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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

WILDE CYPRESS BRANCH, BOGGY BRANCH, CROSBY ISLAND MARSH, LAKE HART, LAKE MARY JANE, and All Other Affected Orange County Waters, and CHARLES O'NEAL, as president of Speak Up Wekiva, on behalf of the Waters of Orange County,

Plaintiffs,

v. Case No. 2021-CA-004420-O

NOAH VALENSTEIN, in has official capacity as Secretary of the Florida Department of Environmental Protection, and BEACHLINE SOUTH RESIDENTIAL, LLC,

Defendants.
_______________________________________/

SECRETARY VALENSTEIN'S MOTION TO DISMISS COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Noah Valenstein ("Secretary Valenstein"), in his official capacity as Secretary of the Florida Department of Environmental Protection ("Department"), by and through undersigned counsel and pursuant to Florida Rule of Civil Procedure 1.140(b), files this Motion to Dismiss Complaint and Incorporated Memorandum of Law ("Motion"). In support of this motion, Secretary Valenstein states:

INTRODUCTION

Charles O'Neal purports to bring this action individually as president of Speak-Up Wekiva, Inc., and on behalf of five bodies of water in Orange County, Florida,

(collectively, "Plaintiffs"), to halt Defendant Beachline South Residential, LLC's ("Beachline") proposed residential and commercial development. He seeks a declaration[1] that granting Beachline's application for a permit to dredge and fill the named bodies of water during construction would violate an Orange County Charter ("Charter") section granting human rights to natural elements.[2] And he asks this Court to enjoin Secretary Valenstein from issuing the permit.[3]

Plaintiffs, however, have no standing to challenge Beachline's permit application because the development has not injured them, and any potential injury is purely hypothetical. Similarly, Plaintiffs ask this Court to preempt the Department's decision on the permit, and they fail to exhaust their administrative remedies before filing this action. Moreover, even if the development had injured Plaintiffs, and Plaintiffs had exhausted their administrative remedies, Plaintiffs do not state a claim upon which relief can be granted because their alleged cause of action conflicts with Florida law. Last, Plaintiffs ignore the primary jurisdiction doctrine by asking this Court to decide issues squarely within the Department's

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[1] Plaintiffs' Complaint also purports to seek a declaration that Secretary Valenstein must apply, and comply with, the Orange County Charter before issuing dredge and fill permits in Orange County. But it does not request this relief in any of its four counts. Thus, Secretary Valenstein will not address this request for relief.

[2] Count I and II's relief sections ask this Court to issue an order enjoining both the Department from issuing Beachline a permit, and Beachline from beginning construction. Their numbered paragraphs, however, only address enjoining the Department. Thus, the Motion addresses that requested relief.

[3] Likewise, Counts III and IV's relief sections request a declaration that "Defendant Valenstein, in his official capacity as Secretary of Florida DEP, deny the permit applications of Defendant Beachline for the Meridian Parks Remainder development . . . ." But this is a request for an injunction, not a declaration, and these counts' numbered paragraphs only request a traditional declaration that granting the permit application would violate the Charter. Thus, the Motion addresses those requests.

specialized knowledge and authority. For each of these reasons, this Court should dismiss the Complaint.

STATEMENT OF FACTS[4]

On November 3, 2020, Orange County voters amended the Orange County Charter to confer natural rights on all bodies of water within Orange County. ("Amendment") ¶¶ 16-17.[5] Specifically, the language, which took effect immediately and appears in Article VII, Section 704.1 of the Charter, states:

> A. *Natural Rights of Orange County Waters and Citizens.*
>
> 1) The Wekiva River and Econlockhatchee River, portions of which are within the boundaries of Orange County, and all other Waters within the boundaries of Orange County, have a right to exist, Flow [sic], to be protected against Pollution [sic] and to maintain a healthy ecosystem.
>
> 2) All Citizens of Orange County have a right to clean water by having the Waters [sic] of Orange County protected against Pollution [sic].

Orange County Code, §704.1(A). In addition, the Amendment purports to prohibit "any governmental agency, non-natural person, or corporate entity [from] intentionally or negligently pollut[ing] . . . [any] Waters [sic] within the boundaries of Orange County," and create a cause of action for Orange County citizens to enforce these sections. *Id.*

Florida's Environmental Protection Act, codified at section 403.412, Florida Statutes, and as amended, however, states that:

> A local government regulation, ordinance, code, rule, comprehensive plan, charter, or any other provision of law **may not recognize or**

[4] Secretary Valenstein takes these facts from the Complaint, which are accepted as true for purposes of this Motion, but does not concede their truth by including them.
[5] Hereinafter, references to "¶ __" denote paragraphs of the Complaint.

> **grant any legal rights to a plant, an animal, a body of water, or any other part of the natural environment that is not a person or political subdivision** as defined in s. 1.01(8) or grant such person or political subdivision any specific rights relating to the natural environment not otherwise authorized in general law or specifically granted in the State Constitution.

§ 403.412(9)(a), Fla. Stat. (emphasis added).

Further, section 404 of the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, governs permits for discharging dredged or fill material into United States waters. And section 404(g) empowers states to seek approval from the Environmental Protection Agency ("EPA") to administer their own Section 404 Permitting Program. Section 373.4146, Fla. Stat. (2018) authorizes the Department to assume EPA's permitting authority over Florida waters by rule. The Department issued its rules in July 2020 and codified their language in Chapter 62-331, Florida Administrative Code. Thereafter, Florida submitted its application to administer the 404 Permitting Program and EPA approved, effective December 22, 2020.

On November 9, 2020, Beachline applied for a permit to dredge and fill 63.23 acres of wetlands in Orange County as part of their proposed development. ¶¶ 18 & 21. Pursuant to the EPA's approval, Beachline transferred the permit application to the Department on January 8, 2021. ¶ 19. The Department has not acted on Beachline's application.

Meanwhile, while the Department reviews Beachline's application, Plaintiffs appear to have been forum shopping this litigation around the state, looking for a receptive judge to either strike down section 403.412 or endorse the Amendment.

Indeed, Speak Up Wekiva filed two strikingly similar lawsuits against the Department and Governor Ron DeSantis in July and August 2020.

First, the organization filed a 42 U.S.C. § 1983 pre-enforcement challenge to section 403.412(9)(a) under the Fourteenth Amendment in the Middle District of Florida. But after the court entered an order to show cause why the complaint should not be dismissed, or transferred to the Northern District of Florida, Plaintiffs quickly dismissed the suit.

Shortly thereafter, Speak Up Wekiva filed a similar 42 U.S.C. § 1983 pre-enforcement challenge to section 403.412(9)(a) – this time under the Ninth and Fourteenth Amendments and the Florida Constitution – in the Second Judicial Circuit. But, only after the presiding judge announced retirement and a replacement judge was designated, Plaintiffs again dismissed the suit.

Now Plaintiffs, realizing that their second dismissal operates as an adjudication on the merits of their section 403.412 claims, *see* Fla. R. Civ. P. 1.420(a)(1), file basically the same lawsuit in this Court. But here they file under, and thereby ask this Court to endorse, the Amendment, rather than challenging section 403.412.

<u>ARGUMENT</u>

I. STANDARD OF REVIEW

When considering a motion to dismiss, courts accept all allegations as true and draw all reasonable inferences in favor of the pleader. *Williams v. Salt Springs Resort Ass'n, Inc.*, 298 So. 3d 1255, 1257 (Fla. 5th DCA 2020). But they need not accept

"internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st DCA 2016). And where a complaint does not plead the required elements, courts may not infer them from the context of the allegations. *Myers v. Myers,* 652 So.2d 1214, 1215-16 (Fla. 5th DCA 1995).

II. PLAINTIFFS DO NOT HAVE STANDING

Standing is a threshold issue courts must consider before evaluating the merits. *Cmty. Bank & Tr. of Fla.*, 277 So. 3d 1095, 1097 (Fla. 5th DCA 2019). Plaintiffs bear the burden. *Vaughan v. First Union Nat. Bank of Florida,* 740 So. 2d 1216, 1217 (Fla. 2d DCA 1999) ("Any litigant must demonstrate that he or she has standing to invoke the power of the court to determine the merits of an issue.").

To prove their standing, would-be plaintiffs must "demonstrate a direct and articulable stake in the outcome of a controversy." *Brown v. Firestone,* 382 So.2d 654, 662 (Fla. 1980). This requires establishing: [1] an "injury in fact, which is concrete, distinct and palpable, and actual or imminent"; [2] a causal connection between the injury and the conduct complained of; and [3] "a substantial likelihood that the requested relief will remedy the alleged injury in fact." *Giuffre v. Edwards*, 226 So. 3d 1034, 1039 (Fla. 4th DCA 2017) (quoting *State v. J.P.*, 907 So.2d 1101, 1113 n.4 (Fla. 2004)). Plaintiffs established none of these elements.

1. <u>Plaintiffs do not demonstrate an injury.</u>

Plaintiffs do not allege – much less demonstrate – that Beachline's proposed development has polluted, or otherwise harmed, a body of water within Orange

County. Indeed, Plaintiffs cannot logically establish such an injury because Beachline must obtain a dredge and fill permit before beginning construction, and the Department has not ruled on its application.

Instead, they allege the development "***would*** make it impossible for all of these water bodies to maintain a healthy ecosystem" and thereby "***would*** end the existence of these wetlands." ¶¶ 21 & 24 (emphasis added).[6] But this alleged injury is purely hypothetical. And injuries confer standing only where "distinct and palpable, not abstract or hypothetical." *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 117 (Fla. 2011); *see also Peregood v. Cosmides*, 663 So. 2d 665, 668 (Fla. 5th DCA 1995). Thus, Plaintiffs have not demonstrated an injury sufficient to establish standing.

2. Plaintiffs do not establish causation.

Because Plaintiffs do not establish an injury, they clearly cannot prove that the Defendants caused them injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

3. Plaintiffs do not demonstrate redressability.

Likewise, with no injury to cure, this action cannot provide a remedy. *See Giuffre*, 226 So.3d at 1039; *see Peregood*, 663 So. 2d at 668 ("To establish standing it must be shown that the party suffered injury in fact (economic or otherwise) for which relief is likely to be redressed . . . .").

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[6] In fact, the Complaint claims that "the Meridian Parks Remainder Project Application" – i.e., the permit application itself, not the development – would harm Orange County waters. Secretary Valenstein, however, assumes Plaintiffs meant that the result of granting the application and proceeding with the proposed development, not the act of applying for a permit, would harm the waters.

Plaintiffs have not demonstrated any of the required elements of standing. For each of those reasons, this Court should dismiss the Complaint.

III. PLAINTIFFS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDIES

Plaintiffs ask this Court to preempt the Department's permit review by declaring that granting Beachline's permit application would violate the Charter and enjoining the Department from issuing the permit. There are, at minimum, two fundamental problems with Plaintiffs' request.

First, by filing this action before the Department rules on Beachline's application, Plaintiffs ask this Court to substitute its judgment for the Department's. As discussed in Part IV, this is improper. Second, filing before the Department rules necessarily means that Plaintiffs have not exhausted their administrative remedies. Litigants generally must exhaust their administrative remedies before filing suit in circuit court. *Fla. Welding & Erection Serv., Inc. v. Am. Mut. Ins. Co. of Bos.*, 285 So. 2d 386, 389 (Fla. 1973); *see also Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Cath. High Sch.*, 867 So. 2d 1281, 1286 (Fla. 5th DCA 2004) ("A reviewing court may not entertain a suit when the complaining party has not exhausted available administrative remedies.").

But there are two exceptions. First, litigants need not exhaust their administrative remedies if they demonstrate: (1) Chapter 120 does not provide an adequate administrative remedy; (2) the agency acted without colorable statutory authority and clearly beyond its delegated powers; or (3) the case raises certain constitutional challenges. *Orange Cty. v. Expedia, Inc.*, 985 So. 2d 622, 627 (Fla. 5th

DCA 2008) (citing *Dist. Bd. of Trustees of Broward Cmty. Coll. v. Caldwell*, 959 So. 2d 767, 770 (Fla. 4th DCA 2007)).

Second, plaintiffs need not exhaust if the agency's errors were so "egregious or devastating that the promised administrative remedy is too little or too late." *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1038 (2001) (quoting *Communities Fin. Corp. v. Florida Dep't of Envtl. Regulation,* 416 So.2d 813, 816 (Fla. 1st DCA 1982)). The Florida Supreme Court has endorsed criteria for deciding whether an agency's errors were sufficiently "egregious or devastating" to invoke the circuit court's jurisdiction:

> (1) the complaint must demonstrate some compelling reason why the APA (Chapter 120, Florida Statutes) does not avail the complainants in their grievance against the agency; or (2) the complaint must allege a lack of general authority in the agency and, if it is shown, that the APA has no remedy for it; or (3) illegal conduct by the agency must be shown and, if that is the case, that the APA cannot remedy that illegality; or (4) agency ignorance of the law, the facts, or public good must be shown and, if any of that is the case, that the Act provides no remedy; or (5) a claim must be made that the agency ignores or refuses to recognize related or substantial interests and refuses to afford a hearing or otherwise refuses to recognize that the complainants' grievance is cognizable administratively.

Flo-Sun, 783 So. 2d at 1038 (citing *Communities Fin. Corp.,* 416 So.2d at 816).

Plaintiffs did not allege that the exceptions, or any of the additional criteria, apply. And none do.

First, Chapter 120 offers Plaintiffs an adequate administrative remedy. Specifically, Plaintiffs could challenge the Department's decision – after it is made – by petitioning for an administrative hearing under section 120.569 if the proposed

development would affect their substantial interests.[7] And neither section 403.191's cumulative remedies provision, nor any other "savings clause" creating a cause of action to prevent pollution, allow Plaintiffs to seek injunctive or declaratory relief in circuit court before exhausting their administrative remedies. *Carrollwood State Bank v. Lewis,* 362 So.2d 110, 113-14 (Fla. 1st DCA 1978).

Second, the Department may grant Beachline a dredge and fill permit under section 404(g) of the Clean Water Act and Chapter 62-331, F.A.C., and has not acted beyond that authority.

Last, the Complaint did not raise a constitutional issue.

Further, Plaintiffs did not allege, much less demonstrate, that the Department's errors were "egregious or devastating." Indeed, the Department could not logically have erred because it has yet to act. And the mere possibility that an agency may act improperly is too speculative to demonstrate that administrative remedies are inadequate. *Fla. Bd. of Regents v. Arnesto*, 563 So.2d 1080, 1081 (Fla. 1st DCA 1990). Rather, the burden "is on the party seeking to bypass the usual administrative channels [to] demonstrate that no adequate remedy remains available under Chapter 120." *Flo-Sun*, 783 So. 2d at 1040 (internal quotation marks omitted) (quoting *Gulf Pines Mem'l Park, Inc. v. Oklahoma Mem'l Park, Inc.*, 361 So.2d 695,

[7] The Department goes to great lengths to notify permit applicants of their right to this remedy. Indeed, Rules 62-110.106(7) – (7)(c)(4) state that "[a]fter processing a permit application, the Department shall give the applicant either a notice of permit issuance (or denial) or a notice of the Department's intent to issue (or deny)" that includes "[a] notification of the opportunity to request an administrative hearing and mediation . . . ."

698-99 (Fla. 1978)). Plaintiffs did not meet their burden, and none of the additional criteria apply here.

Plaintiffs' failure to wait for the Department's decision and exhaust their administrative remedies, without alleging an applicable exception or criterion, dooms this action. Accordingly, the Court should dismiss the Complaint.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even if the Complaint demonstrated an injury and either exhausted Plaintiffs' administrative remedies or alleged an applicable exception, the Court must dismiss it for failure to state a claim upon which relief can be granted.

Article VIII, 1(g), of the Florida Constitution provides that counties governing pursuant to a charter, such as Orange County, "shall have all powers of local self-government not inconsistent with general law." Article VIII, 1(g), Fla. Const. In addition, charter counties "may enact county ordinances not inconsistent with general law." *Id.* Local enactments are inconsistent with general law where "(1) the Legislature 'has preempted a particular subject area' or (2) the local enactment conflicts with a state statute." *Sarasota All. For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888 (Fla. 2010) (quoting *Lowe v. Broward Cnty.,* 766 So.2d 1199, 1206 (Fla. 4th DCA 2000)).

Local enactments conflict with state statutes when complying with one requires violating the other. *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs,* 541 So.2d 1160, 1161 (Fla. 1989). Where they conflict, state law prevails.

See, e.g., *City of Palm Bay v. Wells Fargo Bank, N.A.,* 114 So. 3d 924, 928 (Fla. 2013); *Laborers' Int'l Union*, 541 So. 2d at 1161.

Orange County Charter sections 704.1(a) and (b) purport to confer human rights on natural elements within Orange County and create a cause of action to enforce those rights. § 704.1(a)(1), (a)(2), & (b). Section 403.412(9)(a), Fla. Stat., however, prohibits municipalities from conferring "legal rights to . . . a body of water, or any other part of the natural environment that is not a person or political subdivision." As a result, complying with, or relying upon, the former requires violating the latter. Accordingly, Charter section 704.1 conflicts with Florida law and is unconstitutional. *City of Orlando v. Udowychenko*, 98 So.3d 589, 599 (Fla. 5th DCA 2012). And because the Complaint arises under the Charter's unconstitutional cause of action, this Court should dismiss it for failure to state a claim upon which relief can be granted.

V. PLAINTIFFS DISREGARD THE PRIMARY JURISDICTION DOCTRINE.

The primary jurisdiction doctrine is a "doctrine of self-limitation which the courts have evolved[] in marking out the boundary lines between areas of administrative and judicial action." *Flo-Sun*, 783 So. 2d at 1041 (quoting *Florida Soc'y of Newspaper Editors v. Florida Pub. Serv. Comm'n,* 543 So.2d 1262, 1266 (Fla. 1st DCA 1989)). It states that "when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency's special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the

issue has been ruled upon by the agency." *Flo-Sun*, 783 So. 2d at 1037. And, although not mandatory, courts regularly follow its direction because deferring to an agency provides "the benefit of [its'] experience and expertise in matters with which the court is not as familiar, protects the integrity of the regulatory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy." *Id.* at 1037 (citing *Key Haven Assoc. Enters. v. Bd. of Trustees of the Internal Improvement Trust Fund,* 427 So.2d 153, 157 (Fla. 1982)).

But, as with the exhaustion requirement, courts need not comply where an agency's actions were so "egregious or devastating that the promised administrative remedy is too little or too late." *Flo-Sun*, 783 So. 2d at 1038 n.6 (applying this exception to both the exhaustion requirement and primary jurisdiction doctrine). That is not the case here.

Indeed, courts developed the doctrine precisely for this type of situation. First, the Department exercises primary jurisdiction over dredge and fill permitting pursuant to section 404(g) of the Clean Water Act and section 373.4146, Fla. Stat. As a result, Florida courts routinely defer to it on environmental matters, especially permitting. *See, e.g.*, *Fla. Fish & Wildlife Conservation Comm'n v. Pringle*, 838 So. 2d 648, 650 (Fla. 1st DCA 2003) (dismissing fishing net designer's request for declaratory relief against the Fish and Wildlife Conservation Commission because the case's technical details and expertise were "outside the ordinary experience of judges and juries, but within the special competence of the Commission"); *Fla. Marine Fisheries Comm'n (Div. of L. Enf't) v. Pringle*, 736 So. 2d 17, 22-23 (Fla. 1st DCA

1999) (dismissing fishing net manufacturer's challenge to the Marine Fisheries Commission's Net Ban Amendment because the Commission had primary jurisdiction over setting gear specifications and prohibitions and manufacturers had adequate administrative remedies); *South Lake Worth Inlet Dist. v. Ocean Ridge*, 633 So.2d 79, 87-91 (Fla 4th DCA 1994) (deferring to the Department in a challenge to a Department of Natural Resources permit regarding coastal inlet erosion).

Second, as the Florida Supreme Court noted in *Flo-Sun*, Florida's comprehensive environmental regulatory scheme:

> is implemented by numerous volumes of regulations containing extensively detailed, scientific criteria and is enforced by agencies having the required experience and expertise, such as the DEP. These are not simple, routine matters which may be easily understood by trial judges and juries.

783 So. 2d at 1040.

Third, as discussed in Part II, Plaintiffs do not allege, much less establish, that the Department's (hypothetical) errors were so "egregious or devastating" that Chapter 120's remedies are futile And, again, the Florida Supreme Court's explanatory criteria do not apply.

Accordingly, even if this Court does not dismiss this action for each of the reasons advanced in Parts I-III – which it should – it should dismiss without prejudice to Plaintiffs petitioning the Department after it rules on Beachline's permit application. *See Flo-Sun*, 783 So. 2d at 1041 ("After finding that the doctrine of primary jurisdiction was applicable, the district court . . . noted that '[t]he dismissal

is, of course, without prejudice to [the petitioner] to pursue its environmental objections with [the agency].'") (quoting *Bal Harbour Village v. City of North Miami,* 678 So.2d 356, 364 (Fla. 3d DCA 1996)).

CONCLUSION

This Court should dismiss the Complaint because Plaintiffs (1) do not have standing; (2) did not wait for the Department to act and exhaust their administrative remedies; (3) do not state a claim upon which relief can be granted; and (4) disregard the primary jurisdiction doctrine.

Dated: July 13, 2021

Respectfully submitted,

NOAH VALENSTEIN, SECRETARY
DEPARTMENT OF ENVIRONMENTAL PROTECTION

/s/ *Nicholas J.P. Meros*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida E-Filing portal, which provides notice to all parties, on this 13th day of July 2021.

/s/ *Nicholas J.P. Meros*
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Deputy General Counsel