IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

PALM COAST HOLDINGS, INC.
and FLORIDA LANDMARK
COMMUNITIES, LLC

Plaintiffs,

CASE NO: 2025 CA 000670
DIVISION: 49

v.

CITY OF PALM COAST,
a Florida municipal corporation,

Defendant.

_______________________________________/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO DISMISS

Plaintiffs, PALM COAST HOLDINGS, INC. and FLORIDA LANDMARK COMMUNITIES, LLC ("Plaintiffs"), by and through undersigned counsel, file this Response in Opposition to Defendant City of Palm Coast's ("Defendant" or "City") Amended Motion to Dismiss ("MTD").

I. BACKGROUND[1]

On July 11, 2003, the City and Florida Landmark Communities, Inc., as Developer, entered into the Town Center at Palm Coast Development of Regional Impact ("DRI") Order ("2003 DO"), which approved a 1,557-acre mixed use development, referred to as the Town Center DRI.

[1] For purposes of a motion to dismiss for failure to state a cause of action under Rule 1.140(b)(6), the trial court must "accept as true all well-pleaded allegations" and must "draw all inferences in favor of the pleader." *Fox v. Pro. Wrecker Operators of Fla. Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001); *Wallace v. Dean*, 3 So. 3d 1035, 1042–43 (Fla. 2009).

[Compl. ¶¶ 27–28].[2] A DRI is "any development that, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." [Compl. ¶ 15 (citing § 380.06(1), Fla. Stat. (2025)]; *see also* § 380.06(1), Fla. Stat. (2003) (same). Once a DRI is approved, the right to develop pursuant to the terms of the DRI vests. [Compl. ¶ 15 (citing § 163.3167(5), Fla. Stat. (2025)]; *see Bay Point Club, Inc. v. Bay Cnty.*, 890 So. 2d 256, 258 (Fla. 1st DCA 2004).

At the time the Town Center DRI was approved in 2003, there existed a lengthy review process by the state land planning agency, regional planning council, a myriad state and regional agencies, and ultimately the local government. [Compl. ¶ 17 (citing § 380.06(5), (10), (11), (15), Fla. Stat (2003)]. The end result of this complex review process was a series of negotiated agreements to mitigate the impacts of the DRI on the environment, wetlands, and public facilities including but not limited to transportation, sewer, water, schools, and parks—all of which were embedded in the 2003 DO—a bilateral contract—entered into pursuant to section 380.06(15), Florida Statutes (2003). [Compl. ¶¶ 16–18].

As relevant to the instant lawsuit, through the 2003 DO, the City vested the Developer with the rights for both potable water and wastewater for the entitlements in Phase 1 of the Town Center DRI. [Compl. ¶ 31; Compl. Ex. A at 28 ("Sufficient [potable water] capacity exists to accommodate Phase 1 development of the Town Center DRI . . ."), 31 ("Sufficient [wastewater] capacity exists to accommodate Phase 1 development . . .")].[3]

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[2] References to the "Complaint" are to the Amended Complaint filed on November 17, 2025, which is the operative complaint.

[3] For citations to the Complaint Exhibits in this Response, the cited page number is the page number located at the bottom of each page. Within Exhibit A, there are two pages numbered 1; unless otherwise notated, all citations to page number 1 refer to the second page numbered 1 in the Exhibit.

By 2007, Plaintiffs had performed all obligations under their agreement with the City, expending more than $35.5 million on the required improvements. [Compl. ¶¶ 4, 50]. In 2022, and again in 2024, the parties amended and restated the DRI DO. [Compl. ¶¶ 37, 44]. In the 2022 Amended DO, and again in the 2024 Amended DO—even though the DRI was already vested by operation of law—the City expressly acknowledged that Plaintiffs had fully performed their obligations under the negotiated agreements contained within the DO by "vesting" the Developer for <u>all</u> of the public infrastructure services in the Town Center DRI (in all phases) for, *inter alia*, potable water and wastewater:

> (b) Because Developer completed the DRI's offsite mitigation obligations, **<u>the City hereby agrees that all owners within the current DRI Property are vested for water, sewer</u>**, traffic, park, and all other public services concurrency for the Present Entitlements identified . . . herein. . . .

[Compl. Ex. B at 15 (emphasis added); Compl. ¶¶ 41, 48; Compl. Ex. C at 15].

While Plaintiffs met their obligations under the DOs, as acknowledged by the vesting language in the 2022 and 2024 Amended DOs, unfortunately the City has not held up its end of the bargain. In 2024, Plaintiffs entered into two contracts for the sale of a large portion of their remaining real property holdings within the Town Center DRI. [Compl. ¶ 67]. Both contracts were cancelled by the prospective purchasers during the due diligence phase upon the City refusing to guarantee potable water availability and wastewater capacity for development within the Town Center DRI. [Compl. ¶ 67]. Without the guaranteed water and wastewater entitlements, "Plaintiffs are left with nearly worthless vacant land." [Compl. ¶ 7].

Since execution of the 2003 DO, DRIs have been partially de-regulated at the state level in a series of legislative overhauls of Florida's statutory growth management system, with the focus now on local government administration of existing DRIs. [Compl. ¶ 17 n.3]. For example, mandatory annual and biennial reporting to affected state and regional agencies was eliminated in section 380.06, Florida Statutes, in favor of a discretionary reporting requirement at the option of the local government. § 380.06(6), Fla. Stat. (2025).[4] Originally, the development order was required in part to—and did—set forth the requirements of the monitoring report, based upon the rules adopted by the state land planning agency. § 380.06(15)(c)(4), Florida Statutes (2003); [Compl. Ex. A at 14–19].

Another change that occurred in the 2022 and 2024 Amended DOs was that phasing of the remaining buildout of the DRI was tied to actual vehicle trip generation, rather than units. [Compl. ¶¶ 40, 47]. All of the DOs (2003, 2022, and 2024) make abundantly clear that these phases are "**<u>based upon actual trip counts</u>**":

12. **Transportation.**

(a) Notwithstanding the phasing schedule that is set forth in Section 5, under Part I above, for the purpose of phasing and transportation recommendations, Town Center DRI is divided into three phases, based upon actual trip counts, as shown on the following schedule:

	Build-Out	Daily Trips	PM Peak	Cumulative	
				Daily Trips	PM Peak
Phase 1	2017	56,565	5,226	56,565	5,226
Phase 2	2022	56,742	5,218	113,307	10,444
Phase 3	2027	42,953	4,048	156,260	14,492

[Compl. Ex. B at 41; Compl. Ex. C at 40–41].

[4] The 2002 DRI statute, in force at the time of the 2003 DO, required the local DRI development order to "specify the monitoring procedures…" to ensure compliance by the developer with the development order. § 380.06(15)(c)1, Fla. Stat. (2002). Since amendment of the statute, this requirement has been removed in favor of allowing the local government to determine the necessary reporting requirements: "(6) Reports. – Notwithstanding any condition in a [DO] for an approved [DRI], the developer is not required to submit an annual or biennial report on the [DRI] . . . unless required to do so by the local government having jurisdiction over the development . . . ." § 380.06(6), Fla. Stat. (2025).

The methodology and reporting for the actual trip counts are also set forth in the DOs. [*See, e.g.*, Compl. Ex. A at 17]. According to the methodology set forth in the 2003 DO, the traffic reports shall include "**[a]ctual traffic counts**, turning movements and **actual levels of service** . . ." [Compl. Ex. A at 18 (emphasis added)]. The 2003 DO also explains that "[i]f actual FDOT, City or County traffic counts are not available for a particular road or intersection or if available traffic counts are older than 6 months, Developer shall retain, at its expense, a traffic engineering firm to **collect the necessary counts** . . . ," making clear that actual on-the-road traffic counts are required. [Compl. Ex. A at 18 (emphasis added)]. Prior to the Developer's traffic engineer conducting these actual counts, as required by the DOs, the traffic engineer sends a proposed methodology to the City for approval. [Compl. Ex. D]. According to the last Biennial Traffic Report submitted prior to the Complaint, the DRI is in Phase 1. [Compl. ¶ 53].

Plaintiffs, as Developers of the DRI and the owners of significant remaining landholdings in the DRI, brought this Complaint, originally alleging counts for breach of contract (Count I) and promissory estoppel (Count II). Plaintiffs filed an Amended Complaint, adding a third count requesting an injunction from further annexations (Count III) that will put further demand upon the City's already overburdened water and wastewater utility systems. The City filed a Motion to Dismiss and an Amended Motion to Dismiss ("MTD"), requesting dismissal of all claims.

The City's arguments in the Motion to Dismiss[5] are fatally flawed in each instance because none obviates the DRI's express language vesting the development for both build-out and for water and wastewater. Where the City knew for 23 years of its promises and obligations to provide water and wastewater service to this vested DRI—promises recorded in the Official Records of Flagler

[5] Despite requesting dismissal of Count II in its MTD, the City does not include any arguments supporting dismissal.

County—and the Plaintiffs, in reliance, fully performed under the agreements embodied in the DRI, the City must compensate Plaintiffs for the damages caused directly by the City's breach of those material promises.

II. STANDARD OF REVIEW

A complaint may be dismissed if it "fail[s] to state a cause of action." Fla. R. Civ. P. 1.140(b)(6). "Whether a complaint is sufficient to state a cause of action is an issue of law." *Doe v. Baptist Primary Care, Inc.*, 177 So. 3d 669, 674 (Fla. 1st DCA 2015) (citation omitted). For purposes of a motion to dismiss under Rule 1.140(b)(6), "[t]he trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Fox v. Pro. Wrecker Operators of Fla. Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001). "It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them," but rather "the question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." *Id.*; *Wallace v. Dean*, 3 So. 3d 1035, 1042–43 (Fla. 2009).

III. ARGUMENT

A. The City's Current Comprehensive Plan and LDCs Cannot Be Retroactively Applied to a Vested 2003 DO

The City readily acknowledges that "the 2003 DO . . . was the controlling instrument when the Developer's $35.5 million in expenditures were made." [MTD at 2]. The City then makes the flawed argument that the Town Center DRI is "governed by the City's Comprehensive Plan and its Unified Land Development Code (LDC)." [MTD at 2]. What the City fails to mention is that **the City did not have its own Comprehensive Plan or LDCs in 2003 when the original DRI was executed.** The City's Ordinance creating and enacting the initial City of Palm Coast Comprehensive Plan was not passed until April 6, 2004. City of Palm Coast Ordinance No. 2004-

08 (Apr. 6, 2004), *An Ordinance of the City Council of the City of Palm Coast, Florida, creating and enacting the initial City of Palm Coast 2020 Comprehensive Plan*. Similarly, the City's Ordinance creating and enacting the Unified Land Development Code was not passed until years later, on August 19, 2008.[6] City of Palm Coast Ordinance No. 2008-16 (Aug. 19, 2008), *An ordinance of the City Council of the City of Palm Coast, Florida, creating and enacting the Unified Land Development Code of the City of Palm Coast*. Until such time as those ordinances were adopted, pursuant to the law that created the City of Palm Coast, the City operated under a transitional comprehensive plan and LDCs, i.e., Flagler County's Comprehensive Plan and LDCs. Ch. 99-448, § 11(7), Laws of Fla. However, the MTD makes no mention of any applicable provisions that were contained in the Flagler County Comprehensive Plan and LDCs to the extent that they governed the City at the time of execution of the Town Center DRI in 2003.

The City's MTD is riddled with references to the City's <u>current</u> Comprehensive Plan and LDCs, which cannot have possibly applied to the Town Center DRI executed in 2003 because they did not yet exist. [*See, e.g.*, MTD at 13–14, 16–17, 19, 24–25]. Necessarily, any arguments based upon these references fail. For example, the City argues that section 7.05.02 of the LDC applies: "Vested status does not guarantee the availability of water or sewer capacity." [MTD at 17 (quoting LDC § 7.05.02)]. But that LDC did not exist in 2003 when the City contractually agreed that vesting of the Town Center DRI entitlement **<u>did guarantee</u>** the availability of water and sewer capacity. [Compl. Ex. A at 28 ("Sufficient [potable water] capacity exists to accommodate Phase

[6] The City also had a handful of ordinances prior to creation of the Unified Land Development Code, which were all repealed when the Land Development Code was enacted. *See* Ordinance No. 2008-16. The City has not argued in its MTD why any of the ordinances existing as of the date of the 2003 Town Center DRI would apply.

1 development of the Town Center DRI . . ."), 31 ("Sufficient [wastewater] capacity exists to accommodate Phase 1 development . . .")].

It is axiomatic that the City could not have regulated this DRI based on a Comprehensive Plan and LDCs that did not exist when the DRI was approved. Subsequently enacted land regulations do not apply to landowners whose rights to develop, as here, were previously vested. *Monroe Cnty. v. Ambrose*, 866 So. 2d 707, 712 (Fla. 3d DCA 2003).

"Once a DRI has been approved, the right to develop pursuant to the terms of the DRI vests." *Bay Point Club*, 890 So. 2d at 258 (citing what is now § 163.3167(5), Fla. Stat.). Even though vesting occurs automatically via operation of law as soon as the DRI is executed, in this case, the DRI itself also expressly acknowledges the vesting—in 2003 and again in 2022 and 2024. [Compl. ¶¶ 31, 41, 48, 51]. The City is precluded by a new reading of its Comprehensive Plan or LDCs to divest Plaintiffs of their vested development rights to complete the DRI. *See* § 163.3167(5), Fla. Stat. ("Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380 . . . .").

Vested entitlements are constitutionally protected. *Townsend v. R.J. Reynolds Tobacco Co.*, 192 So. 3d 1223, 1228 (Fla. 2016). Article I, section 2, of the Florida Constitution guarantees to all persons the right "to acquire, possess and protect property." Fla. Const. Art. I, § 2. Article I, section 9, of the Florida Constitution protects this property right: "No person shall be deprived of life, liberty or property without due process of law. . . ." Fla. Const. Art. I, § 9. "These constitutional due process rights protect individuals from the retroactive application of a substantive law that adversely affects or destroys a vested right." *Townsend*, 192 So. 3d at 1228 (quoting *Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n*, 127 So. 3d 1258, 1272 (Fla. 2013)). "For the retroactive application of a law to be constitutionally permissible, the [municipality] must express a clear intent that the law apply retroactively, and the law must be procedural or remedial in nature." *Id.* (quoting *Maronda Homes*, 127 So. 3d at 1272). The City has not argued that the LDC should apply retroactively, because it can't—there was no clear intent that the LDCs would apply retroactively, and they are not procedural or remedial.

B. DRI phasing is determined by actual counts

The City twists and contorts the evidence attached to the Amended Complaint to create the false narrative that the Town Center DRI is in Phase 2. [MTD at 9–12]. This argument fails at the motion to dismiss stage for a variety of reasons.

First and foremost, based upon the allegations in the Complaint, the DRI is unequivocally still in Phase 1. [Compl. ¶ 53; Compl. Ex. D]. As alleged in the Complaint:

> The 2024 Amended DO ties the phasing of the remaining buildout of the Town Center DRI to traffic trip generation, as follows, which is unchanged from the 2022 Amended DO:

			Cumulative	
	Daily Trips	PM Peak Hour	Daily Trips	PM Peak Hour
Phase 1	56,565	5,226	56,565	5,256
Phase 2	56,742	5,218	113,307	10,444
Phase 3	42,953	4,048	156,260	14,492

[Compl., ¶ 47; Compl. Ex. C at 9]. All of the DOs (2003, 2022, and 2024) make abundantly clear that these phases are "**<u>based upon actual trip counts</u>**":

12. **Transportation.**

(a) Notwithstanding the phasing schedule that is set forth in Section 5, under Part I above, for the purpose of phasing and transportation recommendations, Town Center DRI is divided into three phases, based upon actual trip counts, as shown on the following schedule:

				Cumulative	
	Build-Out	Daily Trips	PM Peak	Daily Trips	PM Peak
Phase 1	2017	56,565	5,226	56,565	5,226
Phase 2	2022	56,742	5,218	113,307	10,444
Phase 3	2027	42,953	4,048	156,260	14,492

[Compl. Ex. B at 41; Compl. Ex. C at 40–41].

The Complaint then sets forth the factual allegations showing that the Town Center DRI is still in Phase 1, based upon the latest Biennial Traffic Report:

> According to the traffic trip generation data in the Town Center DRI 2023 Biennial Traffic Report, dated April 2024, the Town Center DRI is currently within Phase 1, with a significant portion of the entitlements remaining to be built out.

[Compl. ¶ 54; Compl. Ex. D]. At this stage, the Court should not speculate whether these allegations are true or whether Plaintiffs have the ability to prove them. *Fox*, 801 So. 2d at 178. The Court can readily end its inquiry into this argument here.

Nonetheless, to understand the City’s litigation-created traffic monitoring methodology, some background on the traffic monitoring methodology is helpful, since the methodology is explicitly set forth in the original 2003 DO. [Compl. Ex. A at 17–19]. According to that methodology, the traffic reports shall include “[a]ctual traffic counts, turning movements and actual levels of service . . .” [Compl. Ex. A at 18]. The 2003 DO also explains that “[i]f actual FDOT City or County traffic counts are not available for a particular road or intersection of it available traffic counts are older than 6 months, Developer shall retain, at its expense, a traffic engineering firm to collect the necessary counts . . . ," making clear that actual on the road traffic counts are required. [Compl. Ex. A at 18]. The express directions from the 2003 DO explain exactly how traffic data is to be collected and reported for the DRI—based on **actual** traffic counts.

The biennial reporting requirement was deleted from the DRI in 2022 because "the Statutes and rules regulating Developments of Regional Impacts no longer require the biennial reporting, unless required by the City." [Compl. Ex. B at 17]. The City has continued to require, and the Developers have continued to provide, the biennial traffic reports for the purposes of information sharing and determining phasing. [Compl. ¶ 53 (noting that the latest Biennial Traffic Report was submitted in April 2024)]. This methodology, conducted in the same manner since inception of the DRI, **has not changed**. In fact, before each traffic study, the Developers' traffic engineer sends the proposed methodology to the City for approval. [Compl. Ex. D at 3 ("Please let us know if the City agrees with the methodology as stated, or whether modifications are requested.")]. There has been no indication that the City disapproved of the methodology, prior to the argument set forth in this litigation.

Inexplicably, despite the express language of the DOs that phasing is "**based upon actual trip counts**" and the clear factual allegations in the Complaint, the City's litigation attorneys have, for litigation purposes only, concocted created an entirely new methodology for "calculating" (rather than counting) vehicle trips. This is different from the methodology expressly set forth in the DOs and used for decades, as submitted in the biennial traffic reports, and as approved by the City. Instead of using actual trip counts, as required by the express language of the DOs, the City's counsel has manufactured a methodology whereby they calculate the number of entitlements *sold*, but not necessarily *built*, by the developers to third parties and assigning a hypothetical calculated number of vehicle trips to those entitlements. Indeed, the City acknowledges in their MTD that these entitlements may not have been built; rather, they claim that they have been "otherwise exhausted." [MTD at 11].

The problem with this methodology is two-fold. First, it's not the methodology expressly required by the DOs and used for decades by the City to determine the phase for the DRI. Second, it assigns vehicle trips that are not even on the road yet because those entitlements have not necessarily been built. If they have been built, then vehicles would be on the road and the trips would be counted in the actual trip counts. But if they have not been built, the methodology creates fictitious vehicle trips that do not actually exist. Indeed, many of these entitlements transferred from the developers to third parties likely have **not** been built because they have the same problem that Plaintiffs have—sufficient water and wastewater capacity does not exist to build those entitlements.

It is abundantly clear that the City has contrived this new-found methodology solely for the purposes of litigation. This sort of gamesmanship should be closely scrutinized by the Court. *McElroy v. Perry*, 753 So. 2d 121, 125 (Fla. 2d DCA 2000) ("[W]hen a record is made for the purpose of litigation, its trustworthiness is suspect and should be closely scrutinized."). Even if the City's new-found methodology had a factual basis—which it does not—resolution of that factual dispute is entirely inappropriate at the motion to dismiss stage. *Blanton v. Arbor Facility, Inc.*, 419 So. 3d 692, 695 (Fla. 5th DCA 2025) (explaining that a motion to dismiss "is not a vehicle for resolving factual disputes") (citing *Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006)).

C. Count I

i. The Town Center DRI DOs are enforceable contracts

The City argues that the Town Center DRI is not an enforceable contract. [MTD at 12–15]. This argument ignores the well-pleaded allegations of the Complaint, which must be accepted as true at this stage. *Fox*, 801 So. 2d at 178. First and foremost, the City relies upon the definition of a development order contained in section 163.3164(15), Florida Statutes. [MTD at 12]. That reliance is fundamental error. The Community Planning Act,[7] in which that definition is contained, makes clear that:

> **Nothing in this act shall limit or modify the rights of any person to complete any development that has been authorized as a development of regional impact pursuant to chapter 380** or who has been issued a final local development order and development has commenced and is continuing in good faith.

§ 163.3167(5), Fla. Stat. (emphasis added). Thus, the definition of a development order contained in the Community Planning Act **cannot** function to limit Plaintiffs' rights obtained under chapter 380 and the Town Center DRI.

While some development agreements and orders are unilateral regulatory approvals, that is not always true. Indeed, some Florida courts have expressly declared that development agreements are contracts. *Pres. Palm Beach PAC v. Town of Palm Beach*, 50 So. 3d 1176, 1179 (Fla. 4th DCA 2010) ("[A] 'development agreement' has been defined as 'a contract between a [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits.'" (quoting *Morgran Co. v. Orange Cnty.*, 818 So. 2d 640, 643 (Fla. 5th DCA 2002))).

This discrepancy exists in the law because it depends on the underlying nature of the agreement. Under Florida law, "it is the intention of the parties which governs the interpretation of a document," not its title. *Barr v. Schlarb*, 314 So. 2d 609, 610 (Fla. 1st DCA 1975). "[A]n order, by definition, is often unilateral and non-negotiable," but "development orders are often the product of negotiations between a developer and a municipality." *Pres. Palm Beach PAC*, 50 So.

[7] The Community Planning Act is located at section 163.3161, *et seq.*, Florida Statutes.

3d at 1179; *Osborne v. Walton Cnty.*, 410 So. 3d 37, 61 (Fla. 1st DCA 2025) (Winokur, J., concurring) (discussing "the culmination of the typical give-and-take process whereby a developer successfully obtains modification of a development order").

DRIs are unique creatures compared to other development orders, part statutory and part contractual in nature. As alleged in the Complaint, "the statutory framework set forth for DRI approvals, . . . necessitates complex negotiations and agreements." [Compl. ¶ 2]. This is not a new argument. As argued in *Osborne*, "[t]he process outlined in section 380.06 is distinct and materially different than those formal processes for entering into 'development agreements' found in section 163.3225, Florida Statutes." *See Osborne*, 410 So. 3d at 43 (Fla. 1st DCA 2025), *reh'g denied* (May 20, 2025) (emphasis in original) (citation omitted). Accordingly, the definitions—and restrictions—set forth in chapter 163 do not apply to DRI agreements under section 380.06. Other courts have similarly refused to apply the definitions in chapter 163 to agreements outside chapter 163, recognizing that it depends on the nature of the underlying agreement. *Pres. Palm Beach PAC*, 50 So. 3d at 1179 ("As the trial court noted, there is no controlling authority defining a 'development order' under the circumstances present here.'").

"The Town Center DRI was originally approved under a statutory scheme that required state land planning agency approval, regional agency sufficiency review, and then the local government's approval of a DO before undertaking a DRI." [Compl. ¶ 17 (citing § 380.06(5), (10), (11), (15), Fla. Stat (2003))]. "The DRI review process typically was long and detailed. It was common for a DRI DO to reflect the agreements reached after complex negotiations between or among the agencies, local government, and the Developer over offsite public facilities improvements and land dedications by the Developer in exchange for use of public facilities (i.e., roads, water, sewer) and for development rights." [Compl. ¶ 17]. "This case is no exception." [Compl. ¶ 17].

The Court need only look to the terms of the DRI to see the contractual nature of the agreement. The original 2003 DO and the subsequent 2022 and 2024 Amended DOs all contain classic contract language, referring to the "promises, commitments, obligations, covenants, liabilities and responsibilities" thereunder, which "inure to the benefit of the City" and are "binding upon the Developer and the Developer's heirs, transferees, assigns and successors in interest." [*See, e.g.*, Compl. Ex. A at 23; Compl. Ex. B at 21–22; Compl. Ex C. at 21]. A unilateral regulatory approval would have no reason to discuss "promises, commitments, obligations, covenants, liabilities and responsibilities," nor would it be necessary to recite that those promises "inure to the benefit of the City" and are "binding upon the Developer"—by its very nature, an order is directive to the object of the local government's decision. The result, as clearly alleged in the Complaint, is a "bilateral contract," [Compl. ¶ 18].

ii. <u>The vested entitlements in the Town Center DRI DOs are not conditional</u>

"A vested right has been defined as an immediate, fixed right of present or future enjoyment and also as an immediate right of present enjoyment, or a present, fixed right of future enjoyment." *Gulf Atl. Office Props. v. Dep't of Revenue*, 133 So. 3d 537, 539 (Fla. 2d DCA 2014) (quoting *R.A.M. of S. Fla., Inc. v. WCI Cmtys., Inc.*, 869 So. 2d 1210, 1218 (Fla. 2d DCA 2004) (quoting *Sanford v. McClelland*, 163 So. 513, 514 (1935))). "[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand." *Id.* (citation omitted). The characteristics of an immediate, quantifiable right are clearly present here.

"**<u>Once a DRI has been approved, the right to develop pursuant to the terms of the DRI vests</u>**." *Bay Point Club*, 890 So. 2d at 258 (emphasis added) (citing what is now § 163.3167(5), Fla. Stat.). This vesting is also expressly acknowledged in each iteration of the DRI, in the 2003 DO, and again in the 2022 and 2024 Amended DOs.

In the 2003 DO, the City vested the Developer with the rights for both potable water and wastewater for the entitlements in Phase 1 of the Town Center DRI. [Compl. ¶ 31; Compl. Ex. A at 28 ("Sufficient [potable water] capacity exists to accommodate Phase 1 development of the Town Center DRI . . ."), 31 ("Sufficient [wastewater] capacity exists to accommodate Phase 1 development . . .")]. Importantly, the City appears to ignore the fact that the original 2003 DO included this vesting language **<u>and</u>** express capacity availability language. This explains why the City is attempting to artificially and improperly push the DRI into Phase 2.

By 2007, Plaintiffs had performed all obligations under their agreement with the City, expending more than $35.5 million on the required improvements. [Compl. ¶¶ 4, 50]. As a result, in the 2022 and 2024 DOs, the City expressly acknowledged that Plaintiffs had fully performed their obligations under the negotiated agreements contained within the DO by "vesting" the Developer for <u>all</u> of the public infrastructure services in the Town Center DRI (in all phases) for, *inter alia*, potable water and wastewater:

> (b) Because Developer completed the DRI's offsite mitigation obligations, **<u>the City hereby agrees that all owners within the current DRI Property are vested for water, sewer</u>**, traffic, park, and all other public services concurrency for the Present Entitlements identified . . . herein. . . .

[Compl. Ex. B at 15 (emphasis added); Compl. ¶¶ 41, 48; Compl. Ex. C at 15].

Each version of the DRI reiterates over and over again that the entitlements are vested. For example, the 2024 Amended DO recites the "currently remaining entitlements," confirming that those entitlements are vested. [*See, e.g.*, Compl. Ex. C at 7–8 (Land Use Totals)]. If the Developer does not assign (i.e., to a buyer) or develop all the Present Entitlements "**for which the Town Center DRI is vested**," the developer retains "rights to develop the remaining entitlements and retain its vested rights for such within the DRI Property." [Compl. Ex. C at 16–17]. Significantly, each version of the DRI also protects Plaintiffs from "downzoning or reduction of land uses before" a date certain, absent conditions that are not applicable here. [Compl. Ex. C at 13].

Regardless, the City attempts to retract the clear and express vesting—both statutory and contractual—to argue that Plaintiffs' DRI may be "vested" but doesn't have any right to water and wastewater capacity. This is nonsensical and would render Plaintiffs' development rights worthless. Why would the developers spend $35.5 million for development rights that don't actually allow them to build? Plaintiffs would be "left with nearly worthless vacant land." [Compl. ¶ 7].

iii. The Town Center DRI DOs are not void as ultra vires acts

In a desperate attempt to avoid its contractual obligations under the DRI DOs, the City next argues that if the DRI DOs are contracts, then they should be "void as ultra vires." [MTD at 17]. But the cases that the City cites in support of this proposition are inapposite. The first case cited by the City, *Town of Indian River Shores v. Coll*, 378 So. 2d 53 (Fla. 4th DCA 1979), merely concludes that *if* the contract in question is ultra vires, then no liability accrues to the City. *Id.* at 55. The case does not conclude that the contract *is* ultra vires. *See generally id.*

The next two cases cited by the City, *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956), and *Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996), are classic contract zoning decisions. Where a government includes in its development agreements (i.e. contracts) that it will support approval of a particular project or take a particular action, as opposed to agreeing to conditions in the event a project receives approval after a public hearing, the local government has contracted away its police powers, impermissibly. Florida is fairly strict in its disapproval of contract zoning. As explained in *Citizens for Responsible Development, Inc. v. City of Dania Beach*, 358 So. 3d 1, 11 (Fla. 4th DCA 2023), "the adoption of a development agreement which provides for contract zoning is void as beyond the power of the City *unless there is legislative authority for its enactment*." (Emphasis added).

This is the distinction between the contract zoning cases cited by the City and this case—the DRI statute expressly permits a local government to enter into DRI agreements. *See generally* § 380.06, Fla. Stat. A DRI, as detailed above, is a blended set of proposed agreements and orders—all of which are authorized by statute and none of which pledge that the local government ultimately will approve the DRI. The developer negotiates myriad issues, from traffic improvements to be built to proportionate share agreements for other public infrastructure improvements to set-asides for wetlands and other natural resources. All of these components feed into the final package of agreements and recitations of law, land regulations, reporting requirements, etc., which the local government then considers at a quasi-judicial hearing. Once approved, the agreements become executory and the orders take effect.

The *Town of Indian River Shores*, cited by the City, does raise two relevant points of law. First, in its conclusion, the court acknowledges that the contract at issue could only be voided as ultra vires "absent some special estoppel." *Indian River Shores*, 378 So. 2d at 55. Common sense suggests that Plaintiffs' outlay of $35.5 million for offsite mitigation certainly qualifies as "special estoppel." Second, as quoted by the City in their MTD, the case notes that "one who contracts with a municipality is bound to know the limitations of the City's contracting authority." *Id.* Both parties here absolutely knew of the City's authority because that authority is set forth by the DRI statute.

See generally § 380.06, Fla. Stat. (2003). Because the City's authority to enter into agreements for DRIs is expressly authorized by statute, it is therefore inherently not ultra vires.

The City then attempts to use FDEP Consent Orders from 2020 and 2024 to void as ultra vires Plaintiffs' valid agreement from 20 years prior. As discussed above, once a DRI has been approved, the right to develop pursuant to the terms of the DRI vests. *Bay Point Club*, 890 So. 2d at 258 (citing what is now § 163.3167(5), Fla. Stat.). The City cannot possibly retroactively invalidate an agreement from 2003 by consent orders from FDEP in 2020 and 2023.

iv. Plaintiffs have alleged a material breach

Plaintiffs have sufficiently pled a material breach in the form of anticipatory breach, or repudiation. It is well settled that a breach of contract by anticipatory repudiation allows the nonbreaching party to immediately institute litigation for damages. *Se. Integrated Med., P.L. v. N. Fla. Women's Physicians, P.A.*, 50 So. 3d 21, 23–24 (Fla. 1st DCA 2010) (collecting cases); *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So. 2d 181, 182 (Fla. 1982). Under Florida law, anticipatory breach occurs when one party to a contract demonstrates, through words or conduct, a clear intent not to perform its contractual obligations. *Hosp. Mortg. Grp.*, 411 So. 2d at 182.

Plaintiffs have pled that they "entered into two contracts for the sale of a large portion of their remaining real property holdings within the Town Center DRI." [Compl. ¶ 67]. During the due diligence period for the contracts, unknown persons at the City affirmatively refused to guarantee water and wastewater capacity to the prospective buyers, resulting in the prospective buyers cancelling the contracts and Plaintiffs losing substantial profits and being left with "nearly worthless vacant land." [Compl. ¶ 7; *id.* at ¶¶ 6, 67, 68, 77, 88]. These facts, as alleged and accepted as true, are sufficient to survive a motion to dismiss.

Importantly, the case primarily relied upon by the City was "an appeal and a cross-appeal from a final judgment entered in an action for breach of contract." *Mori v. Matsushita Elec. Corp. of Am.*, 380 So. 2d 461, 462 (Fla. 3d DCA 1980). Plaintiffs don't disagree that further discovery will likely be necessary regarding the specific persons at the City or the specific statements which resulted in the repudiation of the DRI contract. But those are factual issues to be handled during discovery, not at the motion to dismiss stage. *Blanton*, 419 So. 3d at 695. At this stage, the Court must accept Plaintiffs' allegations as true. *Fox*, 801 So. 2d at 178.

Ironically, the City's response confirms the breach and lack of current capacity sufficient to serve Plaintiffs' DRI, noting that "the capacity issues are slated for resolution **by 2028**." [MTD at 20, 22 (emphasis added)]. This statement confirms that the City does not currently have water and wastewater capacity reserved for the DRI, as it is required to do per the terms of the contract. *See Hosp. Mortg. Grp.*, 411 So. 2d at 182 (explaining that repudiation of a duty alone gives rise to an immediate claim for damages for a total breach). Instead, the capacity will not be available until at least 2028, another three-plus years from the filing of this lawsuit.[8]

v. Plaintiffs' damages are not speculative[9]

Florida Rule of Civil Procedure 1.120(g) requires that "[w]hen items of special damage are claimed, they shall be specifically stated." "While Rule 1.120(g) requires that special damages be specifically pled, it does not create an exacting standard where an initial pleading must include the elements of proof and detail that would later be required at trial to sustain a judgment for the special damages claimed." *Kelsey Constr. v. Howard Concrete Servs.*, No. 2010-CA-15390, 2011 Fla.

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[8] To the extent that the City characterizes their breach as "merely a delay," [MTD at 20, 22], Plaintiffs would still be entitled to damages for that significant delay.

[9] To the extent that the City seeks a specific dollar value of damages, Plaintiffs provided a copy of the Damages Report from their expert as part of the Initial Disclosures in this case.

Cir. LEXIS 6611, at *2 (Fla. Cir. Ct. Feb. 18, 2011). "Rather, a claim for special damages is sufficient if it notifies the defendant of the nature of the special damages claimed." *Id.* (citing *Augustine v. S. Bell Tel. & Tel. Co.*, 91 So. 2d 320 (Fla. 1956); *Land Title of Cent. Fla., LLC v. Jimenez*, 946 So. 2d 90, 93 (Fla. 5th DCA 2006)); *see also Newberry Square Dev. Corp. v. S. Landmark, Inc.*, 578 So. 2d 750, 754 (Fla. 1st DCA 1991) ("Special damages should be pleaded with particularity sufficient to apprise the opposing party of the nature of the special damages claimed.") (citing *Augustine*, 91 So. 2d 320).

Plaintiffs have explained their damages in detail in the Complaint, alleging that the Developer expended more than $35.5 million on the required improvements for the DRI (i.e., reliance damages). [Compl. ¶¶ 4, 50]. Plaintiff then sets forth specific allegations about the failed contract (i.e., lost profits damages). [Compl. ¶¶ 67–69, 90, 101].[10] This is sufficient. Of course, at the proof stage, Plaintiffs are not entitled to duplicative damages or to be placed in a better situation than they would have been in but for the breach, but those are evidentiary issues to be determined beyond the motion to dismiss stage. *Blanton*, 419 So. 3d at 695.

Moreover, the nature of lost profits is not inherently speculative, as the City suggests. [MTD at 21–22]. Lost profits are recoverable as damages if, as here, they are "the natural result of the wrong and the amount can be established with reasonable certainty." *Conner v. Atlas Aircraft Corp.*, 310 So. 2d 352, 354 (Fla. 3d DCA 1975). "The standard for the degree of certainty requires that the mind of a prudent impartial person be satisfied with the damages." *Id.* That is, "[i]f the proximate estimates of witnesses lead to a satisfying conclusion, damages may be awarded" and "uncertainty as to the amount of damages or difficulty in proving the damages will not prevent

[10] Plaintiffs restate their claim for general and special damages in the wherefore clause of Counts I and II.

recovery if it is clear that substantial damages were suffered as a result of the wrong." *Id.* (citing *Hodges v. Fries*, 15 So. 682, 684–85 (Fla. 1894)); *4 Corners Ins., Inc. v. Sun Publ'ns of Fla., Inc.*, 5 So. 3d 780, 783 (explaining that lost profits are not required to be established with one-hundred percent certainty or mathematical precision and that there must exist only a "reasonable basis for determining the amount of the loss"); *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1217 (11th Cir. 2006) ("[U]ncertainty as to the precise amount of the lost profits will not defeat recovery so long as there is a reasonable yardstick by which to estimate damages."); *Katz Deli of Aventura, Inc. v. Waterways Plaza, LLC*, No. 03-13228 CA 15, 2013 Fla. Cir. LEXIS 20809, at *6 (Fla. Cir. Ct. Jan. 3, 2023) ("Lost opportunities flowing from the wrongful act have a liberal treatment by the courts.").

Plaintiffs simply "must prove that 1) the defendant's action caused the damage and 2) there is *some* standard by which the amount of damages may be adequately determined." *Katz Deli of Aventura Inc. v. Waterways Plaza, LLC*, 183 So. 3d 374, 382 (Fla. 3d DCA 2013) (emphasis added) (quoting *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1351 (Fla. 1989)); *id.* ("Any 'yardstick' used to show the amount of profits must be reasonable, and the loss of the profits as a result of the [defendant's conduct] must be reasonably certain. Lost profits must be established with a reasonable degree of certainty and must be a natural consequence of the wrong." (quoting *Sostchin v. Doll Enters., Inc.*, 847 So. 2d 1123, 1128 (Fla. 3d DCA 2003)).

vi. <u>Sovereign immunity is waived for express contracts</u>

The City's sovereign immunity argument turns on its argument that the DRI is not a contract. For the reasons discussed *supra*, the DRI is a contract. The City was not acting solely in a regulatory capacity—it was entering into a negotiated exchange, receiving valuable infrastructure improvements worth over $35.5 million and other public benefit in exchange for promised development rights. [Compl. ¶¶ 50, 84]. Florida law provides for a waiver of sovereign immunity when a municipality has entered into an express contract. *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984) ("We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract."). Accordingly, sovereign immunity cannot shield the City from the consequences of its own breach of the DRI agreements.

D. Count II

In its Conclusion section, the City requests dismissal of Count II, arguing in one sentence that Count II is "barred and fails to allege the necessary elements of promissory estoppel." [MTD at 26]. However, the City fails to include any argument whatsoever supporting its request for dismissal of Count II. Florida Rule of Civil Procedure 1.140(b) mandates arguments for dismissal must be stated "specifically and with particularity in the responsive . . . motion." The City's failure to include these arguments for dismissal in its MTD results in a waiver of the arguments. Fla. R. Civ. P. 1.140(b) ("Any ground not stated must be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time."). Accordingly, Plaintiffs request that the Court deny the MTD to the extent that it requests dismissal of Count II.

E. Count III

Plaintiffs have no interest in preventing the City from exercising its legislative function of annexing properties into the City. Rather, Plaintiffs seek to prevent additional harm to their vested rights as a result of those annexations caused by the City guaranteeing water and wastewater capacity to annexed properties ahead of Plaintiffs' vested rights, as explained in paragraphs 104 and 105 of the Complaint:

> 104. Plaintiffs have a clear legal right to prevent the City from giving away to newly annexed lands additional potable water and wastewater capacity to which Plaintiffs have a vested right.
>
> 105. There is no adequate remedy at law to otherwise prevent the City from creating additional unnecessary burdens on the City's already overburdened potable water and wastewater infrastructure through further annexations when the City cannot even properly provide capacity for lands already located inside the City, including that capacity contractually guaranteed to Plaintiffs back in 2003.

[Compl. ¶¶ 104–05].

The City argues that the Court cannot enjoin legislative acts and that there is no clear legal right to an injunction. [MTD at 24–25]. Both of these arguments fail. First, as clarified above, Plaintiffs don't seek to enjoin the legislative act of annexations; they seek to prevent a breach of their DRI contract. As explained above, Florida law provides for a waiver of sovereign immunity when a municipality has entered into an express contract. *Pan-Am Tobacco*, 471 So. 2d at 5. Second, the City relies on a current provision of the City's LDC to argue that there is no clear legal right to an injunction. [MTD at 24–25]. But, as made clear above, the City cannot use subsequently enacted land use regulations to negate the obligations and entitlements set forth in 2003. *Monroe Cnty*, 866 So. 2d at 712.

The City then argues that the harm being caused to Plaintiffs is not irreparable, [MTD at 25], and is only in the nature of delay, contending that "the capacity issues are slated for resolution <u>by 2028</u>." [MTD at 20, 22]. The City contends that Plaintiffs should be forced to challenge each and every annexation that the City approves. Each of these future annexations could give away further water and wastewater capacity to newly annexed properties, constituting a new breach of the DOs and continued harm with each annexation.

This argument by the City highlights why an injunction is necessary. If the City currently anticipates having sufficient capacity available for the DRI by 2028, then Plaintiffs will have been harmed by a four-plus year delay since the time at which the purchasers requested a capacity guarantee in the summer of 2024. [Compl. ¶¶ 67–69, 90, 101]. But if the City continues to annex new properties into the City—and then gives those new properties water and wastewater capacity—then the harm caused to Plaintiffs will be prolonged further into the future.

The Florida Supreme Court has explained that an "injunction is the proper remedy to be invoked to prevent continuous breach of a contract." *Manatee Cnty. Growers Ass'n v. Fla. Power & Light Co.*, 152 So. 181, 182 (1934). As explained above, Plaintiffs have alleged facts demonstrating that the City has breached its DRI contract with Plaintiffs. And the City will continue to breach its contractual obligations to Plaintiffs until it provides the water and wastewater entitlements promised and vested in the DOs. The harms caused to Plaintiffs by the beach will continue infinitely as long as the City is permitted to give away the next available water and wastewater capacity to anyone other than Plaintiffs.

IV. CONCLUSION

WHEREFORE, Plaintiffs request that this Court enter an Order denying the City's Amended Motion to Dismiss.

Date: February 26, 2026

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CERTIFICATE OF SERVICE

I certify that on February 26, 2026, I filed the foregoing through the Florida Courts E-Filing Portal system, which will serve a copy via electronic mail to all counsel of record in this matter.

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