing, the Petitioners, collectively, will suffer an adverse effect to an interest protected that exceeds in degree the general interest in community good shared by all persons if the homeless shelter is opened on the parcel at issue.

19. Additionally, the City failed to timely rezone within six months as required by section 30-347-8 of the Gainesville Ordinance Code.

20. Venue and jurisdiction are proper in this Court, as the parties and the parcel are located within the jurisdictional limits of the City of Gainesville, Florida. Further, Section 163.3215(3), Florida Statutes, provides for just such an action.

21. The City's latest attempt to site a "One-Stop" Homeless Center in Gainesville emanates from the City Commission's decision on April 16, 2009, to move forward with its current plan to develop the Homeless Center on the outskirts of town between an active cement mixing plant and automobile salvage yard, and directly across the street from a long-standing and active corridor of properties developed with a mix of industrial, office and warehouse uses on NW 53rd Avenue.

22. Before, during and after the City's initial approval to purchase and develop the current site with the proposed Homeless Center, Petitioners urged the City to take time out to re-evaluate both the economic feasibility and legal appropriateness of such action. Instead, the City chose to ignore Petitioners' concerns as being "too little, too late."

23. Notably, despite Petitioners' contention that the 2009 projected cost of \$2.2 million to develop the Homeless Center on the subject parcel was grossly underestimated, the City's most recent estimate for developing the site is just over \$4.1 million.

24. Finally, despite Petitioners' repeated reference to the First District Court of Appeal's holding in the case of Dixon v City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000), the City has nevertheless continued to move forward with its plans to circumvent the plain language of its Comprehensive Plan by permitting the development of an admittedly non-industrial use (i.e., the Homeless Center) on land that is designated "Industrial" on the City's Future Land Use Map.

25. Objective 4.1 of the Future Land Use Element of the City's Comprehensive Plan provides:

The City shall establish land use designations that allow sufficient acreage for residential, commercial, mixed-use, professional, office uses and industrial uses at appropriate locations to meet the needs of the projected population and which allow flexibility for the City to consider unique, innovative, and carefully construed proposals *that are in keeping with the surrounding character and environmental conditions of specific sites.* (emphasis added).

A complete copy of the Future Land Use Element of the City's Comprehensive Plan is attached hereto as **Exhibit "B"** and incorporated by reference herein.

26. Policy 4.1.1 of the Future Land Use Element of the City's Comprehensive Plan defines the various land use categories identified on the City's Future Land Use Map. The City's Industrial land use category is defined as follows:

The Industrial land use category identifies those areas appropriate for manufacturing, fabrication, distribution, extraction, wholesaling, warehousing, recycling and other ancillary uses, and, when designed sensitively, retail, service, office and residential uses, *when such non-industrial uses are no more than 25 percent of industrial area* (emphasis added)

27. The proposed Homeless Center development includes an establishment for the provision of social services, which is not an industrial use.

28. The proposed Homeless Center development includes an establishment for the provision of medical services, which is not an industrial use.

29. The proposed Homeless Center development includes an establishment for distributing food and feeding homeless persons, which is not an industrial use.

30. The proposed Homeless Center development includes the provision of up to 200 beds for housing homeless persons, which is not an industrial use.

31. The proposed Homeless Center development includes the provision camping facilities (of up to 100 tent pads) for homeless persons, which is not an industrial use.

32. The proposed Homeless Center development includes a retail and thrift shop for homeless persons, which is not an industrial use.

33. The Future Land Use Element of the City's Comprehensive Plan limits the development of non-industrial uses on land classified as "Industrial" on the City's Future Land Use Map to no more than 25 percent of the industrial area.

34. The proposed Homeless Center development is comprised solely of non-industrial uses; as such, it is inconsistent with Policy 4.1.1 of the Future Land Use Element of the City's Comprehensive Plan.

35. The reviewing court in a Section 163.3215 matter must apply "strict scrutiny" to determine whether a development order is consistent with the local government's comprehensive plan; further, the local government's determination of consistency and interpretation of its comprehensive plan is not entitled to any judicial deference. Dixon v City of Jacksonville, 774 So. 2d 763 (Fla. 1st DCA 2000).

36. As strict scrutiny of the City's Comprehensive Plan shows that the subject Development Order and proposed Homeless Center development would be inconsistent with the City's Comprehensive Plan, both the directives of the Legislature and the First DCA necessitate declaratory and injunctive relief in this matter.

37. Petitioners timely filed their Complaint on November 8, 2010, and have otherwise met all conditions precedent required by Section 163.3215, Florida Statutes.

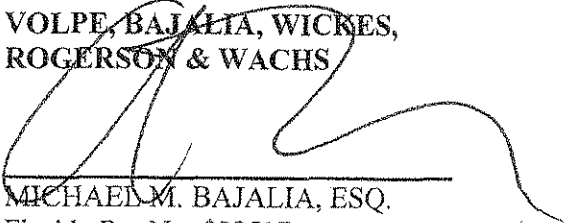
WHEREFORE, Petitioners request that this Court enter an Order:

- A. Declaring that the Development Order is inconsistent with the City's Comprehensive Plan;
- B. Enjoining implementation of the Development Order; and
- C. Awarding Petitioners their costs for bringing this action and ordering such further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this  day of November, 2010.

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