



COUNTY ATTORNEY'S OFFICE
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MEMORANDUM

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TO: Mayor Jerry L. Demings
and County Commissioners

FROM: Jeffrey J. Newton, County Attorney *JJM*
Elaine M. Asad, Senior Assistant County Attorney *JDP for Elaine Asad*

DATE: August 3, 2020

SUBJ: Florida Real Estate Investments and Holdings, LLC; Notice of Claim for Compensation or Other Relief Under Section 70.001, Florida Statutes, known as the Bert J. Harris, Jr., Private Property Rights Protection Act
CONSENT AGENDA ITEM: August 11, 2020

On or about March 26, 2020, Florida Real Estate Investments and Holdings, LLC ("FREIH"), the owner of real property located at 1640 Salem Drive, Orlando, FL, consisting of two platted lots (Lots 169 & 170) of the Cheney Highlands Third Addition plat recorded in 192 at Plat Book O, Page 93 ("Plat"), served the attached Notice of Claim for Compensation or Other Relief under the Bert J. Harris Jr., Private Property Rights Protection Act ("Bert J. Harris Act") upon Orange County ("Notice of Claim"), and requested that the County make a written settlement offer in accordance with the Bert J. Harris Act. The subject property is located in an R-1 zoning district that permits single-family dwellings.. Located on the subject property is a structure illegally converted from a single-family dwelling unit to a duplex. In the R-1 zoning district, duplexes are not permitted.

Pursuant to its Notice of Claim, FREIH seeks relief from the following actions of the County and Board of County Commissioners, asserting that those actions have "inordinately burdened" an "existing use" of FREIH's property or a "vested right" to a specific use of its property, as those terms are defined in the Bert Harris Act:

- (1) the Orange County Code Enforcement Board's September 19, 2018 Findings of Fact, Conclusions of Law and Order finding the subject property in violation of certain Orange County Code provisions;
- (2) the Planning and Zoning Commission's recommendation of denial of FREIH's R-2 rezoning application in January 2019; and

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- (3) the Board's related decision in February 2019 approving the PZC's recommendation of denial of FREIH's rezoning application.

FREIH's appraisal report, prepared by Richard Dreggors, GAA, which is included in the Notice of Claim as "Exhibit A," asserts that the Board's actions have reduced the market value of the subject property in an amount of \$239,500. If any of you would like to review a copy of the appraisal report, please contact our office.

FREIH also has filed a Section 70.51, Florida Statutes, action seeking relief from the Orange County Code Enforcement Board's action. The County responded to the action by moving to dismiss it. The Special Magistrate handling the claim has not yet ruled on the County's motions.

FREIH then filed a Circuit Court action (Case No. 2019-CA-004506-O) seeking damages for alleged violations of the Sunshine Law, Public Records Law, Inverse Condemnation and 42 U. S. Code Section 1983. Thereafter, the County had the Circuit Court case transferred to Federal Court in the Middle District of Florida (Case No.: 6:19-cv-937-Orl-41-EJK). The County has moved to dismiss several of the counts in the Federal case but the Court had not rendered a decision on that motion.

FREIH then sent the County notice of its Bert J. Harris Action that is the subject of this memorandum.

Under the Bert J. Harris Act, the Board, as the local governing body of Orange County, has 150 days from the date FREIH presented its Notice of Claim to the County to do the following:

- (1) make a written settlement offer pursuant to Section 70.001(4)(c), Florida Statutes, which settlement offer may propose to effectuate no changes to the Board's actions; and
- (2) issue a written statement under Section 70.001(5)(a) identifying the allowable uses to which the subject property may be put.

The 150 day period to respond to FREIH expires on or about August 23, 2020.

The County Attorney's Office believes that neither the Code Enforcement Board's actions nor this Board's actions have inordinately burdened an existing use of the subject property or a vested right to a specific use of the subject property. As such, our view is that FREIH is not entitled to any relief under the Bert J. Harris Act.

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Therefore, we recommend that the Board authorize our office to send FREIH a written settlement offer on the Board's behalf proposing no changes to the actions taken by the Code Enforcement Board in September 2018 or this Board in February 2019, and send FREIH a written statement on the Board's behalf declaring that the allowable uses to which the subject property may be put.

For your information, the Bert J. Harris Act provides that if FREIH rejects the Board's settlement offer and the statement of allowable uses, FREIH may then file a claim for compensation in the Circuit Court. If the Board were to make the settlement offer and statement of allowable uses as recommended, and FREIH were to reject them and institute a claim for compensation in the Circuit Court, our office would vigorously contest the claim, raising any and all applicable defenses, and continue to maintain that FREIH's claim is without merit. Also, in any such lawsuit, attorney's fees and costs may be awarded to the prevailing party.

Please let us know if you have any questions or comments.

Notice of Claim for Compensation or Other Relief Under Section 70.001, Florida Statutes by Florida Real Estate Investments and Holdings, LLC is attached.

ACTION REQUESTED: AUTHORIZATION FOR THE COUNTY ATTORNEY'S OFFICE TO TIMELY SEND THE FOLLOWING WRITTEN COMMUNICATIONS TO FLORIDA REAL ESTATE INVESTMENTS AND HOLDINGS, LLC ON BEHALF OF THE ORANGE COUNTY BOARD OF COUNTY COMMISSIONERS:

- (1) A SETTLEMENT OFFER PROPOSING NO CHANGES TO THE ACTIONS OF EITHER THE COUNTY CODE ENFORCEMENT BOARD AND/OR THE BOARD OF COUNTY COMMISSIONERS THAT FLORIDA REAL ESTATE INVESTMENTS AND HOLDINGS, LLC, CLAIMS HAVE INORDINATELY BURDENED AN EXISTING USE OF THE SUBJECT PROPERTY OR A VESTED RIGHT TO A SPECIFIC USE OF THE SUBJECT PROPERTY AS A DUPLEX; AND**

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- (2) **A STATEMENT DECLARING THAT THE USES TO WHICH THE SUBJECT PROPERTY MAY BE PUT ARE THOSE USES ALLOWED UNDER THE COUNTY'S R-1 SINGLE-FAMILY DWELLING UNIT REGULATIONS IN CHAPTER 38 OF THE ORANGE COUNTY CODE, WHICH USES INCLUDE A SINGLE-FAMILY DWELLING BUT NOT A DUPLEX.**

Attachment

cc: Byron Brooks, County Administrator
Chris Testerman, Deputy County Administrator
Alberto Vargas, Manager, Planning Division
Joel D. Prinsell, Deputy County Attorney

FISHBACK ♦ DOMINICK
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March 25, 2020

RECEIVED

MAR 26 2020

Orange County Attorney's Office
JDP

Express Delivery

Honorable Mayor Jerry Demings
Orange County Administration Building
201 S. Rosalind Avenue, 5th Floor
Orlando, Florida 32801

RE: Notice of Claim for Compensation or Other Relief Under Section 70.001, Florida
Statutes by Florida Real Estate Investments and Holdings, LLC

Dear Mayor Demings:

My law firm and I represent Florida Real Estate Investments and Holdings, LLC ("FREIH"), the owner of the improved real property located at 1640 Salem Drive, Orlando, Florida, having Orange County Tax Parcel Identification Number 23-22-30-1280-01-700 (the "Subject Property").

The Subject Property consists of two platted lots (Lots 169 & 170) of the Cheney Highlands Third Addition plat recorded in 1926 at Plat Book O, Page 93, Public Records of Orange County Florida; which are two lots of record. The Subject Property is developed with a two dwelling unit (Units A & B) residential structure. Unit A is a three bedroom and one bathroom dwelling unit with 1,083 sq. ft. in living area and Unit B is a two bedroom and one bathroom dwelling unit with 488 sq. ft. in living area. FREIH rents the two dwelling units within the structure to two different families as part of a HUD Section 8 housing program through the Orlando Housing Authority. FREIH has a vested right to the use and rental of the two dwelling unit residential structure.

The County's Code Enforcement Division alleged that the Subject Property is in violation of the R-1 zoning district because the structure was allegedly illegally converted from a single-family dwelling into a duplex. Notwithstanding Code Enforcement Division Manager, Robert Spivey indicating that the Code Enforcement Board's September 19, 2018 hearing would be continued for 60-days and FREIH not being present in reliance of such representation by Mr. Spivey, on September 19, 2018, the County's Code Enforcement Board entered Findings of Fact, Conclusions of Law and Order finding the Subject Property in violation of Sections 38.3, 38-74 and 38-77, County Code. Even though FREIH was not present at the September 19, 2018 CEB hearing, the code enforcement officer still failed to prove that the Subject Property is in violation of the cited code provisions and failed to prove that FREIH converted the structure as alleged. The Code Enforcement Division asserted that FREIH would have to obtain a building permit and convert FREIH's vested two dwelling residential structure into a one dwelling residential structure to correct the alleged violations of Sections 38.3, 38-74 and 38-77, County Code.

Even though a rezoning is not necessary given FREIH's vested rights, in an attempt to resolve this dispute, on October 3, 2018, FREIH submitted a rezoning application to rezone the Subject Property from R-1 (Single-Family Dwelling District) to R-2 (Residential District). R-2 allows duplexes as a permitted use. Orange County Planner Steven Thorpe deemed the R-2 rezoning request consistent with the Subject Property's Orange County FLUM designation of LDR (Low Density Residential) and signed the rezoning application noting such. Notwithstanding such Comprehensive Plan FLU Map consistency determination by Mr. Thorpe, the County staff later took an inconsistent position and recommended denial of the R-2 rezoning.

At the Planning and Zoning Commission hearing, FREIH offered to limit the density of the Subject Property to the existing two (2) dwelling units as a condition of the approval of the R-2 rezoning application. Such proposed condition addressed any concerns that were expressed about redevelopment of the Subject Property with a higher density than currently exists. Moreover, since the Subject Property consists of two lots of record, two separate dwelling units could be constructed on the Subject Property, so the density would not change as the result of the R-2 rezoning request. Also, because of the two lots are lots of record, the R-2 zoning request is consistent with the existing LDR FLUM designation for the Subject Property. The County has since admitted in pending litigation that the two platted lots comprising of the Subject Property are lots of record prior to the existence of the adoption of the County's zoning code.

On February 14, 2019, the Orange County Planning Division provided a letter stating that the R-2 rezoning had been denied. However, in violation of Florida Statutes, the rezoning denial letter fails to state any basis or cite to any authority for denial of the R-2 rezoning application. Further, there was no written rendition of the P&Z Board's recommendation concerning such rezoning request provided to FREIH. The R-2 rezoning application was improperly denied.

The structure upon the Subject Property was built in 1950 prior to the adoption of the Orange County Zoning Code and the Orange County Building Code. There are no permits or approved plans for the original construction of the structure per the County's records. There are no building permits concerning any improvements made to the structure prior to Mark Allen purchasing the Subject Property in September 2002. The only permits existing for the Subject Property are multiple permits obtained after Mr. Allen purchased the Subject Property in September 2002 and prior to the commencement of the code enforcement action on January 25, 2018. Not once during the issuance of any these multiple permits and conducting the inspection approvals concerning such work performed under such permits did the County raise an issue about the structure being in violation of the R-1 zoning district or any other County Code.

Prior to the January 25, 2018 notice of violation to FREIH, there are no known code enforcement proceedings against the Subject Property, including against prior owners of the Subject Property. Even if a prior property owner converted structure, the obtainment of multiple permits and inspection approvals from Orange County between 2002 and 2016 concerning the duplex structure and the County's failure to take code enforcement action against prior owners of the subject property creates a vested right for continued use and rental of the structure by way of estoppel and laches argument against the County.

Further, the Orange County Code allows in the R-1 zoning district as a matter of right two-family dwelling units that the Code calls single-family homes with attached accessory dwelling units. The structure upon the Subject Property meets the requirements of such structures, but the zoning code places an unlawful restriction on the ownership and rental by requiring such structures to be owner-occupied in at least one of the two dwelling units and for such property to be homestead. Such owner-occupancy and homestead restriction is an unlawful alienation of property rights, a violation of equal protection rights and creates an inordinate burden on property rights.

Orange County's code enforcement action and denial of FREIH's R-2 rezoning has resulted in an inordinate burden of both an existing use of real property and a vested right to a

specific use of real property. This letter serves as a formal, written claim pursuant to Section 70.001, Florida Statutes, the Bert J. Harris Jr. Private Property Rights Protection Act. Enclosed with this letter is a bona fide, valid appraisal that provides for a before and after valuation demonstrating the loss in fair market value of the Subject Property resulting from the actions of Orange County. This appraisal established a loss in value of **\$239,500.00**.

In accordance with Section 70.001(11)(b), Florida Statutes, the time for FREIH bringing its Bert J. Harris Act claim has been tolled by the FREIH's filing of: (i) an appeal to the Orange County Code Enforcement Board on January 18, 2019 regarding the Order Imposing Administrative Fine/Lien dated January 2, 2019 regarding Case No. 2018-3673832; (ii) a Florida Land Use and Environmental Dispute Resolution Act (Section 70.51, Florida Statutes), proceeding on March 8, 2019 concerning the County's denial of the R-2 rezoning; and (iii) *Florida Real Estate Investments and Holdings, LLC v. Orange County*, et. al, Case No: 6:19-cv-937-Orl-41TBS (originally Orange County Case No: 2019-CA-004506-O) on April 9, 2019. Pursuant to Section 70.001(11)(b), a Bert J. Harris Act claim may be commenced after the above proceedings have concluded, thus meaning such claim does not have to be brought with other legal challenges. However, we reserve the right to commence litigation on this Bert J. Harris Act claim earlier.

Pursuant to Section 70.001(4)(c), Florida Statutes, Orange County has 150 days to respond to this claim with a written settlement offer.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Sincerely,



Daniel W. Langley

Enclosure – Real Estate Appraisal Report by
Calhoun, Dreggors & Associates, Inc.

cc: Joel Prinsell, Deputy County Attorney (w/ enclosure)