IN THE DISTRICT COURT OF APPEAL
SIXTH DISTRICT OF FLORIDA

WW SSIR OWNER, LLC,

Appellant, Case No. 6D2025-0268

v. L.T. Case No. 24-CA-2674

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida; and CAPTIVA CIVIC ASSOCIATION, INC.,

Appellees.
_____/

MOTION TO CONSOLIDATE AND SET BRIEFING SCHEDULE

Appellee, Captiva Civic Association (CCA) moves to consolidate this appeal, filed by WW SSIR Owner, LLC (SSIR), with the appeal filed by its co-defendant below, Lee County, Florida (Case No. 6D2025-0335) and to set a briefing schedule. The two appeals are from the same final judgment and arise from the same underlying controversy—the enforceability of a settlement agreement between CCA and Lee County. The issues raised by the two appeals were briefed jointly on summary judgment by SSIR and Lee County. Then, at the hearing on SSIR's and Lee County's motion for summary judgment, the issues were argued together (with one lawyer presenting the joint argument for SSIR and Lee County). The record

in each case is identical. Consolidation will allow these jointly raised and jointly argued issues in the case to be heard in a single unified appeal before a single panel using the same record and one set of briefs, thus avoiding a judicially inefficient piecemeal consideration of the issues.

Despite the routine nature of this request, Lee County and SSIR oppose consolidation.

Background

The two appeals arise out of a declaratory judgment action filed by CCA below, L.T. Case No. 24-CA-2674. (R.12-26).[1] SSIR is the owner of 120 acres of the 304-acre resort known as South Seas on Captiva Island. SSIR wishes to increase the density of development on South Seas, which has been limited to 912 dwelling units for over 50 years. SSIR has filed an application with Lee County to rezone its property pursuant to Land Development Code amendments passed by Lee County exempting South Seas from historic density

[1] Citations are to the record on appeal prepared and served in SSIR's appeal, Case No. 6D2025-0268. The Record on Appeal in the Lee County appeal, Case No. 6D2025-0335, contains a few slight variations causing the pagination of the record to be different. Substantively, the two records are for all intents and purposes identical.

limitations. That zoning request, invited by those Code amendments, would significantly increase the density of South Seas by permitting hundreds more residential and hotel units than currently allowed. (R.731-32).

The County's Code amendments, and SSIR's rezoning request, however, conflicts with a mediated settlement agreement among CCA, a previous owner of South Seas, and the County. (R.731-32). In that settlement agreement, reached after earlier litigation concerning the density of South Seas, the County agreed that the "[t]otal number of dwelling units on South Seas Resort is limited to 912" (R.731). Under the agreement the County is not permitted to issue building permits for dwelling units at South Seas that will "cause that [912] number to be exceeded at any time." (R.731).

When it became apparent that the County was not going to honor the terms of the settlement agreement, CCA brought the declaratory judgment action below against Lee County seeking to enforce the agreement. (R.12-26). SSIR intervened. (R.186-88). SSIR and Lee County ultimately filed a joint motion for summary judgment against CCA. (R.298-328). In that joint motion, SSIR and Lee County argued under various theories that the settlement agreement was

unenforceable because it was beyond the power of the County to enter into the agreement. They also argued that the agreement could not be enforced against SSIR, a subsequent owner of 120 acres within South Seas, because SSIR was not a signatory to the settlement agreement, and the settlement agreement was not a covenant that ran with the land. (R.325).

CCA filed its own motion for summary judgment and responded to SSIR and Lee County's argument. (R.334-493). CCA demonstrated (R.334-61), and the trial court agreed (R.730-38), that the settlement agreement was enforceable against the County. The settlement agreement was aimed at the County's actions, and the County was bound by the settlement agreement it signed and approved. (R.736). As for SSIR, it did not matter whether or not it was bound by the settlement agreement because CCA had sought no relief against SSIR. (R.736).

The trial court issued the declaratory final judgment in CCA's favor. (R.818-19).

SSIR and Lee County each appealed the Final Judgment within a week of each other, resulting in the two appeals that this motion seeks to consolidate. (R.890-93, 894-906). CCA immediately

responded with a notice of related cases in each of the two appeals. Despite this obvious relationship, SSIR then sought to "fast-track" its appeal. Although specifically choosing not to file a motion to expedite, it filed its initial brief soon after the notice of appeal, attaching and citing to an appendix instead of the usual record on appeal (which was still being prepared). SSIR coupled its brief with a motion for leave to proceed on the appendix.

In that motion SSIR explained that briefing in its appeal should proceed immediately and not await the briefing by Lee County below, which has not yet filed its initial brief. CCA did not oppose the use of an appendix but filed a response explaining that SSIR's proposed attempt to accelerate the determination of just one issue of the many issues that SSIR and Lee County raised below was unreasonable, unfair, and unsupported.

SSIR's motion was overtaken by events. The clerk prepared and filed the record on appeal before this Court could rule on the motion to proceed on the appendix. In response, SSIR withdrew its motion and filed a Second Amended Brief, citing to the record instead of its appendix. SSIR, however, filed its Second Amended Brief without seeking leave from this Court. Thus, it is unclear whether SSIR's

brief is officially "on file" and whether CCA's deadline for its answer brief is running yet.

Lee County has not filed a brief in its appeal and appears content to file its brief in the ordinary course. Thus, absent consolidation, CCA may be required to file an answer brief before the initial briefs of each of the two appellants are on file.

SSIR and Lee County oppose consolidation.

During the pendency of SSIR's motion for leave to proceed on an appendix, CCA reached out to SSIR and Lee County about consolidating the two appeals. SSIR and Lee County have informed counsel that they will oppose consolidation.

Discussion

This would seem the most routine of consolidation motions. The two appeals, which are from the same Final Judgment, were filed within a week of each other. That Final Judgment was reached after summary judgment briefing in which Lee County and SSIR jointly argued their position. Thus, each appeal arises from the same order, addresses the same factual and legal controversy, and will proceed on the identical record below.

Consolidation will ensure that there is one record, one set of briefs, one combined oral argument, all before a single panel of this Court. Splitting the two appeals will result in double the appellate effort for the court and the parties and potentially lead to conflicting results, all for no apparent good reason. Consolidation should be granted.

SSIR and Lee County's Opposition to Consolidation

The opposition to consolidation has nothing to do with cost or efficiency but is instead designed to give SSIR and Lee County an unfair tactical advantage at the expense of CCA.

First, SSIR and the County will argue, erroneously, that splitting the two appeals will lead to a faster result. Although it has not moved to expedite its appeal, SSIR, in its motion for leave to file an appendix, argues that, if its appeal is allowed to proceed first, on a fast track, it will get a faster result that may enable its increased development to begin sooner rather than later.

Some context is required. Although SSIR joined with the County on all the issues argued below, it chose to base its initial brief in this appeal on a single issue—whether SSIR is bound by the settlement agreement, even if the agreement is otherwise enforceable.

Apparently, SSIR will leave the County to brief the remaining issues about the County's authority to enter into the agreement.

According to SSIR, if the parties focus first on the single issue raised by SSIR, the appeal could be resolved quickly, and the balance of the issues will be moot. This is important, according to SSIR, because the proceedings on its rezoning application seeking to increase density of its development on South Seas will be completed by the fall. Thus, a favorable appellate ruling coupled with a favorable zoning ruling could permit the increased development to begin more quickly.

This theory is wrong on multiple levels. First, as a practical matter, it is highly unlikely that this appeal would be complete by fall, even if it is limited to just one of the many issues argued below. SSIR's brief has only just been filed (assuming it has been properly filed at all). CCA has the right to develop a considered response to SSIR's brief and may need more time to prepare that response. But even with the fastest of briefing and oral argument schedules, a decision in the fall (which SSIR hopes will be an opinion reversing the trial court below) would require this case to be placed on a much

faster track than the typical appeal in this Court, thus requiring that the appeal take priority over other appeals on this Court's docket.

But SSIR has not tried to demonstrate why its case should get such priority. Indeed, SSIR has virtually conceded this point by not moving to expedite its appeal. Like any developer seeking a permit, SSIR would like its issues resolved sooner rather than later. But this desire is no different from any other appellant with a judgment in hand wanting its case to be first in line. SSIR has not demonstrated why this particular controversy should get priority over the normal workings of this Court's busy docket or the many other cases filed by many other appellants. In short, there is no legitimate basis to jump the line and rush this appeal to judgment.

Moreover, there is nothing magical about having this appeal resolved before the zoning application is complete. Given the long history among these parties, it is highly likely that the rezoning application, whether granted or denied, will generate an appellate review proceeding by the losing party. Thus, no matter what this Court rules in this appeal and when it rules, SSIR still is a long way from pounding stakes into the ground. All the speed in the world in

this appeal will not prevent the losing party in the zoning application from having their full day in court.

Aside from these practical concerns, the central premise of SSIR's opposition to consolidation is mistaken. Resolving SSIR's issue will not moot the rest of the case, as the trial court recognized in its order below. (R.750). As the trial court observed, the relief that CCA seeks is against the County, not SSIR:

> Whether the Settlement Agreement is or is not a restrictive covenant that runs with the land or binds or does not bind SSIR Owner, is immaterial to this case. CCA's claim is directed exclusively at the County. CCA seeks to enforce the County's obligation under Paragraph 3 of the Settlement Agreement which states that the County cannot issue building permits in excess of 912 units. CCA does not seek any relief against SSIR Owner. The County issues building permits, not SSIR Owner.

(R.750). No doubt, SSIR will take a different view, but the issue is sharply disputed among the parties and should be addressed via full briefing.

No authority allows one of the parties to pick and choose which of their arguments should go first. The parties barely briefed in the trial court the restrictive covenant issue that SSIR raises on appeal; it was the last of the many issues raised by SSIR and Lee County in their joint papers on summary judgment (and SSIR and Lee County

devoted less than a page to it). (R.333-34). There is no reason why this "irrelevant issue," in the words of the trial court, (R.750), should suddenly be considered, on its own, and in an expedited fashion ahead of the other issues in the case.

Further, there is the practical effect on the briefing. Absent consolidation, SSIR and the County will get extra briefing. As it now stands, although each of them is the non-prevailing party below, and each of them is an appellant in their appeal, they are technically considered appellees in each other's appeals. Thus, at the same time CCA responds to SSIR's initial brief, the County will get to weigh in with an appellee brief of its own. In other words, CCA will be forced to file its brief before both the County and SSIR take their positions. The same thing will happen in Lee County's appeal, once it is briefed. CCA will be forced to respond to Lee County's brief before SSIR weighs in on the issues.

The rules do not envision such an advantage to Lee County and SSIR. Lee County and the SSIR, co-defendants below who argued all their issues jointly below, in one memorandum of law, are effectively co-appellants here. They should be required to present all of their arguments before CCA is required to file its brief.

In short, the routine consolidation that CCA seeks will ensure that there is one record, one panel, and one set of briefs arising from the two appeals. Equally important, it will ensure that all the issues in the case are heard together and comprehensively instead of the piecemeal fashion envisioned by SSIR and the County. This fair, efficient, and routine approach is exactly what consolidation is designed to accomplish.

The Mechanics of Consolidation

To be clear, CCA seeks full consolidation. The record, already prepared, should be used in both appeals. A single panel should decide the two appeals. Oral argument, if granted, should be held jointly. And briefing should proceed the same as it would in any case where there are two parties who wind up as co-appellants. Both SSIR and Lee County should file their briefs explaining why the order below should be reversed. CCA will then file its brief explaining why the order below should be affirmed (with its deadline running from when both the appellants' briefs are on file). SSIR and Lee County would then get their reply.

Current Deadlines

Regardless of how this Court rules on consolidation, briefing deadlines should be clarified. SSIR has filed its Second Amended Initial Brief, but it did not file a motion seeking permission to do so. CCA has no objection to the filing of SSIR's Second Amended Brief, but this Court's order on this motion should make clear whether SSIR's brief is properly on file and the due date of CCA's answer brief.

In any event, any confusion over briefing can be resolved by this Court's order on consolidation. CCA's deadline, whenever it starts to run, is tolled by this consolidation motion. If the consolidation motion is granted, the Court accepts SSIR's Second Amended Initial Brief, and the Court adopts the briefing schedule suggested above, then any issues regarding the timing of the parties' briefs will be resolved.

In short, consolidation should be granted.

CONCLUSION

For all these reasons, this Court should grant consolidation, and briefing should proceed in the routine fashion suggested by CCA above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Courts E-Filing Portal on all counsel in the service list below on this 16th day of April 2025.

/s/Steven L. Brannock
STEVEN L. BRANNOCK
Florida Bar No. 319651
CECI CULPEPPER BERMAN
Florida Bar No. 329060
JOSEPH T. EAGLETON
Florida Bar No. 98492
BRANNOCK BERMAN & SEIDER
1111 W. Cass Street, Suite 200
Tampa, FL 33306
(813) 223-4300
sbrannock@bbsappeals.com
cberman@bbsappeals.com
jeagleton@bbsappeals.com
Secondary:
eservice@bbsappeals.com

MICHAEL R. WHITT
Florida Bar No. 725020
THEODORE L. TRIPP JR.
Florida Bar No. 221856
GABRIEL ARBOIS
Florida Bar No. 1031204
HAHN LOESER PARKS LLP
2400 First Street, Suite 300
Fort Myers, FL 33901
(239) 337-6700
mwhitt@hahnlaw.com
(S): kzamzow@hahnlaw.com
(S): FL-eservice@hahnlaw.com
ttripp@hahnlaw.com
(S):tvonschmittou@hahnlaw.com
garbois@hahnlaw.com
(S): mhawkins@hahnlaw.com

Counsel for Appellee Captiva Civic Association

SERVICE LIST

Counsel for Appellant WW SSIR Owner, LLC:

Hala A. Sandridge
Buchanan Ingersoll & Rooney
401 E. Jackson Street
Suite 2400
Tampa, FL 33602
hala.sandridge@bipc.com

Counsel for Appellee Lee County, Florida:

Chris W. Altenbernd
Eleanor H. Sills
Banker Lopez Gassler P.A.
501 E. Kennedy Blvd.,
Suite 1700

Tampa, FL 33602
caltenbernd@bankerlopez.com
service-esills@bankerlopez.com

L. Chuck Lira
Lee County Attorney's Office
P.O. Box 398
Fort Myers, FL 33902
trialsection@leegov.com

Jeffrey L. Hinds
Jay J. Bartlett
Bartlett Loeb Hinds &
Thompson, PLLC
1001 Water Street, Suite 475
Tampa, FL 33602
jeffreyh@blhtlaw.com
jayb@blhtlaw.com