DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CONSERVANCY OF SOUTHWEST FLORIDA, INC.,

Appellant,

v.

COLLIER COUNTY, FLORIDA, and COLLIER ENTERPRISES MANAGEMENT, INC.,

Appellees.

No. 2D21-2094

December 2, 2022

Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge.

Geoffrey J. Michael, Brian D. Israel, Ethan G. Shenkman, Lauren C. Daniel, and Stephen K. Wirth of Arnold & Porter Kaye Scholer, LLP, Washington, D.C., for Appellant.

Glenn Burhans, Jr., and Bridget Smitha of Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Tallahassee; and Richard D. Yovanovich of Coleman, Yovanovich & Koester, P.A., Naples, for Appellee Collier Enterprises Management, Inc.

Sally A. Ashkar, Jeffrey A. Klatzkow, and Colleen Greene of Collier County Attorney's Office; and Gregory N. Woods and Jessica F.

Tolin, Woods of Weidenmiller, Michetti & Rudnick, LLP, Naples, for Appellee Collier County, Florida.

Patrick H. Neale of Patrick Neal & Associates, Naples, for Amicus Curiae The Golden Gate Estates Area Civic Association and Affected Golden Gate Estates Residents.

Martha M. Collins of Collins Law Group, Tampa, for Amicus Curiae Center for Biological Diversity, Sierra Club Florida Chapter, Sanibel-Captiva Conservation Foundation, Calusa Waterkeeper, Environmental Confederation of Southwest Florida, Cypress Cove Landkeepers, and Stone Crab Alliance.

Ralf Brookes of Ralf Brookes Attorney, Cape Coral, for Amicus Curiae The League of Women Voters of Collier County.

Edward L. Larsen of Edward L. Larsen, Esquire, P.A., Naples, for Amicus Curiae Strong Towns.

Elizabeth Fata Carpenter, Lisa Interlandi and S. Ansley Samson of Everglades Law Center, Inc., North Palm Beach, for Amicus Curiae Tropical Audubon Society and Friends of the Evergaldes.

Steven M. Meyers of Meyers & Stanley, Orlando, for Amicus Curiae Florida Rights of Nature Network, Inc.

Clayton T. Osteen and Benjamin B. Bush of Ausley & McMullen, P.A., Tallahassee, for Amicus Curiae Florida Home Builders Association and Association of Florida Community Developers, Inc.

LUCAS, Judge.

We have before us an appeal of a final judgment denying a comprehensive plan challenge to a county's development order. The circuit court carefully considered—and correctly resolved—the majority of the issues that were presented. One legal error,

however, compels us to reverse a summary adjudication the court rendered and remand for further proceedings. We also certify a conflict that has emerged between our district and a sister district concerning the scope of a statutory cause of action.

I.

The Conservancy of Southwest Florida, Inc. (the Conservancy), filed a single-count declaratory judgment action under the aegis of section 163.3215 of Florida's Community Planning Act, challenging Collier County's approval of a development project proposed by Collier Enterprises Management, Inc. (CEM). The proposed development, known as Rivergrass Village, covers nearly a thousand acres of rural land in the eastern part of the county; it entails a mixture of single and multifamily residential homes, commercial, and public space. In its lawsuit, the Conservancy maintained that the Rivergrass Village development violated various parts of Collier County's comprehensive plan (known as the Growth Management Plan or "GMP"), as well as provisions within Collier County's Land Development Code and other land use standards.

Although it was a single-count complaint, the scope and sweep of the issues the Conservancy raised were multifaceted.[1]

Over the course of a year, the case proceeded through litigation, summary judgment proceedings and, eventually, a bench trial in May of 2021. The circuit court resolved part of the Conservancy's declaratory relief action—in which the Conservancy argued that the development order violated traffic impacts and fiscal neutrality requirements of the GMP—through a partial summary judgment in favor of Collier County and CEM. The remaining issues were decided against the Conservancy in a final judgment after the bench trial. The Conservancy now seeks our review.

We affirm the judgment and rulings below in all respects except for the circuit court's summary adjudication of the

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[1] In its operative complaint, the Conservancy alleged that the Rivergrass Village development approved by the county (1) failed to include fundamental design characteristics (including sufficient traffic infrastructure and mitigation); (2) was not interconnected, accessible, or walkable; (3) lacked housing diversity; (4) lacked a sufficient gradient of density and intensity of use; (5) failed to incorporate "innovative planning" strategies; (6) lacked affordable housing options; and (7) was not fiscally neutral and was a drain on taxpayer dollars.

Conservancy's claim that the traffic and fiscal impacts of Rivergrass Village violated the County's GMP. On that discrete issue, we find there were disputed material facts which precluded summary judgment.

II.

"We review summary judgments de novo . . . mindful that the movant for summary judgment must show that there are no genuine issues of material fact" in dispute and that, as such, the movant is entitled to judgment as a matter of law. *See Mack v. Hyundai Motor Am. Corp.*, 346 So. 3d 661, 665 (Fla. 2d DCA 2022) (first citing *Scott v. Strategic Realty Fund*, 311 So. 3d 113, 116 (Fla. 2d DCA 2020), then citing *Tank Tech, Inc. v. Valley Tank Testing, L.L.C.*, 244 So. 3d 383, 389 (Fla. 2d DCA 2018)). Because the court's entry of summary judgment preceded the effective date of the Florida Supreme Court's recent amendment to Florida Rule of Civil Procedure 1.510, we are bound to apply the prior, more restrictive standard of the summary judgment rule. *Id.* at D1614, n.2. Much of our analysis turns upon the interpretation of statutory law, which is also an issue subject to de novo review. *See*

Lab. Corp. of Am. v. Davis, 339 So. 3d 318, 323 (Fla. 2021) (citing *Lopez v. Hall*, 233 So. 3d 451, 453 (Fla. 2018)).

III.

A.

We begin with the statutory cause of action at issue found in section 163.3215. Subsection (2) of the statute defines who has standing to bring a private comprehensive plan consistency challenge, while subsection (3) provides the scope of their cause of action:

> (2) As used in this section, the term "aggrieved or adversely affected party" means any person or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons. The term includes the owner, developer, or applicant for a development order.
>
> (3) 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, or to prevent such local government from taking any action on, 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.

The Fifth District summarized the history of this section's adoption and how it impacted the scope of standing for citizens to challenge development orders for other people's private property:

> Prior to 1985, common law governed a third party's standing to intervene to challenge a development order as inconsistent with the governing comprehensive plan. *See Parker v. Leon County,* 627 So. 2d 476, 479 (Fla. 1993), *Citizens Growth Mgmt. Coal., Inc. v. City of W. Palm Beach,* 450 So. 2d 204, 206–08 (Fla. 1984). The common law rule provided that, in order to have standing to challenge a land use decision, a party had to possess a legally recognized right that would be adversely affected by the decision or suffer special damages different in kind from that suffered by the community as a whole. *Putnam [Cnty.] Envtl. Council, Inc. v. Bd. of [Cnty.] Comm'rs,* 757 So. 2d 590, 592–93 (Fla. 5th DCA 2000); *Citizens Growth Mgmt. Coal., Inc.,* 450 So. 2d at 206. In 1985, the Florida Legislature reacted to the Supreme Court's 1984 decision in *Citizens Growth Management* that the common law rules of standing applied to the Growth Management Act by enacting section 163.3215, Florida Statutes. Its stated purpose was "to ensure the standing for any person who 'will suffer an adverse effect to an interest protected . . . by the . . . comprehensive plan.' " *Parker,* 627 So. 2d at 479 (citing § 163.3215(2), Fla. Stat. (1985)) . . . . There is no doubt that the purpose of the adoption of section 163.3215 was to liberalize standing in this context. *See City of Ft. Myers v. Splitt,* 988 So. 2d 28 (Fla. 2d DCA 2008).

Save the Homosassa River All., Inc. v. Citrus County, 2 So. 3d 329, 336 (Fla. 5th DCA 2008) (third and fourth alterations in original) (footnote omitted).

However, as we explained in *Heine v. Lee County*, 221 So. 3d 1254, 1257 (Fla. 2d DCA 2017), "the type of claim allowed under the Consistency Statute is not unlimited." We held in *Heine* that this statutory cause of action "enunciates only three bases upon which a party may challenge a development order's purported inconsistency with a comprehensive plan." *Id.* Thus, the Consistency Statute only provides a private cause of action to challenge a development order that "materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan." *Id.*

The circuit court correctly applied *Heine* when it confined the scope of the Conservancy's rather sprawling consistency challenge to claims alleging a material alteration to the use or intensity of use on the Rivergrass Village property that purportedly violated the GMP.[2] From our review of the record, much of what the

[2] The Conservancy does not challenge on appeal the trial court's finding that the amount of density allowed under the

Conservancy alleged and argued below concerned documents and provisions (such as the Collier County Land Development Code) that were, as the circuit court observed, "extrinsic" and "not incorporated" into the GMP. The court properly dispensed of those issues by concluding they could not be raised in a section 163.3215(3) consistency challenge. *See Heine*, 221 So. 3d at 1257.

B.

The question we address here is whether the Conservancy's claims concerning the traffic and fiscal impacts of the Rivergrass Village development could be brought within the ambit of a section 163.3215 action. The circuit court concluded that they couldn't. The court ruled, "[T]o the extent those provisions [traffic impact and fiscal neutrality] are found within the GMP, they do not relate to use, density, or intensity of use and are thus not within the scope of Section 163.3215(3)." We disagree. As framed in this case, those two issues implicated the "intensity of use" on this property under

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approved development order was not in violation of the GMP. *Cf. Prince v. State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010) ("An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue—essentially conceding that denial was correct.").

the GMP and, as such, could appropriately be made the subject of a section 163.3215 challenge.

Section 163.3164(22) provides the following definition of "intensity" under the Community Planning Act:

> an objective measurement of the extent to which land may be developed or used, including the consumption or use of the space above, on, or below ground; the measurement of the use of or demand on natural resources; and the measurement of the use of or demand on facilities and services.

With that understanding of what "intensity" in "intensity of use" would entail under section 163.3215(3), we turn now to the arguments and evidence the Conservancy raised and the provisions of the GMP that were potentially implicated.

The county's GMP incorporates a program known as the Rural Lands Stewardship Area (RLSA) Overlay, which sets forth a variety of requirements for developments within approximately 195,000 acres of rural eastern Collier County. Development regulation within the RLSA Overlay district is generally divided into Stewardship Sending Areas (SSAs) and Stewardship Receiving Areas (SRAs), the latter being the designated places where development is

encouraged in order to afford greater protection for SSA areas.[3] Pertinent here, the comprehensive plan's RLSA Overlay includes the following provisions:

> RLSA Overlay Policy 4.14: No SRA shall be approved unless the capacity of the County collector or arterial road(s) serving the SRA is demonstrated to be adequate.
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> RLSA Overlay Policy 4.16: An SRA shall have adequate infrastructure available to serve the proposed development, or such infrastructure must be provided concurrently with the demand.
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> RLSA Overlay Policy 4.18: The SRA will be planned and designed to be fiscally neutral or positive to Collier County at the horizon year on a public facilities impact assessment, as identified in LDC 4.08.07.K. . . . At a minimum, the assessment shall consider the following public facilities and services: transportation, potable water, wastewater, irrigation water, stormwater management, solid waste, parks, law enforcement, and schools. Development phasing, developer contributions and mitigation, and other public/private partnerships shall address any potential adverse impacts to adopted levels of service standards.

From our de novo review of the record, the Conservancy put forward summary judgment evidence that, however a finder of fact may ultimately weigh it, at least raised a genuine dispute that the

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[3] According to the GMP, this demarcation ostensibly "guide[s] concentrated population growth and intensive land development away from areas of great sensitivity and toward areas more tolerant to development."

development order complies with these policies. The Conservancy filed the reports and deposition transcripts of several expert witnesses who opined that the road networks, the proposed traffic mitigation, the demands on county infrastructure, as well as the anticipated population growth and fiscal impacts of the Village Rivergrass project would violate RLSA Policies 4.14, 4.16, and 4.18. Taken together, these issues and these three RLSA policies come within the definitional purview of "intensity" under section 163.33164(22); that is, they implicate "the measurement of the use of or demand on facilities and services." Thus, contrary to the circuit court's ruling, this aspect of the Conservancy's claim was cognizable under the consistency statute and should have been adjudicated on the merits of the evidence.[4]

Accordingly, we are compelled to reverse that aspect of the judgment below and remand for further proceedings.

C.

[4] We express no opinion about those merits; we hold only that the Conservancy's evidence created a disputed issue of material fact precluding summary judgment.

We recognize that our decision today turns upon this court's view, first set forth in *Heine*, about the permissible scope of consistency challenges under section 163.3215(3) and that that view is not universally shared. The Conservancy (along with various amici) urge us to revisit our holding in *Heine* in light of the First District's more recent and more capacious reading of section 163.3215(3) in *Imhof v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021). We respectfully decline to do so.

In *Imhof*, two neighboring landowners and two environmental organizations challenged the approval of a mixed-use, planned unit development (PUD) next to a state park. The Walton County circuit court construed section 163.3215(3) in line with our court's holding in *Heine* and, as such, limited the scope of the plaintiffs' consistency challenge to claims pertaining to the development's density and intensity of use. *Id.* at 35-36. The circuit court determined that the PUD was consistent with the county's comprehensive plan, but the First District reversed.

Certifying conflict with *Heine*, the *Imhof* court deemed section 163.3215(3) ambiguous; the court felt it was unclear which phrase the subsection's clause—"which is not consistent with the

comprehensive plan"—should modify. To resolve this perceived ambiguity, *Imhof* cited a version of the last antecedent rule, which, according to *Imhof*'s rendering of that interpretive canon, "states that a relative pronoun (like 'which' or 'that') 'generally refers to the nearest *reasonable* antecedent.' " *Id.* at 38 (quoting Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 144 (2012)). Ultimately, the court determined that the nearest antecedents to the statute's qualifying phrase "which is not consistent with the comprehensive plan" were not reasonable to apply that clause to. Instead, the court worked its way backwards (some twenty-three words) into the subsection's sentence and found that "[b]oth 'development order' and the government decision or action regarding that order plausibly can serve in place of the second relative adjective 'which' and receive the subject complement phrase 'not consistent with the comprehensive plan.' " *Id.* at 40. Thus, *Imhof* concluded:

> A trial court . . . must conduct a de novo review of a development order challenged under section 163.3215(3)—provided the order alters the use, density, or intensity of use on a property—and determine whether there is *complete* consistency between the local government's action on that order and the local comprehensive plan. It cannot limit its review to just

> those inconsistency claims strictly relating to land use, density, and intensity of use.

Id. at 41.

While we respect the depth of the First District's analysis, it seems to us that *Imhof*'s exegesis of grammatical conventions concerning relative clauses and noun phrases (or, perhaps more accurately, exceptions to those conventions) coupled with the court's robust emphasis of the term "*reasonable* antecedent" found in Justice Scalia and Professor Garner's book,[5] ended up creating the ambiguity the court purported to resolve. *Accord Bifulco v. U.S.*, 447 U.S. 381, 387 (1980) ("Where Congress has manifested its intention, we may not manufacture ambiguity in order to defeat that intent."); *Coon v. Cont'l Ins. Co.*, 511 So. 2d 971, 973 (Fla. 1987) ("Rules of construction 'are useful only in case of doubt and

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[5] Curiously, *Imhof* did not cite Florida's pronouncement of the last antecedent rule, which is rendered differently than the version found in the book *Imhof* applied. In Florida, the doctrine of the last antecedent, a canon of statutory construction, states that "relative and qualifying words, phrases and clauses *are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote.*" *See Kasischke v. State*, 991 So. 2d 803, 811 (Fla. 2008) (emphasis added) (quoting *City of St. Petersburg v. Nasworthy*, 751 So. 2d 772, 774 (Fla. 1st DCA 2000)).

should never be used to create doubt, only to remove it.' " (quoting *State v. Egan*, 287 So. 2d 1, 4 (Fla. 1973))). Indeed, the takeaway of *Imhof*'s interpretation—that "the trial court's inquiry when considering whether there is consistency with the comprehensive plan is not limited at all"—effectively deletes the express limiting language the legislature adopted in this statutory cause of action.[6]

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[6] *Imhof* attempted to buttress its view with the observation that elsewhere in the Community Planning Act (outside of the statutory cause of action), the legislature has expressed an intent to require "strict and *complete* compliance with a duly adopted comprehensive plan." 328 So. 3d at 42. But we find that an unconvincing point.

We can all agree that the legislature expressed an intention that development orders must strictly comply with applicable comprehensive plans. But the question of *who* is authorized to invoke judicial power to enforce compliance with comprehensive plan regulation of another's private property—and, just as importantly, *what the scope* of that invocation entails—is categorically distinct from the question of substantive compliance with that regulation. *See Heine*, 221 So. 3d at 1259 ("[T]he Consistency Statute was intended to liberalize standing, not broaden the scope of what a party with standing may challenge beyond use, density, and intensity . . . ."); *see also Peoples Gas Sys. v. Posen Constr., Inc.*, 322 So. 3d 604, 613 (Fla. 2021) ("We generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014))); *Torres v. Shaw*, 345 So. 3d 970, 974 (Fla. 1st DCA 2022) ("Courts have little room to imply such rights to bring a civil action; rather, statute-based private rights of action must be legislatively created *and show textual support*." (emphasis added)).

Accord Heart of Adoptions, Inc. v. J.A., 963 So. 2d 189, 198 (Fla. 2007) ("We are required to give effect to 'every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplusage.' " (quoting *Am. Home Assur. Co. v. Plaza Materials Corp.,* 908 So. 2d 360, 366 (Fla. 2005))); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.").

"The words of a statute are to be taken in their natural and ordinary signification and import." *Lab. Corp. of Am.*, 339 So. 3d at 323 (quoting James Kent, *Commentaries on American Law* 432 (1826)). Reading the phrases of section 163.3215(3) from left to right and understanding those phrases in their natural, temporal order,[7] the question of standing and scope in cases such as the one

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[7] When reading, we typically make cognitive order of clusters of words from the temporal order they are presented because doing so is the innate preference of human cognition. *See, e.g.*, Lyn Frazier, *Syntactic Complexity*, *in* NATURAL LANGUAGE PARSING: PSYCHOLOGICAL, COMPUTATIONAL, AND THEORETICAL PERSPECTIVES 135-40 (David Dowty, Lauri Karttunen, and Arnold M. Zwicky, eds., 1985). What linguists describe as the "Late Closure Principle"—that

before us should be broken down and answered in the same order as the flow of the statute's sentence: (1) is the plaintiff "aggrieved or adversely affected" by a "development order"; (2) does that development order materially alter the "use or density or intensity of use on a particular piece of property"; and (3) does that material alteration result in an inconsistency with the comprehensive plan. We believe that is the plain and ordinary rendering of this statute's text; and if it were necessary to apply the doctrine of the last antecedent to construe an ambiguity in this subsection, *accord Kasischke v. State*, 991 So. 2d 803, 811 (Fla. 2008) (recognizing the doctrine's application "only where no contrary intention appears"), our interpretation in no way "impair[s] the meaning of the [statute's] sentence." *Id.* To the contrary, it fulfills it. *Cf. Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) ("[T]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used,

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readers prefer to analyze incoming items as part of the phrase or clause they are currently processing—is, to some degree, reflected in the last antecedent rule.

and the broader context of the statute as a whole." (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))).

However, we acknowledge that our holding in *Heine*, as well as our decision today, conflicts with the First District's holding in *Imhof* on this issue of statutory interpretation, and so we certify conflict with our sister court.

IV.

Section 163.3215 extended standing to those "aggrieved or adversely affected" by local government decisions concerning a development order "which materially alters the use, or density or intensity of use on a particular piece of property which is not consistent with" a comprehensive plan. If the legislature had intended for this section to authorize private consistency challenges to encompass any and every detail of a comprehensive plan, section 163.3215(3) would have been worded differently (and more succinctly).[8] Consistent with our holding in *Heine*, the circuit court

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[8] Such a broad construction would have been easily accomplished just by deleting the limiting text as illustrated below:

> Any aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local

properly confined the scope of issues in this lawsuit to those implicating "intensity of use" under section 163.3215(3).

However, the court went too far when it curtailed section 163.3215(3)'s applicability to the Conservancy's traffic and fiscal impact claims. On the record before us, those claims fell within the statute's purview. For that reason, we reverse that aspect of the judgment below and remand this case for further proceedings consistent with our opinion.

Affirmed in part; reversed in part; remanded for further proceedings; conflict certified.

ATKINSON, J., Concurs in result only with opinion.
KELLY, J., Concurring in part and dissenting in part.

> government to challenge any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, 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.

ATKINSON, J., Concurring in result only.

Because this court's prior decision in *Heine v. Lee County*, 221 So. 3d 1254 (Fla. 2d DCA 2017), is controlling, I concur in result only with the majority's opinion. I also concur in the certification of conflict with *Imhof v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021).

Being human, neither legislators nor judges can be relied upon to infallibly make sense when employing the English language to convey a particular meaning. Sometimes there are no right answers, only better or worse answers. *Cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 59 (2012) ("Principles of interpretation are guides to solving the puzzle of textual meaning, and as in any good mystery, different clues often point in different directions. . . . The skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies."). It is our charge as judges to discern the best answer to the question, What do the words of a statute, in context, mean? *See Schoeff v. R.J. Reynolds Tobacco Company*, 232 So. 3d 294, 313 (Fla. 2017) (Lawson, J., concurring in part and dissenting in part) ("[O]ur first (and often only) step in statutory construction is

to ask what the Legislature actually said in the statute, based upon the common meaning of the words used." (citation omitted) (quoting *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984))). The majority, as did the First District in *Imhof*, exerts confidence-inspiring intrepidity in endeavoring to answer that question in the face of the considerable challenge posed by the language of section 163.3215(3), Florida Statutes (2019). However, because I conclude that the latter reached the better answer, I cannot fully join the majority opinion.

In determining what the relative phrase "which is not consistent with the comprehensive plan" modifies, the majority understandably alights upon the nearest antecedent—"use or density or intensity of use." However, the phrase "use or density or intensity of use" is the object of the verb "alters," the subject of which is the noun "development order," which is the object of the preceding prepositional phrases "any decision of such local government granting or denying an application for" and "any action on," which is what an "aggrieved or adversely affected party" may "challenge": "any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, *a development order*." *See* § 163.3215(3)

(emphasis added); *see also* § 163.3215(1) ("Subsections (3) and (4) provide the exclusive methods for an aggrieved or adversely affected party to appeal and challenge the consistency *of a development order* with a comprehensive plan adopted under this part." (emphasis added)). Like the relative clause "which materially alters," of which the phrase "use or density or intensity of use" is an integral part, the subsequent relative clause "which is not consistent with the comprehensive plan" also modifies "any decision of such local government granting or denying an application for, or to prevent such local government from taking any action on, a development order"—again, what an "aggrieved or adversely affected party" may "challenge." *See* § 163.3215(3). In other words, "the use or density or intensity of use" is what is *being* "*alter[ed]*"—being changed from one thing to another—not the thing that "is not consistent with the comprehensive plan"; instead it is what is *doing the "alter[ing]"*—the "decision" or "action" regarding a "development order"—that is, by virtue of changing the status quo, "not consistent with the comprehensive plan." *See* § 163.3215(3); *cf. Imhof*, 328 So. 3d at 39 ("For a development order to be subject to a consistency challenge, it must *materially alter* the use, density, or intensity

designation on a property. 'Materially alters' presumes a change to an *existing*, *consistent* use, density, or intensity designation. Application of the relative clause ["which is not consistent with the comprehensive plan"] to this series of nouns, then, would not make sense, because there would be no reason to limit a claim of inconsistency to an established use, density, or intensity designation that necessarily will be consistent with the plan prior to the grant of a development order. And there certainly would be no reason to apply the limitation in a case where an application for a development order is denied." (emphasis in original)).

One might reasonably ask, as the majority opinion effectively does, Why require a decision or action on a development order to materially alter the use or density or intensity of use on a piece of property for it to be eligible for challenge if such a challenge is not confined to the development order's alteration of the use, density, or intensity of use? It is not always possible to answer every teleological question that might linger after the application of the ordinary meaning of the words, phrases, and sentences of a statute. *See Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 145–46 (2014) ("Today's decision leaves open what [the appellant] thinks is

a gap in the statute. . . . The riddle is not ours to solve (if it can be solved at all). . . . '[T]he question . . . is not what [the legislature] "would have wanted" but what [the legislature] enacted in the [statute].' " (second alteration in original) (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992))). And, as previously suggested, sometimes there may not be a sure solution—only better or worse answers to questions elicited by language crafted by humans. While it may be a good one, on balance I cannot conclude that the answer reached by the majority is the better one. However, because this court's decision in *Heine* is controlling, I concur in result only.

KELLY, J., Concurring in part and dissenting in part.

I agree that the trial court erred in granting summary judgment on the Conservancy's traffic and fiscal neutrality claims. I dissent from the portion of the opinion that affirms the remainder of the trial court's rulings because I agree with the Conservancy that the trial court misapplied *Heine v. Lee County,* 221 So. 3d 1254 (Fla. 2d DCA 2017), and that even under *Heine's* interpretation of section 163.3215(3), the trial court erred by rejecting the

Conservancy's remaining claims.[9] Among other things, I think the trial court erred when it concluded that claims based on violations of provisions in the land development code did not fall within the scope of section 163.3215(3) even though the comprehensive plan expressly required compliance with those provisions, and also when it concluded that the statutory definitions of use, density, or intensity of use were inapplicable when determining which claims fell within the scope of section 163.3215(3).

I understand *Heine* is controlling. However, for reasons different than those expressed in the concurring opinion here or in *Imhof v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021), I believe that the statute does not limit a consistency challenge to only those aspects of a development order that pertain to use or density or intensity of use. It seems to me that little interpretation is required when the phrase at issue is read in its statutory context. *See Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) ("It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether

[9] This includes the trial court's evidentiary rulings challenged by the Conservancy, but not mentioned in our opinion.

a term has a 'plain' or 'clear' meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute.").[10] Finally, I agree that we should certify conflict with *Imhof.*

[10] Given the differing interpretations of the statute evidenced in the opinions in this case, *Heine*, and *Imhof*, one could wonder at the assertion that the statute is unambiguous. *See Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 454, 455 (Fla. 1992) ("Ambiguity suggests that reasonable persons can find different meanings in the same language."); *see also Alachua County v. Expedia, Inc.*, 175 So. 3d 730, 737 (Fla. 2015) (Pariente, J., concurring) ("The fact that both the majority and the dissent conclude that the statute is clear and unambiguous as to their conflicting interpretations is in and of itself an illustration of that statute's ambiguity.").