

WINDERMERE CLUB HOMEOWNERS ASSOCIATION, INC.

OPPOSITION TO WINDERMERE COUNTRY CLUB, LLC'S PETITION TO VACATE

A. Kurt Ardaman

FISHBACK ♦ DOMINICK

ESTABLISHED 1935

ATTORNEYS AND COUNSELORS AT LAW

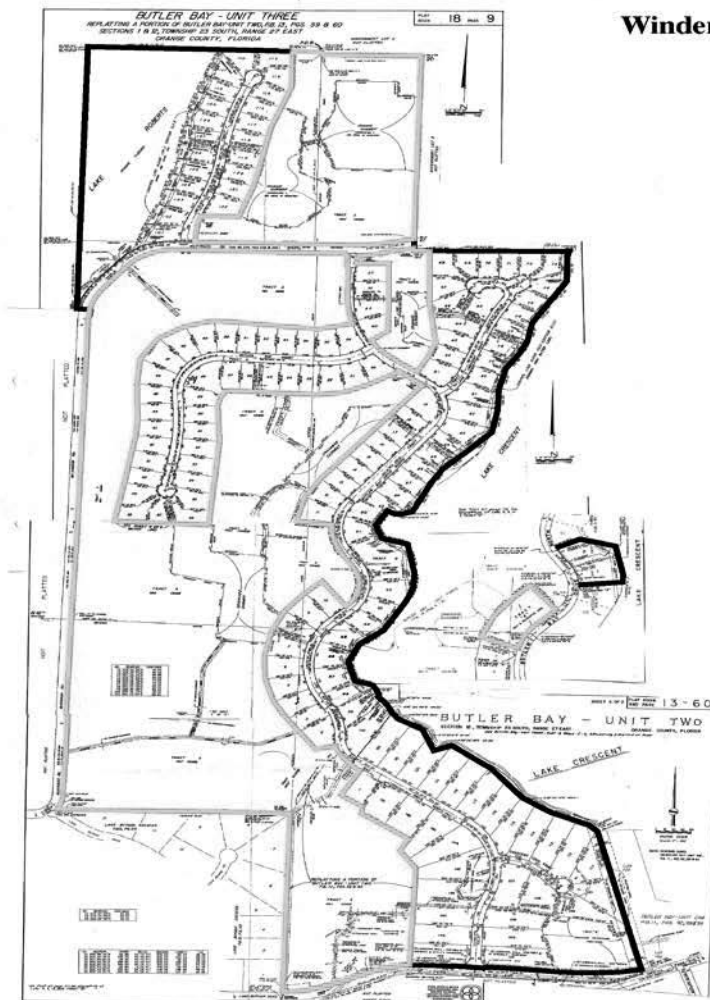
Rationale for Denial of Petition to Vacate

- I. Tract A is permanent open space under the County Code
- II. The requirements for plat vacation under the County Code & Florida Statutes cannot be met
- III. Private and Public Easement Rights over Tract A and no ARB approval
- IV. No authority to transfer or vacate development rights
- V. Summary

CHRONOLOGY:

1. In 1985, Tract A was part of a 502-acre tract that was rezoned to R-CE-C where 38% of the gross acreage was required to be open space.
2. On February 24, 1986, the developer and County entered into a developer agreement that required the Tract A development rights be dedicated to Orange County.
3. On July 21, 1986, the developer platted and the County accepted and approved the Butler Bay - Unit Three plat which dedicated the development rights and access rights over Tract A to Orange County.

Tract A



Windermere Club
Tract "A"

First Basis for Denial of Petition to Vacate:

Tract A is permanent open space
under the County Code

1985 County Code

PLANNING AND ZONING RESOLUTION

ORANGE COUNTY FLORIDA

This pamphlet is a reprint of Part I, Chapter 37, and Part II, Planning and Zoning, of the Code of Orange County, Florida, published by order of the Board of County Commissioners.



MUNICIPAL CODE CORPORATION

Tallahassee, Florida

19
Reprinted 19

ARTICLE XXXVI. CLUSTER DISTRICT

Sec. 1. Purpose and intent.

(1) To provide an alternative approach to residential development under specified residential zoning districts.

(2) To enhance the living environment through the creation of permanent open space.

(3) To provide flexibility in lot size, housing styles and building placement for variety in development design compatible with abutting development.

(4) To provide for a more cost-effective development design and thereby providing more affordable housing.

(5) To maintain gross densities compatible with and equal to those possible under the conventional zoning.

(6) To ensure that adequate public facilities and services are provided based upon the net densities of the development.

(7) To encourage the dedication of public lands which serve and benefit the community. (Approved Co. Comm., 11-1-82)

Sec. 2. Processing procedure.

(1) A complete cluster development zoning application.

(2) A cluster development plan to include the following:

(a) The configuration and dimensions of the plan drawn to a specified scale, not to exceed one (1) inch equals two hundred (200) feet;

(b) Existing street network and anticipated access points;

(c) Natural features, (i.e., lakes, rivers, conservation areas);

(d) Gross density;

(e) Proposed type of housing and location;

(f) Location of common open space and per cent of gross land area;

(g) Names of abutting subdivisions;

“permanent open space”

“dedication of public lands which...benefit the community”



NOTE: The identical Purpose and intent section is in current Code Sec. 38-551.

Sec. 7. Common open space.

All common open space areas shall be shown on the cluster development plan. A method shall be provided for assuring the maintenance of all common open space areas in perpetuity, either by transferring ownership and maintenance responsibilities for the open space areas to a trustee or mandatory homeowner's association, or by some other method acceptable to the board of county commissioners. Orange County shall not be responsible for the maintenance of common open space areas.

The owner shall offer to dedicate development rights for all common open space areas to Orange County. The county may accept the offer of dedication. If, however, the county refuses to accept the offer, an alternative method acceptable to Orange County shall be provided to guarantee that common open space areas shall remain in such a state as to maintain the natural character of the area. (Approved Co. Comm., 11-1-82)

Sec. 8. Density bonus.

The developer may offer to dedicate land within the project for a specified public purpose, including, but not limited to, parks, schools, fire stations, utility plants, etc. Acceptance of such offers shall be discretionary with the board of county commissioners or other agencies having authority to accept such an offer.

If the offer of dedication is accepted, the development shall be granted a density bonus equal to an additional twenty-five (25) per cent of the density allowed on land being dedicated.

A density credit based on a percentage of the gross density permitted under Section 3 of this article may be provided for the following conservation areas, provided that dedication of development rights are secured:

	<i>Maximum Transfer Credit¹</i>
Class I conservation area	0 or 20% ²
Class II conservation area	50%

"All common open space areas shall be shown on the cluster development plan."

A method shall be provided for assuring...common open space in perpetuity...by transferring ownership...to a trustee...or by some other method acceptable to the board.

"The owner shall offer to dedicate development rights for all common open space areas to Orange County."

If the County refuses dedication, an alternative must still "guarantee that common open space areas shall ... maintain the natural character of the area."

NOTE: These Common Open Space requirements are in current Code Sec. 38-557

Cluster Development Plan is Part of Current Zoning (The BCC's February 21, 1985 R-CE-C Rezoning)

7. ED SPOMER, "BUTLER BAY CLUSTER", request for a Change in Zoning Classification from R-CE and A-1 to R-CE-C on property which is located Southeast Corner Park Ridge Gotha Road and Windermere Road, extending West of McKennon Road.

(All 1-23-27

SE 1/4 6-23-28

N 1/2 7-23-28

E 3/4 12-23-27

Tract Size: 509 acres

District #3)

Ed Williams, Planning Director, gave a staff report (Exhibit #1 of the Zoning Department Evidence File) and recommended approval, subject to conditions as recommended by the DRC which were highlighted for the Board.

8. Development shall be in accordance with the Cluster Plan dated February 8, 1985, the Zoning Resolution, Subdivision Regulations, and the Shoreline Protection Ordinance.



DATA:

PROPOSED ZONING

R-CE-C

TOTAL GROSS AREA

502 ACRES ±

*TOTAL NET AREA

472.8 ACRES ±

TOTAL LOTS

340

DENSITY

.72 D.U./NET ACRE

TYPICAL LOT SIZE

110' x 200' (MIN. 1/2 ACRE)

OPEN SPACE

38% OF GROSS AREA

* (LESS WATER BODIES AND CONSERVATION AREAS)

CLUSTER PLAN

The Dedication of Development Rights Secured Open Space

- **Developer's Agreement** (O.R. Book 3757, Page 1536)-
Approved by BCC on February 24, 1986
 - Condition #12 required dedication of the development rights over Tract A to Orange County.
 - Section 6 confirms that the conditions of approval "assure compatibility of development on the Property with surrounding development and with the surrounding environment."

- **Unit Three Plat** (O.R. Book 18, Page 4) – Approved by BCC on July 21, 1986
 - Golf course identified as "Tract A"
 - Plat Note #12 "Development rights to the Conservation Easement and Tract A are dedicated to Orange County, Florida."
 - Plat Note #13 "Access Rights from Lot 101 and Tract A are dedicated to Orange County, Florida."

"Open Space" vs. "Common Open Space" vs. "Common Area"

The County Code contains various provisions defining and governing 1) "open space," 2) "common open space," and 3) "common areas."

Tract A constitutes all three within the meaning of the Code.

Definitions:

A. Open space: "land set aside for the following: (1) the protection of natural resources. .. (2) Recreation areas; or (3) The enhancement of the developed urban environment (including buffer areas, landscaped areas, plazas and hardscapes)." Sec. 30-83(c) (old and new County Code_

B. Common Open Space: "a type of open space designed and intended for use or enjoyment of the occupants of a project." Sec. 24-26 (old and new County Code)

C. Common Area: "not defined under the County Code

All open space dedicated as part of a Cluster District is permanent regardless of whether it also constitutes "common open space" or "common area."

Permanent Open Space

- Open space as part of cluster zoning is permanent:
 - County Code (new and old) provides that one of the primary purposes of cluster zoning is “[t]o enhance the living environment through the creation of permanent open space.”
 - Sec. 38-551 (current)
 - Sec. 1(2), Art. XXXVI (1984 Code).

Private Ownership of Tract A is Irrelevant to Status as Open Space

- Section 34-155(a), County code, old and new, authorizes the inclusion in a subdivision of “private parks and recreation areas” as open space. Note that the old Code did not require that such space be owned by a homeowners association.
- **The old Code expressly contemplates the use of a private golf course as open space:**
 - Sec. 5, Art. XXXVI (1984 Code) provides for the inclusion of “[p]rivately owned and operated recreational facilities” and “[c]lubs such as: Country and golf clubs” as special exceptions within a cluster district.
 - In approving such a use, the relevant County board must consider various criteria including “the area of the site as it relates particularly to the required open space.”
 - Tract A fulfills the bulk of the open space required by the Cluster Development Plan, which is a requirement of the zoning on this property.

Tract A is permanent open
space

Second Basis for Denial of Petition to Vacate:

The plat vacation requirements under the
County Code and Florida Statutes cannot
be met

Plat Vacation: County Code Sec. 30-83(e)

- Code Sec. 30-83(e) provides:
 - “The board of county commissioners may order the vacation and reversion to acreage of all or any part of a plat or subdivision in the manner and subject to the restrictions provided by law; provided that no reversion can occur where the subdivision street and drainage improvements have been completed.”
- The subdivision street and drainage improvements have long been completed
- Thus, the Code precludes vacation of the dedications of development rights and access rights.

Plat Vacation: Fla. Stat. 177.101

- The statute provides requirements that must be met for a valid plat vacation.
- Among other requirements, it must be “shown that the vacation by the governing body of the county will not affect the ownership or right of convenient access of persons owning other parts of the subdivision.” Sec. 177.101(3).

Certified General Real Estate Appraiser, Calhoun, Dreggors & Associates, Inc. Study of the Effect of Open Space on Residential Values dated July 29, 2016:

Opinion and Conclusion:

"...it is my opinion that the lots that directly abut the open space areas do command a premium in the market of anywhere between 10% and 20%. Lots that do not directly abut also appear to command premium based upon published studies of subdivisions around the Country. "

"...it is my opinion that the proposed Windermere Country Club project which would convert the golf course/open space into 95 single family lots and associated site improvements will adversely affect the value of the homes within the Windermere Club subdivision. In my opinion, this reduction in value could be as much as 20%."

LOSS OF OVER \$18,000,000.00 TO HOMEOWNERS

Plat Vacation: Fla. Stat. 177.101

- Vacation of the development rights would “affect the ownership of persons owning other parts of the subdivision,” as the resulting development would:
 - 1) Damage the homes in Windermere Club by reducing their values by up to 20% or at least \$18,000,000.00
 - 2) Interfere with the various private easement rights (property rights) held by the lot owners and HOA
 - Private easement rights discussed in Part III

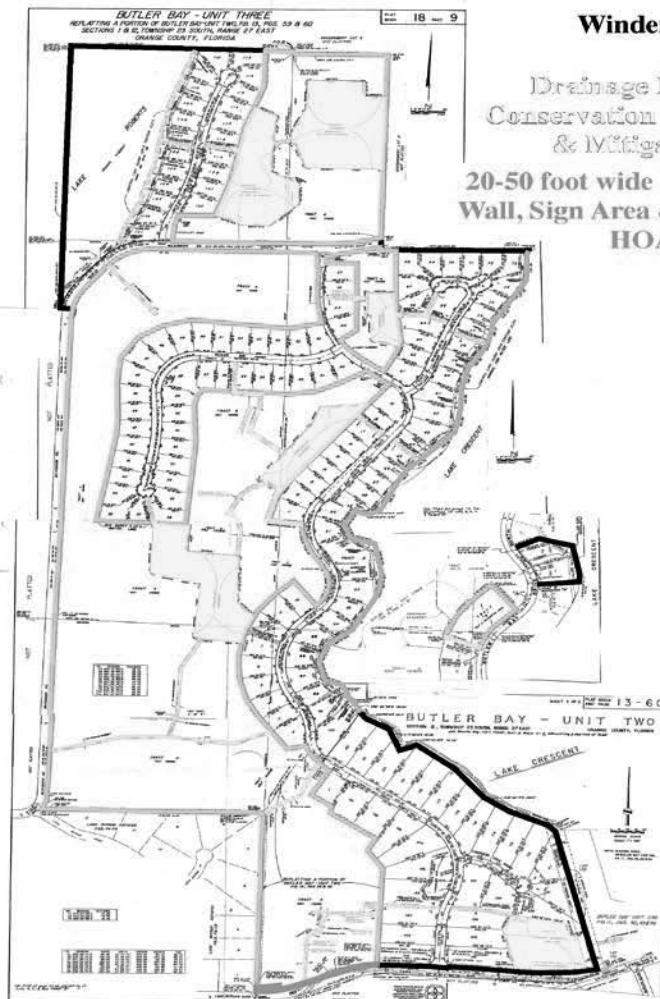
SUMMARY OF THE SECOND BASIS FOR DENIAL OF THE PETITION TO VACATE:

- The law is clear: the County may not grant the Petition to Vacate except upon a showing of the statutory requirements and County Code requirements having been met.
- The County Code requirements cannot be met:
 - 1) Vacation prohibited by Sec. 30-83(e)
 - 2) The Code requires Tract "A" to remain permanent open space
- The statutory requirements (F.S. 177.101) cannot be met, as Vacation of the development rights would adversely "affect the ownership . . . of persons owning other parts of the subdivision":
 - 1) Reduce the value of the homes in Windermere Club
 - 2) Interfere with the various private easement rights (property rights) held by the homeowners and HOA

THIRD BASIS FOR DENIAL OF THE PETITION TO VACATE:

Existing Private and Public Easements
over Tract "A"

Tract A Easements



Windermere Club
Tract "A"
Drainage Easements,
Conservation Easements
& Irrigation Areas
20-50 foot wide Landscape,
Wall, Sign Area & Sidewalk
HOA Easement

UTILITY I NO. 697

Developer's Proposed Encroachment over the Landscape, Wall, Sign, and Sidewalk Easement



Proposal is inconsistent with and would interfere with easement.

Proposed Gated Entrance & Road within easement area

Private Rights in Public Easements

- The homeowners and/or Association have private easement rights in all publicly dedicated easements as intended beneficiaries of such.
 - See *Silver Blue Lake Apartments, Inc. v. Silver Blue Lake Home Owners Asso.*, 245 So. 2d 609, 611 (Fla. 1971). See also *Osius v. Barton*, 109 Fla. 556, 562 (Fla. 1933); *Rea v. Brandt*, 467 So. 2d 368, 368 (Fla. 2d DCA 1985).
- The Windermere Club homeowners have private easement rights in all public dedications on the Unit Three plat as a result of having purchased lots with reference to such plats
 - See *Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841, 844 (Fla. 1st DCA 1985); *Tampa v. Hickey*, 502 So. 2d 1254, 1256 (Fla. 2d DCA 1986).

Original Declaration Governs Tract A

Tract A is subject to the Declaration of Covenants, Conditions, and Restrictions for Butler Bay Unit Three since the Amended and Restated Declaration of Covenants, Conditions and Restrictions only replaced the original Declaration as to the Lots and not Tract A.

No ARB Approval

- Under the Unit Three Declaration, Tract A is subject to the restriction and negative easement whereby no construction may take place upon Tract A without approval by the Architectural Review Board (the "ARB") of the Windermere Club Homeowners Association
 - Unit Three Declaration, Art. VII.
- The applicant has not requested or received ARB approval
- Both the Association and the homeowners have the right to enforce the above restriction.
 - See Unit Three Declaration, Art. XV.

- **KEY POINTS:**

- Fla. Stat. 177.101(3) prohibits vacation of a plat unless it is shown that vacation “will not affect the ownership or right of convenient access of persons owning other parts of the subdivision.”
- Vacating the plat and the development rights dedication would affect and interfere with valuable property rights, in the form of easements, of the homeowners and HOA.
- The applicant lacks the right to develop Tract A without obtaining approval from the Architectural Review Board, the HOA and the homeowners.

Fourth Basis for Denial of Petition to Vacate:

No authority to transfer or vacate
development rights.

Law Re. Public Dedications

- “It is well settled that where lands have been dedicated to a municipality [or county] the municipality holds the title in trust for the public and has no power, unless specially authorized by the legislature, to sell or appropriate such lands for the use and benefit of private interests.”
 - *City of Daytona Beach v. Tuttle*, 630 So. 2d 586, 589 (Fla. 5th DCA 1993).
- In *Tuttle*, the court held that a municipality had no authority to transfer riparian rights to publicly dedicated property since not specifically authorized under statute or charter, even though the charter generally authorized the vacation of streets and public ways.
- Similarly, there is no authority under statute or the County’s charter or code to transfer development rights or vacate such for the benefit of private interests.

Law Re. Development Rights

- As discussed, at least one Florida court has opined that the transfer of development rights is intended to be permanent.
- *Hollywood v. Hollywood*, 432 So. 2d 1332 (Fla. 4th DCA 1983)
 - The court upheld an ordinance providing for the transfer of development rights between properties in exchange for a development credit, and requiring conveyance of the transferring property to the city as a way of securing open space
 - The developer argued that it should not be required to permanently convey property to the city to secure open space
 - The court disagreed: “To us, the *quid pro quo* is what should control. If the developer takes advantage of the increased density transferred and builds accordingly, does that not mean the preservation of open space is forever? We certainly hope so”
- The court recognized that where a developer receives something in return for dedicating or conveying property as open space, it should be permanent.
- For Tract A, the original developer received a rezoning and subdivision plan approval in exchange for the dedication of open space. Further, homeowners relied upon the dedication.

Reliance by Homeowners

- Homeowners bought their homes in reliance on:
 1. The developer's dedication of development and access rights to the County, which were accepted by the County, creating permanent open space over Tract A.
 2. The open space community layout.



Summary

1. County Code requires Tract A to remain permanent open space.
2. County Code prohibits plat vacation where street and drainage improvements have been completed.
3. Statute prohibits vacation where ownership rights of property owners are adversely affected.
4. Transferring/vacating development rights is inconsistent with public dedication and is not authorized by Code or by law.
5. Plat Vacation Would be Unfair and Unreasonable: Homeowners were enticed and relied on the development and access right dedications, open space, and community's layout when purchasing homes.
6. Plat Vacation Would Violate the Public Trust and Set a Dangerous Precedent: It would support an interpretation of the Code allowing future developers to obtain a windfall benefit at the expense of homeowners.

List of Documents Submitted Into the Record

- Power Point Presentation
- Memorandum in Opposition to Petition to Vacate dated 7/22/16 ("Memorandum")
- Supplement to Memorandum in Opposition dated 10/05/16 ("Supplement")
- Meeting minutes cluster approval by P&Z (2-21-85) and BCC (2-25-85) – Exhibit "A" to Memorandum
- Butler Bay Cluster Plan – Exhibit "B" to Memorandum
- Meeting minutes: preliminary site plan approval by BCC (11-18-85) – Exhibit "C" to Memorandum
- Meeting minutes: golf course special exception approvals by BZA (2-2-89, 6-1-89) – Exhibit "D" to Memorandum
- Developer's Agreement (3-6-86) – Exhibit "E" to Memorandum
- Plat for Butler Bay Unit Three – Exhibit "F" to Memorandum
- Deeds conveying Tract "A" to Newcourse (8-26-86, 8-28-86) – Exhibit "G" to Memorandum
- Agreement and Consent Relating to Construction of Golf Course (6-13-85) – Exhibit "H" to Memorandum
- Code provisions in effect at the time of original rezoning and approvals – Exhibit "I" to Memorandum:
 - Art. XXXVI, Planning & Zoning Resolution (cluster district)
 - Art. III, Sec. 4(b), Planning & Zoning Resolution (restrictive rezoning)
 - Sec. 34-155, Res. 1991-29 (private open spaces)
 - Sec. 24-26 (common open space)
- Study by Calhoun, Dreggors & Associates, Inc. and Addenda
- Developer Real Estate Marketing Materials from 1989
- Declaration of Covenants, Conditions, and Restrictions for Butler Bay Unit Three – Exhibit "A" to Supplement
- Amended and Restated Declaration of Covenants, Conditions and Restrictions for Windermere Club Homeowners Association, Inc. – Exhibit "B" to Supplement
- Hampton Golf Course Discovery Session Report



Request:

Please Deny the Petition to
Vacate



Back Up Slides

Refusal to Sell E-Mail:

From: Truong M. Nguyen [Truong.Nguyen@gray-robinson.com]
Sent: Friday, August 19, 2016 1:38 PM
To: Kurt Ardaman
Cc: Michelle Lindsay; edw5654@bellsouth.net
Subject: RE: Windermere Country Club

Kurt,

After much deliberation, we feel that setting a market price based on 95 lots would inflame a number of homeowners' already strong emotions against redevelopment of the golf course. We have directed our focus towards revising our conceptual plans and concessions to address some of the concerns discussed during our last meeting. We will send you proposed revised conceptual plans when ready.

Thanks.

Truong M. Nguyen | Shareholder
GRAY | ROBINSON

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From: Kurt Ardaman [<mailto:ardaman@fishbacklaw.com>]
Sent: Thursday, August 18, 2016 5:52 PM
To: Truong M. Nguyen
Cc: Michelle Lindsay; edw5654@bellsouth.net
Subject: Windermere Country Club

Truong

The HOA Board hopes your client will promptly provide a purchase price for Tract A and the clubhouse and related matters for their consideration.

Kurt

Tract A is “Open Space” under Code Definition

- Tract A falls within the definition of “Open Space” under the County Code (old and new):
 - *Open space* shall mean lands set aside for the following:
 - The protection of natural resources (such as uplands, wildlife habitats and groundwater recharge areas) and areas unsuitable for development due to natural hazards (such as wetlands, floodplains and areas of unsuitable soil);
 - Recreation areas; or
 - The enhancement of the developed urban environment (including buffer areas, landscaped areas, plazas and hardscapes).
 - Sec. 24-26 County Code (old and new).

Permanent Open Space

- The only mention of dedication of development rights in Cluster Zoning provisions is in the context of preserving either open space or conservation areas.
 - Sec. 38-557 (current)
 - Requires “assuring the maintenance of all common open space areas in perpetuity...”
 - Sec. 7, Art. XXXVI (1984 Code)
 - Sec. 8, Art. XXXVI (1984 Code)

Tract A is “Common Open Space”

- In addition to meeting the definition of “open space,” Tract A” also meets the definition of “common open space”
- The County Code (old and new) define “common open space” as “a type of open space designed and intended for use or enjoyment of the occupants of a project.”
 - Sec. 24-26, County Code.
- The Tract A open space was of course intended for the “enjoyment of the occupants” of the subdivision, as it forms an integral part of the community layout.

Tract A is “Common Open Space”

- Both the County and the original developer entities acknowledged that Tract A was intended for the use and/or enjoyment of the subdivision lot owners.
- The BZA, when it approved the golf course as a special exception on Tract A, stated on the record: “The proposed recreational use is a permanent facility to serve the residents of the Butler Bay Subdivision[.]”
 - BZA Meeting Minutes 2-2-89.
- The original developer entities (current applicant’s predecessors-in-interest) executed and recorded an agreement “acknowledg[ing] and agree[ing] that construction of the Golf Course will mutually benefit the lands adjacent to the Golf Course . . . By enhancing the value of subdivision lots to be located thereon.”
 - Agreement and Consent Relating to construction of the Golf Course (6-13-85)

“Common Open Space” is Permanent

- The purpose of a development rights dedication or other method of securing “common open space” is to “guarantee that common open space areas shall remain in such a state as to maintain the natural character of the area.”
 - Sec. 7, Art. XXXVI (1985 Code).
 - Sec. 38-557(b) (current Code)
- Thus, the Code requires the dedication of development rights to be permanent.

Declaration of Covenants, Conditions and Restrictions for Butler Bay Unit Three

Definitions:

- “Common Area” shall mean and refer to those areas of land shown on any recorded subdivision plat of the Properties intended to be devoted to the common use and enjoyment of the owners of the Properties...
- “Properties” shall mean and refer to the Subdivision, as hereinafter defined...
- “Subdivision” shall mean and refer to Butler Bay Unit Three, according to the plat thereof as recorded in Plat Book 18, Pages 4-9 of the Public Records of Orange County, Florida.

Amended and Restated Declaration of Covenants, Conditions and Restrictions:

Article I, Section 2. Amendment to Declaration. ...“It is further intended that this Declaration supersede and act in substitution and replacement of the Prior Declarations, *in toto*, to the extent enforceable under the law and in equity.”

Permanent Open Space

- KEY POINTS:

- Tract A constitutes “open space.” All “open space” dedicated as part of a cluster district must remain permanent, regardless of its status as “common open space” or a “common area.” This requirement goes to the heart of the purpose of cluster zoning to “enhance the living environment through the creation of permanent open space.”
 - Sec. 38-551 (current)
 - Sec. 1(2), Art. XXXVI (1985 Code).
- Tract A also constitutes “common open space.” A “common open space” dedication must “guarantee that common open space areas shall remain in such a state as to maintain the natural character of the area.” This is the reason the County required the development rights dedication.
 - Sec. 7, Art. XXXVI (1985 Code).
 - Sec. 38-557(b) (current Code)
- The Code requires that all private parks and recreation areas included in subdivisions be dedicated as common areas for the use or enjoyment of the subdivision lot owners. This is another reason for requiring the development rights dedication.
 - Sec. 34-155(a) (important distinctions exist between the current version and the version in effect at the time of the original development approvals, which did not require ownership by a homeowners association)

What have the Courts Said?

- At least one Florida court has recognized that open space secured by the transfer of development rights should be permanent
- *Hollywood v. Hollywood*, 432 So. 2d 1332 (Fla. 4th DCA 1983)
 - The court upheld an ordinance providing for the transfer of development rights between properties in exchange for a development credit, and requiring conveyance of the transferring property to the city as a way of securing open space
 - The developer argued that it should not be required to permanently convey property to the city to secure open space
 - The court disagreed: “To us, the *quid pro quo* is what should control. If the developer takes advantage of the increased density transferred and builds accordingly, does that not mean the preservation of open space is forever? We certainly hope so”
- The court recognized that where a developer receives something in return for dedicating or conveying property as open space, it should be permanent.
- In the instant matter, the developer received a property rezoning and subdivision plan approval in exchange for the dedication of open space.

Law Re. Public Dedications

- This bears repeating: publicly dedicated rights are held in trust and may not be diverted to benefit a private interest absent specific legislative authorization.
- Transfer or vacation of development rights is not specifically authorized by statute or County Charter/Code, and for good reason.