IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 4D2024-0366
Lower Tribunal Case No. 23-1310-CA

ADENA TESTA, individually and as co-trustee of the Michael David Testa Revocable Trust,

Appellant,

v.

DOLPHIN SUITE, LLC, a Florida Limited Liability Company, et al.,

Appellees.

On Appeal from the Nineteenth Judicial Circuit,
in and for, Martin County, Florida

APPELLANT'S REPLY BRIEF

Jesse Panuccio (FBN 31401)
Stuart H. Singer (FBN 377325)
James Grippando (FBN 383015)
Jason Hilborn (FBN 1008829)
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
jpanuccio@bsfllp.com
ssinger@bsfllp.com
jgrippando@bsfllp.com
jhilborn@bsfllp.com

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INTRODUCTION

Dolphin Suite admits that, through this lawsuit, it seeks to "vest[ ] a bundle of property rights." AB 13. But those supposed property rights are the very ones Mrs. Testa challenges in two other lawsuits. Dolphin Suite's lawsuit is, therefore, a transparent attempt to circumvent Mrs. Testa's lawsuits (both of which have been successful) without her participation. She thus has a direct, legal interest in Dolphin Suite's lawsuit and should have been permitted to intervene.

Moreover, as a neighboring property owner whose home is subject to damage if Dolphin Suite destroys the protective dunes as it proposes, Mrs. Testa has a property interest that justifies intervention.

ARGUMENT

"Anyone claiming an interest in pending litigation" may intervene, Fla. R. Civ. P. 1.230, and "the concept of intervention is liberally applied," *K.N. v. Dep't of Child. & Fams.*, 359 So.3d 741, 743 (Fla. 4th DCA 2023). It is an abuse of discretion by a trial court to deny intervention to a party that has a sufficient interest under the rule. *See, e.g.*, *Symcon Dev. Grp. Corp. v. Passero*, 219 So.3d 879,

880, 882 (Fla. 4th DCA 2017); *T.R.-B. v. Dep't of Child. & Fams.*, 335 So.3d 729, 739 (Fla. 3d DCA 2022) ("the trial court abused its discretion in not granting the petitioner's amended motion to intervene"); *Lefkowitz v. Quality Lab. Mgmt., LLC*, 159 So.3d 147, 148 (Fla. 5th DCA 2014) ("We conclude that the trial court abused its discretion in denying the motion to intervene and, accordingly, reverse."); *Litvak v. Scylla Properties, LLC*, 946 So.2d 1165, 1175 (Fla. 1st DCA 2006) ("[T]he judge abused his discretion in denying [the] motion to intervene."). Here, Mrs. Testa has three independently sufficient interests, and the trial court therefore erred in denying her motion to intervene.

I. MRS. TESTA WILL GAIN OR LOSE BY THE JUDGMENT IN THIS CASE BECAUSE IT WILL DETERMINE THE EFFECT, UNDER JUPITER ISLAND'S ORDINANCES, OF HER PARALLEL FDEP PERMIT CHALLENGE.

The Jupiter Island Construction Code states: "No [building] permit … shall be issued until compliance with … all other applicable codes and regulations has been satisfied." LDR Art. VII, Div. 3, Sec. 3, § 104.1.[1] Section 161.053, Florida Statutes—which requires

[1] The Town's Comprehensive Plan and its Land Development Regulations ("LDRs") are part of its Code of Ordinances, available at

issuance of a Florida Department of Environmental Protection ("FDEP") permit for coastal construction—is one of the "other applicable codes" that must be "satisfied" under this local ordinance. Dolphin Suite does not dispute, and therefore concedes, that Mrs. Testa's Division of Administrative Hearings ("DOAH") lawsuit precludes it from obtaining a final FDEP permit. *See* AB 12; F.A.C. § 62-110.106(12) (FDEP permit not final if petition for administrative hearing is filed). This concession is all that is necessary to demonstrate that Mrs. Testa has an interest in *this* lawsuit and should have been granted intervention.

In this lawsuit, Dolphin Suite seeks to have a court compel the Town to issue the local building permit even though Mrs. Testa's DOAH challenge renders it legally impossible for Dolphin Suite to "satisf[y]" the "other applicable codes," as required by Jupiter Island ordinance. In other words, through *this* lawsuit, Dolphin Suite seeks to negate the legal effect of Mrs. Testa's *other* lawsuit without her participation. Mrs. Testa seeks to intervene here to protect the legal

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https://library.municode.com/fl/jupiter_island/codes/code_of_ordinances?nodeId=12535.

effect of her other lawsuit, and that is an interest that warrants intervention. *See Stefanos v. Riviera-Berrios,* 673 So.2d 12, 13 (Fla. 1996) (if party "will gain or lose by the direct legal operation and effect of the judgment," then intervention should be granted).[2] Dolphin Suite's counterarguments are unavailing.

1. Dolphin Suite argues that Mrs. Testa's interest "does not stand to gain or lose by judgment in this case" because a different Jupiter Island ordinance prohibits "commencement of the permitted development" before "all other applicable state … permits [are] obtained." AB 11–12 (quoting LDR Art. VII, Div. 3, Sec. 3, § 104.7).

[2] In footnote 5, Dolphin Suite sounds the same refrain it and its co-developers have parroted for years now—namely, that Mrs. Testa seeks "to cause [them] maximal delay, expense, and frustration." AB 14 n.5. The problem for this "argument"—and the reason it is now relegated to a footnote—is that Dolphin Suite and its co-developers keep losing in court. Mrs. Testa is asserting her legally protected interests in not having neighboring development that violates the law and endangers her property. This Court has agreed with Mrs. Testa that the ordinance Dolphin Suite relies upon was illegally enacted, *Testa v. Town of Jupiter Island*, 360 So.3d 722, 730 (Fla. 4th DCA 2023), and the FDEP's final order finds that the first of the development projects to be litigated will, in fact, destroy the frontal dune and thereby endanger surrounding properties, *Testa, et al. v. Jupiter Island Compound, LLC, et al.*, Case No. 22-0518 (DOAH Aug. 23, 2023), *modified in part by* Case No. 21-1175 (FDEP Nov. 20, 2023).

But Dolphin Suite contradicts that argument just two pages later when it says "[t]he issuance of a building permit" will "vest[ ] a bundle of property rights." AB 13. In other words, Dolphin Suite itself says it seeks to use *this* lawsuit to vest a bundle of property rights, but Mrs. Testa's point is that the legal effect of *her* lawsuit prohibits any such vesting. Thus, she should be permitted to intervene in *this* lawsuit to protect that legal interest.

To be sure, Mrs. Testa disputes Dolphin Suite's position. Its first argument is correct: the building permit is not sufficient to vest it with *any* rights. But that would mean Dolphin Suite suffers no injury and thus has no standing to bring this lawsuit. *See Southam v. Red Wing Shoe Co.*, 343 So.3d 106, 107, 109–13 (Fla. 4th DCA 2022) ("no concrete harm, no standing"). Realizing the trap it has set for itself on pages 11 and 12 of its Answer Brief, Dolphin Suite pivots on page 13 to argue that it *will* gain something by this lawsuit. And because it advances that position, Mrs. Testa's interest is squarely in play.

2. Dolphin Suite next argues that Mrs. Testa's reliance on section 104.1 of the Jupiter Island Construction Code is "dubious"

under the surplusage canon. AB 14–17. Dolphin Suite's theory is that because section 104.7 prohibits "commencement of the permitted development" before "all other applicable state or federal permits [are] obtained," that section would be rendered "entirely superfluous" if section 104.1 also prohibits issuance of the building permit before state permits are obtained. AB 16–17.

Dolphin Suite has it backwards. It is entirely consistent for the Jupiter Island Construction Code to condition both issuance of the permit and commencement of development upon obtaining all state permits. But under Dolphin Suite's reading there truly is superfluity—section 104.1 is rendered entirely meaningless because the word "no" in "[n]o such permit … shall be issued" is entirely ignored. Under its reading, the permit *shall* be issued before all other applicable codes are satisfied.

Dolphin Suite attempts to evade this problem by stating "'all other applicable codes and regulations' in Section 104.1 must refer to something other than the 'state and federal permits' referenced in Section 104.7." AB 17. But this conclusory argument fails to say *what* that other "something" could be. And Dolphin Suite's reading

violates the ordinary-meaning canon, under which legal texts must be interpreted according to the "plain, obvious, and common sense" meaning of "the actual language," consistent with "dictionary definitions of the terms." *Advisory Opinion to the Governor re Implementation of Amendment 4*, 288 So.3d 1070, 1078 (Fla. 2020). "It is axiomatic that all means all, every single one." *Francois v. State*, 317 So.3d 1268, 1272 (Fla. 3d DCA 2021); *see also CIS v. City of Clearwater*, 908 So.2d 1195, 1196 (Fla. 2d DCA 2005) ("The term 'all' means 'every; any whatever[.]'"); *All*, Random House Dict. of the English Language (2d ed. 1987) ("the whole of … every"). Accordingly, "all other applicable codes" means every single other applicable code, and it is undisputed that the state law requiring a FDEP permit is a code applicable to this property.[3]

* * *

[3] Dolphin Suite suggests that the proper interpretation of the Jupiter Island Construction Code is "a merits-based argument." AB 14. But consideration of the merits is often bound up in the intervention question because the merits of the lawsuit are what determines whether a party has an interest at stake. And the debate between Dolphin Suite and Mrs. Testa regarding this merits question only underscores that Mrs. Testa's interests stand to gain or lose based on whether Dolphin Suite's proffered interpretation of the Code is adopted.

Mrs. Testa's interest in protecting the legal effect, under Jupiter Island ordinances, of her challenge to the FDEP draft permit is alone sufficient for intervention.

II. MRS. TESTA HAS A DIRECT LEGAL INTEREST IN PROTECTING THE EFFECT OF HER CHALLENGE TO THE VALIDITY OF THE UNDERLYING ORDINANCE ON WHICH DOLPHIN SUITE'S PROPOSED DEVELOPMENT RELIES.

Dolphin Suite concedes in its Complaint that its development proposal hinges on the legality of the Waterfront Setback Line (known as Ordinance 376). App. 5. And it is Mrs. Testa who prevailed in this Court in her argument that Ordinance 376 was illegally enacted. *See Testa v. Town of Jupiter Island*, 360 So.3d 722 (Fla. 4th DCA 2023). If, on remand, Mrs. Testa prevails on the Town's affirmative defenses, the ordinance will be declared void ab initio, leaving Dolphin Suite with no ability to "meet[ ] the requirements of the[ ] land development regulations" and thus no right to "issu[ance] [of] the development permit." LDR Art. X, Div. 10, § 10.04.

Yet, in *this* lawsuit, Dolphin Suite apparently seeks an insurance policy against that eventuality by requiring the immediate issuance of the local permit, which it argues will "vest[ ] a bundle of property rights." AB 13. To be sure, Mrs. Testa disagrees with that

argument. But that is the point: Dolphin Suite all but *admits* that it is using this lawsuit to support an eventual argument that its right to develop is "vest[ed]" no matter what happens in the Ordinance 376 litigation. Mrs. Testa therefore has an interest in intervening to protect her rights in that other litigation—for example, by arguing that the trial court should exercise discretion to await the conclusion of the first-filed and logically antecedent Ordinance 376 litigation.

Dolphin Suite's attempts to deny the connection between the Ordinance 376 litigation and this case are all meritless.

1. Dolphin Suite argues that Mrs. "Testa's arguments" that it "is not entitled to a local building permit … have been rejected." AB 19. That is flat wrong. This Court *agreed* with Mrs. Testa and held Ordinance 376 was illegally enacted. *Testa v. Town of Jupiter Island*, 360 So.3d 722 (Fla. 4th DCA 2023). Thus, "the law underlying th[e] approval" of Dolphin Suite's development project, AB 19, is exactly what is at issue, and Dolphin Suite admits it is attempting to use this

lawsuit to have an argument that it can develop the accessory beach house even if the underlying law ultimately falls.

2. Dolphin Suite argues that raising Ordinance 376 would "inject a new issue" into the case because, as "framed by the pleadings, the validity of Ordinance 376 is not at issue." AB 20–21. But Dolphin Suite ignores its own Complaint, which directly states that its requested permit depends on the validity of Ordinance 376. App. 5, ¶ 8 ("In reliance on the Town's adoption of a 2019 Ordinance ('Ordinance 376') shifting the Waterfront Setback Line throughout the Town landward, thereby increasing the buildable square footage on the oceanfront portion of the Property, Dolphin Suite hired contractors and consultants to develop construction plans for a 2,576 square foot beach house on the portion of the property located to the east of South Beach Road (the 'Beach House').").

Dolphin Suite also argues that the Ordinance 376 litigation would inject a new issue because the Town "does not take the position that its own ordinance was unlawfully enacted." AB 20. But, again, Dolphin Suite ignores that *this* Court has already held the ordinance was illegally enacted. It is not a "new" issue—it is

simply a baseline legal reality, and one Dolphin Suite is trying to circumvent with this lawsuit. In any event, Dolphin Suite waived this argument by contending below that Mrs. Testa could not intervene because the Town already adequately represents all her interests. App. 175–76. It cannot now reverse course and say she cannot intervene because the Town *fails* to represent her interests. *See Castor v. State*, 365 So.2d 701, 703 (Fla. 1978) ("a reviewing court will not consider points raised for the first time on appeal").

3. Dolphin Suite argues that Testa's interest "premised on her Ordinance 376 lawsuit is, at best, … inconsequential" because "Dolphin Suite's ultimate ability to commence construction on the Property depends not only on the local building permit at issue in this case, but also on the issuance of state-level permits, which Testa is also challenging." AB 21–22. But, as explained above, Dolphin Suite creates a dilemma for itself. If the building permit is inconsequential, then Dolphin Suite is not harmed by its non-issuance and thus lacks standing. *See Southam*, 343 So.3d at 107, 109–13 ("no concrete harm, no standing"). That is why Dolphin Suite argues that, far from being inconsequential, this lawsuit will "vest[ ]

a bundle of property rights." AB 13. Dolphin Suite cannot have it both ways, and so long as it is arguing that this lawsuit will vest it with development rights, Mrs. Testa has an interest in preserving the effect of her lawsuit that proves it has no such rights.

4. As noted, Dolphin Suite concedes that there is a direct relationship between its development proposal and the validity of Ordinance 376, and that this relationship is why Dolphin Suite (represented by the same counsel) was granted intervention in Mrs. Testa's Ordinance 376 litigation. AB 22. But it claims, in this mirror-image case, that mirror-image intervention should not be permitted because Mrs. Testa's property is "several hundred feet from Dolphin Suite's beachfront lot." AB 23. Dolphin Suite does not explain the import of this point, but presumably it means to argue that Mrs. Testa's property is thus unaffected by its proposed development. The problem for Dolphin Suite is that an administrative law judge, and then the FDEP in a final order, rejected this argument. The Final Order holds that destruction of the frontal dunes in this area *will* affect nearby properties by causing the dune to "become unstable or collapse, and, consequently, its protective value significantly

lowered." App. 217, 266. Moreover, the Jupiter Island LDRs recognize that property owners "within 1,000 feet from any part of the parcel proposed for development" have property interests that may be affected. *See* LDR Art. X, Div. 7, Sec. 7.03.A.1.

III. MRS. TESTA HAS AN INTEREST IN HER PROPERTY RIGHTS AS PROTECTED BY THE TOWN'S LAND DEVELOPMENT REGULATIONS.

The third independently sufficient interest justifying Mrs. Testa's intervention is her status as the owner of a nearby property that may face physical damage from the destruction of protective dunes proposed by Dolphin Suite. This interest is recognized in the Jupiter Island Land Development Regulations, in Florida statutory law, and in caselaw. *See* LDR Art. I, Div. 1, § 1.01 ("purpose[ ]" of LDRs is to "protect[ ] landowners from adverse impacts of adjoining developments"); LDR Art. X, Div. 7, Sec. 7.03.A.1 (providing that property owners "within 1,000 feet from any part of the parcel proposed for development" must receive notice); § 161.053(1)(a) , Fla. Stat. ("it is in the public interest to preserve and protect [coastal barrier dunes] from imprudent construction" that "jeopardize[s] the stability of the beach-dune system," "provide[s] inadequate protection to upland structures," or "endanger[s] adjacent properties"); *State ex*

rel. Gardner v. Sailboat Key, Inc., 306 So.2d 616, 618 (Fla. 3d DCA 1974) (if a proceeding involves one property owner's claimed right to build under local zoning ordinances, neighboring property owners affected by the outcome of that litigation may intervene). Dolphin Suite's attempts to minimize this interest rely on caricature and misstatements of the law.

1. Dolphin Suite's lead argument is that Mrs. Testa claims "mere[ly] … liv[ing] in the same Town where Dolphin Suite owns property … confers upon her a right to intervene in any lawsuit related to Dolphin Suite's Property." AB 24. *See also* AB 26 (contending that Mrs. Testa argues any "landowner in the same Town or general vicinity of a proposed construction project is entitled to intervene"). That is quite obviously a caricature of Mrs. Testa's argument. Mrs. Testa contends that Dolphin Suite's proposed destruction of the barrier dunes that protect *her property* directly affects her interest. And that interest is at issue in *this* lawsuit about Dolphin Suite's property because Dolphin Suite seeks to use its property to destroy those protective dunes. Other, non-injurious uses of its property would not affect Mrs. Testa's interests even if

there were litigation over them. And Town residents who do not live near the protective dunes on Dolphin Suite's property likewise would not have an interest. That Dolphin Suite's lead argument is such an easily rebutted caricature is indicative of the strength of its overall response.

2. Dolphin Suite tries to distinguish *Gardner* by claiming that intervention in suits over development rights is available only for plaintiffs. AB 25. As an initial matter, this has been disproven even in the current dispute on Jupiter Island: Dolphin Suite (represented by the same counsel) intervened as a *defendant* in the mirror-image Ordinance 376 litigation. As Dolphin Suite admits, this was permitted not because they were plaintiffs with "the exact same allegations against the defendant," AB 25 (emphasis removed), but because (according to Dolphin Suite) the case "affected … its own property," AB 22.

In any event, "closer scrutiny" of *Gardner*, AB 24, does not support Dolphin Suite's attempt to limit the case. The issue in *Gardner* was that a developer proposed to build structures that would have an "effect" on "the adjacent landowners" of "possibly causing

delay in recession of storm waters which could aggravate the risk of flooding the home." 306 So.2d at 618. That interest meant an adjacent landowner "should have been permitted" to intervene. *Id.* That is precisely the same interest at issue here for Mrs. Testa: Dolphin Suite proposes to destroy the protective dunes, and the FDEP has already concluded that such destruction in this area of Jupiter Island will affect nearby properties by causing the dune to "become unstable or collapse, and, consequently, its protective value significantly lowered." App. 217, 266.

3. Dolphin Suite relies on *Grimes v. Walton County*, 591 So.2d 1091 (Fla. 1st DCA 1992). But as explained in the Initial Brief (and completely ignored by Dolphin Suite), *Grimes* cuts *against* Dolphin Suite's position because it held that "several owners of land in the vicinity of" a proposed development project *would* have an interest, sufficient for intervention, in any "decision … allow[ing]" the property owners to proceed with their proposed development. *Id.* at 1094. And that "is precisely the situation here," AB 27, because Dolphin Suite seeks to compel the Town to issue a development permit. *Grimes* recognizes that the downstream effects of such

development are an interest that would permit neighboring property owners to intervene.

IV. THE TOWN WILL NOT ADEQUATELY PROTECT MRS. TESTA'S INTEREST.

Dolphin Suite argues that "the Town is the appropriate party to protect [Mrs. Testa's] interest" under the LDRs. AB 28–29. As an initial matter, if that were a bar to intervention, then Dolphin Suite would not have been granted intervention in Mrs. Testa's lawsuit challenging Ordinance 376. After all, the Town in that case is fully aligned with the developers and has defended the local ordinance. Yet Dolphin Suite insists that intervention was warranted. AB 22. Its position thus seems to shift depending on the page of the Answer Brief at issue, but Dolphin Suite cannot have it both ways. And its position on page 22 is the correct one: unlike the federal system, Florida does not have an adequacy-of-representation requirement. Florida Rule of Civil Procedure 1.230 permits intervention by "[a]nyone claiming an interest in pending litigation," and such

"[i]ntervention is ordinarily liberally allowed." *Ownby v. Citrus County*, 13 So.3d 136, 137 (Fla. 5th DCA 2009).[4]

In any event, it is not true that the Town will adequately represent Mrs. Testa's interest. The Town has been adverse to Mrs. Testa's position on these development issues for years and has opposed her in every lawsuit she has filed, including the litigation over Ordinance 376. Dolphin Suite concedes as much, noting that the Town will *not* protect Mrs. Testa's interest deriving from the

[4] *Florida Wildlife Federation, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 707 So.2d 841 (Fla. 5th DCA 1998), a three-paragraph opinion from another district, should not be read to have judicially engrafted an adequacy-of-representation requirement onto a rule of procedure that does not have one. Instead, that case merely affirmed the denial of intervention for a public-intertest organization—with no property ownership at issue—in a case about "sovereign[] lands … held by the state in trust for the use and benefit of the public." *Id.* at 842. The Fifth DCA did not decide, one way or the other, whether the "interest" of that environmental organization was, in fact, "direct and immediate" and thus the court's statement that the group's "interest" was protected by the state should not be read as announcing a broad, extra-textual gloss on Rule 1.230 for parties that do have a direct and immediate interest. And if *Florida Wildlife* does stand for such a proposition, this Court should not follow it because it has no basis in the written text of Rule 1.230. *See Amendment 4*, 288 So.3d at 1078 (cautioning against "judicial imposition of meaning that the text cannot bear").

Ordinance 376 litigation, AB 20, and thus its argument here has no basis in fact.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court's January 30, 2024 order denying Appellant's motion to intervene, instruct the trial court to grant intervention, and instruct the trial court to adjust the case-management deadlines and trial date to provide Mrs. Testa the right of full participation that was erroneously denied.

April 8, 2024

s/ *Jesse Panuccio*
Jesse Panuccio (FBN 34101)
Stuart H. Singer (FBN 377325)
James Grippando (FBN 383015)
Jason Hilborn (FBN 1008829)
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd.
Suite 1200
Fort Lauderdale, FL 33301
Tel: (954) 356-0011
jpanuccio@bsfllp.com
ssinger@bsfllp.com
jgrippando@bsfllp.com
jhilborn@bsfllp.com

Counsel for Appellant Adena Testa

CERTIFICATE OF SERVICE

I certify that this Reply Brief was filed with the Clerk of Court and a copy has been furnished via email through the Florida Courts E-Filing Portal to the following on April 8, 2024:

Counsel for Appellee Dolphin Suite
Ethan J. Loeb
Cynthia G. Angelos
Elliot P. Haney
Nicholas M. Gieseler
Jalen Larubbio
Bartlett Loeb Hinds & Thompson, LLC
100 N. Tampa St Suite 2050
Tampa, FL 33602
EthanL@BLHTLaw.com
Cynthiaa@BLHTLaw.com
ElliotH@BLHTLaw.com
NicholasG@BLHTLaw.com
JalenL@BLHTLaw.com

Counsel for Appellee Town of Jupiter Island:
Joanne O'Connor
Thomas J. Baird
Lainey W. Francisco
Jones Foster, P.A.
505 S. Flagler Dr., Suite 1100
West Palm Beach, FL 33401
joconnor@jonesfoster.com
jgavigan@jonesfoster.com
lfrancisco@jonesfoster.com

s/ *Jesse Panuccio*
Jesse Panuccio

CERTIFICATE OF COMPLIANCE

I hereby certify under Florida Rules of Appellate Procedure 9.045(b) and 9.210 that the used font is Bookman Old Style, 14-point, and that this Reply Brief contains 3,727 words and complies with the word-count limitations contained in Rule 9.210.

s/ *Jesse Panuccio*
Jesse Panuccio