IN THE THIRTEENTH JUDICIAL CIRCUIT FOR THE STATE OF FLORIDA
CIRCUIT CIVIL DIVISION

EISENHOWER PROPERTY GROUP, LLC,
A limited liability company,
Petitioner,

CASE NO.: 21-CA-204

vs.

DIVISION: C

HILLSBOROUGH COUNTY, a political subdivision of the State of Florida,
Respondent.
_____/

Having considered Petitioner's motion for rehearing, the court grants the motion, withdraws its original opinion rendered August 23, 2021, and substitutes the opinion below. No further rehearing will be considered by the court.

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

Petitioner, Eisenhower Property Group, LLC, seeks review in certiorari of Hillsborough County Board of County Commissioners' (the "Board") denial of its rezoning application. The application sought to change the property's current Agriculture Rural (AR) zoning to Planned Development within the Wimauma Village Residential-2 ("WVR-2") future land use category. The petition is timely, and this court has jurisdiction. Fla. R. App. P. 9.030(c)(3) and 9.190(a). Having reviewed the petition, response, reply, appendices, and applicable law, the court determines that to the extent that the Board's decision to deny rezoning rests on the lack of school capacity, it departs from the essential requirements of law because school capacity need not be shown at the time rezoning is sought. With regard to the Board's determination that the proposed development is inconsistent with the comprehensive plan, this court concludes on rehearing that it lacks subject matter jurisdiction to review it. Accordingly, the petition is granted, but only to the extent the decision rests on the school capacity issue.

Background:

Hillsborough County evaluates rezoning requests under the Future of Hillsborough Comprehensive Plan ("the Plan").[1] The Plan is required to contain "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of…" unincorporated portions of the County. § 163.3177(1), Fla. Stat. (2016). The Future Land Use Element ("FLUE") is a required element of the Plan. § 163.3177(6)(a), Fla. Stat. The FLUE is required to designate proposed *future* land uses and must include standards for the distribution of densities and intensities of development. *Id*. The Plan also provides for a Livable

[1] The Comprehensive Plan is also known colloquially as the "comp plan."

Communities Element as a Plan extension. The subject property is located in Wimauma. The Livable Communities Element[2] contains community and special area studies, including the the Wimauma Village Plan.[3] The Wimauma Village Plan establishes the vision statement and goals for the community, which are listed in order of priority to the community, including the establishment of the Wimauma Village Residential-2 ("WVR-2") land use classification within the boundaries of the Wimauma Village Plan. One of the specific goals of the Wimauma Village Plan is economic development, which emphasizes the desire of the community to "[p]rovide opportunities for business growth and jobs in the Wimauma community."

The goal of economic development is set forth in the Plan's Objective 48, which applies to property within WVR-2, and states:

> In order to avoid a pattern of development that could contribute to urban sprawl, it is the intent of this category to designate Wimauma Village Residential-2 areas inside the boundaries of the Wimauma Village Plan that are suited for agricultural development in the immediate horizon of the Plan, but may be suitable for the expansion of the Village as described in this Plan. (Pet. Appx. A at 237).

In addition, the Plan contains specified assumptions that are used "in determining compliance" with the WVR-2 employment and service requirements. The Plan assumes:

1. There are 2.7 persons per household
2. There are 1.5 job holders per household
3. One job is created for every 500 sq. ft. of commercial development
4. One job is created for every 240 sq. ft. of office development
5. One job is created for every 400 sq. ft. of light industrial development
6. One job is created for every 400 sq. ft. of government services (schools, parks, fire stations, etc.), and residential support uses (churches, day cares, nursing homes, etc.)
7. Neighborhood retail and community commercial demand is 10 sq. ft., respectively, per person
8. The Village shall provide 55% of the needed household jobs (no. of households X 1.5 X .55 = needed jobs)
9. The Village shall have available 75% of the needed household services (households X 2.7 X 10 = desired level of available commercial space in square feet).

To satisfy the employment requirements:

[2] http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf

[3] http://www.planhillsborough.org/wp-content/uploads/2012/10/LIVABLE-COMMUNITIES_09_15.pdf beginning at p. 115 (p. 118 on the online version).

> [T]he proposed commercial square footage shall be contained in the Wimauma Village Downtown. Other employment square-footage requirements shall be contained in the Wimauma Light Industrial and Office District & the West End Commercial District.

In addition to requiring that commercial square footage be contained in the Wimauma Village Downtown, Objective 48 also provides that "[t]he WVR-2 zoning category's employment and shopping requirements shall be tracked *through each individual Planned Development district* and as part of the County's Annual Planned Development Review."

Plan objectives are implemented through more specific policies. Objective 48 of the Comprehensive Plan is implemented through Policy 48.1, which provides that developments within WVR-2 "shall achieve" the minimum clustering ratios, job opportunities, and shopping provisions required by the Plan, and reads in pertinent part:

> …In order to achieve densities in excess of 1 du/5 ga in the WVR-2 category, developments shall achieve the minimum clustering ratios, job opportunity provisions, and shopping provisions, required by this Plan, except as noted in the Zoning Exception found in the Implementation Section of the FLUE.

This objective formed the basis for the Board's decision on Petitioner's rezoning application.

Procedural History:

This matter arises from the Board's denial of Petitioner's application to rezone a site of approximately 194 acres in the rural Wimauma Community in the Rural Service Area of Hillsborough County from AR to WVR-2 with a maximum 387 single-family lots. The proposed development would contain 2.2 acres of residential support uses and approximately 83.42 acres of open space. The properties to the north and south are, like the subject property, within the WVR-2 classification; the properties to the east and west are designated as Residential-4.

When an application for rezoning is filed, the County coordinates reviews of other departments and governmental agencies, who then provide reports with comments and recommendations. Under this process, Hillsborough County City-County Planning Commission ("Planning Commission") staff reviewed the application for Plan consistency. Noting that Petitioner's own analysis indicated the need for 319 jobs to support the project, Planning Commission staff found the proposal to be *inconsistent* with the Plan because not enough jobs were available to render the development self-supporting as the Plan requires. The Planning Commission had previously determined that under Policy 48.1, jobs had to be available *before* project approval. Planning Commission staff also made reference to the School Capacity Report provided by the School District, noting that there is not current adequate capacity for the proposed

development. The County's Development Services also determined the project to be inconsistent with the Plan, citing the same deficiencies as had the Planning Commission.

Following review by county staff, a hearing was held before a land use hearing officer. Sec. 10.03.03, Land Development Code (LDC). This is the first part of a two-part review process and is evidentiary. *Id.* At this proceeding, a hearing officer receives sworn testimony and documentary evidence, including the parcel's zoning history, reports of reviewing agencies, and permitted uses for the property. The hearing officer is also required to consider applicable goals, objectives, and policies contained in the Plan, availability and capacity of public services, nature of any impacts on surrounding land use, environmental impact of the proposed use, and applicable development standards promulgated by the Board. Sec. 10.03.03(E), LDC. The second part of the two-part process is review by the Board of County Commissioners and consists only of a review of the record. Sec. 10.03.04(A), LDC. The record the Board considers contains the application and accompanying documents, staff reports and recommendations, exhibits and documentary evidence, the summary, findings, conclusions, and recommendation of the hearing officer, an audio recording of testimony at the hearing, and a verbatim transcript of the proceedings. Sec. 10.03.04(C), LDC. The Board may hear oral argument, but it does not take any new evidence in this second part of the process. Sec. 10.03.04(C)(1), LDC. The Board is also not required to agree with or accept the hearing officer's conclusion. Sec. 10.03.04(G)(1), LDC. The Board signifies its written approval—or disapproval—of an application by Resolution. *Id.*

The evidentiary hearing before the hearing officer in this case was held February 18, 2020. Although Petitioner disagreed with the interpretation by both the Planning Commission and Development Services that Policy 48.1 required jobs to be in place to support additional development in the area, it submitted an existing employment analysis for the project. The analysis demonstrated that the 319 jobs needed for the requested 387 residential units[4] could not be provided by the existing non-residential square footage within the Wimauma Community Plan boundary. Petitioner took the position that the number of jobs need not be present prior to any rezoning request. Petitioner's representative also discussed the school capacity issue.

Representatives of both the County's Development Services and the Planning Commission spoke on the jobs requirement. They explained that the employment and service requirement numbers were calculated using the square footage of existing nonresidential development from within the entire community plan boundary. This analysis included review of rezoning applications as far back as 2008-09, which looked at whether nonresidential development within the Wimauma community was sufficient to support the addition of the residential units proposed. Based on this analysis, research, and the Plan language, Planning Commission staff interpreted the Plan to require the existence of nonresidential entitlements to move forward with rezonings of a density of two dwelling units per gross acre, the maximum density allowed in the category.

[4] 387 homes x 1.5 jobs per household x .55 (the required percentage of jobs to be met) = 319 jobs.

Following Petitioner's and staff's presentations, a member of the public spoke in opposition to the project. In addition, there were a number of written objections to the project. Most cited the explosion of development without the necessary infrastructure to support it. Petitioner was afforded an opportunity to provide rebuttal, and it did so. At the conclusion of the evidentiary presentation, the hearing officer recommended approving the application, citing his disagreement with the Planning Commission's interpretation that Policy 48.1 requires jobs to be available *before* a rezoning is approved.

On August 11, 2020, the Board of County Commissioners reviewed the matter. This second part of the two-part process is not evidentiary. Sec. 10.03.04(A), LDC. The Board considers only the complete record of the hearing before the hearing officer. Sec. 10.03.04(C), LDC. Petitioner was permitted to present argument in favor of the project and in opposition to the Planning Commission's interpretation of Policy 48.1. Planning Commission staff summarized the positions taken in its staff report and evidence from the hearing below. In addition, a representative from the County Attorney's Office presented the hearing officer's recommendation to approve the planned development. Although Petitioner initially sought time for rebuttal in the Board proceeding, Petitioner was advised that no one from the public appeared for the hearing, and there were no amended staff recommendations. *See* Sec. 10.03.04(E)(5)(d)-(e), LDC. At the conclusion of the hearing, Petitioner did not renew its request to provide rebuttal.

After oral argument, a commissioner moved for denial. Board members discussed the job opportunities requirement contained in Policy 48.1. It was explained that the development request was for a 10-fold density increase *outside* the Urban Service Area[5] and that such requests must be self-sustaining. It was further noted that State Road 679 would remain substandard even after required improvements were made. Ultimately, the Board rejected the hearing officer's recommendation and voted to deny rezoning by a vote of 5 to 2.

On December 9, 2020, the County issued and filed with the Clerk its Resolution RR20-055 (the Resolution) denying the request. It sets forth the findings of the Board and, as required by law, identifies points of noncompliance with the Plan. Among other things, the Board found a failure to demonstrate consistency with Policy 48.1 because insufficient jobs were available to support the project. In addition, the Board also made the finding that the school system lacked adequate capacity to support the development. This timely petition followed the Board's denial of the rezoning request.

STANDARD OF REVIEW:

Certiorari is appropriate to review the quasi-judicial decisions of a Board. *Hirt v. Polk Cnty. Bd. of Cnty. Comm'rs*, 578 So. 2d 415, 416 (Fla. 2d DCA 1991) ("Certiorari is the proper method to review the quasi-judicial actions of a Board of [the] County… injunctive and declaratory suits are the proper way to attack a Board's legislative actions."). Certiorari review of a quasi-judicial zoning decision is akin to a plenary appeal in that it is "a matter of right." *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d

[5] Areas outside the Urban Service Area are within what is referred to as the Rural Service Area.

1089, 1092 (Fla. 2000). In such proceedings, the circuit court reviews the agency's quasi-judicial decision to determine whether the local government provided due process, whether the local government followed the essential requirements of law, and whether competent substantial evidence in the record supports the decision. *City of Deerfield Beach v. Valliant*, 419 So. 2d 624, 626 (Fla. 1982). Courts are not permitted to reweigh evidence or substitute their findings for those of the administrative agency. *Haines City Com'ty Dev. v. Heggs*, 658 So.2d 523, 530 (Fla.1995). Moreover, courts are charged with reviewing the record for evidence that supports local government, not that which rebuts it. *Broward Cnty. v. G.B.V. Intern. Ltd.,* 787 So. 2d 838, 846 (Fla. 2001). In such proceedings, the landowner has the initial burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance before the burden shifts to the government to demonstrate that maintaining the existing zoning classification accomplishes a legitimate public purpose. *Martin Cnty. v. Yusem*, 690 So. 2d 1288, 1292-93 (Fla. 1997).

Due Process:

The requirements of due process in an administrative proceeding are met if the parties are afforded notice and a meaningful opportunity to be heard. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So.2d 940, 948 (Fla. 2001) (internal citations omitted). Petitioner received notice, appeared, and participated in all aspects of the proceedings. Here, Petitioner asserts two bases for its claim that it was denied its right to due process: 1) Petitioner was not given an opportunity for rebuttal at the August 11, 2020 Board hearing; and 2) Petitioner was not given an opportunity to rebut justifications set forth within the Resolution itself.

The court is not persuaded that Petitioner was denied due process because it was not afforded the opportunity to provide rebuttal at the hearing before the Board. The LDC mandates that "[t]he content of testimony shall be the same as the content of testimony submitted verbally or in writing to the Land Use Hearing Officer." Sec. 10.03.04 (E), LDC. Petitioner was afforded the opportunity to provide rebuttal in the first hearing. In the second hearing the Board receives no new evidence. Sec. 10.03.04 (D)(1), LDC. Petitioner's entire presentation in the evidentiary hearing was in the record. Petitioner is correct that, *if* the Board permits oral argument, sec. 10.03.04 (E)(5)(f) allots five minutes for rebuttal, but it also provides a party that is not the applicant 10 minutes and an additional five minutes for any amended staff recommendations, neither of which occurred here. Moreover, the LDC also provides that "[a]ll irrelevant, immaterial or unduly repetitious evidence shall be excluded." *See* Sec. 10.03.03(D), LDC.

In addition to the rebuttal Petitioner provided in the record, Petitioner presented significant argument to the Board, addressing the Planning Commission's finding of inconsistency with the Plan, and the hearing officer's recommendation to approve it. Although Petitioner initially asked to reserve time for rebuttal, Petitioner was informed that, where no party of record had appeared in support of or to oppose the project, there was nothing to rebut. Petitioner did not thereafter object to the disallowance of rebuttal.

The failure to object waived the issue for appellate review. *See Clear Channel Communs., Inc. v. City of North Bay Vill*., 911 So. 2d 188, 190 (Fla. 3d DCA 2005).

Petitioner also claims it was not given an opportunity to rebut the justifications for the Resolution.[6] Though there are multiple bases given in the Resolution as to inconsistency with the Plan, Petitioner's argument relates to the finding regarding school capacity. Petitioner alleges that "[h]ad the Board discussed this issue or made [Petitioner] aware of it, [Petitioner] would have been able to explain that the Board could not deny rezoning applications based on school capacity." Because, for reasons explained below, this court agrees that the Board erred when it included school capacity as a basis for denying rezoning, it is unnecessary to discuss the issue on due process grounds.

Competent Substantial Evidence / Essential Requirements of Law:

Petitioner next argues that no competent, substantial evidence supports the Board's decision to deny rezoning. If competent substantial evidence supports the local government's decision, the decision is presumed to adhere to the essential requirements of law. *State v. Wiggins*, 151 So. 3d 457, 464 (Fla. 1st DCA 2014) (*citing Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1276 (Fla. 2001)). It is an applicant's burden to demonstrate consistency with the Plan. *Bd. of County Comm'rs. of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). The Board has no burden to show that Petitioner's application is inconsistent, *St. Johns Cnty. v. Smith*, 766 So. 2d 1097 (Fla. 5th DCA 2000), or that there is a legitimate public purpose in maintaining the current zoning, *Snyder*, 627 So. 2d at 475, unless Petitioner first demonstrates the Board's decision to deny the application is inconsistent with the Plan.

As noted in the facts, the Resolution denying the rezoning identifies two main bases for its conclusion that the project did not comply with the Plan. This Court agrees with Petitioner that the lack of school capacity at the time of the Board hearing is not an appropriate basis to deny rezoning. *After rezoning is completed*, a developer must submit a school concurrency application to receive a mandatory determination of school capacity at the time of permitting or preliminary plat or site development plan. *See* Interlocal Agreement §5.5.2 (a-b).[7] If capacity remains unavailable, the applicant may mitigate for the development's impacts. *Id.* §§ 5.5.2(e)(1–2), (g); and §163.3180(6)(h)(2), Fla. Stat. If adequate capacity does not exist and mitigation is not an acceptable alternative, the County may then deny the *development application*.[8] Interlocal Agreement § 5.5.2(f).The Interlocal Agreement does not even allow a property

[6] The Resolution was issued several months after the hearing.

[7] Hillsborough County Interlocal Agreement for School Facilities Planning, Siting and Concurrency. *See also* the School Capacity Report in Petitioner's appendix at p. 96.

[8] School concurrency applies only to that phase of residential development requiring subdivision plat approval or site development plan approval, or its functional equivalent. Interlocal Agreement § 5.5.1(a). *See also* § 5.5.2(a).

owner to submit either the mandatory determination of capacity or a mitigation proposal at the time of rezoning. *Id.* § 5.5.1(a). Thus, to the extent that the Board's decision rests on the lack of school capacity, the decision departs from the essential requirements of law.

The Court now turns its attention to the Resolution's finding that the project was inconsistent with the FLUE's Policy 48.1, requiring that sufficient jobs be available to support the development. Although this point of alleged Plan inconsistency was argued in the administrative proceeding below, the petition presented no argument as to the alleged error of the Board's determination that the requested rezoning did not meet policy requirements. Respondent contends that the issue is, therefore, abandoned. *City of Miami v. Steckloff,* 111 So. 2d 446, 447 (Fla. 1959) (points will not be considered by an appellate court unless they are properly raised and discussed in the briefs); *see also Parker-Cyrus v. Justice Admin. Com'n,* 160 So. 3d 926, 928 (Fla. 1st DCA 2015) (issue not raised in the initial petition deemed abandoned).

In response, Petitioner contends that consistency with FLUE's policy 48.1 was not eligible for review in this certiorari proceeding because section 163.3215(3) provides the *exclusive* method for challenging the consistency of a development order with a comprehensive plan under §163.3215(1).[9] That proceeding is a de novo one filed in circuit court. §163.3215(3), Fla. Stat. After considering the issue on rehearing, the court agrees. Before 2002, the legal remedy provided under section 163.3215 was not available to owner/applicants whose applications for development orders were denied. *See* §163.3215, Fla. Stat. (2001); *Parker v. Leon Cnty.,* 627 So. 2d 476, 479 (Fla. 1993) (owner whose application has been denied does not seek to prevent action on a development order). Before 2002, the right to mount a consistency challenge under the statute was limited to affected third parties. §163.3215(2), Fla. Stat. (2001) (defining "aggrieved or adversely affected party");[10] *Parker,* 627 So. 2d at 479 (section 163.3215

[9] **§163.3215, Florida Statutes (2019) states**: (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. …

(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 de novo action must be filed no later than 30 days following rendition of a development order or other written decision, or when all local administrative appeals, if any, are exhausted, whichever occurs later.

applicable only to actions by third-party intervenors). In addition, before 2002, the statute specifically limited consistency challenges to action related to development orders that altered the density, intensity, or use of property. §163.3215(1), Fla. Stat. (1989);[11] *Parker v. Leon Cnty., 627 So. 2d* at 479.[12]

The intent of section 163.3215, Florida Statutes, was to afford third parties the ability to challenge, in a de novo proceeding, development orders on grounds of Plan inconsistency. Ch. 85-55, §18, Laws of Florida. *See also Seminole Tribe of Fla. v. Hendry Cnty*., 106 So. 3d 19, 22 (Fla. 2d DCA 2013) (section 163.3215 precluded third-party petitioner from raising comprehensive plan consistency challenge in a petition for writ of certiorari; an adversely affected party may maintain a de novo action for declaratory or other relief to challenge a development order.)*; Stranahan House, Inc. v. City of Ft. Lauderdale,* 967 So. 2d 1121, 1125-26 (Fla. 4th DCA 2007). The claimed applicability of the statute to *denials* of applications for development orders such as the one before this court changed in 2002, when section 163.3215(2) was amended to include owners, developers, and applicants for developers in the definition of "aggrieved party." Ch. 2002-296, § 10, Laws of Fla. In addition, subsection (3) was amended. Previously, it allowed aggrieved parties to seek relief "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 that is not consistent with the comprehensive plan adopted under this part." As amended, subsection (3) now allows aggrieved parties like Petitioner to maintain a de novo action for relief to challenge "any decision…*denying an application for*…a development order, as defined in section 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…Plan." §163.3215(3), Fla. Stat. Thus, although the denial of the requested development order maintained the status quo, that is, it did not alter the use, density, or

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[10]**Section 163.3215 (2), Florida Statutes (2001) states**: "Aggrieved or adversely affected party" means any person or local government which 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, or environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in community good shared by all persons. *Cf.* §163.3215(2) (2019), which is the same as the 2001 version, except for the following added language: "…The term includes the owner, developer, or applicant for a development order."

[11] **Section 163.3215(1), Florida Statutes (2001)**: "Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government 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 that is not consistent with the comprehensive plan adopted under this part."

[12] In *Parker,* the court noted that the definition of "development order" in section 163.3164(6), Florida Statutes (1989) included applications for development permits. It is the same today except that it has been renumbered from subsection (6) to subsection (15). Although this definition was incorporated into the version of section 163.3215 the *Parker* court considered, its decision ultimately turned on the definition of "aggrieved party," which it determined did not include owners/applicants, as the amended statute now does.

intensity of use of the property, the *application* sought approval (or a development order) to increase the density and intensity of use of the property.

The court must give effect to every word of a statute so that no word is construed as "mere surplusage." *Hardee County v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017) (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007)). To decide otherwise would fail to give effect to the legislature's addition of the words "applications for" as they modify "development order." Moreover, if only development orders that alter the use, density, or intensity of use of property were actionable, rather than *applications* for development orders that would do so, the denial of an application would rarely, if ever, be actionable under the statute because a denial maintains the status quo. *Parker*, 627 So. 2d at 479 ("denial of an application does not alter the use or density of property…denial order simply preserves the status quo and no further action is possible.")[13] The court is aware of the newly decided case, *Imhof, et al. v. Walton Cnty., Fla.,* 46 Fla. L. Weekly D2048 (Fla. 1st DCA Sept. 15, 2021), wherein the court said that there would be no reason to apply the statutory limitation to an application for a development order that has been denied, citing *Parker* at 479, but *Imhof* does not reach the discrete issue before this court.

This court concludes that under the current version of section 163.3215(3), all Plan consistency challenges must be brought in a de novo proceeding. *Bush v. City of Mexico Beach,* 71 So. 3d 147, 150 (Fla. 1st DCA 2011). Accordingly, the Board's finding that the rezoning is inconsistent with FLUE Policy 48.1 is not one that can be raised in certiorari. Issues unrelated to Plan consistency, such as the school capacity issue raised in the petition here, must still be raised by petition for writ of certiorari. *Id.* Because Petitioner is correct that the County departed from the essential requirements of law on the school capacity issue, the court grants the petition as to that issue.

It is therefore ORDERED that the petition for writ of certiorari is GRANTED only to the extent that the County's decision is based on insufficient school capacity. The Resolution remains in effect pending a determination by the trial court as to Petitioner's Plan consistency challenge.

ORDERED in Tampa, Hillsborough County, Florida, on the date imprinted with the Judge's signature.

Electronically Conformed 10/21/2021
James Barton

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CARL HINSON, Circuit Judge

Electronic Copies Provided Through JAWS

[13]The term "application" was added to the statute after the *Parker* decision.