Marchena & Graham, P.A.

**IN THE CIRCUIT COURT,
NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE
COUNTY, FLORIDA**

CASE NO. 2016-CA-009999-O

**WINDERMERE COUNTRY CLUB, LLC,
A Florida limited liability company,**

Petitioner,

v.

**ORANGE COUNTY, FLORIDA,
a charter county and a political
subdivision of the State of Florida, and
the BOARD OF COUNTY
COMMISSIONERS OF ORANGE
COUNTY, FLORIDA,**

Respondents.

Supplemental Appendix

Volume I of II

Filing # 51176037 E-Filed 01/13/2017 03:39:56 PM

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

WINDERMERE COUNTRY CLUB, LLC,

Petitioner,

CASE NO. 2016-CA-009999-0

v.

ORANGE COUNTY, FLORIDA, a Charter county and a political subdivision Of the State of Florida, and the BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA,

Respondents.

SUPPLEMENTAL APPENDIX FOR WRIT OF MANDAMUS AND, IN THE ALTERNATIVE, FOR WRIT OF CERTIORARI

Appendix #	Document	Bate Stamp #
20.	Windermere Country Club Petition to Vacate	001034-001206
21.	Poulos & Bennett Letter of Transmittal dated 02/01/16 with enclosed Petition to Vacate Plat Request	001207-001234
22.	Poulos & Bennett Letter of Transmittal dated 03/29/16 with enclosed Petition to Vacate Response Documents	001235-001243
23.	E-mail from Steven J. Thorp to Doreen Overstreet, John Smoger, Alberto Vargas and Whitney Evers dated April 4, 2016	001244-001246

59.	Ord. No. 1974-1, Orange County, Florida Code of Ordinances, approved on January 8, 1974 (amending former Chapter 24-Landscaping of the county's 1965 Code of Ordinances)	001463-001474
60.	Ord. No. 1991-9, Orange County, Florida Code of Ordinances, approved on April 16, 1991 (deleting in its entirety and recodifying the Orange County, Florida Code of Ordinances).	001475-001476
61.	Ord. No. 1992-42, Orange County, Florida Code of Ordinances, approved on December 15, 1992 (deleting former Ch. 24-Landscaping of the county's 1965 Code, as amended by Ord. No. 74-1, in its entirety and replacing it with Ch. 24 – Landscaping, Buffering, and Open Space; amending Chapter 38-Zoning and Chapter 34-Subdivision Regulations for consistency with new Chapter 24 – Landscaping, Buffering, and Open Space).	001477-001524
62.	Orange County, Florida Code of Ordinances (2016), Chapter 30 – Planning and Development, Sec. 30-35, Functions, powers and duties.	001525-001526
63.	Orange County, Florida Code of Ordinances (2016), Chapter 30 – Planning and Development, Sec. 30-83, Plats; vertical construction prior to plat approval; vacation.	001527-001529
64.	Orange County, Florida Code of Ordinances (2016), Chapter 30 – Planning and Development, Sec. 30-48.5, Application for rezoning, variances, special exceptions, and	001530-001531

	appeals of the zoning manager's determinations.	
65.	Orange County, Florida Code of Ordinances (2016), Chapter 38 – Zoning, Sections 38-551 – 38-559 (R-CE-Cluster District)	001532-001536
66.	Code Comparative Table Zoning Resolutions, regarding the location of various Planning and Zoning Resolutions codified in the Orange County, Florida Code of Ordinances.	001537-001538
67.	Code Comparative Table 1965 Code, (referencing the old code provisions by number and correlating them to the new section numbers in the recodified Orange County, Florida Code of Ordinances enacted by Ord. No 91-9).	001539-001543
68.	Code Comparative Table Ordinances, (referencing the location of ordinances adopted from 1970 to 2015 by number and correlating them to the new section numbers in the recodified Orange County, Florida Code of Ordinances).	001544-001601
69.	Code Comparative Table Laws of Florida, (referencing the location of Laws of Florida and correlating them to the section of the Orange County, Florida Code of Ordinances).	001602-001604
70.	Supplement History Table to the Orange County, Florida Code of Ordinances (referring to ordinances considered in each supplement number and correlating them to the year the ordinance was adopted) for	001605-001607

	supplements published from 2010 through 2015.	
71.	E-mail from Doreen Overstreet to Steven T. Thorp dated December 23, 2015	001608-001610
72.	E-mail from Doreen Overstreet to Jennifer Nesslar dated December 23, 2015	001611-001613
73.	E-mail from Chris Testerman to Diana Dethlefs dated October 26, 2016	001614-001616
74.	E-mail from Joel Prinsell to Steven T. Thorp dated October 7, 2015	001617-001622
75.	E-mail from Paul H. Chipok to Whitney Evers, Olan D. Hill and Joel Prinsell dated November 12, 2015	001623-001626
76.	E-mail from Whitney Evers to Olan Hill and Steven T. Thorp dated November 17, 2015	001627
77.	E-mail from Doreen Overstreet to Jennifer Nesslar dated December 23 2015	001628-001630
78.	E-mail from Jamie Poulos to Steven T. Thorp, Truong Nguyen, Diana Almodovar, Francisco Villar, Whitney Evers and Matthew E. Kalus dated March 24, 2016	001631-001632
79.	E-mail from Nick Lepp to Steven T. Thorp dated April 29 2016	001633-001638
80.	E-mail from Matthew E. Kalus to Francisco Villar dated May 13, 2016	001639
81.	E-mail from Truong M. Nguyen to Commissioner Boyd dated October 5, 2016	001640-001644

82.	E-mail from Francisco Villar to Joe Kunkel dated October 6 2016 with attached draft BCC memo and Power Point Presentation	001645-001652
83.	E-mail from Francisco Villar to Joe Kunkel dated October 13 2016 with attached BCC staff report and Power Point Presentation	001653-001668
84.	E-mail from Whitney Evers to Steven T. Thorp, Joel Prinsell, Chris Testerman, Jon Weiss, Joe Kunkel, Alberto A. Vargas and Eric P. Raasch Jr. dated 10182016	001669-001695
85.	10212015 DRC Minutes - #13 Butler Bay	001696-001699
86.	CAD Documentation	001700-001729
87.	DRC 10.21.2015 - Tab 13 - DRAFT Butler Bay Cluster Plan (RZ-15-10-038)	001730-001740
88.	DRC 11.18.2015 - Tab 2 - 11-18-2015 DRC_RZ-15-10-038 (Butler Bay Cluster Plan)	001741-001758
89.	Interoffice Memorandum 09012016 from Diana M. Almodovar to Katie Smith re Windermere Country Club Plat Vacation Public Hearing Request	001759-001768
90.	Letter from Thomas C. Blanton responding to Textron Financial Corp. dated April 4 2008 re verification of zoning	001769-001778
91.	Responses in Favor as of 111815 at 3:08pm	001779-001800
92.	Responses in Opposition as of 111815 at 3:08pm	001801-002033

93.	Board of County Commissioners Public Hearings Presentation dated October 18, 2016	002034-002054
94.	2016-10-18 Sentinel File 16-060 Plat Vacation Bryan DeCunha	002055-002056
95.	Plat Vacation Hearing Exhibit 01 Nguyen Windermere County Club Plat Vacation	002057-002059
96.	Plat Vacation Hearing Exhibit 04 Herring Windermere County Club Plat Vacation	002060
97.	Plat Vacation Hearing Exhibit 05 Hawthorne Windermere County Club Plat Vacation	002061-002066
98.	Plat Vacation Hearing Exhibit 06 McChesney Windermere County Club Plat Vacation	002067-002112
99.	Plat Vacation Hearing Exhibit 07 Kolar Windermere County Club Plat Vacation	002113-002120

DATED: January 13, 2017.

/s/ Keith A. Graham
Keith A. Graham
Florida Bar No. 0705314
Marchena and Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814
Email: kgraham@mgfirm.com
mcatalano@mgfirm.com
Telephone No.: (407) 658-8566
Facsimile No.: (407) 281-8564
Attorneys for Windermere Country Club, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Orange County Clerk of Court using the Florida E-Filing Portal System this 13th day of January, 2017, and, accordingly, a copy is being served via the E-Filing Portal System and electronic means to:

Joel Prinsell, Esq. (joel.prinsell@ocfl.net)
Orange County Attorneys' Office
201 S. Rosalind Avenue, 3rd Floor
Orlando, FL 32801-3527

Daniel W. Langley, Esq. (dlangley@fishbacklaw.com)
A. Kurt Ardaman, Esq. (ardaman@fishbacklaw.com)
Christopher R. Conley, Esq. (crconley@fishbacklaw.com)
Fishback, Dominick, Bennett, Ardaman,
Ahlers, Langley & Geller LLP
1947 Lee Road
Winter Park, FL 32789

/s/ Keith A. Graham
Keith A. Graham
Florida Bar No. 0705314
Marchena and Graham, P.A.
976 Lake Baldwin Lane, Suite 101
Orlando, Florida 32814
Email: kgraham@mgfirm.com
mcatalano@mgfirm.com
Telephone No.: (407) 658-8566
Facsimile No.: (407) 281-8564
Attorneys for Windermere Country Club, LLC

Appendix 20.

Table of Contents

Amend others not deleted

WINDERMERE
COUNTRY CLUB

January 27, 2016

M◆ Joe Kunkel
County Engineer
Orange County
4200 South John Young Parkway
Orlando. Florida 32839

Subject: Petition to Vacate
Windermere Country Club
Parcel ID 01-23-27-1108-00-001 and 01-23-27-1117-00-001

Dear Mr, Kunkel

The Orange County Planning and Zoning Board on November 19, 2015 continued Case No. RZ-15-10-038 and requested the applicant submit a requestfor Petition-to-Vacate ("PTV") pursuant to Section 177.101 (3), Florida Statues, requesting that the Board of County Commissioners remove all notes/restrictions regarding development rights and access to Tract A on the Plat. In accordance with this request, please accept this letter as request for a PTV. In accordance with the requirements of Section 177.101 (3) F.S., the person making application for the said vapation owns fee simple title to Tract A, which is sought to be vacated. In addition, the PTV ◆ould not affect the ownership or right of convenient access of persons owning other parts of the subdivision within the plat and no other property owner will be denied access to or from their property.

Please see the specific items below with regard to this request for a PTV;

1. This PTV is requested to return the 155.30 acres of Tract A to acreage. Please see the attached sketch and legal description prepared by a registered land-;urveyor showing and describing the area proposed to be vacated **(Attachment A).**
2. Please see the attached metes and bounds and conservation easement form **(Attachment B).** While Plat Note 12 references that development rights to the Conservation Easement are dedicated to the County, the Plat (PB 18, Page 4) does not identify a "Conservation Easement" on the Plat, only a "Drainage Easement ' Conservation ll and Area of Mitigation'". The attached legal description for the Conservation Easement is the same legal description used on CAD 15◆08-106 approved December 10, 2015. It Is the intent to place a conservation easement over the areas identified in the CAO with the PTV to protect the CAD areas from future development. The remaining Drainage Easement is covered under item 3 below.
3. Please see the attached Temporary Blanket Drainage Easement **(Attachment C).** Several drainage easements <!edicated to Orange County exist within Tract A ◆n the ◆isting plat. ◆ easements will be maintained ◆ the Temporary Blanket Drainage Easement until such time as the property is re-platted. At that time, the

Temporary Blanket Drainage Easement will be replaced with specific drainage easements.

4. Please see attached Landscape, Wall, Sign and Sidewalk Easement **(Attachment D).** The Tract A Owner, contemporaneously with the approval of the PTV will convey to Windermere Club Homeowners Association, Inc., a Florida not for profit corporation, a document for a non-exclusive Easement for Landscape, Wall, Sign and Sidewalk over that same area and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 which acknowledge said Easement created by PB 13, Pages 59-60.
5. Please see the attached metes and bounds descriptions for inclusion in a non-exclusive Easement for utilities over the following areas: (i) a 10 foot wide easement over that same area southwest of Butler Bay Drive North between Lots 1 and 2; (H) a 25 foot wide easement over that same area east of Lake Buynak Estates along the western boundary of the Property and then running northeast to Butler Bay Drive North; (iii) a 10 foot wide easement over that same area west of Butler Bay Drive North between Lots 7 and 11; (iv) a 10 foot ***wide*** easement over that same area southwest of Butler Bay Drive North between Lots 19 and 20; (v) a 10 foot wide easement over that same area west of Butler Bay Drive North between lot 56 and McKinnon Road; (vi) a 10 foot wide easement over that same area northeast of Butler Bay Drive North between Lots 60 and 61; and (vii) a 10 foot wide easement over that same area north of McKinnon Road and east of Lake Roberts Court from McKinnon Road to Lot 122; all as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 1Oand Tract B Butler Bay - Unit 3 Plat. PB 25, Page 116 **(Attachment E).** It is the intent to place a utility easement over these areas with the PTV.
6. Please see the attached metes and bounds description for inclusion in a non-exclusive Easement of 15 feet by 55 feet for water tanks over the following areas: (i) north of McKinnon Road on *the* east side of Lake Roberts Court and South of Lot 122; and (ii) southwest of Butler Bay Drive North and Northwest of Lot 19; as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 **(Attachment F).** It is the intent to place a water tank easement over these areas with the PTV.
7. Please see the attached Developer's Agreement **(Attachment** G). As directed by the Planning and Zoning Commission on November 19, 2015, the Developer's Agreement is submitted by the Owner of the Tract A Property to, in part, modify and supersede the Developer's Agreement adopted February 24, 1986 and recorded at OR Book 3757, Page 1536, Public Records of Orange County, Florida between Orange County and Windermere Lakes, Ltd.
8. In support of the PTV, please see the attached "Memorandum re: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space" **(Attachment H).**
9. A legal notice will be published in a newspaper of general circulation in Orange County in not less than two (2) weekly issues of the paper.
10. Please see the attached certificates showing that all state and county taxes have been paid on the subject property to be vacated.

11. A notice of petition to vacate the subject property will be posted on the subject property in a conspicuous and easily visible location no later than ten (10) days prior to the public hearing on the petition. It is assumed that this notice will be available at the Orange County Public Works Division after tl}♦gy bjjc..fiearmg lias been scheduled.
12. Please see attached certificates (Attachment I) from public utility companies serving the area of the subject property showing each utility has certified that the vacation will not interfere with the utility services being provided. kL bc>J e c+ e

The undersign submits these items as grounds and reasons in support of this petition.

Sincerely,

Bryan DeCunha
Owner
Windermere County Club

CC: Whitney Evers, Orange County Attorney's Office

Clear Form

Print Form

AGENT AUTHORIZATION FORM

FOR PROJECTS LOCATED IN ORANGE COUNTY, FLORIDA

I/WE, (PRINT PROPERTY OWNER NAME) Windermere Country Club, LLC. ,AS THE OWNER(S) OF THE REAL PROPERTY DESCRIBED AS FOLLOWS, _____ , DO HEREBY AUTHORIZE TO ACT AS MY/OUR AGENT (PRINT AGENT'S NAME), Poulos & Bennett, LLC c/o Jamie Poulos, P.E. , TO EXECUTE ANY PETITIONS OR OTHER DOCUMENTS NECESSARY TO AFFECT THE APPLICATION APPROVAL REQUESTED AND MORE SPECIFICALLY DESCRIBED AS FOLLOWS, Petition to Vacate, Tract A-Golf Course, Butler Bay Unit Three (PB18-Page 4) , AND TO APPEAR ON MY/OUR BEHALF BEFORE ANY ADMINISTRATIVE OR LEGISLATIVE BODY IN THE COUNTY CONSIDERING THIS APPLICATION AND TO ACT IN ALL RESPECTS AS OUR AGENT IN MATIERS PERTAINING TO THE APPLICATION.

oate: JAN u}-u,1/o — Bryan DeCunha

Sigmrtureufuwner — Print Name Property Owner

Date: - - - - -

Signature of Property Owner — Print Name Property Owner

STATEOFF◆IDA :

.'"°UNTY OF - -◆◆

I certify that the foregoing instrument was acknowledged before me this 2! day of- 20 14' by R◆PAJ))..eCu H-A. . He/she is personally known to @) or h s produce - - - - - - - - - - as identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated *above* on the U day of _____ in the year -z,e::"'/

WILLIAM HENRY FURLONGE
MYCOMMIM!M◆◆mrg
EXPIRES October 3, 20 7
07) 39S-0153 FloridaNoteryService.com

Notary Public for the State of Florida

My Commission Expires: /£? 0 2017

Legal Oescription(s) or Parcel Identification Number(s) are required:
PARCEL ID#:
LEGAL DESCRIPTION:
t A, Golf Course, portion of Butler Bay Unit Three Plat as recorded in Plat Book 18, Page 4 of the Public Records of Orange County, Florida.

001038

Specific Project Expenditure Report (Revised November 5, 2010)
Foruse as of March 1, 2011

For Staff Use Only:
Initially submitted 011'-----
Updated On _____
Project Name (as filed) _____
Case or Bid No. _____

ORANGE COUNTY SPECIFIC PROJECT EXPENDITURE REPORT

This lobbying expenditure form shall be completed in full and flied with aU application submittals, This form shall remain cumulative and shall be filed with the department processing your application. Forms signed by a principal's authorized agent shall include an executed Agent Authorization Form.

This is the initial Form:___
This is a Subsequent Form:__

Part I
Please complete all of the following:

Name and Address of Principal (legal name of entity or owner per Orange County tax rolls.): _____

—wnde1111e,e Cou11by Club, LLC., c/o Bya11 DeCunlia, 2716 Batle1 Bay Dt. N, Wude1111e,e, FL 94786,

Name and Address of Principal's Authorized Agent, if applicable: _____

Poulos & Bennett, LLC., c/o Jamie Poulos, P.E., 2602 E. Livingston St., Orlando, FL 32803

List the name an address of all lobbyists, consultants, contractors, subcontractors, individuals or business entities who will assist with obtaining approval for this project. (Additional forms may be used as necessary.)

1. Name and address of individual or business entity: Poulos and Bennett, LLC
   Are they registered Lobbyist? Yes / or No _ 2602 E Livingston St., Orlando, FL 32803
2. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
3. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
4. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
5. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
6. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
7. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _
8. Name and address of individual or business entity:_____
   Are they registered Lobbyist? Yes _ or No _

Specific Project Expenditure Report (Revised November 5, 2010)
For use as of March 1, 2011

For Staff Use Only:
Initially submitted on ____
Updated On ____
Project Name (as filed) ____
Case or Bid No. ____

Part II
Expenditures:

For this report, an "expenditure" means money or anything of value given by the principal and/or his/her lobbyist for the purpose of lobbying, as defined in section 2-351, Orange County Code. This may include public relations expenditures including, but not limited to, petitions, fliers, purchase of media time, cost of print and distribution of publications. However, the term "expenditure" **does not** include:

- Contributions or expenditures reported pursuant to chapter 106, Florida Statutes;
- Federal election law, campaign related personal services provided without compensation by individuals volunteering their time;
- Any other contribution or expenditure made by or to a political party;
- Any other contribution or expenditure made by an organization that is exempt from taxation under 26 U.S.C. s. 527 ors. 501(c)(4), in accordance with s.112.3215, Florida Statutes; and/or
- Professional fees paid to registered lobbyists associated with the project or item.

The following is a complete list of all lobbying expenditures and activities (including those of lobbyists, contractors, consultants, etc.) incurred by the principal or his/her authorized agent and expended in connection with the above-referenced project or issue. **You need not include de minimus costs (under $50) for producing or reproducing graphics, aerial photographs, photocopies, surveys, studies or other documents related to this project.**

Date of Expenditure	Name of Party Incurring Expenditure	Description of Activity	Amount Paid
			-0-
		TOTAL EXPENDED THIS REPORT	$ -0-

Specific Project Expenditure Report (Revised November 5, 2010)
ForuseasofMarch 1,2011

For Staff Use Only:
Initially submitted on___ _
Updated On_____ _
Project Name (as filed) _____ _
Case or Bid No. ------

Partm
ORIGINAL SIGNATURE AND NOTARIZATION REQUIRED

I hereby certify that information provided in this specific project expenditure report is true and correct based on my knowledge and belief. I acknowledge and agree to comply with the requirement of section 2-354, of the Orange County code, to amend this specific project expenditure report for any additional expenditure(s) incurred relating to this project prior to the scheduled Board of County Commissioner meeting. I further acknowledge and agree that failure to comply with these requirements to file the specific expenditure report and all associated amendments may result in the delay of approval by the Board of County Commissioners for my project or item, any associated costs for which I shall be held responsible. In accordance withs. 837.06, Florida Statutes, 1understand and aclmowledge that whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor in the second degree, punishable as provided in s. 775.082 ors. 775.083, Floridt, Sm

Date:,, JAJ 21/2,c,1o

Signature o:tJ(!'rincipal or a Principal's Authorized Agent
(check appropriate box)
PRINT NAME AND TITLE: fSR.':{PN £. DECut4HA
6(>)1-J R..

STATE OF FLORIDA :
COUNTY OF

I certify that the furegoing instrument was acknowledged befure me tbis :Vt'. day or,:::;[, _____ 20 by 1/2 A#J pC C\HVP . He/she is personally known to @ or bas produced __ V as identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated above on the 21 day of January in the year -1q /(R'-

WILLIAM HENRY FURLONGE
MY COMMISSION #FF059829
EXPIRES October 3, 2017
(407) 398-0153 FloridaNotaryService.com
(Notary Seal)

Signature of Notary Public
Notary Public for the State of Florida
My Commission Expires: 10-03-2017

Staff signature and date of receipt of form _____
Staff reviews as to form and does not attest to the accuracy or veracity of the information provided herein.

S:dcrosby\ ethics p k g - final forms and ords\2010 workgroup\specific project expenditure form 3-1-11

001041

OCCEFORM2D
FOR DEVEWPMENT-RELATED ITEMS (November 5, 2010)
For use after March 1, 2011

For Staff Use Only:
Initially submitted on _____
Updated on _____
Project Name (as filed) _____
Case Number _____

RELATIONSIDP DISCLOSURE FORM
FOR USE WITH DEVELOPMENT RELATED ITEMS, EXCEPT THOSE WHERE THE COUNTY IS THE PRINCIPAL OR PRIMARY APPLICANT

This relationship disclosure form must be submitted to the Orange County department or division processing your application at the time of filing. fn the event any infonnation provided oil this fonn should change, the Owner, Contract Purchaser, or Authorized Agent(s) must tile an amended form on or before the date the item is considered by the appropriate board or body,

Part I

INFORMATION ON OWNER OF RECORD PER ORANGE COUNTY TAX ROLLS:

Name: Windermere Country Club. LLC. c/o Bryan DeCunha

Business Address (Street/P.O. Box, City and Zip Code): ---------

2110 BuHer Bay Dr. N. Windermere, Fl 34786-6110

Business Phone (407) 547-7774

Facsimile ( ) N/A

INFORMATION ON CONTRACT PURCHASER, 1F APPLICABLE:

Name: _____

Business Address (Street/P.0. Box, City and Zip Code): _____

Business Phone ( ) _____

Facsimile ( ) _____

INFORMATION ON AUTHORIZED AGENT, IF APPLICABLE:
(Agent Authorization Form also required to be attached)

Name: Poulos &Nemmett. LLC. c/o Jamie Poulos. P.E.

Business Address (Street/P.0. Box, City and Zip Code): _____

2602 E. Livingston Street. Orlando, FL 32803

Business Phone (407) 488-7-250-4

Facsimile ( ) N/A

001042

OCCEFORM2D
FOR DEVELOPMENT-RELATED ITEMS (November 5,2010)
For use after March 1, 2011

For Staff Use Only:
Initially submitted on _____ _
Updated on _____ _
Project Name (as filed) _____ _
Case Number _____ _

Part II

IS THE OWNER, CONTRACT PURCHASER, OR AUTHORIZED AGENT A RELATIVE OF THE MAYOR OR ANY MEMBER OF THE BCC?

_YES _x_NO

IS THE MAYOR OR ANY MEMBER OF THE BCC AN EMPLOYEE OF THE OWNER, CONTRACT PURCHASER, OR AUTHORIZED AGENT?

____ YES _X_NO

TS ANY PERSON WITH A DIRECT BENEFICIAL INTEREST IN THE OUTCOME OF THIS MATTER A BUSINESS ASSOCIATE OF THE MAYOR OR ANY MEMBER OF THE BCC? (When responding to this questioa please consider all consultants, attorneys, contractors/subcontractors and any other persons who may have been retained by the Owner, Contract Purchaser, or Authorized Agent to assist with obtaining approval of this item.)

____ YES _x_NO

If you responded "YES" to any of the above questions, please state with whom and explain the relationship:

_____

_____

_____

_____

_____

_____

(Use additional sheets of paper if necessary)

OCCEFORM2D
FOR DEVEWPMENT-RELATED ITEMS (November 5, 2010)
For use after Man:h 1, 2011

For Staff Use Only:
Initially submitted on _____
Updated on _____
Project Name (as filed) _____
CaseNumber - - - - - - - - - -

Partill
ORIGINAL SIGNATURE AND NOTARIZATION REQUIRED

I hereby certify that information provided in this relationship disclosure form is true and correct based on my knowledge and belief. If any o fthis information changes, I further acknowledge and agree to amend this relationship disclosure form prior to any meeting at which the above-referenced project is scheduled to be heard. In accordance withs. 837.06, Florida Statutes, I understand and acknowledge that whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor in the second degree, punishable as provided in

—

Date: JAoJ 2-c/z,o1(;,

Signature of , tract Purchaser
or oAuthorize-d Agent

Print Name and Title of Person completing this form: [illegible]

STATEOFFL A :
COUNTY OF _____

I certify that the foregoing instrument was acknowledged before me this -z,/. day of a- _____ 20Jz.. by [illegible] D Cv'ro #-a\ _____. He/she is personally 19iown to illi; or has produce _____ as identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated above on the 'Z-y' \ST day of .,:::{afl/. _____, in the year -o .

[illegible]
Signature of Notary Public
Notary Public for the State of Florida
My Commission Expires:
10-03-2017

[illegible] WILLIAM HENRY FURW[illegible] Seal)
MY COMMISSION #FF059829
EXPIRES October 3, 2017
(407) 398-0153 FloridaNotaryService.com

Staff sjgnature and date of receipt of form

Staff reviews as to form and does not attest to the accuracy or veracity of the information provided herein.

form oc ce 2d (relationship disclosure form - development) 3-1-11

Table of Contents

Amend others not deleted

delete

WINDERMERE
COUNTRY CLUB

January 27, 2016

Mr. Joe Kunkel
County Engineer
Orange County
4200 South John Young Parkway
Orlando, Florida 32839

Subject: Petition to Vacate
Windermere Country Club
Parcel ID 01-23-27-1108-00-001 and 01-23-27-1117-00-001

Dear Mr, Kunkel

The Orange County Planning and Zoning Board on November 19, 2015 continued Case No. RZ-15-10-038 and requested the applicant submit a request for Petition-to-Vacate ("PTV") pursuant to Section 177.101(3), Florida Statues, requesting thatthe Board of County Commissioners remove all notes/restrictions regarding development rights and access to Tract A on the Plat. In accordance with this request, please accept this letter as request for a PTV In accordance with the requirements of Section 177.101(3) F.S., the person making application for the said vapation owns fee simple title to Tract A, which is sought to be vacated. In addition, the PTV ould not affect the ownership or right of convenient access of persons owning other parts of the subdivision within the plat and no other property owner will be denied access to or from their property.

Please see the specmc items below with regard to this request for a PTV;

1. This PTV is requested to return the 155.30 acres of Tract A to acreage. Please see the attached sketch and legal description prepared by a re9istered--i;nd urveyor showing and describing the area proposed to be vacated **(Attachment A).**
2. Please see the attached metes and bounds and conservation easement form **(Attachment** B). While Plat Note 12 references that development rights to the Conservation Easement are dedicated to the County, the Plat (PB 18, Page 4) does not identify a "Conservation Easement" on the Plat, only a "Drainage Easement ' Conservation ll and Area of Mitigation" . The attached legal description for the Conservation Easement is the same legal description used on CAD 15-08-106 approved December 10, 2015. It is the intent to place a conservation easement over the areas identified in the CAD with the PTV to protect the CAD areas from future development. The remaining Drainage Easement is covered under item 3 below.
3. Please see the attached Temporary Blanket Drainage Easement **(Attachment C).** Several drainage easements dedicated to Orange County exist within Tract A n the existing plat. These easements will be maintained under the Temporary Blanket Drainage Easement until such time as the property is re-platted. At that time, the

Temporary Blanket Drainage Easement will be replaced with specific drainage easements.

4. PJease see attached Landscape, Wall, Sign and Sidewalk Easement **(Attachment D).** The Tract A Owner, contemporaneously with the approval of the PTV will convey to Windermere Club Homeowners Association, Inc., a Florida not for profit corporation, a document for a non-exclusive Easement for Landscape, Wall, Sign and Sidewalk over that same area and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 which acknowledge said Easement created by PB 13, Pages 59-60.
5. Please see the attached metes and bounds descriptions for inclusion in a non-exclusive Easement for utilities over the following areas: (i} a 10 foot wide easement over that same area southwest of Butler Bay Drive North between Lots 1 and 2; (ii) a 25 foot wide easement over that same area east of Lake Buynak Estates along the western boundary of the Property and then running northeast to Butler Bay Drive North; (iii) a 10 foot wide easement over that same area west of Butler Bay Drive North between Lots 7 and 11; ***(iv)*** a 10 foot wide easement ***over*** that same area southwest of Butler Bay Drive North between Lots 19 and 20; (v) a 10 foot wide easement over that same area west of Butler Bay Drive North between lot 56 and McKinnon Road; (vi) a 10 foot wide easement over that same area northeast of Butler Bay Drive North between Lots 60 and 61; and (vii) a 10 foot wide easement over that same area north of McKinnon Road and east of Lake Roberts Court from McKinnon Road to Lot 122; all as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 10 and Tract B Butler Bay - Unit 3 Plat, PB 25, Page 116 **(Attachment** E). It is the intent to place a utility easement over these areas with the PTV.
6. Please see the attached metes and bounds description for inclusion in a non-exclusive Easement of 15 feet by 55 feet for water tanks over the following areas: (i) north of McKinnon Road on the east side of Lake Roberts Court and South of Lot 122; and (ii) southwest of Butler Bay Drive North and Northwest of Lot 19; as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 **{Attachment** F). It is the intent to place a water tank easement over these areas with the PTV.
7. Please see the attached Developer's Agreement **{Attachment** G). As directed by the Planning and Zoning Commission on November 19, 2015, the Developer's Agreement is submitted by the Owner of the Tract A Property to, in part, modify and supersede the Developer's Agreement adopted February 24, 1986 and recorded at OR Book 3757, Page 1536, Public Records of Orange County, Florida between Orange County and Windermere Lakes, Ltd.
8. In support of the PTV, please see the attached "Memorandum re: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space" **(Attachment H).**
9. A legal notice will be published in a newspaper of general circulation in Orange County in not Jess than two (2) weekly issues of the paper.
10. Please see the attached certificates showing that all state and county taxes have been paid on the subject property to be vacated.

11. A notice of petition to vacate the subject property will be posted on the subject property in a conspicuous and easily visible location no later than ten (10) days prior to the public hearing on the petition. It is assumed that this notice will be available at the Orange County Public Works Division after tf]_♦p_ybti.♦!'en sched•♦·
12. Please see attached certificates **(Attachment** I) from public utility companies serving the area of the subject property showing each utility has certified that the vacation will not interfere with the utility services being provided. kL-0J ecf-t'

The undersign submlts these items as grounds and reasons in support of this petition.

Sincerely,

Bryan DeCunha
Owner
Windermere County Club

CC: Whitney Evers, Orange County Attorney's Office

Clear Form

Print Form

AGENT AUTHORIZATION FORM

FOR PROJECTS LOCATED IN ORANGE COUNTY, FLORIDA

I/we, (PRINT PROPERTY owNER NAME) Windermere Country Club, LLC., AS THE OWNER(S) OF THE REAL PROPERTY DESCRIBED AS FOLLOWS, _____, DO HEREBY AUTHORIZE TO ACT AS MY/OUR AGENT (PRINT AGENT'S NAME), Poulos & Bennett, LLC c/o Jamie Poulos, P.E., TO EXECUTE ANY PETITIONS OR OTHER DOCUMENTS NECESSARY TO AFFECT THE APPLICATION APPROVAL REQUESTED AND MORE SPECIFICALLY DESCRIBED AS FOLLOWS, Petition to Vacate, Tract A-Golf Course, Butler Bay Unit Three (PB18-Page 4), ANO TO APPEAR ON MY/OUR BEHALF BEFORE ANY ADMINISTRATIVE OR LEGISLATIVE BODY IN THE COUNTY CONSIDERING THIS APPLICATION ANO TO ACT IN ALL RESPECTS AS OUR AGENT IN MATTERS PERTAINING TO THE APPLICATION.

Date: JAN "-a/=,,,, _____ Bryan DeCunha

Sig, ner — Print Name Property Owner

Date: _____ _____ _____

Signature of Property Owner — Print Name Property Owner

STATE OF FLORIDA :

.<""UNTY OF _____

I certify that the foregoing instrument was acknowledged before me this day of- _____ 20 I__ by .&f<>t\A/.Cu l+A. _____. He/she is personally known to @ or has produce _____ as identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated above on the U day of _____ in the year-◆/◆

WILLIAM HENRY FURLONGE
MY COMMISSION #FF058899
EXPIRES October 3, 2017
)1) 398-0153 floridaNotaryService.com

(Notary Seal)

Signature of Notary Publ's
Notary Public for the State of Florida

My Commission Expires: /P.: 0 ·zo/'·7

Legal Description(s} or Parcel Identification Number(s} are required:
PARCEL ID#:
1 LEGAL DESCRIPTION:
.;t A, Golf Course, portion of Butler Bay Unit Three Plat as recorded in Plat Book 18, Page 4 of the Public Records of Orange County, Florida.

001049

Specific Project Expenditure Report (Revised November 5. 2010)
ForuseasofMarch 1,2011

For Staff Use Only:
Initially submitted on___ _
Updated On _____ _
Project Name (as filed) _____ _
Case or Bid No. - - - - - -

ORANGE COUNTY SPECIFIC PROJECT EXPENDITURE REPORT

This lobbying expenditure form shall be completed in full and flied with all application submittals. This form shall remain cumulative and shall be filed with the department processing your application. Forms signed by a principal's authorized agent shall include an executed Agent Authorization Form.

This is the initial Form:- - -
This is a Subsequent Form:__ _

Part I
Please complete all of the following:

Name and Address of Principal (legal name of entity or owner per Orange County tax rolls.): _____ _

Winder111e,eCmmby Club,-LLC,-c,'o-B,yar,-DeCu11ra,-2710-Bulle,-Bay-Dr.-N,-Wi11de,mere,-FL-34786,

Name and Address of Principal's Authorized Agent, if applicable: _____ _

Poulos & Bennett. LLC., c/o Jamie Poulos, P.E., 2602 E. Livingston St., Orlando, FL 32803

List the name and address of all lobbyists, consultants, contractors, subcontractors, individuals or business entities who will assist with obtaining approval for this project. (Additional forms may be used as necessary.)

1. Name and address of individual or business entity: -'-Poulos and Bennett, LLC
   Are they registered Lobbyist? Yes ,:L or No _ 2602 E. Livingston St., Orlando, FL 32803
2. Name and address of individual or business entity:_____ _
   Are they registered Lobbyist? Yes _ or No _
3. Name and address of individual or business entity:_____ _
   Are they registered Lobbyist? Yes _ or No _
4. Name and address of individual or business entity:_____ _
   Are they registered Lobbyist? Yes _ or No _
5. Name and address of individual or business entity:_____ _
   Are they registered Lobbyist? Yes _ or No _
6. Name and address of individual or business entity:- - - - - - - - - - - - - - - - - -
   Are they registered Lobbyist? Yes _ or No _
7. Name and address of individual or business entity-:_____ _
   Are they registered Lobbyist? Yes _ or No _
8. Name and address of individual or business entity:_____ _
   Are they registered Lobbyist? Yes _ or No _

Specific Project Expenditure Report (Revised November 5, 2010)
ForuseasofMarch 1,2011

For Staff Use Only:
Initially submitted On___ _
Updated On_____ _
Project Name (as **filed**) _____ _
Case or Bid No. ------

Partll
Expenditures:

For this report, an "expenditure" means money or anything of value given by the principal and/or his/her lobbyist for the purpose of lobbying, as defined in section 2-351, Orange County Code. This may include public relations expenditures including, but not limited to, petitions, fliers, purchase of media time, cost of print and distribution of publications. However, the term "expenditure" **does not** include:

- e Contributions or expenditures reported pursuant to chapter 106, Florida Statutes;
- Federal election law, campaign-related personal services provided without compensation by individuals volunteering their time;
- e Any other contribution or expenditure made by or to a political party;
- Any other contribution or expenditure made by an organization that is exempt from taxation under 26 U.S.C. s. 527 ors. 501(c)(4), in accordance with s.112.3215, Florida Statutes; and/or
- Professional fees paid to registered lobbyists associated with the project or item.

The following is a complete list of all lobbying expenditures and activities (including those of lobbyists, contractors, consultants, etc.) incurred by the principal or his/her authorized agent and expended in connection with the above-referenced project or issue. **You need not include de minimus costs (under $50) for producing or reproducing graphics, aerial photographs, photocopies, surveys, studies or other documents related to this project.**

Date of Expenditure	Name of Party Incurring Expenditure	Description of Activity	Amount Paid
			-0-
		TOTAL EXPENDED THIS REPORT	$ -0-

Specific Project Expenditure Report (Revised November 5, 2010)
ForuseasofMarch 1,2011

For Staff Use Only:
Initially submitted on ____ _
Updated On _____ _
Project Name (as filed) _____ _
Case or Bid No. - - - - - -

Part ill
ORIGINAL SIGNATURE AND NOTARIZATION REQUIRED

I hereby certify that information provided in this specific project expenditure report is true and correct based on my knowledge and belief. I acknowledge and agree to comply with the requirement of section 2-354, of the Orange County code, to amend this specific project expenditure report for any additional expenditure(s) incurred relating to this project prior to the scheduled Board of County Commissioner meeting. I further acknowledge and agree that failure to comply with these requirements to file the specific expenditure report and all associated amendments may result in the delay of approval by the Board of County Commissioners for my project or item, any associated costs for which I shall be held responsible. In accordance with s. 837.06, Florida Statutes, l understand and acknowledge that whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the performance of his or her official duty shall be guilty of a misdemeanor in the second degree, punishable as provided ins. 775.082 ors. 775.083, FloridoB

Date: Kbl2..1/2.0b
7

_____
Signature of)Q'rincipal or a Principal's Authorized Agent
(check appropriate box)
PRINT NAME AND TITLE: 6R':::(AN £. DEC..ut4HA
6L>JN R..

STATE *OF* FLORIDA :
COUNTYOFa('£ ::-

I certify that the foregomg instrument was aclmowledged before me this t' day o _____ zof_fby
1/2 AN *1)-i: CLJ7L/#-"P-* • He/she is personally known to @ or has pr-oquced __v""" _____ as
identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated above on the 21 day of January
in the year -:v.o£4

WILLIAM HENRY FURLONGE (Notary Seal)
MY COMMISSION #FF059829
EXPIRES October 3, 2017
(407) 398-0153 FloridaNotaryService.com

Signature of Notary Public
Notary Public for the State of Florida
My Commission Expires: 10-03-2017

Staff signature and date of receipt of form _____
Staff reviews as to form and does not attest to the accuracy or veracity of the information provided herein.

S;dcrosby\ ethics pkg-final forms and ords\2010 workgroup\specific project expenditure form 3-1-11

001052

OCCEFORM2D
FOR DEVELOPMENT-RELATED ITEMS (November 5, 2010)
For use after March 1, 2011

For Staff Use Only:
Initially submitted on _____
Updated on _____
Project Name (as filed) _____
Case Number _____

RELATIONSHIP DISCLOSURE FORM
FOR USE WITH DEVELOPMENT RELATED ITEMS. EXCEPT THOSE WHERE THE COUNTY IS THE PRINCIPAL OR PRIMARY APPLICANT

This relationship disclosure form must be submitted to the Orange County department or division processing your application at the time of filing. In the event any information provided on this form should change, the Owner, Contract Purchaser, or Authorized Agent(s) must file an amended form on or before the date the item is considered by the appropriate board or body.

Part I

INFORMATION ON OWNER OF RECORD PER ORANGE COUNTY TAX ROLLS:

Name: Windermere Country Club, LLC. c/o Bryan DeCunha

Business Address (Street/P.O. Box, City and Zip Code): _____

2710 Buher Bay Dr. N. Windermere, Fl 34786-6110

Business Phone (407) 547-7764

Facsimile ( ) N/A

INFORMATION ON CONTRACT PURCHASER, IF APPLICABLE:

Name: _____

Business Address (Street/P.O. Box, City and Zip Code): _____

Business Phone ( ) _____

Facsimile ( ) _____

INFORMATION ON AUTHORIZED AGENT, IF APPLICABLE:
(Agent Authorization Form also required to be attached)

Name: Poulos &Nemmett, LLC. c/o Jamie Poulos, P.E.

Business Address (Street/P.O. Box, City and Zip Code): _____

2602 E. Livingston Street, Orlando. FL 32803

Business Phone (407) 487-2594

Facsimile ( ) N/A

OCCEFORM2D
FOR DEVELOPMENT-RELATED ITEMS (November 5, 2010)
For use after March 1, 2011

For Staff Use ***Only:***
Initially submitted on _____
Updated on _____
Project Name (as filed) _____
Case Number _____

Part II

IS THE OWNER, CONTRACT PURCHASER, OR AUTHORIZED AGENT A RELATIVE OF THE MAYOR OR ANY MEMBER OF THE DCC?

__ YES - L N O

IS THE MAYOR OR ANY MEMBER OF THE DCC AN EMPLOYEE OF THE OWNER, CONTRACT PURCHASER, OR AUTHORIZED AGENT?

___ YES __x__ NO

IS ANY PERSON WITH A DIRECT BENEFICIAL INTEREST IN THE OUTCOME OF THIS MATTER A BUSINESS ASSOCIATE OF TRE MAYOR OR ANY MEMBER OF THE BCC? (When responding to this question please consider all consultants, attorneys, contractors/subcontractors and any other persons who may have been retained by the Owner, Contract Purchaser, or Authorized Agent to assist with obtaining approval of this item.)

____ YES. __x__ NO

If you responded "YES" to any of the above questions, please state with whom and explain the relationship:

_____

_____

_____

_____

_____

_____

(Use additional sheets of paper if necessary)

OCCEFORM2D
-FOR DEVEWPMENT-RELATED ITEMS (November 5, 2010)
Ftir use after March 1, 2011

For Staff Use Only:
Initially **submitted on** _____
Updated on _____
Project Name (as filed) _____
Case Number - - - - - - - - - -

Partm
ORIGINAL SIGNATURE AND NOTARIZATION REQUIRED

I hereby certify that information provided in this relationship disclosure fonn is true and correct based on my knowledge and belief. If any of this information changes, I further acknowledge and agree to amend this relationship disclosure fonn prior to any meeting at which the above-referenced project is scheduled to be heard. In accordance withs. 837.06, Florida Statutes, I understand and acknowledge that whoever knowingly makes a false statement in writing with the intent to mislead a public servant in the perfonnance of his or her official duty shall be guilty of a misdemeanor in the second degree, punishable as provided in s 775.082 ors. 775.083, Florida Statutes.

Signature of ~~Owner~~, □Contract Purchaser
or □Authorized Agent

Date: JAN Z,(/2,o1f,

Print Name and Title of Person completing this fonn: ~~Ryan Decuna~~

STATE OF F
COUNTY OF · · t..e-

I certify that the foregoing instrument was acknowledged before me this -z./ day of _____ 20fJ! by 8&AH D'~G..s4 +A. He/she is personally kpown to m or 3 has produce -- ---- as identification and did/did not take an oath.

Witness my hand and official seal in the county and state stated above on the .z_l' !!iT day of :::[;?if\l:. , in the year ·,-o r;:;,.. '12 t / g .

/i;A·;:t f-\ WILLIAM HENRY FUR
*( )•} MY COMMISSION #FF059829
EXPIRES October 3, 2017
(407) 398-0153 FloridaNotaryService.com

If Seal)

Signature of Notary Public
Notary Public for the State of Florida
My Commission Expires:
10-03-2017

Staff signature and date of receipt of form

Staff reviews as to form and does not attest to the acmrracy or veracity of the information provided herein,

fonn oc ce 2d (relationship disclosure fonn - development) 3-1-11

001055

A

ALTA / ACSM LAND TITLE AND BOUNDARY LOCATION SURVEY OF:
Windermere Golf and Country Club

SHEET 1 OF 3

SCHEDULE B-II (EXCEPTIONS)

4. All matters contained on the Plat of Butler Bay – Unit One, as recorded in Plat Book 13, Page 50, Resolution recorded in O.R. Book 2968, Page 3094, Public Records of Orange County, Florida. (As to Parcel D) PLOTTED

5. All matters contained on the Plat of Butler Bay – Unit Two, as recorded in Plat Book 18, Page 4, Resolution associated in O.R. Book 4033, Page 3812, Public Records of Orange County, Florida. (As to Parcels A, C, E and F) PLOTTED

6. Easement in favor of American Telephone and Telegraph Company recorded in O.R. Book 1526, Page 667, Public Records of Orange County, Florida. PLOTTED

7. Agreement between Orange/Seminole Collection and Windermere Lakes Recorded recorded in O.R. Book 3125, Page 2245, Public Records of Orange County, Florida. CLOSES NOT PLOTTABLE

8. Use Agreement by and between The Country Club of Windermere and Orange County recorded in O.R. Book 3753, Page 1261, Public Records of Orange County, Florida. (As to Parcel A) NOT PLOTTABLE

9. Developer's Agreement by and between Orange County and Windermere Lakes, Ltd. recorded in O.R. Book 3753, Page 1338, Public Records of Orange County, Florida. NOT PLOTTABLE

10. Grant of Easement for Ingress, Egress and Utilities recorded in O.R. Book 3843, Page 4181, Public Records of Orange County, Florida. (As to Parcels A and E) PLOTTED

11. Resolution Concerning and Exchange and Option Agreement recorded in O.R. Book 4013, Page 4235, Amended in O.R. Book 4068, Page 1793, Public Records of Orange County, Florida. NOT PLOTTABLE

12. Ingress-egress Maintenance Easement recorded in O.R. Book 4230, Page 3832, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED

13. Conditional Maintenance Easement recorded in O.R. Book 4230, Page 3833, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED

14. Utilities Membership Agreement recorded in O.R. Book 4318, Page 713, Public Records of Orange County, Florida. NOT PLOTTABLE

15. Orange County / Consolidated Oak, Inc. Interim Wastewater Facilities Agreement recorded in O.R. Book 4206, Page 2259, Public Records of Orange County, Florida. NOT PLOTTABLE

16. Easement Agreement recorded in O.R. Book 4230, Page 3882, corrected in O.R. Book 4251, Page 3997, Public Records of Orange County, Florida. (As to Parcels A, C and D) CLOSES NOT PLOTTABLE

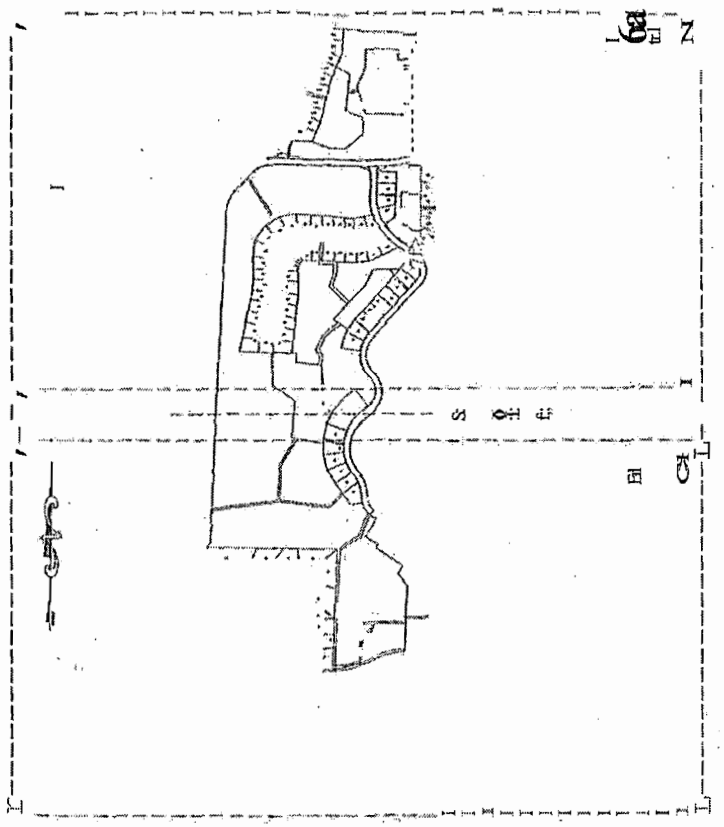
17. Orange County / Arnold Oak Partners Interim Water Facilities Agreement recorded in O.R. Book 4274, Page 1778, Public Records of Orange County, Florida. NOT PLOTTABLE

18. Agreement recorded in O.R. Book 4352, Page 3727, Public Records of Orange County, Florida. NOT PLOTTABLE

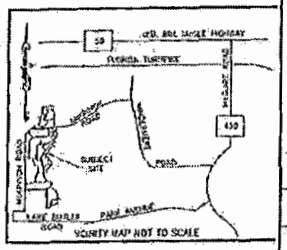
19. Florida Covenant in favor of Orange County recorded in O.R. Book 5484, Page 1761, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED

20. Not Reserved in favor of Butler Bay Association, Inc. recorded in O.R. Book 5143, Page 618, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED

21. Declaration of Covenants, Conditions and Restrictions for Butler Bay Unit Two recorded in O.R. Book 5434, Page 735, as amended in O.R. Book 5554, Page 1137 and O.R. Book 5630, Page 46, and Declaration of Covenants, Conditions and Restrictions for Butler Bay Unit Three recorded in O.R. Book 5558, Page 1978, as amended in O.R. Book 5642, Page 2410, O.R. Book 5973, Page 778 and O.R. Book 6550, Page 922, O.R. Book 10478, Page 9374, O.R. Book 10706, Page 3402 and O.R. Book 10970, Page 3430, Public Records of Orange County, Florida, which contains provisions regarding easements and/or assessments. (As to Parcels C, D and E) Book 5558, Page 280 and Declaration recorded in O.R. Book 6550, Page 922, O.R. Book 6550 Page 816, ORL) NOT PLOTTABLE



SHEET MAP
NOT TO SCALE



LEGAL DESCRIPTION (SCHEDULE "A" OF TITLE POLICY)

PARCEL A:

PARCEL B:

PARCEL C:

PARCEL D:

PARCEL E:

SURVEYOR NOTES:

SURVEYOR'S CERTIFICATION:

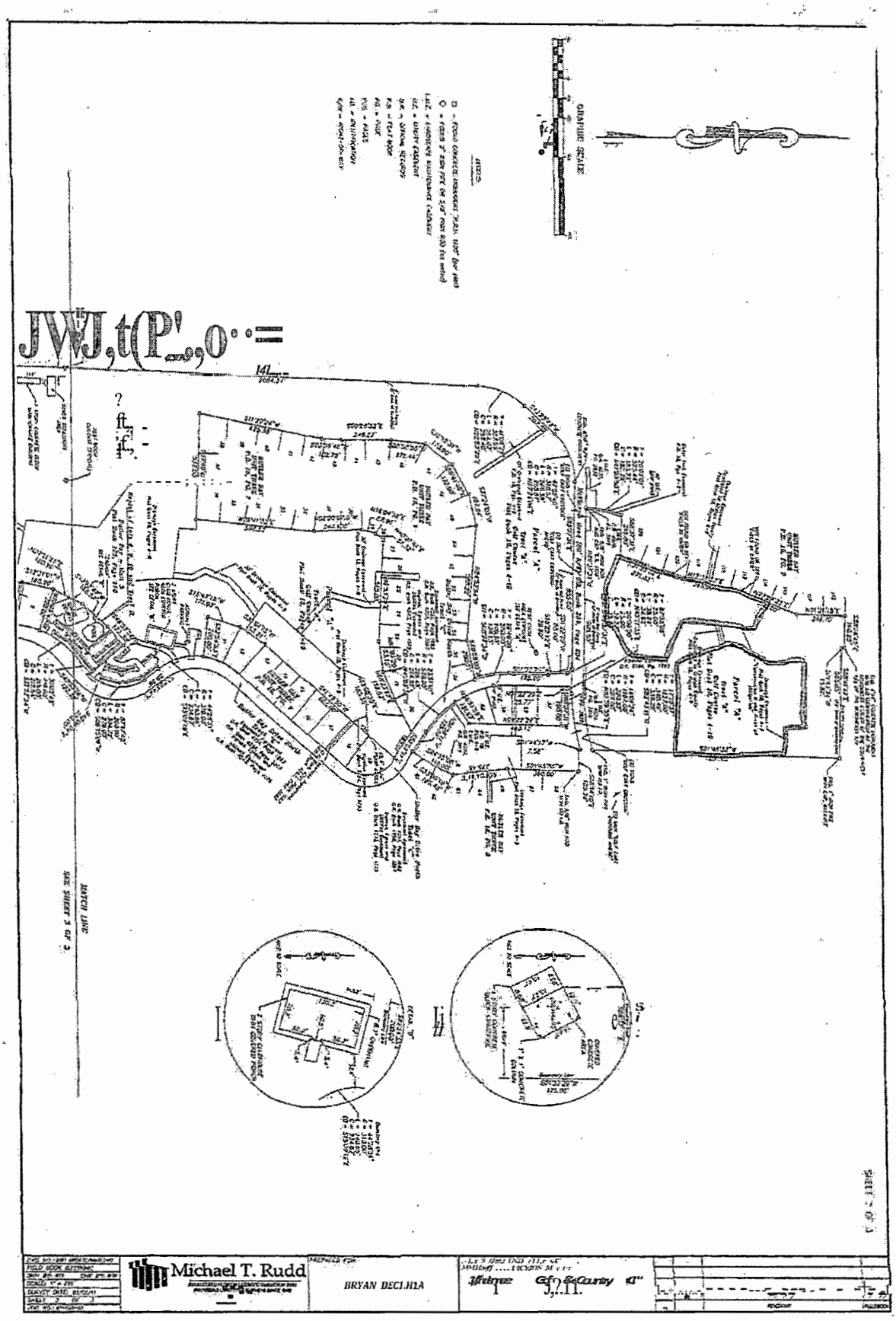
DATE SIGNED 23 Sept 2015

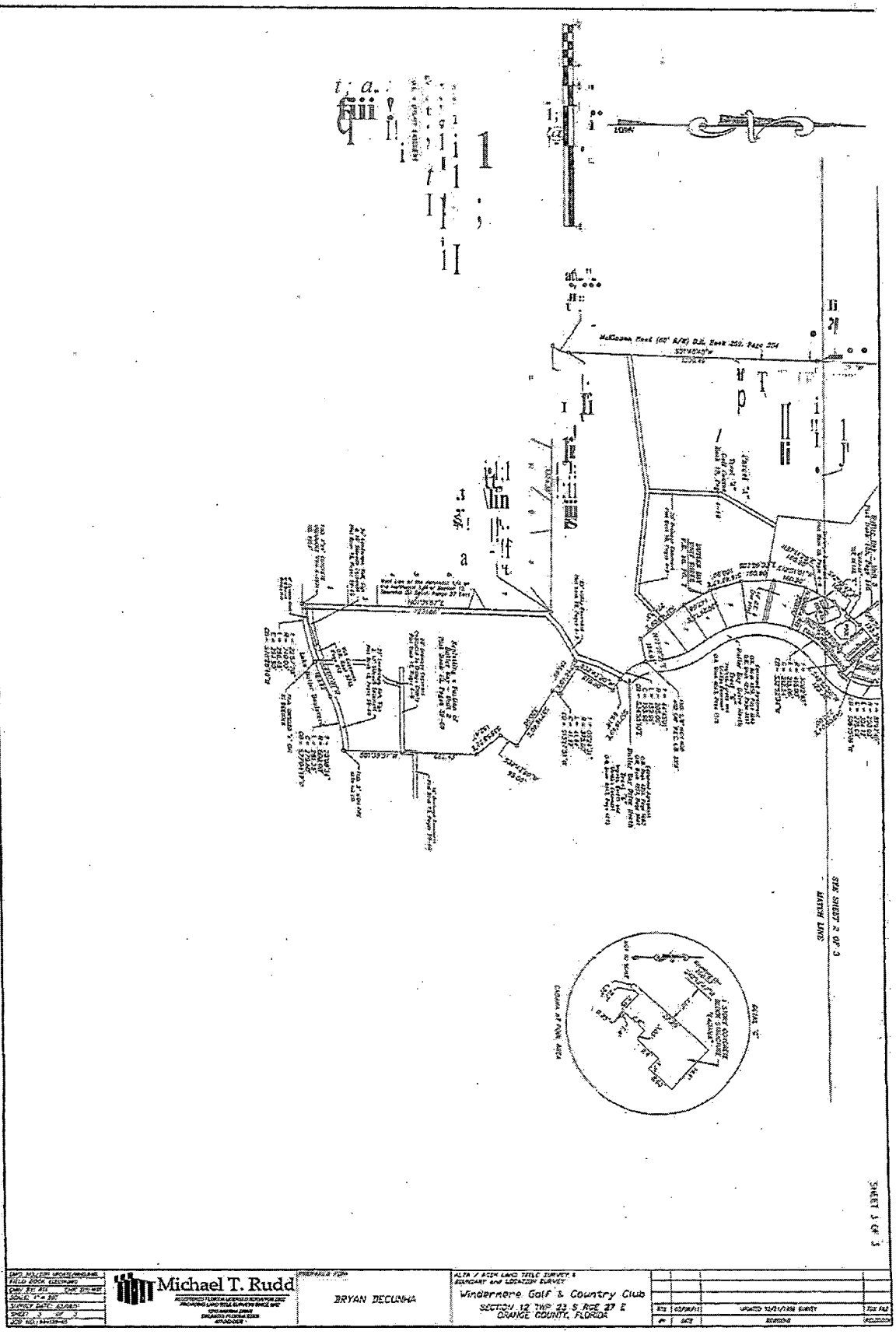
Golf & Country Club
(Individual Lots)
SECTIONS 17, 18, 19 & 20
ORANGE COUNTY, FLORIDA

Michael T. Rudd
PROFESSIONAL SURVEYOR & MAPPER

BRYAN BEGUNKA

001056


Michael T. Rudd
BRYAN DECI.HIA



Michael T. Rudd

BRYAN DECUNHA

ALTA / ACSM LAND TITLE SURVEY & SKETCH and LEGAL DESCRIPTION

Windermere Golf & Country Club

SECTION 12 TWP 23 S RGE 27 E
ORANGE COUNTY, FLORIDA

UPDATED TO REFLECT NEW SURVEY

(3

Instrument prepared by and recorded original returned to:
Real Estate Management
Division Orange County, Florida
400 East South Street, 5th Floor
Orlando, Florida 32801

7

Parcel Id. No.
a portion of:

CONSERVATION AND ACCESS EASEMENT

This CONSERVATION AND ACCESS EASEMENT is made this day of ___ _ , 2016 by WINDERMERE COUNTRY CLUB, LLC, a Florida limited liability company, whose address is 2710 Butler B ay Drive, N., Windermere, Florida 34786 ("GRANTOR"), in favor of ORANGE COUNTY, a political subdivision of the State of Florida, whose address is Post Office Box 1393, Orlando, Florida 32802-1393 ("GRANTEE").

RECITALS:

1. Owner owns certain real property located in the unincorporated area of Orange County (the "PROPERTY"), which consists of 155± acres of land described as Tract A on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 10 and Tract B Butler B ay - Unit 3 Plat, PB 25, Page 116.

2. Owner and the County has entered into a Developer's Agreement dated of even date herewith to be recorded in the Public Records of Orange County, Florida, governing the redevelopment of the PROPERTY (the "Developer's Agreement").

3. Under section 2.03 of the Developer's Agreement, Owner agreed to convey a conservation and access easement over 8.4 acres of conservation area within the PROPERTY (the **"CONSERVATION AREA"),** which **CONSERVATION AREA** is more particularly described in Exhibit "A" attached hereto.

4. The CONSERVATION AREA is subject to _____ permit , governing storm water drainage retention and other us of the Conservation Area (the "PERMIT").

NOW, THEREFORE, in consideration TEN DOLLARS in hand paid by GRANTEE to GRANTOR, and of the above and the mutual covenants, terms, conditions and restrictions contained herein, the receipt and sufficiency of which is hereby acknowledged, GRANTOR hereby voluntarily grants and conveys to GRANTEE a conservation easement over the Conservation Area of the nature and character and to the extent hereinafter set forth herein (the "CONSERVATION EASEMENT.") In exchange for good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties, GRANTOR hereby voluntarily grants and conveys to GRANTEE an access easement over the PROPERTY to the extent hereinafter set forth (the "ACCESS EASEMENT"). Collectively, the CONSERVATION EASEMENT and the ACCESS EASEMENT are referred to as the "CONSERVATION AND ACCESS EASEMENT."

1. **Purpose.** rhe purpose of this CONSERVATION EASEMENT is to assure that the CONSERVATION AREA will be retained forever in its natural condition, as that may be altered in accordance with the PERMIT. Those wetland and upland areas included in the CONSERVATION EASEMENT that are to be enhanced, restored, or created pursuant to the PERMIT shall be retained and maintained in the enhanced, restored, or created conditions required by the PERMIT.

2. **Prohibited Uses.** Except for restoration, creation, enhancement, maintenance and monitoring activities, or surface water management improvements, which are specifically authorized or required by the PERMIT, any activity on or use of the CONSERVATION AREA inconsistent with this CONSERVATION EASEMENT's purpose

is prohibited. Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited in, under, or on the CONSERVATION AREA:

(a) Constructing or placing buildings, roads, signs, billboards or other advertising, utilities or other structures on or above the ground.

(b) Dumping or placing soil or other substance or material as landfill or dumping or placing of trash, waste, or unsightly or offensive materials.

(c) Removing or destroying trees, shrubs, or other vegetation.

(d) Excavating, dredging or removing loam, peat, gravel, soil, rock, or other material substances in such a manner as to affect the surface.

(e) Surface use, except for purposes that permit the land or water area to remain predominantly in its natural condition.

(f) Activities detrimental to drainage, flood controls, water conservation, erosion

control, soil conservation, or fish and wildlife habitat preservation.

(g) Acts or uses detrimental to such retention of land or water areas.

(h) Acts or uses detrimental to the preservation of the stmctural integrity or physical appearance of sites or properties of historical, architectural, archaeological, or cultural significance.

3. **Reserved Rights in the CONSERVATION AREA.** GRANTOR reserves unto itself, and its successors and assigns, all rights accruing from its ownership of the CONSERVATION AREA, including the right to engage in or permit or invite others to engage in all uses of the CONSERVATION AREA, which are not expressly prohibited herein and are not inconsistent with the PERMIT or the purpose of this CONSERVATION EASEMENT.

4. **Public Access.** No right or access by the general public to any portion of

the CONSERVATION AREA or the PROPERTY is conveyed by this CONSERVATION AND ACCESS EASEMENT.

5. Rights of GRANTEE. To accomplish the purposes stated herein, GRANTOR conveys the following rights and easements to GRANTEE:

(a) ACCESS EASEMENT. To enter on, over and through the PROPERTY for the purpose of vehicular and pedestrian ingress and egress over and across the PROPERTY as is necessary for GRANTEE to access the PROPERTY in a reasonable manner and at reasonable times for the purposes granted or conveyed by the CONSERVATION EASEMENT.

(b) CONSERVATION EASEMENT. To enter upon and inspect the CONSERVATION AREA in a reasonable manner and at reasonable times to determine if activities and uses thereon are in compliance with this CONSERVATION EASEMENT, and/or to perform, or require to be performed, any restoration, creation, enhancement, maintenance and monitoring activities, or surface water improvements which are specifically authorized or required by the PERMIT.

(c) CONSERVATION AND ACCESS EASEMENT. To proceed at law or in equity to enforce the provisions of this CONSERVATION AND ACCESS EASEMENT and/or to prevent the occurrence of any of the prohibited activities set forth herein, and/or to require the restoration of areas or features of the CONSERVATION AREA that may be damaged by any activity inconsistent with this CONSERVATION AND ACCESS EASEMENT.

6. GRANTEE's Discretion. GRANTEE may enforce the terms of this CONSERVATION AND ACCESS EASEMENT at its discretion, but if GRANTOR breaches any term of this CONSERVATION AND ACCESS EASEMENT and GRANTEE does not exercise its rights under this CONSERVATION AND ACCESS EASEMENT, GRANTEE's forbearance shall not be construed to be a waiver by GRANTEE of such term, or of any

subsequent breach of the same, or any other term of this CONSERVATION AND ACCESS EASEMENT, or of any of the GRANTEE's rights under this CONSERVATION AND ACCESS EASEMENT. No delay or omission by GRANTEE in the exercise of any right or remedy upon any breach by GRANTOR shall impair such right or remedy or be construed as a waiver. GRANTEE shall not be obligated to GRANTOR, or to any other person or entity, to enforce the provisions of this CONSERVATION AND ACCESS EASEMENT.

7. **GRANTEE's Liability.** GRANTOR will assume all liability for any injury or damage to the person or property of third parties that may occur on the CONSERVATION AREA and the PROPERTY. Neither GRANTOR, nor any person or entity claiming by or through GRANTOR, shall hold GRANTEE liable for any damage or injury to person or personal property that may occur on the CONSERVATION AREA or the PROPERTY.

8. **Acts Beyond GRANTOR's Control.** Nothing contained in this CONSERVATION AND ACCESS EASEMENT shall be construed to entitle GRANTEE to bring any action against GRANTOR for any injury to or change in the CONSERVATION AREA resulting from natural causes beyond GRANTOR's control, including, without limitation, fire, flood, storm and earth movement, or from any action taken by GRANTOR under emergency conditions to prevent, abate or mitigate significant injury to the CONSERVATION AREA resulting from such causes.

9. **Recordation.** GRANTOR shall record this CONSERVATION AND ACCESS EASEMENT in timely fashion in the Official Records of Orange County, Florida, and shall rerecord it at any time GRANTEE may require to preserve its rights. GRANTOR shall pay all recording costs and taxes necessary to record this CONSERVATION AND ACCESS EASEMENT in the public records. GRANTOR will hold GRANTEE harmless from any recording costs or taxes necessary to record this CONSERVATION AND ACCESS

EASEMENT in the public records.

10. Successors. The covenants, terms, conditions and restrictions of this CONSERVATION AND ACCESS EASEMENT shall be binding upon, and inure to the benefit of the parties hereto and their respective personal representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the CONSERVATION AREA and the PROPERTY.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the said GRANTOR has caused these presents to be signed in his name.

Signed, sealed, and delivered
in the presence of:

WINDERMERE COUNTRY CLUB, LLC,
a Florida limited liability company

Witness:

_____

Print Name:

_____

By:_____
Bryan DeCunha, President

Witness:

_____

Print Name:

_____

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Bryan DeCunha, as President of Windermere Country Club, LLC, to me known to be the person described in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this __ day of_____, 2016.

_____
Notary Public
Printed Name:
My Commission Expires:

Exhibit "A"

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 3

WETLAND (WI) SHEET 1
WINDERME E GOLF & COUNTRY CLUB LLC

PROPERTY AT· SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA
WETLAND 1

LEGAL DESCRIPTION :

COMMENCE AT THE SOUTHEAST CORNER OF LOT 122 OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE N 21'20'32" E, ALONG THE EAST LINE OF SAID LOT 122, A DISTANCE OF 92.59 FEET; TO THE POINT OF BEGINNING; THENCE S 10'16'38" E, A DISTANCE OF 14.44 FEET; THENCE S 4T28'52" E, A DISTANCE OF 25.30 FEET; THENCE S 15'54'22" E, A DISTANCE OF 4.97 FEET; THENCE S 41"35'15" E, A DISTANCE OF 30.51 FEET; THENCE S 61'41'56" E, A DISTANCE OF 60.72 FEET; THENCE S 68'30'40" E, A DISTANCE OF 68.87 FEET; THENCE S 64'40'42" E, A DISTANCE OF 53.96 FEET; THENCE N 86'07'10" E, A DISTANCE OF 70.72 FEET; THENCE N 68'18'37" E, A DISTANCE OF 58.39 FEET; THENCE N 59'53'02" E, A DISTANCE OF 88.16 FEET; THENCE N 5T56'02" E, A DISTANCE OF 42.47 FEET; THENCE N 11"55'18" E, A DISTANCE OF 56.09 FEET; THENCE N 00·55'27" E, A DISTANCE OF 114.96 FEET; THENCE N 16'14'26" E, A DISTANCE OF 44.54 FEET; THENCE N 79•54'10" W, A DISTANCE OF 95.88 FEET; THENCE N 4T00'1J" W, A DISTANCE OF 42.55 FEET; THENCE N 60'13'43" W, A DISTANCE OF 48.55 FEET; THENCE N 50'11'04" W, A DISTANCE OF 66.28 FEET; THENCE N 10'27'/3" E, A DISTANCE OF 109.73 FEET; THENCE N 19'03'08" E, A DISTANCE OF 63.28 FEET; THENCE N 20'16'0/" E, A DISTANCE OF 56.89 FEET; THENCE N 04'39'40" E, A DISTANCE OF 66.86 FEET; THENCE N 17'50'40" W, A DISTANCE OF 54.50 FEET; THENCE N 53'52'01" W, A DISTANCE OF 43.21 FEET; THENCE N 75'52'14" W, TO THE WEST LINE OF THE AFOREMENTIONED TRACT A, A DISTANCE OF 64.46 FEET; THENCE S 23'27'35" W, ALONG THE EAST LINE OF THE AFOREMENTIONED BUTLER BAY - UNIT THREE, A DISTANCE OF 152.29 FEET; THENCE S 12'30'52" W, ALONG THE EAST LINE OF THE AFOREMENTIONED BUTLER BAY - UNIT THREE, A DISTANCE OF 62.40 FEET; THENCE LEAVING SAID EAST LINE S 06'27'37" E, A DISTANCE OF 29.95 FEET; THENCE S 46'22'39" E, A DISTANCE OF 40.17 FEET; THENCE S 75"14'47" E, A DISTANCE OF 46.64 FEET; THENCE S 33'38'29" W, A DISTANCE OF 19.42 FEET; THENCE S 19'50'35" W, A DISTANCE OF 77.16 FEET; THENCE S 60'39'10" W, A DISTANCE OF 90.62 FEET; THENCE S 59'06'20" W, TO THE WEST LINE OF THE AFOREMENTIONED TRACT A, A DISTANCE OF 8.82 FEET; THENCE S 12'30'52" W, OF SAID EAST LINE OF mACT A THE FOLLOWING COURSES AND DISTANCES, A DISTANCE OF 90.53 FEET; THENCE S 21°20'32" W, ALONG THE EAST LINE OF LOT 121 OF AFOREMENTIONED BUTLER BAY - UNIT THREE A DISTANCE OF 179.23 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 4.359 ACRES (189856.66 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1. BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N 01'40'40" E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRfPTION IS FOR PURPOSE OF VACA TfNG PLATTED EASEMENTS.

SURVEYOR'S CERTfFfCA TION:

TO: WINDERMERE COUNTRY CLUB LLC, o Florido limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACAT{NG PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOC/A TES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DA TE SIGNED .,2. _,?..,. I/,

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

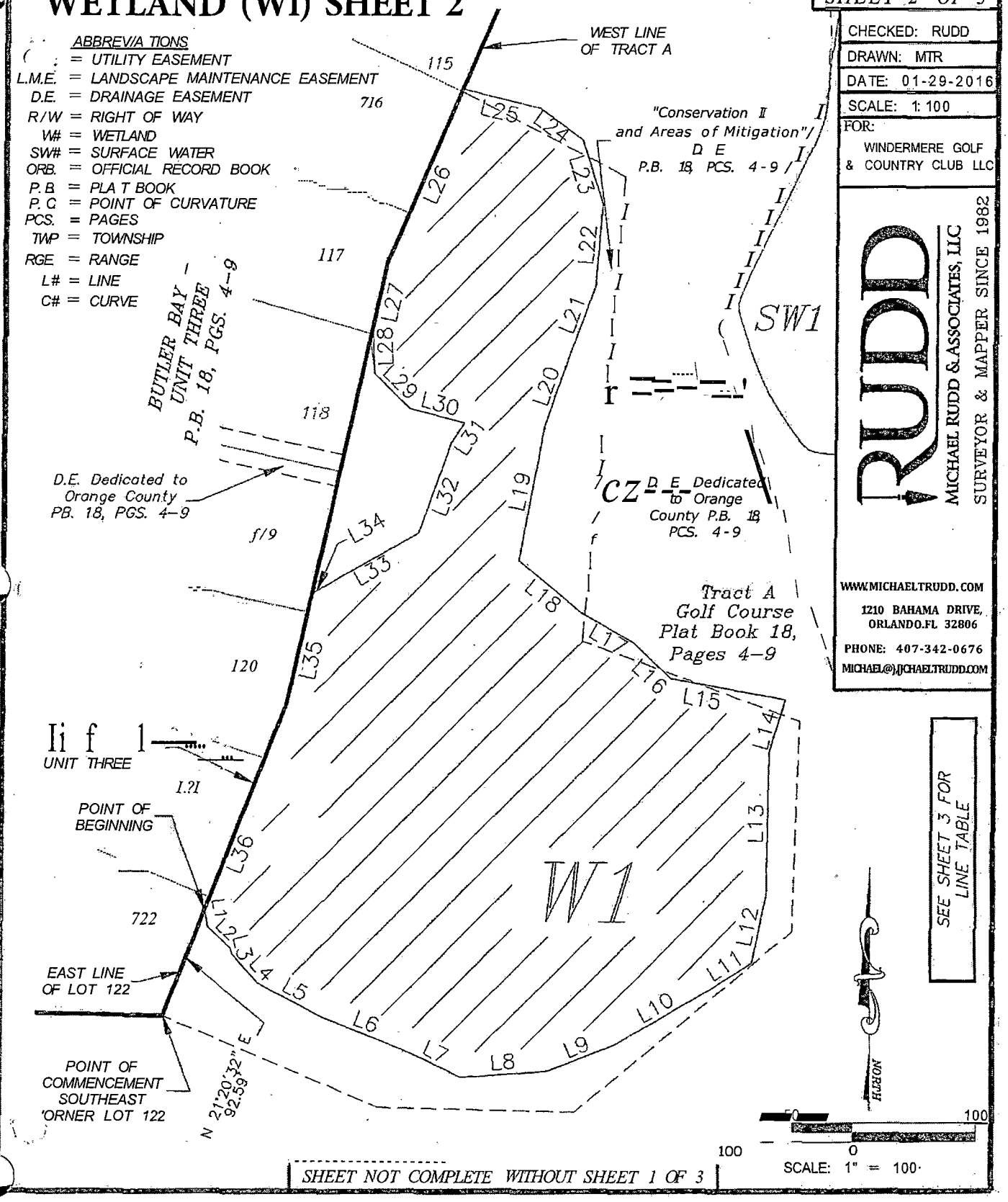
SHEET NOT COMPLETE WITHOUT SHEET 2 OF 3

CHECKED: RUDO DRAWN: MTR DATE: 01-29-2016 SCALE N/A FOR: WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD &AsSOCIATES, LLC SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying- Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO.FL 32806 PHONE: 407-342-0676 MICHAEL@MJCHAELTRUDD.COM FLA. L.B. 8067	SEAL

001067

WETLAND (W1) SHEET 2

ABBREVIATIONS
(: = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
D.E. = DRAINAGE EASEMENT
R/W = RIGHT OF WAY
W# = WETLAND
SW# = SURFACE WATER
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P.C. = POINT OF CURVATURE
PCS. = PAGES
TWP = TOWNSHIP
RGE = RANGE
L# = LINE
C# = CURVE



CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE: 1: 100
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO.FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 3

001068

WETLAND LINE TABLE SHEET

CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE N/A
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

Wl LINE TABLE

LINE	BEARING	DISTANCE
L1	S 10·15'3s" .E	14.44'
L2	S 47"28'52" E	25.30'
L3	S 15'54'22" E	4.97'
L4	S 41 35'15" E	30.51'
LS	S 61'41'56" E	60.72'
L6	S 68'30'40" E	68.87'
L7	S 64 40'42" E	53.96'
LS	N 86'07' 10" E	70.72'
L9	N 68 18'37" E	58.39'
L10	N 59·53'02" E	88.16'
L11	N 57"56'02" E	42.47'
L12	N 11·55'18" E	56.09'
L13	N ∞·55'27" E	114.96'
L14	N 16'14 26" E	44.54'
L15	N 79·54'10" W	95.88'
L1 6	N 47 00'13" W	42.55'
L17	N 60' 13'43" W	48.55'
L18	N 50'11 '04" W	66.28'
L19	N 10'21'13" E	109.73'
L20	N 19'03'08" E	63.28'
L21	N 20·16'o1" E	56.89'
L22	N 04·39'40" E	66.86'
L23	N 1TSO' 40" W	54.50'
L24	N 53'52'01" W	43.21'
L25	N 75·52'14" W	64.46'
L26	S 23'27'35" W	152.29'
L27	S 12'30'52" W	62.40'
L28	S 06'27'37" E	29.95'
L29	S 46'22'39" E	40.17'
L30	S 75'14'47" E	46.64'
L31	S 33'38'29" W	19.42'
L32	S 19'50'35" W	77.16'
L33	S 60-39'10" W	90.62'
L34	S 59'06'20" W	8.82'
L35	S 12·30'52" W	90.53'
L36	S 21·20'32" W	179.23'

R.D.
SURVEYING & MAPPING SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO, FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 3

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 4

WETLAND (W2) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT' SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

WETLAND 2

LEGAL DESCRIPTION :

COMMENCE AT THE SOUTHEAST CORNER OF TRACT A OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE N 01"46'33" E, ALONG THE EAST LINE OF TRACT A OF AFOREMENTIONED BUTLER BAY - UNIT THREE, A DISTANCE OF 29.40 FEET; TO THE POINT OF BEGINNING; THENCE N 88'13'27" W, A DISTANCE OF 3.77 FEET; THENCE N 27'08'51"W, A DISTANCE OF 45.55 FEET; THENCE N 14'16'19"W, A DISTANCE OF 58.20 FEET; THENCE N 17'08'59"E, A DISTANCE OF 29.50 FEET; THENCE N OOW'42"W, A DISTANCE OF 62.31 FEET; THENCE N 24'23'53"W, A DISTANCE OF 71.73 FEET; THENCE N 03'29'45"E, A DISTANCE OF 100.64 FEET; THENCE N 17'38'32"E, A DISTANCE OF 56.60 FEET; THENCE N 00'10'06"W, A DISTANCE OF 86.31 FEET; THENCE S 73'27'28"W, A DISTANCE OF 66.82 FEET; THENCE S 37·33'35"w, A DISTANCE OF 6706 FEET; THENCE S 73'27'/7"W, A DISTANCE OF 46.36 FEET; THENCE N 73'23'17"W, A DISTANCE OF 47.99 FEET; THENCE N 41'45'38"W, A DISTANCE OF 34.39 FEET; THENCE N 18'13'26"W, A DISTANCE OF 28.73 FEET; THENCE N 11'47'03"E, A DISTANCE OF 79.17 FEET; THENCE N 39'59'30"E, A DISTANCE OF 52.96 FEET; THENCE N 15'40'46"E, A DISTANCE OF 103.38 FEET; THENCE N 15'56'55"E, A DISTANCE OF 99.85 FEET; THENCE N 13'57'38"E, A DISTANCE OF 111.06 FEET; THENCE N 52'48'46"E, A DISTANCE OF 29.97 FEET; THENCE S 88"37'54"E, A DISTANCE OF 58.63 FEET; THENCE N 16'52'07"E, A DISTANCE OF 54.00 FEET; THENCE S 86"23'50"E, A DISTANCE OF 56.36 FEET; THENCE S 88'13'27"E, TO THE EAST LINE OF TRACT A OF AFOREMENTIONED BUTLER BAY - UNIT THREE, A DISTANCE OF 7.32 FEET; THENCE S 07'46'33"W, ALONG SAID EAST LINE, A DISTANCE OF 961.37 FffT; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 2.886 ACRES (125699.02 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1. BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF- WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N 01'40'40" E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLA TTEO EASEMENTS.

SURVEYOR'S CERTIFICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.

MICHAEL RUDO & ASSOC/A TES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED 2-2-16

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEETS 2, 3 & 4 OF 4

CHECKED: RUDD
DRAWN: MIR
DATE: 01-29-2016
)3CALE N/A
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD

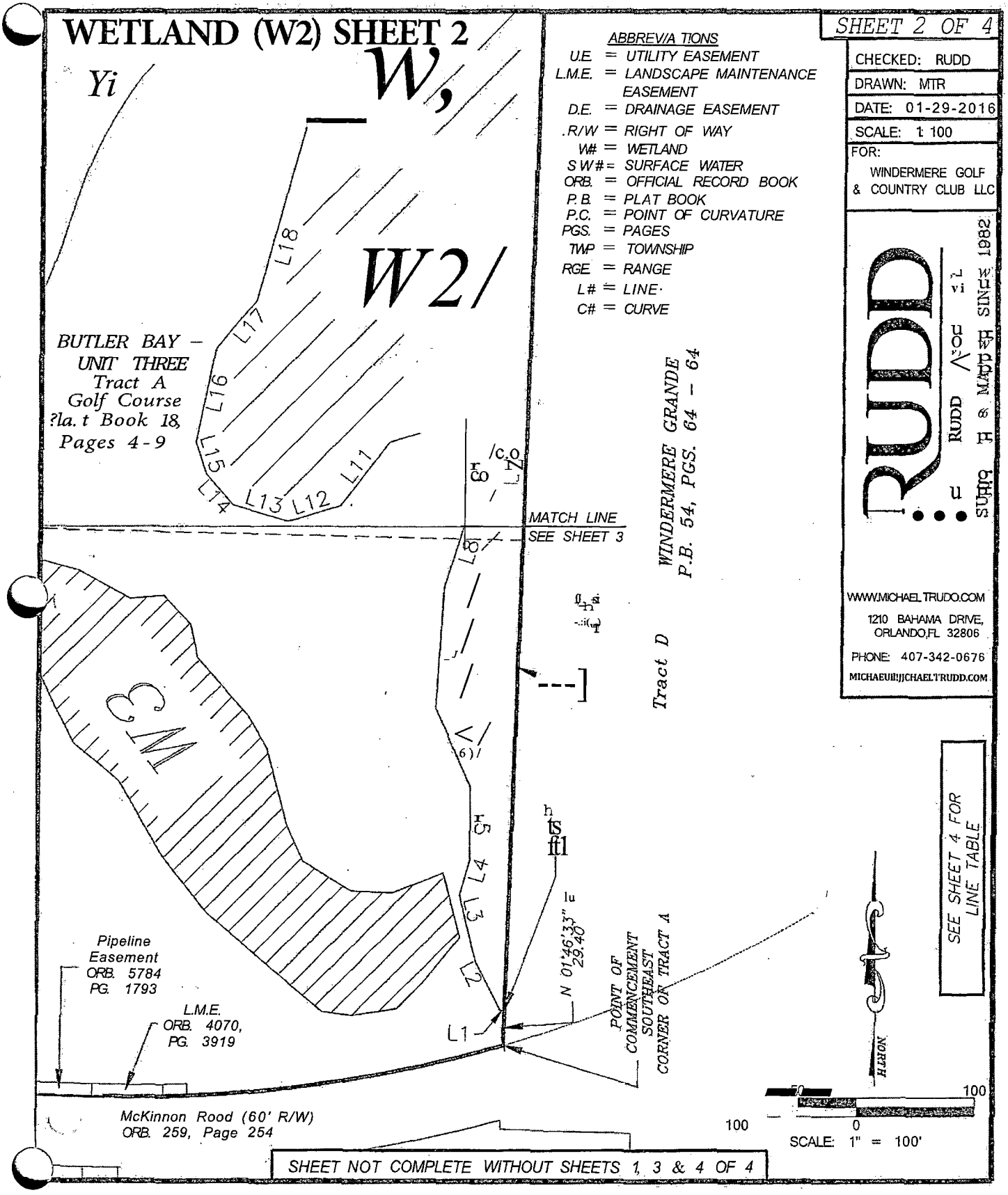
MICHAEL RUDD &ASSOCIATES, UC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO.FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

001070

WETLAND (W2) SHEET 2



ABBREVIATIONS

- U.E. = UTILITY EASEMENT
- L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
- D.E. = DRAINAGE EASEMENT
- R/W = RIGHT OF WAY
- W# = WETLAND
- SW# = SURFACE WATER
- ORB. = OFFICIAL RECORD BOOK
- P.B. = PLAT BOOK
- P.C. = POINT OF CURVATURE
- PGS. = PAGES
- TWP = TOWNSHIP
- RGE = RANGE
- L# = LINE
- C# = CURVE

SHEET 2 OF 4

CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE: 1: 100
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

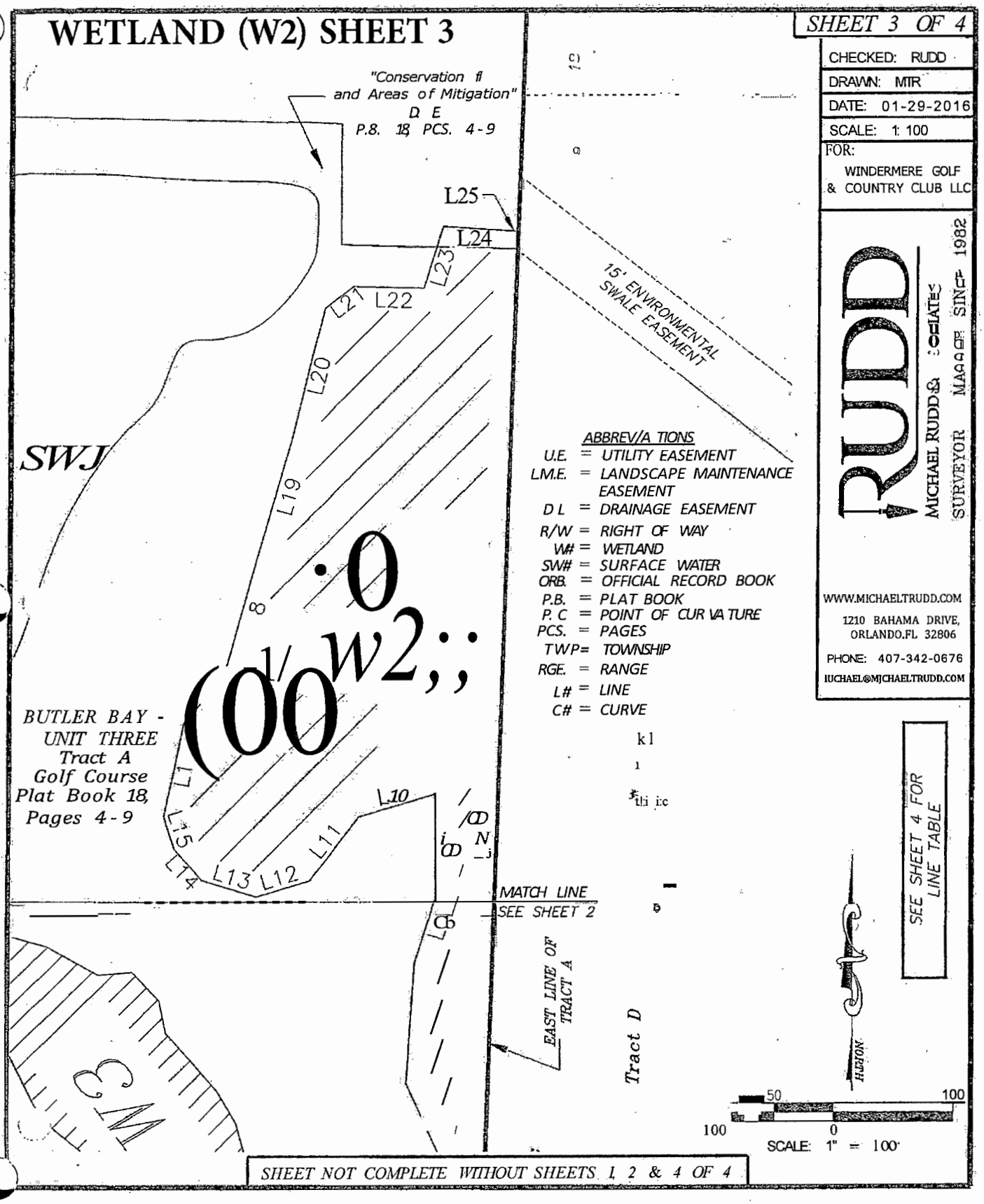
RUDD
RUDD & MAHONEY
SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEETS 1, 3 & 4 OF 4

001071

WETLAND (W2) SHEET 3

CHECKED:	RUDD
DRAWN:	MTR
DATE:	01-29-2016
SCALE:	1: 100
FOR:	WINDERMERE GOLF & COUNTRY CLUB LLC



ABBREV/A TIONS

U.E.	=	UTILITY EASEMENT
LM.E.	=	LANDSCAPE MAINTENANCE EASEMENT
D L	=	DRAINAGE EASEMENT
R/W	=	RIGHT OF WAY
W#	=	WETLAND
SW#	=	SURFACE WATER
ORB.	=	OFFICIAL RECORD BOOK
P.B.	=	PLAT BOOK
P. C	=	POINT OF CUR VA TURE
PCS.	=	PAGES
TWP=		TOWNSHIP
RGE.	=	RANGE
L#	=	LINE
C#	=	CURVE

RUDD
MICHAEL RUDD & ASSOCIATES
SURVEYOR MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO.FL 32806
PHONE: 407-342-0676
IUCHAEL@MJCHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEETS 1, 2 & 4 OF 4

WETLAND LINE TABLE SHEET

CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE N/A
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

W2 LINE TABLE

LINE	BEARING	DISTANCE
L1	N 88 13'27" W	3.77'
L2	N 27 08'51" W	45.55'
L3	N 14 16' 19" W	58.20'
L4	N 17 08'59" E	29.50'
L5	N 00" 10' 42" W	62.31'
L6	N 24·23'53" W	71.73'
L7	N 03·29'45" E	100.64'
L8	N 1T38'32" E	56.60'
L9	N 00·10'06" W	86.31'
L10	S 73·27'28" W	66.82'
L11	S 37 38'35" W	67.06'
L12	S 73 27'17" W	46.36'
L13	N 73 23'17" W	47.99'
L14	N 41 45'38" W	34.39'
L15	N 18"13'26" W	28.73'
L16	N 11·47'03" E	79.17'
L17	N 39·59'30" E	52.96'
L18	N 15 40'46" E	103.38'
L19	N 15 56'55" E	99.85'
L20	N 13 57'38" E	111.06'
L21	N 52 48'46" E	29.97'
L22	S 33·37'54" E	58.63'
L23	N 15·52'07" E	54.00'
L24	S 86 23'50" E	56.36'
L25	S 88 13'27" E	7.32'
L26	S 01 46'33" W	961.37'

SHEET NOT COMPLETE WITHOUT SHEETS 2 & 3 OF 4

SKETC!d OF DESCRIPTION FOR:

SHEET 1 OF 3

WETLAND (W3) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT· SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE ('UNTY, FLORIDA

'lrc.TLAND3

LEGAL DESCRIPTION :

COMMENCE AT THE SOUTHEAST CORNER OF TRACT A OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE N 71'04'28" W, A DISTANCE OF 94. 77 FEET; TO THE POINT OF BEGINNING; THENCE N 44'03'48" E, A DISTANCE OF 28.33 FEET; THENCE N 39'19'47" E, A DISTANCE OF 51.30 FEET; THENCE N 15'02'36" W, A DISTANCE OF 55.57 FEET,, THENCE S 68'47'48" W, A DISTANCE OF 45. 58 FEET; THENCE N 33·02'10" W, A DISTANCE OF 34.68 FEET; THENCE N 58'49'42" W, A DISTANCE OF 48. 44 FEET; THENCE N 24'.26'03" W, A DISTANCE OF 33. 79 FEET; THENCE N 15'03'26" W, A DISTANCE OF 65.62 FEET; THENCE N 30·45'75" W, A DISTANCE OF 31.59 FEET; THENCE N 41'48'21" W, A DISTANCE OF 64.55 FEET; THENCE N 11'54'11" W, A DISTANCE OF 28.19 FEET; THENCE N 4S22'02" W, A DISTANCE OF 33.18 FEET; THENCE S 35·43'43" W, A DISTANCE OF 28.62 FEET; THENCE N 61°40'02" W, A DISTANCE OF 48.82 FEET; THENCE N 74·35'43" W, A DISTANCE OF 61.81 FEET; THENCE S 02'34'31" E, A DISTANCE OF 52.87 FEET; THENCE S 26'39'43" E, A DISTANCE OF 120.80 FEET; THENCE S 50'54'36" E, A DISTANCE OF 49.07 FEET; THENCE S 30·07'33" E, A DISTANCE OF 70.87 FEET; THENCE S 38'36'04" E, A DISTANCE OF 61.42 FEET; THENCE S 49·47'74" E, A DISTANCE OF 129.30 FEET; THENCE S 82'26'55" E, A DISTANCE OF 25.75 FEET; THENCE N 81°18'44" E, A DISTANCE OF 38.40 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 1.201 ACRES (52312.49 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1. BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N 01'40'40" E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-27-2075 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, o Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.

MICHAEL RUDD & ASSOC/A TES, LLC (FLA. LB. 8067)

MICHAEL T. RUDD, PLS. (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED 29 January 2016

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEETS 2 & 3 OF 3

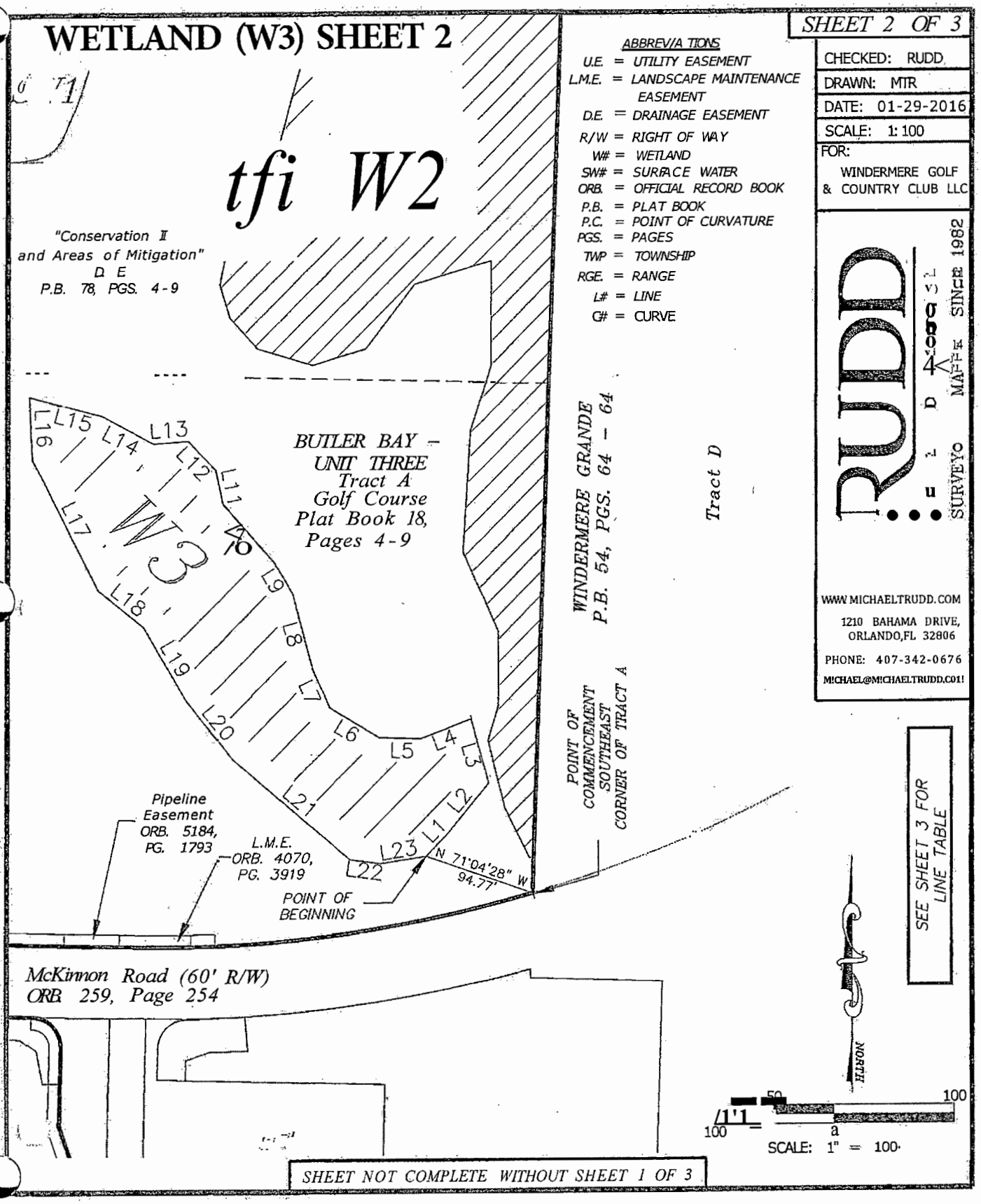
CHECKED: RUDO
f \WN: MTR
DAfE: 01-29-2016
SCALE N/A
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD &AsSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD. COM
FLA. L.B. 8067

SEAL

WETLAND (W3) SHEET 2



ABBREVIATIONS

- U.E. = UTILITY EASEMENT
- L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
- D.E. = DRAINAGE EASEMENT
- R/W = RIGHT OF WAY
- W# = WETLAND
- SW# = SURFACE WATER
- ORB. = OFFICIAL RECORD BOOK
- P.B. = PLAT BOOK
- P.C. = POINT OF CURVATURE
- PGS. = PAGES
- TWP = TOWNSHIP
- RGE. = RANGE
- L# = LINE
- C# = CURVE

SHEET 2 OF 3

CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE: 1:100
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD SURVEYING MAPPING SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 3

WETLAND LINE TABLE SHEET

CHECKED: RUDD
DRAWN: MTR
DATE: 01-29-2016
SCALE N/A
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

W3 LINE TABLE

LINE	BEARING	DISTANCE
L1	N 44 03'48" E	28.33'
L2	N 39 19'47" E	51.30'
L3	N 15 02'36" W	55.57'
L4	S 68 47'48" W	45.58'
L5	N 88 02'10" W	34.68'
L6	N 58 49'42" W	48.44'
L7	N 24 26'03" W	33.79'
L8	N 15 03'26" W	65.62'
L9	N 30 46'15" W	31.59'
L10	N 41 48'21" W	64.55'
L11	N 11 54'11" W	28.19'
L12	N 43 22'02" W	33.18'
L13	S 85 43'43" W	28.62'
L14	N 61 40'02" W	48.82'
L15	N 74 35'43" W	61 .81'
L16	S 02 34'31" E	52.87'
L17	S 26 39'43" E	120.80'
L18	S 50 54'36" E	49.01'
L19	S 30 07'38" E	70.87'
L20	S 33 35'04" E	61 .42'
L21	S 49 47'14" E	129.30'
L22	S 82 26'55" E	25.75'
L23	N 81 18'44" E	38.40'

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 3

C

Prepared by/return to:
GrayRobinson, P.A.
301 East Pine Street
Suite 1400
Orlando, Florida 32801
Attn: Truong Nguyen, Esq.

TEMPORARY BLANKET DRAINAGE EASEMENT

THIS TEMPORARY BLANKET DRAINAGE EASEMENT (the "Easement") is made this ___ day of------ -• 2016, by and between WINDERMERE COUNTRY CLUB, LLC, a Florida limited liability company, whose address is 2710 Butler Bay Drive, N., Windermere, Florida 34786, as the first party, and ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida, whose address is Post Office Box 1393, Orlando, Florida 32802-1393, as the second party.

WITNESSETH: That the party of the first part for and in consideration of the sum of One Dollar and other valuable consideration, paid receipt of which is hereby acknowledged, does hereby grant onto the party in the second part, its successors and assigns, a temporary public blanket drainage easement, together with the right of ingress and egress, over, across, on, above and/or below ground level of lands of the first party, in Orange County, Florida, described as follows:

LANDS DESCRIBED IN EXHIBIT "A"
ATTACHED HERETO AND MADE A PART HEREOF.

SKETCH INCLUDED FOR ILLUSTRATION PURPOSES ONLY.

THIS EASEMENT SHALL TERMINATE AT SUCH TJME AS THE ABOVE DESCRIBED PROPERTY IS INCLUDED ON A SUBDIVISION PLAT ACCEPTED. BY ORANGE COUNTY.

TO HAVE AND TO HOLD the same unto the second party, its successors and assigns, and the parties of the first part will defend the title to said lands against all persons claiming by, through or under said party of the first part.

IN WITNESS WHEREOF, the first party has caused these presents to be duly executed in its name by its duly authorized officer(s) on the date first above written.

WITNESSES:

_____
Print name:- - - - - - - -

_____
Print name:- - - - - - - -

WINDERMERE COUNTRY CLUB, LLC,
a Florida limited liability company

By:_____
Bryan DeCunha, President

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTJFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Bryan DeCunha, as President of Windermere Country Club, LLC, to me known to be the person describyd in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this __ day of - - - - - -• 2016.

_____
Notary Public
Printed Name:
My Commission Expires:

EXHIBIT "A"

[Attach legal description and sketch of Temporary Drainage Easement]

D

This instrument prepared by and return to:
Truong Nguyen, Esquire
GrayRobinson, P.A.
301 East Pine Street, Suite 1400
Orlando, Florida 32801
(407) 843-8880

Property Appraisers Parcel ID Number:
Portion of

LANDSCAPE, WALL, SIGN AND SIDEWALK EASEMENT

This Landscape, Wall, Sign and Sidewalk Easement ("Easement") is given this __ day of ____ , 2016, by WINDERMERE COUNTRY CLUB, LLC, a Florida limited liability company, whose address is 2710 Butler B ay Drive, N., Windermere, Florida 34786 (hereinafter "Grantor") to ORANGE COUNTY, a political subdivision of the State of Florida, whose address is Post Office Box 1393, Orlando, Florida 32802-1393 (hereinafter "Grantee").

WITNESSETH:

Grantors for and in consideration of the sum of Ten Dollars ($10.00) and other valuable consideration, receipt of which is hereby acknowledged, do grant unto Grantee, an easement over, across, under and on, the lands of Grantor, situated in Orange County, Florida, and described on the attached Exhibit "A" incorporated herein by this reference (the "Easement Area"), easements for installation and maintenance of the following improvements: landscaping, wall, signs and sidewalk.

This Easement is a non-exclusive easement for the purposes as set forth herein and Grantor retains all other rights for the use of the Property. The Property is subject to all matters of record, the retained rights of Grantor and whatever other easements, rights, licenses, or grants that contemporaneous herewith or subsequent hereto, may be granted, or otherwise created by Grantor, provided that any subsequently created interest does not prevent Grantee from utilizing this Easement for its intended purpose.

THIS EASEMENT SHALL TERMINATE AT SUCH TIME AS THE ABOVE DESCRIBED PROPERTY IS INCLUDED ON A SUBDIVISION PLAT ACCEPTED BY ORANGE COUNTY.

TO HAVE AND TO HOLD the same unto Grantee and, except as provided herein, Grantors will defend the title to said lands against all persons claiming by, through or under Grantee.

IN WITNESS WHEREOF, Grantors have caused these presents to be duly executed in their name on the day first set forth above.

WITNESSES:

_____
Print name:_____

_____
Print name:_____

WINDERMERE COUNTRY CLUB, LLC,
a Florida limited liability company

By:_____
Bryan DeCunha, President

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Bryan DeCunha, as President of Windermere Country Club, LLC, to me known to be the person described in and who executed the foregoing instrument, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this __ day of_____, 2016.

_____
Notary Public
Printed Name:
My Commission Expires:

EXHIBIT "A"

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

LANDSCAPE, WALL, SIGN AND 10' SIDEWALK EASEMENT

LEGAL DESCRIPTION :

BEGIN AT SOUTHWEST CORNER OF TRACT A OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE N 01'39'57" E, ALONG THE WEST LINE OF TRACT A, A DISTANCE OF 50.02 FEET, TO A POINT BEING ON A CURVE CONCAVE NORTHERLY AND HAVING A RADIUS OF 689.99 FEET,· THENCE FROM A CHORD BEARING OF N 81'27'05" E ALONG THE ARC OF SAID CURVE AN ARC DISTANCE OF 201.84 FEET THROUGH A CENTRAL ANGLE OF 16.45'38" A DISTANCE OF 201.12 FEET; THENCE S 16.51'74" E, A DISTANCE OF 25.00 FEET; THENCE N 67.00'00" E, A DISTANCE OF 276.35 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE SOUTHERLY AND HAVING A RADIUS 825.00 FEET,- THENCE FROM A CHORD BEARING OF N 77'31VO" E ALONG THE ARC OF SAID CURVE AN ARC DISTANCE OF 281.17 FEET THROUGH A CENTRAL ANGLE OF 19'31'36" A DISTANCE OF 279.81 FEET, TO A POINT ON THE EAST LINE OF AFOREMENTIONED TRACT A; THENCE S 01'39'57" W, ALONG THE EAST LINE OF SAID TRACT A, DISTANCE OF 25.08 FEET, TO THE SOUTHWEST CORNER OF AFOREMENTIONED TRACT A, AND THE NORTH RIGHT-OF-WAY LINE OF LAKE BUTLER BOULEVARD, SAID POINT ALSO BEING ON A CURVE; TO THE POINT OF CURVATURE OF A CURVE CONCAVE SOUTHERLY AND HAVING A RADIUS 800.00 FEET,· THENCE ALONG SAID NORTH RIGHT-OF-WAY LINE THE FOLLOWING COURSES AND DISTANCES: FROM A CHORD BEARING OF S 77°04'17" W ALONG THE ARC OF SAID CURVE AN ARC DISTANCE OF 281.25 FEET THROUGH A CENTRAL ANGLE OF 20·08'34" A DISTANCE OF 279.80 FEET; THENCE S 67'00'00" W, A DISTANCE OF 189.82 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE NORTHERLY AND HAVING A RADIUS 740.00 FEET,· THENCE FROM A CHORD BEARING OF S 78.28'40" W ALONG THE ARC OF SAID CURVE AN ARC DISTANCE OF 296.48 FEET THROUGH A CENTRAL ANGLE OF 22.57'20" A DISTANCE OF 294.50 FEET, TO THE POINT OF BEGINNING.

CONTAINING THEREIN: .558 ACRES (24319.78 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1. BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACATING PLATTED EASEMENTS.

SURVEYOR'S CERTIFICATION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florido limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACATING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

/

(SEAL)
FLORIDA REGISTERED SURVEYOR ND. 3960

DATE SIGNED, 3,t,,,,,t :e,/ &,.

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

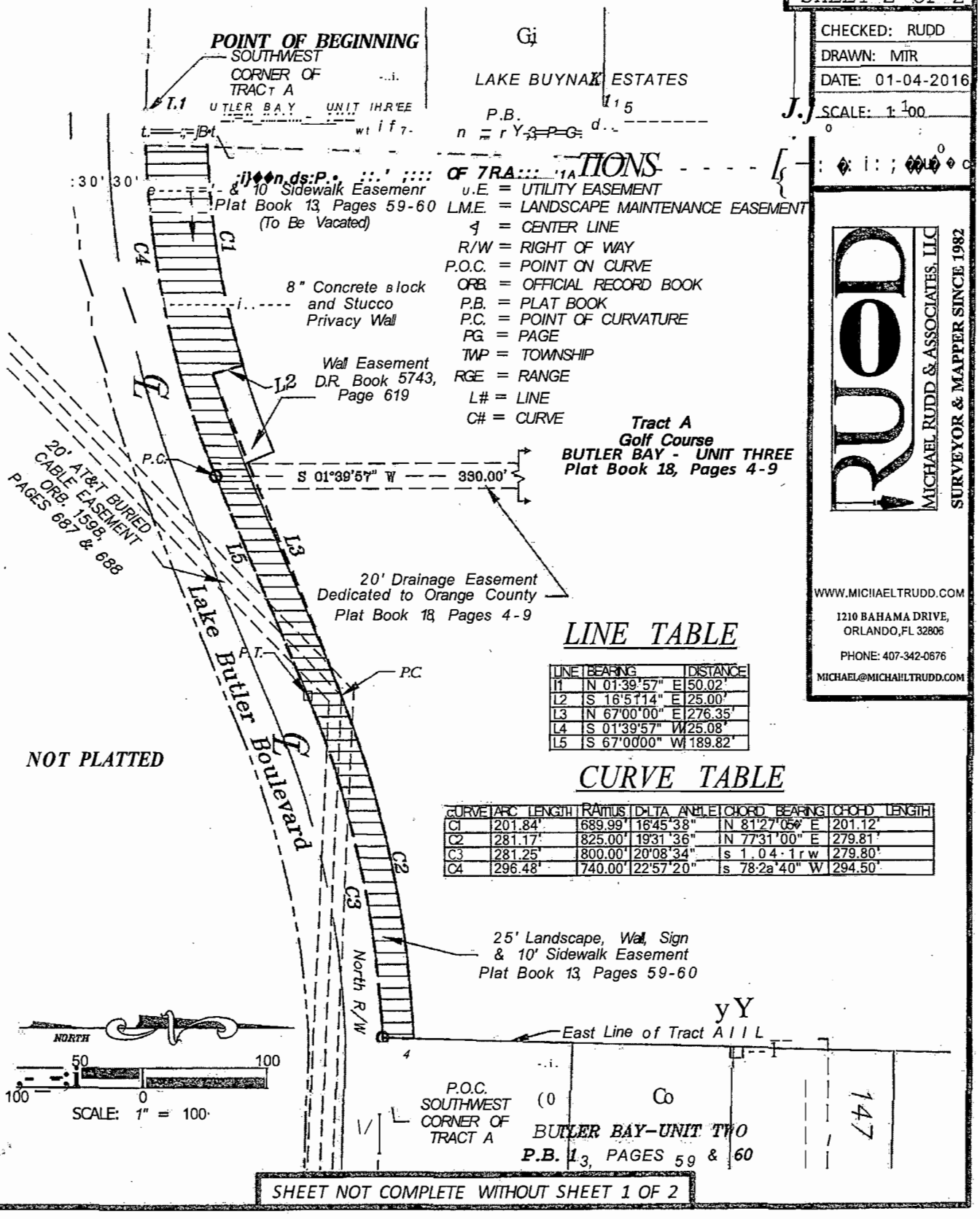
CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE N/A
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTR.UDD.COM
FLA. L.B. 8067

SEAL

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'



U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P.C. = POINT OF CURVATURE
PG. = PAGE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

LINE TABLE

LINE	BEARING	DISTANCE
L1	N 01°39'57" E	50.02'
L2	S 16°57'14" E	25.00'
L3	N 67°00'00" E	276.35'
L4	S 01°39'57" W	25.08'
L5	S 67°00'00" W	189.82'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	201.84'	689.99'	16°45'38"	N 81°27'05" E	201.12'
C2	281.17'	825.00'	19°31'36"	N 77°31'00" E	279.81'
C3	281.25'	800.00'	20°08'34"	S 78°24'40" W	279.80'
C4	296.48'	740.00'	22°57'20"	S 78°24'40" W	294.50'

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO, FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

001084

E

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

EASEMENT (i) SHEET 1

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE INTERSECTION OF THE SOUTH LINE OF LOT 2, BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4-9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, AND WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE; POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 205.00 FEET, WITH A CHORD BEARING OF S 34·5570• E, WITH AN ARC DISTANCE OF 159.99 FEET THROUGH A CENTRAL ANGLE OF 44•4301•: A DISTANCE OF 159.96 FEET,· THENCE S 57'16'40" E, ALONG THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 69.18 FEET; THENCE S 32"43'20" W, ALONG THE SOUTH LINE OF TRACT A, A DISTANCE OF 10.00 FEET,· THENCE N 57'16'40" W, A DISTANCE OF 69.18 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 215.00 FEET, WITH A CHORD BEARING OF N 34'55'10" W, WITH AN ARC DISTANCE OF 167.80 FEET THROUGH A CENTRAL ANGLE OF 44'43'01: A DISTANCE OF 163.57 FEET, TO THE AFOREMENTIONED SOUTH LINE OF LOT 2; THENCE N 77"26'21 "E, ALONG SAID SOUTH LINE OF LOT 2, A DISTANCE OF 10.00 FEET,· TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.053 ACRES (2330. 75 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOC/A TES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SJGNEDZ =:::,,, 2e>I

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD DRAWN: MTR OATE: 01-04-2016 SCALE N/A FOR: WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD &AsSOCIAfES, LLC SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying- Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO,FL 32806 PHONE: 407-342-0676 MICHAEL@MICHAELTRUDD.COM FLA. L.B. 8067	SEAL

001085

EASEMENT (i) SHEET 2

ABBREVIATIONS

U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P.C = POINT OF CURVATURE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# CURVE

CHECKED:	RUDD
DRAWN:	MTR
DATE:	01-04-2016
SCALE:	1" = 50'
FOR:	WINDERMERE GOLF & COUNTRY CLUB LLC

Butler Bay - Unit Three
Golf Course, Tract A
Plat Book 18, Pages 4-9

2

25' Utility Easement
Plat Book 18, Pages 4-9

10' Utility Easement
Plat Book 18, Pages 4-9
(To Be Vacated)

SOUTH LINE OF LOT 2

L4

C2

C1

WEST R/W

30.00'

30.00'

℄

POINT OF BEGINNING
-P.O.C.

P.C.

SOUTH LINE OF TRACT A

L3

L1

P.T.

L2

Butler Bay
– Unit Two

Butler Bay Drive North
Tract C

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 57°16'40" E	69.18'
L2	S 32°43'20" W	10.00'
L3	N 57°16'40" W	69.18'
L4	N 77°26'21" E	10.00'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	159.99'	205.00'	44°43'01"	S 34°55'10" E	159.96'
C2	167.80'	215.00'	44°43'01"	N 34°55'10" W	163.57'

NORTH

25 50
50 0

SCALE: 1" = 50'

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DIUVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

EASEMENT (ii) SHEET 1

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

25' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE SOUTHWEST CORNER OF TRACT A OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE N 01'39'57" E, ALONG THE WEST LINE OF SAID TRACT A, A DISTANCE OF 1214.37 FEET; THENCE N 47·12'36" E, A DISTANCE OF 102.11 FEET; THENCE N 59.29'58" E, A DISTANCE OF 162. 75 FEET; THENCE N 18'05'55" E, A DISTANCE OF 108.55 FEET; THENCE N 2777'18" E, A DISTANCE OF 136.20 FEET; THENCE S 52"13'30" E, A DISTANCE OF 25.42 FEET; THENCE S 277778" W, A DISTANCE OF 129.60 FEET; THENCE S 18'05'43" W, A DISTANCE OF 115.95 FEET; THENCE S 59.29'58" W, A DISTANCE OF 169.51 FEET; THENCE S 47'12'36" W, A DISTANCE OF 88.92 FEET; THENCE S 01'39'5r W, TO THE SOUTH LINE OF AFOREMENTIONED TRACT A, A DISTANCE OF 1202.71 FEET; THENCE S 88°59'12" W, ALONG SAID SOUTH LINE, A DISTANCE OF 25.03 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: .984 ACRES (42883.07 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2075 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA T/ON:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

M/CHAEL RUDD
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED 29 January 2016

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
OATE: 01-04-2016
·SCAL{ ◆/A — • —
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD &AsSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

001087

EASEMENT (ii) SHEET 2

ABBREV/A TIONS

U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = GENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
PGS. = PAGES
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

LINE TABLE

UNE	BEARING	DISTANCE
L1	N 01-39'57" E	1214.37'
L2	N 47'12'36" E	102.11'
L3	N 59-29'58" E	162.75'
L4	N 18.05'55" E	108.55'
L5	N 27"17'18" E	136.20'
L6	S 52-13'30" E	25.42'
L7	S 27"17'18" W	129.60'
L8	S 18'05'43" W	115.95'
L9	S 59-29'58" W	169.51'
L10	S 47'12'36" W	88.92'
L11	S 01-39-57-' W	1202.71'
L12	s ss-59-12" W	25.03'

POINT OF BEGINNING
SOUTHWEST CORNER
OF TRACT A
BUTLER BAY - UNIT THREE

LAKE BUYNAK ESTATES
P.B. 3 PAGE 115

BUTLER BAY - UNIT THREE
Tract A
Golf Course
Plat Book 18, Pages 4-9

WEST LINE OF TRACT A

30' 30'

50' Landscape, Wall Sign & 10' Sidewalk Easement
Plat Book 13 Pages 59-60

8" Concrete Block and Stucco Privacy Wall

Tract A
Golf Course
BUTLER BAY - UNIT THREE
Plat Book 18, Pages 4-9

25' U.E. TO BE VACATED

Wall Easement
O.R. Book 5743,
Page 619

20' Drainage Easement
Dedicated to Orange County
Plat Book 18, Pages 4-9

20' AT&T BURIED CABLE EASEMENT
ORB. 1598, PGS. 687 & 688

Lake Butler Bou

Butler Boy Drive North
Tract "C"

NORTH

50 100
100 0
SCALE: 1" = 100'

NOT PLATTED

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

EASEMENT (iiia) SHEET 1

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE INTERSECT/ON OF THE SOUTH LINE OF LOT 11 OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY FLORIDA, AND WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE; POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 310.00 FEET, WITH A CHORD BEARING OF S 75·09•f9 " E, WITH AN ARC DISTANCE OF 240.66 FEET THROUGH A CENTRAL ANGLE OF 44.28'51: ALONG THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 234.67 FEET; THENCE S 37'23'44" E, ALONG THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 88.86 FEET,· POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 200.00 FEET, WITH A CHORD BEARING OF S 06'15'06" W, WITH AN ARC DISTANCE OF 304.72 FEET THROUGH A CENTRAL ANGLE OF 8T17'40: ALONG THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 276.09 FEET,· THENCE N 40'06'04" W, ALONG THE NORTHWESTERLY LINE OF TRACT "A" OF A REPLAT OF LOTS 8, 9, 10 BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 25 AT PAGE 116 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, A DISTANCE OF 10.00 FEET,· POINT BEING ON A CURVE CONCA VE WESTERL Y AND HAVING A RADIUS OF 190.00 FEET, WITH A CHORD BEARING OF N 06'15'06" E, WITH AN ARC DISTANCE OF 289.48 FEET THROUGH A CENTRAL ANGLE OF 87'17'40: A DISTANCE OF 262.28 FEET; THENCE N 37'23'44" W, A DISTANCE OF 88.86 FEET,· TO THE POINT OF CURVA TURE OF A CURVE CONCA VE EASTERLY AND HAVING A RADIUS OF 320.00 FEET, WITH A CHORD BEARING OF N 15'09'19" W, WITH AN .ARC DISTANCE OF 248.43 FEET THROUGH A CENTRAL ANGLE OF 44'28'51" A DISTANCE OF 242.24 FEET, TO THE AFOREMENTIONED SOUTH LINE OF LOT 11; THENCE S 82"54'53" E, ALONG THE AFOREMENTIONED SOUTH LINE OF LOT 11, A DISTANCE OF 10.00 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.145 ACRES {6305.03 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01 '40'40"E ASSUMED.
2. GRAPHIC REPRESENTA 7ION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4 THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STA TE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. {SEAL}
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED 29 June 2016

NOT VALID WITHOUT THE EMBO 'f;JI.,Z. .,1,IJ.'....J../.;if;;.,Jii/,j -----

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD DRAWN: MTR DATE: 01-04-2016 SCALE N/,t., FOR: WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD & ASSOCIATES, LLC SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying- Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO,FL 32806 PHONE: 407-342-0676 MICHAEL@MICHAELTRUDD.COM FLA. L.B. 8067	SEAL

001089

EASEMENT (iiia) SHEET 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

ABBREVIATIONS

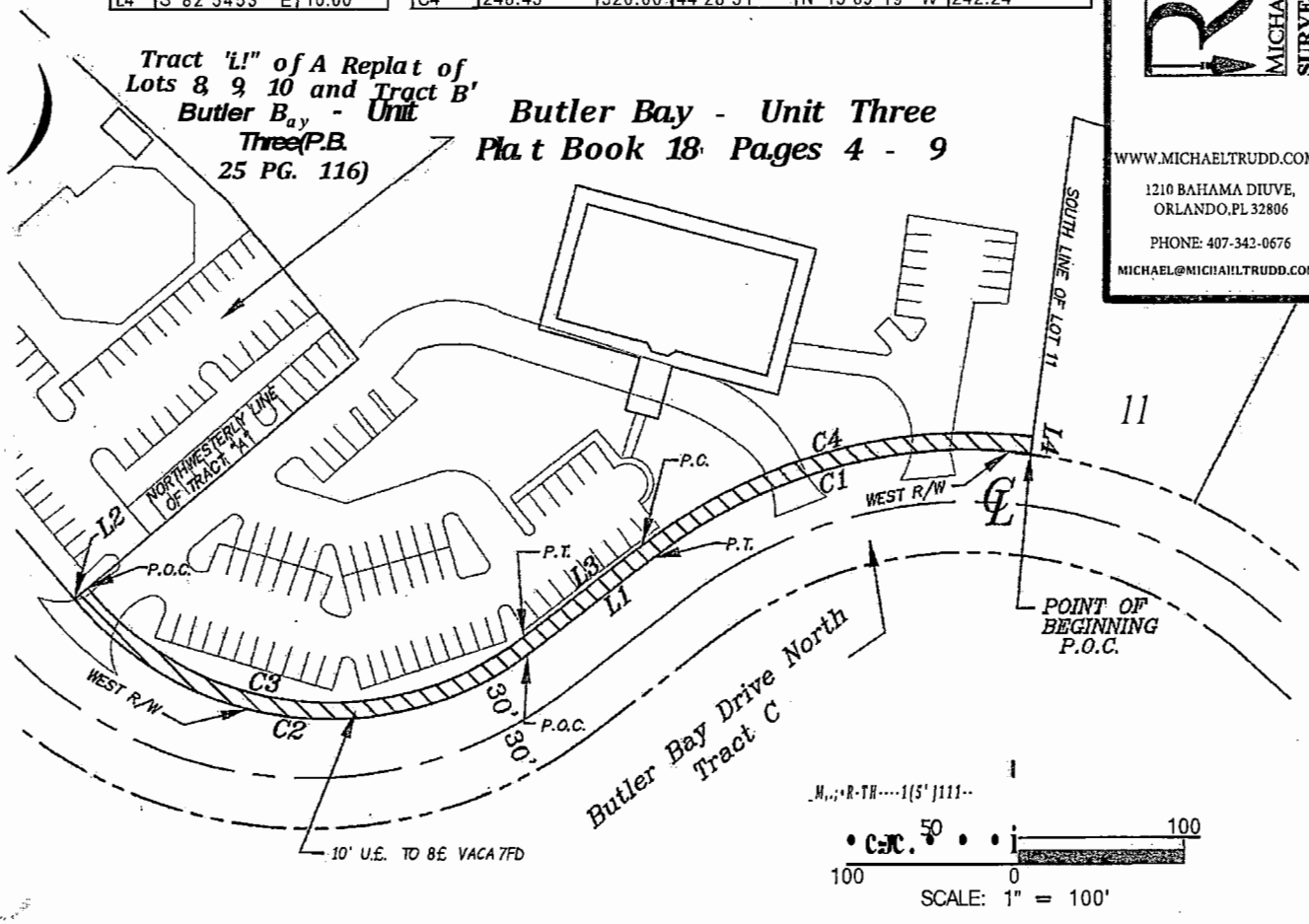
U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
'i = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P. T. = POINT OF TANGENCY
P.C. = POINT OF CURVATURE
PG. = PAGE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 37'23'44" E	88.86'
L2	N 40'06'04" W	10.00'
L3	N 37'23'44" W	88.86'
L4	S 82'54'53" E	10.00'

CURVE TABLE

IIRVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORn LI'NE::TH
Ct	240.66'	310.00'	44'28'51"	S 15•09'19" E	234.67'
C2	304.72'	200.00'	87'17'40"	S 06'15'06" W	276.09'
C3	289.48'	190.00'	87'17'40"	N 06'15'06" E	262.28'
C4	248.43'	320.00'	44·28'51"	N 15"09'19" W	242.24'



RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DIUVE, ORLANDO,PL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

EASEMENT (iiib) SHEET 1

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE NORTHWEST CORNER OF LOT 7 OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY FLORIDA; THENCE N 70-08'47" W, ALONG THE NORTHWESTERLY LINE OF SAID LOT 7, A DISTANCE OF 10.00 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 420.00 FEET, WITH A CHORD BEARING OF N 34'52'34" E, WITH AN ARC DISTANCE OF 220.24 FEET THROUGH A CENTRAL ANGLE OF 30-02•43•; A DISTANCE OF 217.73 FEET; THENCE N 49.53'56" E, TO THE NORTHWEST LINE OF TRACT "A" OF A REPLAT OF LOTS 8, 9, 10 AND TRACT B, BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 25 AT PAGE 116 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, A DISTANCE OF 123.38 FEET; THENCE S 40'06'04" E, ALONG SAID NORTHWEST LINE, A DISTANCE OF 10.00 FEET; THENCE S 49.53'56" W, ALONG THE WEST RIGHT-OF-WAY BUTLER BAY DRIVE NORTH, A DISTANCE OF 123.38 FEET,· TO A POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 410.00 FEET, WITH A CHORD BEARING OF S 34.52'35" W, WITH AN ARC DISTANCE OF 215.00 FEET THROUGH A CENTRAL ANGLE OF 30.02'43: ALONG THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE NORTH, A DISTANCE OF 212.54 FEET; TO THE POINT OF BEGINNING

CONTAINING THEREIN: 0.078 ACRES (3410.01 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS No1·40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4 THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2075 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA 77NG PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA TING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STA TE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. (SEAL) DA TE SIGNED e e>,' ,t.
FLORIDA REGISTERED SURVEYOR NO. 3960

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED; RUDD
DRAWN: MIR
DATE: 01-04-2016
SCALE N/A
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RVDD
MICHAEL RUDD &ASSOCIATES LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying-Platting

WWW.MICHAELTRUDO.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

001091

EASEMENT (iiib) SHEET 2

ABBREV/A TIONS

U.E. = UTILITY EASEMENT
LM.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.8. = PLAT BOOK
P. T. = POINT OF TANGENCY
P. C = POINT OF CURVATURE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

LINE TABLE

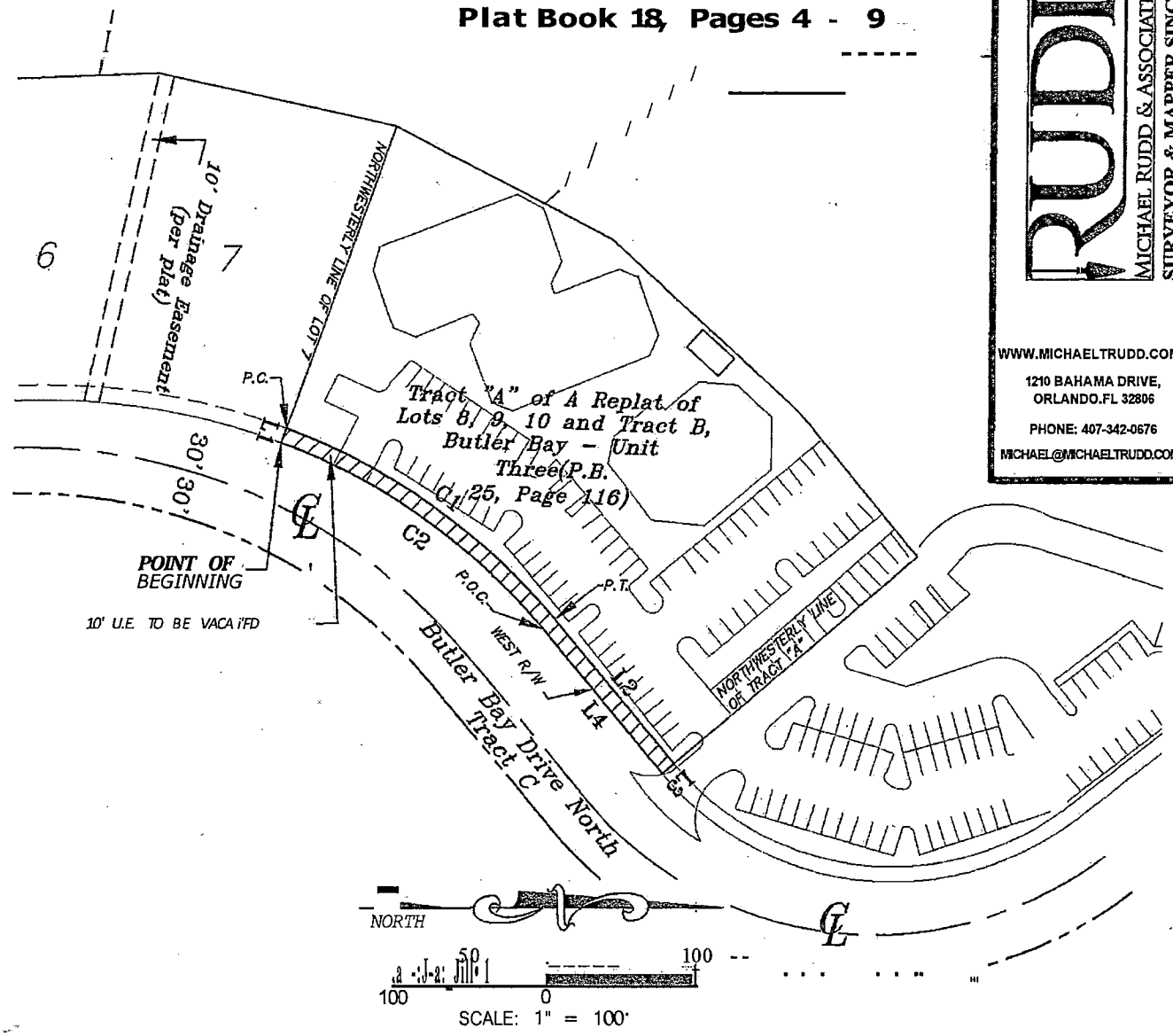
LINE	BEARING	DISTANCE
L1	N 70°08'47" W	10.00'
L2	N 49°53'56" E	123.38'
L3	S 40°06'04" E	10.00'
L4	S 49°53'56" W	123.38'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	220.24'	420.00'	30°02'43"	N 34°52'34" E	217.73'
C2	215.00'	410.00'	30°02'43"	S 34°52'35" W	212.54'

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

Butler Bay - Unit Three
Plat Book 18, Pages 4 - 9



RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO.FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

001092

SKETCH OF DESCRIPTION FOR:

EASEMENT (iv) SHEET 1

WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE INTERSECTION OF THE SOUTH LINE OF LOT 20 OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 ON PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA AND THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE NORTH; THENCE S 55·5971 " E, ALONG SAID WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 162.01 FEET; TO A POINT ON THE NORTH LINE OF LOT 19 OF AFOREMENTIONED BUTLER BAY UNIT - THREE, THENCE S 41'49'56" W, ALONG THE NORTH LINE OF SAID LOT 19, A DISTANCE OF 10.12 FEET; THENCE N 56"59'11" W, A DISTANCE OF 166.26 FffT; TO A POINT ON THE SOUTH LINE OF LOT 20, THENCE N 63"08'35" E, ALONG SAID SOUTH LINE OF LOT 20; A DISTANCE OF 11.56 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.038 ACRES {1641.36 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4 THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACATING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACA 7ANG PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. (SEAL) DATE SIGNED ,:!'e:>/
FLORIDA REGISTERED SURVEYOR NO. 3960

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD DRAWN: MTR DATE: 01-04-2016 SCALE N/A FOR:-- WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD &AsSOCIATES, U C SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying- Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO,FL 32806 PHONE: 407-342-0676 MICHAEL@MICHAELTRUDD.COM FLA. L.B. 8067	SEAL

EASEMENT (iv) SHEET 2

ABBREVIATIONS
U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
'I = CENTER LINE
R/W = RIGHT OF WAY
P. O. C = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
PGS. = PAGES
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

BUTLER BAY UNIT THREE Tract A Golf Course (Plat Book 18, Pages 4-9}

BUTLER BAY - UNIT THREE
(P.B. 18, PGS. 4 - 9)

SOUTH LINE OF LOT 20

20

POINT OF BEGINNING

WEST R/W

NORTH LINE OF LOT 19

79

L3

L1

10' U.E. (To Be Vacated)

Butler Bay Drive North Tract C

BUTLER BAY - UNIT THREE
(P.B. 18, PGS. 4 - 9)

61

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 56°59'11" E	162.01'
L2	S 41°49'56" W	10.12'
L3	N 56°59'11" W	166.26'
L4	N 63°08'35" E	11.56'

NORTH

50 25 0 50

SCALE: 1" = 50'

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 50'
FOR:
"WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE; 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SKETCH OF DESCR/PnON FOR:

EASEMENT (v) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE INTERSECTION OF THE NORTH LINE OF LOT 56 OF BUTLER BAY - UNIT THREE AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY FLORIDA, AND THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE NORTH; THENCE S 78.58'00" W, ALONG SAID NORTH LINE, A DISTANCE OF 10.08 FEET; POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 590.00 FEET, WITH A CHORD BEARING OF N 08.23'51" W, WITH AN ARC DISTANCE OF 201.26 FEET THROUGH A CENTRAL ANGLE OF 19.32'41; A DISTANCE OF 200.29 FEET; THENCE N 01 '22'29" E, A DISTANCE OF 173.26 FEET; THENCE N 18'2212" W, A DISTANCE OF 29.60 FEET,· THENCE N 01"22'29" E, A DISTANCE OF 66. 74 FEET: TO THE POINT OF CURVATURE OF A CURVE CONCAVE SOUTHWESTERLY AND HAVING A RADIUS OF 15.00 FEET. WITH A CHORD BEARING OF N 43·3737" W, WITH AN ARC DISTANCE OF 23,56 FEET THROUGH A CENTRAL ANGLE OF 90.00'00" A DISTANCE OF 21.21 FEET,· THENCE N 01'22'29" E, TO THE SOUTH RIGHT-OF-WAY OF MCKINNON ROAD (ORB. 259, PCS. 254 - 255), A DISTANCE OF 10.00 FEET; SAID POINT BEING ON A CURVE CONCAVE SOUTHWESTERLY ANO HAVING A RADIUS OF 25.00 FEET. WITH A CHORD BEARING OF S 43•3737" E, WITH AN ARC DISTANCE OF 39.27 FEET THROUGH A CENTRAL ANGLE OF 90.00'00" A DISTANCE OF 35.36 FEET; THENCE CONTINUING ALONG SAID WEST RIGHT-OF-WAY LINE THE FOLLOWING COURSES AND DISTANCES; THENCE S 01'22'29" W, A DISTANCE OF 65.00 FEET; THENCE S 18.2212" E, A DISTANCE OF 29.60 FEET; .THENCE S 01"22'29" W, A DISTANCE OF 175.00 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE EASTERLY AND HAVING A RADIUS OF 580. 00 FEET, WITH A CHORD BEARING OF S 08'27'34" E, WITH AN ARC DISTANCE OF 199.10 FEET 7HROUGH A CENTRAL ANGLE OF 19'40'06: A DISTANCE OF 198.12 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.115 ACRES (5011.96 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2 GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4 THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON .12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACATING PLATTED EASEMENTS.

SURVEYOR'S CERTIFICATION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT JS BASED FOR THE PURPOSE OF VACATING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH ?HE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN SJ-17-FAC.
MICHAEL RUDD & ASSOC/ATES, LLC (F.i.A. L.B. 8067)

£ (SEAL) DATE SIGNED 29 January 2016
FLORIDA REGISTERED SURVEYOR NO. 3960

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE NA
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

EASEMENT (v) SHEET 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

ABBREV/ANONS

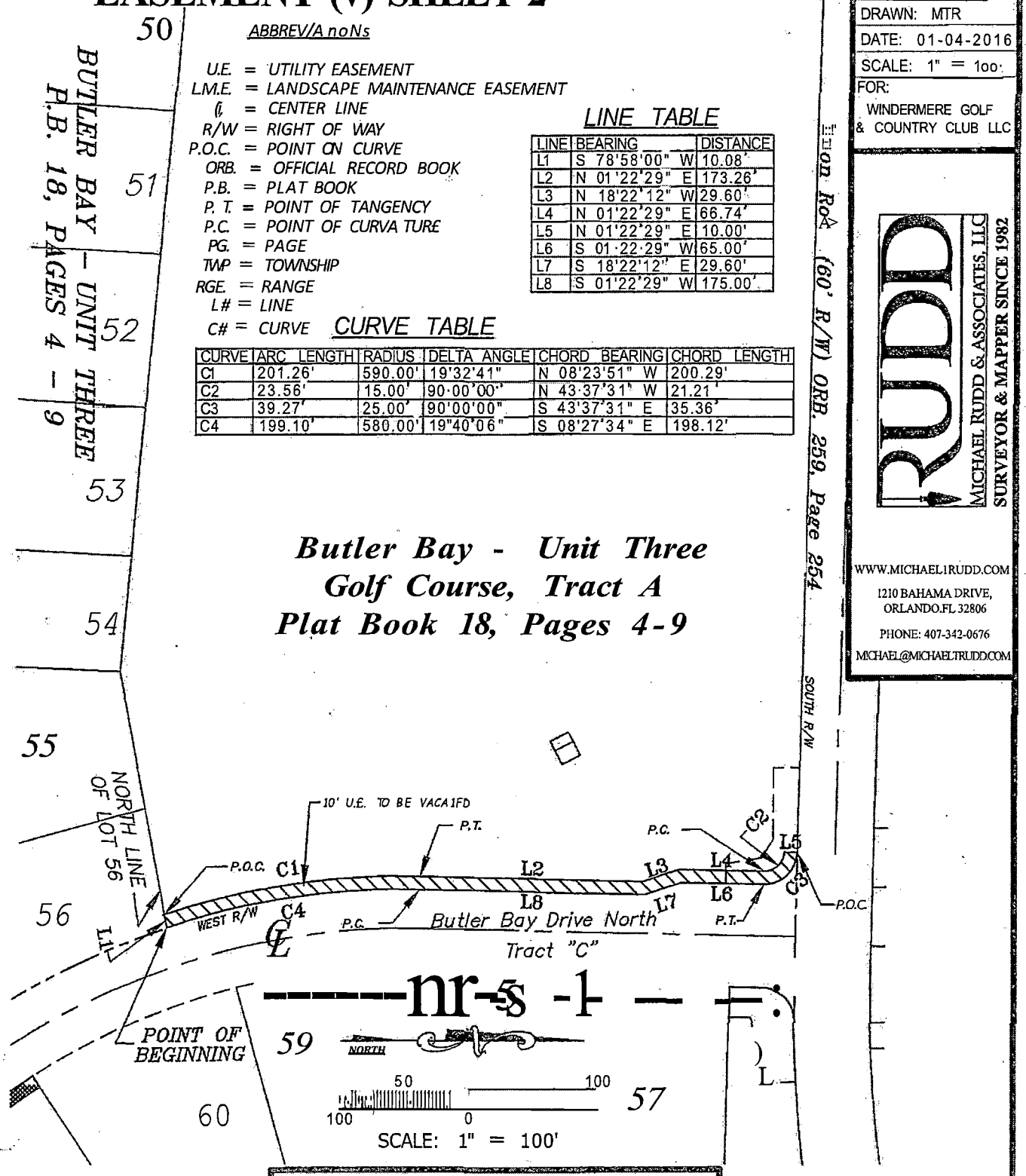
U.E. = UTILITY EASEMENT
LM.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P. T. = POINT OF TANGENCY
P.C. = POINT OF CURVATURE
PG. = PAGE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 78°58'00" W	10.08'
L2	N 01°22'29" E	173.26'
L3	N 18°22'12" W	29.60'
L4	N 01°22'29" E	66.74'
L5	N 01°22'29" E	10.00'
L6	S 01°22'29" W	65.00'
L7	S 18°22'12" E	29.60'
L8	S 01°22'29" W	175.00'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	201.26'	590.00'	19°32'41"	N 08°23'51" W	200.29'
C2	23.56'	15.00'	90°00'00"	N 43°37'31" W	21.21'
C3	39.27'	25.00'	90°00'00"	S 43°37'31" E	35.36'
C4	199.10'	580.00'	19°40'06"	S 08°27'34" E	198.12'



RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982

WWW.MICHAELRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

001096

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

VACATED EASEMENT (vi) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE NORTHWEST CORNER OF LOT 61 OF BUTLER - BAY UNIT THREE, AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS. OF ORANGE COUNTY, FLORIDA; THENCE N 56'59'11" W, ALONG THE EAST RIGHT-OF-WAY OF BUTLER BAY DRIVE, A DISTANCE OF 125.03 FEET; TO THE POINT OF CURVATURE OF A CURVE CONCAVE NORTHEASTERLY AND HAVING A RADIUS OF 520.00 FEET, WITH A CHORD BEARING OF N 45"03'36" W, WITH AN ARC DISTANCE OF 216.48 FEET THROUGH A CENTRAL ANGLE OF 23'5170'; A DISTANCE OF 214.92 FEET, TO THE SOUTHWEST CORNER OF LOT 60 OF AFOREMEN770NED BUTLER BAY UNIT - THREE; THENCE N 56'51 '59" E, ALONG THE SOUTH LINE OF SAID LOT 60, A DISTANCE OF 10.00 FEET,- SAID POINT BEING ON A CURVE CONCAVE NORTHEASTERLY AND HAVING A RADIUS OF 510.00 FEET, WITH A CHORD BEARING OF S 45'03'36" E, WITH AN ARC DISTANCE OF 212.32 FEET THROUGH A CENTRAL ANGLE OF 23'5110: A DISTANCE OF 210. 79 FEET,· THENCE S 56"59'11" E, TO THE NORTHWESTERLY LINE OF AFOREMEN770NED LOT 61, A DISTANCE OF 125.03 FEET; THENCE S 33'00'49" W, ALONG THE AFOREMENTIONED NORTHWESTERLY LINE OF LOT 61, A DISTANCE OF 10.00 FEET,· TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.042 ACRES (1837.95 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO U77LITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACATING PLATTED EASEMENTS.

SURVEYOR'S CER77FICA 770N:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED FOR THE PURPOSE OF VACATING PLATTED EASEMENTS WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL C RZ,
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED 25 January 2016

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

9HECKED: RUDD DRAWN: MTR DATE: 01-04-2016 /SCALE N/A FOR: WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD & ASSOCIATES, LLC SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying" Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO,FL 32806 PHONE: 407-342-0676 MICHAEL@MICHAELTRUDD.COM FLA. L.B. 8067	SEAL

001097

EASEMENT (vi) SHEET 2

ABBREV/A T/ONS

U.E. = UTILITY EASEMENT
L.M.E = LANDSCAPE MAINTENANCE EASEMENT
'i = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
P. T. = POINT OF TANGENCY
P.C. = POINT OF CURVATURE
PGS. = PAGES
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

BUTLER BAY – UNIT THREE
Tract A
Golf Course
(Plat Book 18, Pages 4-9)

BUTLER BAY
UNIT THREE
(P.B. 18, PGS. 4 – 9)

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 100'
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO.FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

Butler Bay Drive North
Tract "C"
C1
C2
L1
L2
L3
L4
P.O.C.
P.C.
SOUTH LINE OF LOT 60
10' U.E. TO BE VACATED
30'
30'
POINT OF BEGINNING
EAST R/W
NORTHWESTERLY L/N OF LOT 61
NORTH
SCALE: 1" = 100'
Tract A
Golf Course
Plat Book 18,
Pages 4-9

LINE TABLE

LINE	BEARING	DISTANCE
L1	N 55°59'11" W	125.03'
L2	N 56°51'59" E	10.00'
L3	S 56°59'11" E	125.03'
L4	S 33°00'49" W	10.00'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	216.48'	520.00'	23°51'10"	N 45°03'35" W	214.92'
C2	212.32'	510.00'	23°51'10"	S 45°03'36" E	210.79'

001098

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

EASEMENT (vii) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

10' UTILITY EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE SOUTHWEST CORNER OF TRACT A OF BUTLER - BAY UNIT THREE, AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; POINT BEING ON A CURVE CONCAVE EASTERLY AND HAVING A RADIUS OF 525.44 FEET, WITH A CHORD BEARING OF N 11'23'50" E, WITH AN ARC DISTANCE OF 183. 72 FEET THROUGH A CENTRAL ANGLE OF 20'02'00" A DISTANCE OF 182.79 FEET; THENCE S 88"37'31" E, ALONG THE SOUTH LINE OF LOT 122 OF BUTLER - BAY UNIT THREE, AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, A DISTANCE OF 10.66 FEET; SAID POINT BEING ON A CURVE CONCAVE EASTERLY AND HAVING A RADIUS OF 515.44 FEET, WITH A CHORD BEARING OF S W36'0t" W, WITH AN ARC DISTANCE OF 183.87 FEET THROUGH A CENTRAL ANGLE OF 20'2621" A DISTANCE OF 182.90 FEET, TO THE NORTH RIGHT-OF-WAY OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255); THENCE N 88"37'31" W, ALONG THE AFOREMENTIONED NORTH RIGHT-OF-WAY OF MCKINNON ROAD, A DISTANCE OF 10.00 FEET, TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.042 ACRES (1837.95 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01"40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACATING PLATTED EASEMENTS.

SURVEYOR'S CERTIFICATION:

TO; WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC.
MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

DATE SIGNED: .,,./&.

FLORIDA REGISTERED SURVEYOR NO. 3960

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD DRAWN: MTR DATE: 01-04-2016 SCALE N/A FOR: WINDERMERE GOLF & COUNTRY CLUB LLC	RUDD MICHAEL RUDD &AsSOCIATES, LLC SURVEYOR & MAPPER SINCE 1982 Commercial Land Title Surveying- Platting	WWW.MICHAELTRUDD.COM 1210 BAHAMA DRIVE, ORLANDO,FL 32806 PHONE: 407-342-0676 MICHAEL@MICHAELTRUDD.COM FLA. L.B. 8067	SEAL

001099

EASEMENT (vii) SHEET 2

SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 50'
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 88'37'31" E	10.66'
L2	N 88'37'31" W	10.00'

CURVE TABLE

CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	183.72'	525.44'	20°02'00"	N 11°23'50" E	182.79'
C2	183.87'	515.44'	20°26'21"	S 11°36'01" W	182.90'

ABBREVIATIONS

U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
PG. = PAGE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE

30.00' 30.00'

POINT OF BEGINNING SOUTHWEST CORNER OF TRACT A

L.M.E. ORB. 4070, PG. 3932

L1

P.O.C.

EASTERLY R/W

C1

C2

30.00'

30.00'

10' U.E. (To Be Vacated)

15' Water Tank Easement P.B. 18, Pages 4-9

P.O.C.

TRACT A (GOLF COURSE)

L.M.E. ORB. 4070, PG. 3919

NORTH

0 50

SCALE: 1" = 50'

BUTLER BAY - UNIT THREE P.B. 18, PAGES 4 - 9

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO.FL 32806
PHONE: 407-342-0676
MICHABL@MICHAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

001100

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

WATER TANK EASEMENT (i) SHEET 1
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT: SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

15' WATER TANK EASEMENT

LEGAL DESCRPT/ON :

BEGIN AT THE NORTHWEST CORNER OF TRACT A OF BUTLER - BAY UNIT THREE, AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE S 88"3731. E, ALONG THE SOUTH LINE OF LOT 122 OF SAID BUTLER BAY - UNIT THREE, A DISTANCE OF 12 79 FEET; TO A POINT BEING ON A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 513.44 FEET, WITH A CHORD BEARING OF S 18"23'59" W, WITH AN ARC DISTANCE OF 62. 79 FEET THROUGH A CENTRAL ANGLE OF 07"00'24: A DISTANCE OF 62. 75 FEET,· THENCE N 88"3731" W, TO THE EAST RIGHT-OF-WAY OF LAKE ROBERTS COURT, A DISTANCE OF 12.33 FEET,· SAID POINT BEING ON A CURVE CONCAVE EASTERLY AND HAVING A RADIUS OF 525.44 FEET, WITH A CHORD BEARING OF N 17"59'53" E, WITH AN ARC DISTANCE OF 62.65 FEET THROUGH A CENTRAL ANGLE OF 06"49'55'; A DISTANCE OF 62.62 FEET, TO THE £AST RIGHT-OF-WAY OF LAKE ROBERTS COURT;· TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.042 ACRES (1837.95 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01"40'40"E ASSUMED.
2. GRAPHIC REPRESENTA T/ON OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4 THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA TING PLATTED EASEMENTS.

SURVEYOR'S CER77FICA TION:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT JS BASED WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC. MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL T. RUDD, PLS. (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED d!e:J&.

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE N /A
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD &AsSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying- Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

WATER TANK EASEMENT (i) SHEET 2

SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 50'
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

CURVE TABLE

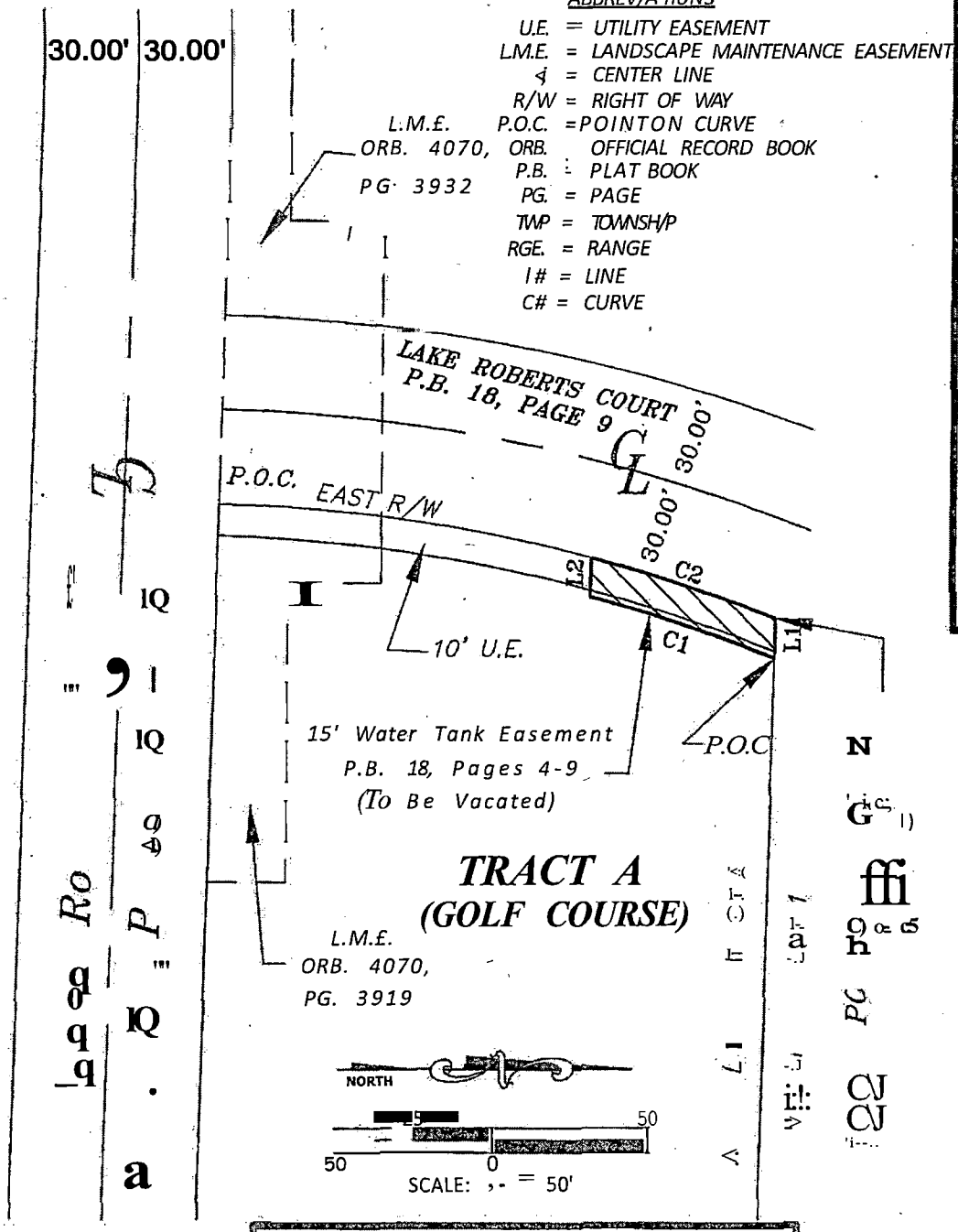
CURVE	ARC LENGTH	RADIUS	DELTA ANGLE	CHORD BEARING	CHORD LENGTH
C1	62.79'	513.44'	07°00'24"	S 18°23'59" W	62.75'
C2	62.65'	525.44'	05°49'55"	N 17°59'53" E	62.62'

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 88°37'31" E	12.79'
L2	N 88°37'31" W	12.33'

ABBREV/A noNS

U.E. = UTILITY EASEMENT
L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
℄ = CENTER LINE
R/W = RIGHT OF WAY
P.O.C. = POINT ON CURVE
ORB. = OFFICIAL RECORD BOOK
P.B. = PLAT BOOK
PG. = PAGE
TWP = TOWNSHIP
RGE. = RANGE
L# = LINE
C# = CURVE



SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE, ORLANDO, FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM

SKETCH OF DESCRIPTION FOR:

SHEET 1 OF 2

WATER TANK EASEMENT (ii) SHEET l
WINDERMERE GOLF & COUNTRY CLUB LLC

PROPERTY AT.· SECTION 1 & 12, TWP 23 SOUTH, RGE 27 EAST ORANGE COUNTY, FLORIDA

15' WATER TANK EASEMENT

LEGAL DESCRIPTION :

BEGIN AT THE NORTHWEST CORNER OF LOT 19 OF BUTLER - BAY UNIT THREE, AS RECORDED IN PLAT BOOK 18 AT PAGES 4 - 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA; THENCE S 41'49'56" W. ALONG THE NORTH LINE OF SAID LOT 19, A DISTANCE OF 15.18 FEET; THENCE N 56.59'11" W. A DISTANCE OF 55.66 FEET; THENCE N 41'49'56" E, TO THE WEST RIGHT-OF-WAY OF BUTLER BAY DRIVE NORTH, A DISTANCE OF 15.18 FEET; THENCE S 56.5911" E, ALONG SAID WEST RIGHT-OF-WAY, A DISTANCE OF 55.66 FEET; TO THE POINT OF BEGINNING.

CONTAINING THEREIN: 0.019 ACRES (834.87 SQUARE FEET), MORE OR LESS.

SURVEYOR'S NOTES:

1 BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF MCKINNON ROAD (ORB. 259, PGS. 254 - 255) AS N01'40'40"E ASSUMED.
2. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
3. ALL BEARINGS AND DISTANCES SHOWN ARE IN ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
4. THIS IS NOT A FIELD SURVEY AND IS BASED ON A FIELD SURVEY COMPLETED ON 12-21-2015 AND NO UTILITIES LOCATED UNDER THIS ASSIGNMENT.
5. PURPOSE OF THE SKETCH AND DESCRIPTION IS FOR PURPOSE OF VACA 7ING PLATTED EASEMENTS.

SURVEYOR'S CERT/FICA T/ON:

TO: WINDERMERE COUNTRY CLUB LLC, a Florida limited liability company, BRYAN DeCUNHA, MANAGER: THIS IS TO CERTIFY THAT THIS SKETCH OF DESCRIPTION AND THE SURVEY ON WHICH IT IS BASED WERE MADE IN ACCORDANCE WITH THE STANDARDS OF PRACTICE OF THE STATE OF FLORIDA, AS FOUND IN 5J-17-FAC. MICHAEL RUDD & ASSOCIATES, LLC (FLA. L.B. 8067)

MICHAEL P. RUDD, PLS. (SEAL)
FLORIDA REGISTERED SURVEYOR NO. 3960

DATE SIGNED /.!.

NOT 1111m w1-rwn11T Tl-Jc ;=1;=i

SHEET NOT COMPLETE WITHOUT SHEET 2 OF 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE N/A
FOR: WINDERMERE GOLF & COUNTRY CLUB LLC

RUDD
MICHAEL RUDD &AsSOCIATES L1C
SURVEYOR & MAPPER SINCE 1982
Commercial Land Title Surveying" Platting

WWW.MICHAELTRUDD.COM
1210 BAHAMA DRIVE,
ORLANDO,FL 32806
PHONE: 407-342-0676
MICHAEL@MICHAELTRUDD.COM
FLA. L.B. 8067

SEAL

001103

WATER TANK EASEMENT (ii) SHEET 2

CHECKED: RUDD
DRAWN: MTR
DATE: 01-04-2016
SCALE: 1" = 50'
FOR:
WINDERMERE GOLF & COUNTRY CLUB LLC

ABBREVIATIONS

- U.E. = UTILITY EASEMENT
- L.M.E. = LANDSCAPE MAINTENANCE EASEMENT
- ℄ = CENTER LINE
- R/W = RIGHT OF WAY
- P.O.C. = POINT ON CURVE
- ORB. = OFFICIAL RECORD BOOK
- P. B. = PLAT BOOK
- TWP = TOWNSHIP
- RGE. = RANGE
- L# = LINE
- C# = CURVE

BUTLER BAY - UNIT THREE
(P.B. 18, PAGES 4 -9)

BUTLER BAY UNIT THREE Tract A Golf Course (Plat Book 18, Pages 4-9)

20

SOUTH LINE OF LOT 20

WEST R/W

15' Water Tank Easement
P.B. 18 Pages 4-9
(To Be Vacated)

10' U.E.

Butler Bay Drive North
Tract C

79

BUTLER BAY - UNIT THREE
(P.B. 18, PAGES 4 - 9)

POINT OF BEGINNING

L1 L2 L3 L4

℄

LINE TABLE

LINE	BEARING	DISTANCE
L1	S 41°49'56" W	15.18'
L2	N 56°59'11" W	55.66'
L3	N 41°49'56" E	15.18'
L4	S 56°59'11" E	55.66'

67

NORTH

50 0 50

SCALE: 1" = 50'

RUDD
MICHAEL RUDD & ASSOCIATES, LLC
SURVEYOR & MAPPER SINCE 1982
WWW.MICHAELIRUDD.COM
1210 BAHAMA DRIVE, ORLANDO, FL 32806
PHONE; 407-342-0676
MICHAEL@MICIAELTRUDD.COM

SHEET NOT COMPLETE WITHOUT SHEET 1 OF 2

G

DRAFf
01/31/16

DEVELOPER'S AGREEMENT

THIS AGREEMENT is made by and between ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida ("Orange County") and WINDERMERE COUNTRY CLUB, LLC, a Florida limited liability company, 2710 Butler B ay Drive, N., Windennere, Florida 34786 ("Owner").

RECITALS:

1. Owner owns certain real property located in the unincorporated area of Orange County (the "Property") more particularly described in Exhibit "A" attached hereto, which is the 155± acre parcel listed as Tract A on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 10 and Tract B Butler B a y - Unit 3 Plat, PB 25, Page 116.

2. Owner applied for a Petition to Vacate Plat regarding the Property.

3. At the public hearing on November 18, 1985, the Board of County Commissioners of Orange County adopted certain conditions of approval for the Preliminary Subdivision Plan, which included the Property, based upon the Orange County Subdivision Regulations and based upon considerations relating to the area surrounding the Property, water bodies abutting the properties adjacent to the Property and other circumstances affecting the adjacent properties and the Property.

4. The conditions of approval adopted by Orange County assure compliance with the Orange County Subdivision Regulations and assure compatibility of development on the Property with surrounding development and with the smTounding environment.

5. Orange County memorialized the conditions of approval in a Developer's Agreement adopted February 24, 1986 and recorded at OR Book 3757, Page 1536, Public Records of Orange County, Florida (the "1986 Developer's Agreement") between Orange County and Windermere Lakes, Ltd.

6. The 1986 Developer's Agreement recognized that the Conditions of Approval control all future development in the Butler Bay Unit 3 Plat, including the Property, "unless said conditions of approval are amended or modified by Orange County".

7. Now, 30 years after the original 1986 Developer's Agreement, Owner is closing the golf course, ceasing utilization of the Property as a golf course, and desires to utilize the Property in a manner consistent with the FLU designation of R1 to 1 and the R-CE-C zoning regulations.

8. To accomplish redevelopment of the Property, Orange County, through its actions of November 19, 2015, bas directed Owner to file a Petition to Vacate the Property in order to remove all notes and restrictions regarding development rights and access to the Property as noted on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 10 and Tract B Butler Bay - Unit 3 Plat, PB 25, Page 116 and to file this Developer's Agreement to modify the 1986 Developer's Agreement.

NOW, THEREFORE, in consideration of the foregoing and of the terms and conditions stated below, Orange County and Owner agree as follows:

1. Recitals. The foregoing recitals are true and form a material part of this Agreement.

PB 18, Page 4 which acknowledge said Easement created by PB 13, Pages 59-60.

2.07 Conveyance of Utility Easement.

Owner, contemporaneously with the execution of this Developer's Agreement, hereby conveys to Orange County a document for a non-exclusive Easement for utilities over the following areas: (i) a 10 foot wide easement over that same area southwest of Butler Bay Drive North between Lots 1 and 2; (ii) a 25 foot wide easement over that same area east of Lake Buynak Estates along the western boundary of the Property and then running northeast to Butler Bay Drive North; (iii) a 10 foot wide easement over that same area west of Butler Bay Drive North between Lots 7 and 11 which is described as (iii-a) for that area from Lot 11 to the former Lot 10 which was vacated and replatted as Tract A by PB 25, Page 116 and (iii-b) for that area formerly known as Lots 8, 9 and 10 which were vacated and replatted as Tract A by PB 25, Page 116; (iv) a 10 foot wide easement over that same area southwest of Butler Bay Drive North between Lots 19 and 20; (v) a 10 foot wide easement over that same area west of Butler Bay Drive North between lot 56 and McKinnon Road; (vi) a 10 foot wide easement over that same area northeast of Butler Bay Drive North between Lots 60 and 61; and (vii) a 10 foot wide easement over that same area north of McKinnon Road and east of Lake Roberts Court from McKinnon Road to Lot 122; all as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A

Replat of Lots 8, 9, 10 and Tract B Butler Bay - Unit 3 Plat, PB 25, Page 116.

2.08 Conveyance of Water Tank Easement.

Owner, contemporaneously with the execution of this Developer's Agreement, hereby conveys to Orange County a document for a non-exclusive Easement of 15 feet by 55 feet for water tanks over the following areas: (i) north of McKinnon Road on the east side of Lake Roberts Court and South of Lot 122; and (ii) southwest of Butler Bay Drive North and Northwest of Lot 19; as generally depicted on and for the same purposes as indicated on the Butler Bay Unit 3 Plat, PB 18, Page 4.

6. Recording. The parties hereto agree that an executed copy of this Agreement shall be recorded at the Developer's expense in the Official Records of Orange County, Florida, prior to platting all or any part of the Property.

7. Letter from Orange County. Upon written request from the Owner, Orange County, or any successor agency or entity, will execute a document (the form of which is reasonably satisfactory to Owner) which vidences the status of compliance by Owner with the conditions of approval contained herein. Said document shall be prepared in recordable form and shall be delivered to Owner within (10) days of receipt by the County of the request for same.

8. Recording Modifications to Conditions of Approval. Any modifications to the Conditions of Approval referenced in Paragraph 2 above shall be recorded in the Public Records of Orange County, Florida.

9. Effective Date. This Agreement takes effect on the later of the dates stated below.

ORANGE COUNTY, FLORIDA

By:_____
Mayor, Board of
County Commissioners

ATTEST: MARTHA HAYNIE,
Clerk to Board of County
Commissioners

DATE:_____

By:_____

WINDERMERE COUNTRY CLUB, LLC,
a Florida limited liability company

By:_____
Bryan DeCunha, President

DATE:_____

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Bryan DeCunha, as President of Windermere Country Club, LLC, to me known to be the person described in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this __ day of_____ ,2016.

Notary Public
Printed Name:
My Commission Expires:

EXHIBIT "A"

Legal Description of the "Property", Windermere Country Club, LLC

GRAY!ROBINSON
ATTORNEYS AT LAW

301 EAST PINE STREET
SUITE 1400
POST OFFICE Box 3068 (32802-3068)
ORLANDO, FLORI[;>A 32801
TEL 407-843-8880
FAX 407◆244-5690
gray-robinson.com

BocARATON
FORTLAUDEJWALE
FORTMYERS
GAJNESVILLE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

407-244-5683
PAUL.CHIPOK@GRAY-ROBINSON.COM

MEMORANDUM

TO: Mayor Jacobs and Board of County Commissioners

FROM: Paul H. Chipok *e:uJ) /Jr*

DATE: January 27, 2016

SUBJECT: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space

---

Petitioner, owners of a soon to be defunct f01mer golf course, is requesting the Board approve a Petition to Vacate the Tract A portion of the Butler Bay Unit 3 Plat as amended. As the information in this Memorandum makes clear, Petitioner's request fully complies with all relevant County Code provisions and should be approved.

Windermere Country Club has filed a rezoning application, Application #RZ-10-038, to modify the Cluster Plan to 1) bring the 155 acres under the current standard of 1 unit per 1 acre and 2) change the 155 acres from golf course (a referenced use and not open space) to residential area to accommodate 95 lots. At the November 19, 2015 Planning and Zoning Commission meeting, the Planning and Zoning Commission continued the rezoning application to April 21, 2016 and directed Windermere Country Club to file a Petition to Vacate the 155 acre Tract Ngolf course property and to modify the 1986 Developer's Agreement applicable to the Butler Bay, Unit 3 Plat[1].

The modification to the 1986 Developer's Agreement and Plat Conditions 12 (development rights) and 13 (access rights) are being addressed through a new Developer's Agreement and Petition to Vacate #16-__ .

BACKGROUND

The Butler Bay Cluster Plan, where the Tract NGolf Course Property is located, receiv_ed its zoning approval on February 21, 1985. There was no mention of conveyance of development

[1] Tab I

rights from the Golf Course Property in this zoning approval.2

Language regarding dedication of the development rights to the Golf Course Property to Orange County first emerged during PSP review on November 18, 1985.[3] That condition to convey development rights was included in the "1986 Developer's Agreement"[4]. When the Butler Bay Unit 3 Plat[5], was approved, a Resolution Vacating and Annulling a portion of the Butler Bay Unit 2 Plat was approved at the same time.[6] Further, when the Replat of Lots 8 9, 10 and Tract B was approved on April 2, 1990[7], a second Resolution Vacating and Annulling Plat was approved by the BOCC on the same day.[8]

GOLF COURSE PROPERTY IS NOT "COMMON OPEN SPACE", "COMMON AREA", OR "COMMON PRIVATE FACILITIES."

The Windermere Country Club golf course is privately held property and maintained by the Golf Course Property owner. It is not common open space. The County's ordinances and a review of the history of the County approvals associated with the Golf Course Property make this very clear.

Section 34-155(a)[9] defines "open space" and states it may include private parks and recreation areas provided: (i) they have been designated as a tract on the plat, (ii) they are adequate for the intended purpose, (iii) assurance has been given by deed restrictio_n or Covenants, Conditions and Restrictions ("CCRs") that the area will be maintained and (iv) the area must be identified on the plat as 'common areas' for owners of property within the subdivision. In this case, the Golf Course Property is not identified as 'common area' on the plat. There is no plat dedication of Golf Course Property to any other lot or property owners. The CCRs do not include the Golf Course Property nor provide for maintenance of the golf course. In fact, the "Property" as defined in Exhibit A to the CCRs is limited to Lots 1-123, PB 18, Pages 4-9 and notably does not include the Tract A/Golf Course Property. The CCR definition of "Common Area" requires that common area be owned by the "Association". Article XII of the CCRs is titled "Covenants and Restrictions Relating to Golf Course". Section 1 states "All Owners of Lots on the Property acknowledge the existence of a private golf course on lands adjoining the Property. The golf course is for the use and enjoyment of the members of the –private-gol-f-e-1-ub Seet-i-em-3-ereates–a-l-0–fo0t-easement-in-fav0r-0f—th@—gglf—GGUr-s -acmss—the– -·

[2] See Minutes ofFebrnary 21, 1985 Planning and Zoning Commissi_onMeeting (Tab A) and Minutes ofFebruary 25, 1985 Board of County Commission Meeting (Tab B).
[3] Attached Tab C
[4] Development Agreement recorded at OR 3757/1536 (Tab D) and hereinafter "1986 Developer's Agreement."
[5] PB 18/4 (Tab E)
[6] See OR 3808/2058 (Tab F).
[7] Replat of Lots 8, 9, 10 and Tract B, Butler Bay Unit 3, PB 25/116 (Tab G).
[8] See OR 4173/3662 (Tab H)
[9] Tab J

rear of each lot adjacent to the golf course. The easement prohibits fences, walls or shrub planting. See OR Book 3808, Page 1478 (Tab K). The plat note 12 and 13 on PB 18, Page 4, which are applicable to the golf course are between the Golf Course Property owner and the County, the subdivision owners are not parties to those plat note restrictions. At the time of plat and the 1986 Developer's Agreement, the owner of the Golf Course was a separate entity from the subdivision lot developers. Clearly, there is no dedication or identification on the plat that the Tract A/Golf Course Property is common area for the owners of property within the subdivision. Further, the subdivision lot developer and their successors, the individual lot owners, were on notice through the CCRs that the golf course was not common area or common open space for the benefit of the lot owners. Rather, the lot owners acknowledge through the CCRs the existence of a private golf course for the use and enjoyment of the members of the private golf club. There is no documented expectation that the lot owners have any legal or equitable interest in the Tract A/Golf Course Property.

The 1986 Developer's Agreement (Tab D) approved by the Board of County Commissioners on February 26, 1986 incorporated the November 18, 1985 Preliminary Subdivision Plan conditions of approval (Tab C). That 1986 Developer's Agreement recognizes that the conditions shall control all future development of the property "(unless said conditions of approval are amended or modified by Orange County".

The 1986 Developer's Agreement, Condition 5, provides: "The applicant shall enter into a Developer's Agreement with the County to address ownership and maintenance of all common private facilities," The "Developer's Agreement - Common Private Facilities" was approved by the Board of County Commissioners on July 21, 1986[10]. That Development Agreement was executed by "Windermere Lakes, Ltd." who was not the owner of the Golf Course Property. Further, the "Property" subject to that Developer's Agreement is Lots 1 123 of "Butler Bay Unit 3" not the Tract A/ Golf Course Property. The Tract A/Golf Course Property by the terms of that 1986 Developer's Agreement is not "common private facilities."

In regards to open space, the Tract A/Golf Course Property is zoned R-CE-C. Section 38-556[11], requires 40% of each lot to be pervious surface. Section 38-557[12],Common Open Space, Subsection (a) refers to Chapter 24 for open space regulations. Section 24-29(e)[13] provides, that for residential cluster districts, when the density is less than or equal to 1 unit per acre, there is no common open space required. Section 24-26[14], Definitions, states "Common Open Space" shall mean a type of open space designed and intended for the use or enjoymel\t of occupants of a project. That Section also defines "Residential Private Open Space" to include

[10] Tab L. Recorded at OR Book 3808, Page 1466.
[11] Tab M.
[12] Tab N.
[13] Tab 0.
[14] Tab P.

front, rear and side yards excluding parcel driveways and structures. Both common open space and residential private open space are included as part of the definition of "Open Space."

Section 24-2'11[5], Legislative findings, at Subsection (e) states:

> "Consistency in the definition of open space and the provisions for open space are necessary to balance between private property rights and the protection of the public health, safety and welfare."

Section 24-28[16], Applicability, proviges, in part, that the open space standards are minimum standards, "however, an applicant may provide a greater percentage of open space but a greater percentage of open space will not be required by the county." Section 24-30[17], Open Space Design Guidelines, subsection (e), Ownership and Maintenance, states common open space areas shall be the responsibility of a property owners' association or a mandatory homeowner's association. In Butler Bay Unit 3, this responsibility is addressed through the July 21, 1986 "Developer's Agreement - Common Private Facilities" (Tab L), which does not include the Tract A/Golf Course Property.

Notwithstanding the foregoing, in 1985 the standard for common open space was 25%. Attached as Tab T is a chart prepared by Poulos and Bennett making clear that the owners' proposed revision to Tract A/Golf Course Property within the Cluster Plan retains <u>total</u> Butler Bay Cluster Plan gross common open space at 25%.

Notwithstanding the foregoing, the 1985 approved Cluster Plan (Tab A) does not define the term "Gross Open Space". As defined by the Orange County Code, "Open Space" includes "Residential Private Open Space" and "Common Open Space". In the 1985 Cluster Plan, reference is made to having 38% '4Gross Open Space" within the Butler Bay Cluster Plan. Attached as Tab U is a chart prepared by Poulos and Bennett which establishes that the total Butler Bay Cluster Plan open space (calculated utilizing both common open space and residential open space) after redevelopment of Tract A to 95 lots will be 45.3% of the total area. For just the 155 acres within Tract A after redevelopment to 95 lots the open space will be 60.6%.

<u>CONCLUSION</u>

Under the current Orange County Code there is no common open space requirements for an R-CE-C project when density is less than or equal to 1 unit per acre. The County, by releasing the development rights for 95 units back to the Tract A/Golf Course Property,

[15] Tab Q.
[16] TabR.
[17] Tab S.

maintains an overall density .within the Butler Bay Cluster Plan of 1 unit per one acre in full compliance with County Code.

Even if the old standard of 25% common open space was applied to the request for 95 units on the Golf Course Property, the overall common open space within the Butler Bay Cluster Plan will remain at 25% common open space, also fully compliant with the County Code.

In the event that the 38% "gross open space" as listed in the original 1985 Butler Bay Cluster Plan is interpreted to apply to the current cluster plan modification request, the resulting modified Butler Bay Cluster Plan, with 95 units assigned to the Tract A/Golf Course Property, will exceed the 38% gross open space, also fully compliant with the County Code.

This memorandum establishes that the release of the development rights back to the Tract A/Golf Course Property owner through the vacation of the plat as applicable to Tract A/Golf Course Property can be accomplished in compliance with the open space standards.

A

4. DONALD ARNOLD, request for a Change in Zoning Classification from A-1 to R-CE-C on property which is located 1/10 mile North of intersection of Clarcona-Ocoee Road and Hiawassee Road.
(NE¼ of SE¼ 35-21-28 Tract Size: 15.3 acres District #2)

Ed Williams, Planning Director, gave a staff report (Exhibit #1 of the Zoning Department Evidence File). The R-CE Cluster District would be appropriate in this location, however, submitted plans do not meet the requirements of the Cluster Plan. Staff recommended denial, as submitted.

Sharon Smith, Zoning Director, advised the Board that the applicant had requested the hearing be continued for one month for further study.

A motion was made by Joe Boogaart, seconded by Nancy Weber and unanimously carried to continue the hearing to March 21, 1985 for further study.

5. 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
SE¼ 6-23-28
W½ 7-23-28
E3/4 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.

Bob Canter of Dyer, Riddle, Mills & Precourt, Inc., 1505 E. Colonial Drive, was present representing the project and in agreement with the staff recommendation and conditions.

Jim Merchant, of Wauseon Drive, representing the Wauseon Home Owners Association, was present in opposition to the request due to traffic concerns. Mr. Merchant said that he had actually done a traffic count between the hours of 6:00 AM and 9:00 AM at the three way stop at McGuire and Park Ridge Roads. In that hour, 195 vehicles went through the interseciton. He added that this was not 'peak-traffic' time, as it becomes heavier between 7:15 AM and 8:15 AM due to the school traffic. Mr. Merchant also stated that the elemtary school in the area is already over capacity and a further hardship would be created on the current residents should the rezoning be approved.

A motion was made by Don Phillips, seconded by Linwood Billings and unanimously carried to approve the request, subject to the following staff conditions:

1. Perimeter lots abutting R-CE zoning shall be either one acre in size or 130 feet in lot width with 50 foot setback at perimeter line. Perimeter lots abutting unplatted R-CE Districts may be 110 feet at perimeter line with the provision of a minimum 35 foot landscaped buffer.

2. Minimum lot width at normal high water elevation shall be 110 feet. Lots 12, 20, 23, 24, 25, 30, 31, 42, 75 and 76, as submitted, are in non-conformance. This Board policy was adopted to resolve the high percentage of vegetation that could

potentially be ♦emoved as a result of the cumulative effect. of small lots on the lakesho;e.

3, All 1ots shall be platte4 outside all Consel:vation Areas,

4, A reverse swale system sball· be con♦ti;uc.ted on all lakefron"t lots, as dete♦ned by Engineering and Pollution Control;

5. Setbacks shall be:

a. 35 feet from right-of-way of E Drive", due to. the nature of it being.the principal north/south collector for the development.

b, -All. other lots as stip_ulated In the RCEc District:

I]"ront:	30 Eeet
Rear:	15 Feet
Side:	10 Feet
·side Street:	15 Fe♦t

6, .Additional rights-of-way for major streets.shall be dedicaced to Oca♦ge County as pe" Ai:ticle XXI.

7, Maxmum building height for all structures shall be 35 feet,

8. Development shall be In accorda♦ce with- the Cluster Plan· dated February ♦. 1985, the Zoning .Resolution, Subdivision Regulations, and the Shoreln♦ P♦otection Ordinance,

and further, made a find:f,♦g of consistency with the Growt♦ Management Policy.

13. COLUMBA MANAGEMENTCOLU, reque♦t fot a Change In Zoning·Classification from R-IA and C-1 to C-1 on ptop'erty which Is focated Northwest Corner Lee Road (St. Rd. 438)·and Adanson Street (Winter Fark).
(NE) . 3-22-2♦ ·Tract .Sizet 2,5 acres· District /12)

Ed Williams, Planning Dir♦ctor, .advised 'the Board ·that.the traffic situation had not yet been resolved, and recommended th♦ hearing be continued,

A motion.was made by Joe Jloogaalt♦ ·seconded by Chris .Bauer and unanimously carried. to continue the hearing to April 1♦, 1985 for further study,·

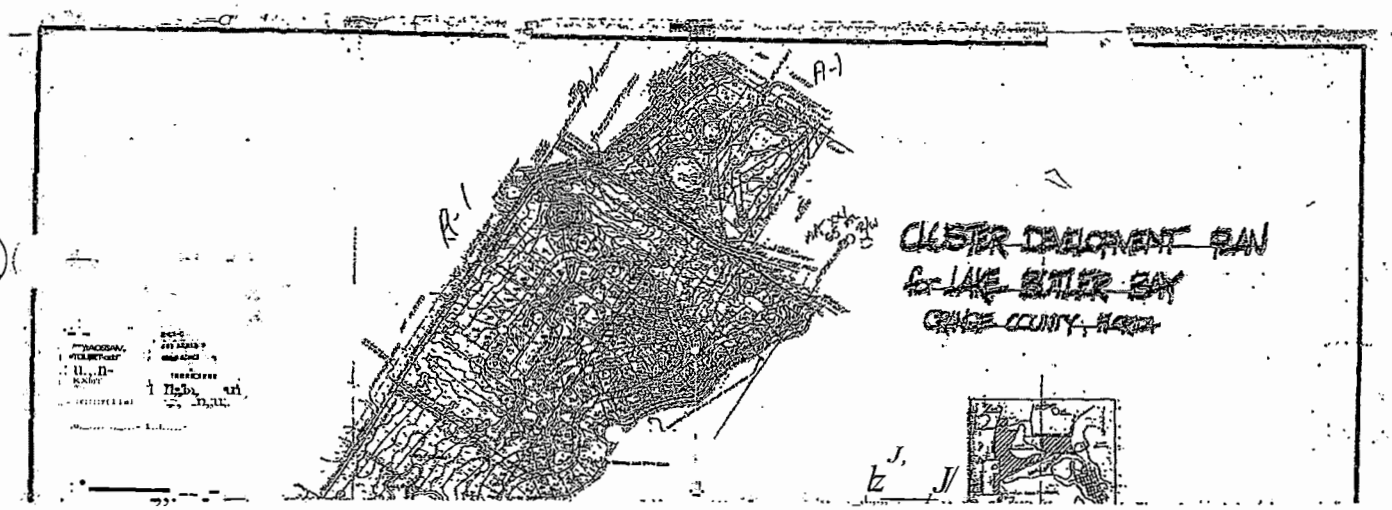
14. THOMAS B·. DRAGB JR,, request for a Change In·Zoning,Classification from R♦IA to C-1 on p-roperty which Is, located East side Fairview Avenue, 125 feet North of Fairbanks Avenue,
(SE; of SEL 3-22-29 ·Tract Size: ,50 X 142 District f2)-

Sharon Smith, zoning Director, advised the Board that the ·applicant had withdrawn the·request. by ♦etter dated·January 2r, ;985,

No acti.on was taken.·bl the Planning an♦ Zoning Commission,

18, JAMES H. WILLIAMS, request for a ♦hange In Zoning 91assif:f.cation from R-IA to C-2·on property which Is located North·side 35th Street, 150 .feet .East of South, Orange .Blossom Trail".
(NE; of ♦E; . 10♦23-79 Tract Size: .50 ♦ 135 · District 111)

Ed Williams, Planning _Dire♦tm:, gave a staff repo♦t (E♦hibit Ui.of tbe Zoning Department ,Evidence ·File) , The Future Land Use designat.io♦ for the area Is cOlllllllential. .1'.CollDercial use♦ are located· to tl)e west and south of the subject . property. Both have orientation to Orange Blossom Trail:· The subject propel;ty ... does not meet the minimum·lot width and lot size for-♦he C-2 District. Staff Is .concerned over the impacts _that would result· from the over"?rowding. of the property,


A-1
R-1
CLUSTER DEVELOPMENT PLAN
for LAKE BUTLER BAY
ORANGE COUNTY, FLORIDA

Zoning

P&Z Rec, 2/21/85

BearilJg fl7 Butler Bay Cluster

CoLJULJi.ssione Carter requested clarif cation of Planning & Zoning Commission

Continued Hearing 1/7 - Ed Spower, "Butler Bay Cluste.r", which was approlled with re.strictions.

Zoning Director Sharon Smith and Planning & Development Director Tracy Watson discussed the restrictions which were imposed for an acceptable plan in accordance with all County rules and regulations.

No further action was taken.

Meeting Adjourned

There being no further business, the Chairman adjourned the meeting.

ATTEST:

Thomas R. Locker
Clerk

lfu fu
Chairman

Mary Jo Garrison
Deputy Clerk

into. "<IOill liane "With r¢rised- s·tate: LIW· at}kd fi1. 'X.elffiiM'l. ino.om,ktenmes- arrd

ption_ll pt 1:le $.istiiw[oi/d <ie, •

.!\ii:. Jli_y 'Wei;,t membet> ·9 f the. ll,A..Jt:_;V-, B'.ooli4, wns piel-Bn-:t io ·n:o,swef ,q'Je,w.tm,s

from ·tho· <ommisi;Lors_.

Upon a motion- t;;t €omml'ssw1 Bax'te1·t s®olided·- by- C()mnrisskn1er 11raJ1. and

:rJisi,) wit!J. IIII p etj.t Cornj_jit;!!$. ;,:otirig ·;\. Qqro"!Qi n - 'Pri-'Iwiay W

a-bSeJlt, tlle B adopted fill. (]rdfu!m ·tn amend Al:tiel1;· /V, a;. delet<ltJeq

afiov.c:.

.(Qr.auiimce on file .in f.l)fl ¢fie ·;ft t islet to 1fo<J .qt \Irit"t ·l::(J.li)ll:is.sioh iit;

'Public: I'.1 ns-

I> in1i.rarr S'Ubdtvisicm Plan.

Butler Bay

titiCl!· ,11,is ,p n e.1at th?. Bot1r4 of <;;ounty :Gemmissi,o,ie;fll· w.9,t'9, llti14 hlfo.

hem·· to donsider the :P-teliminllily subdlmion ,Pllin fur Burl-er Bay on tha

fo.lw_g tten_bd pr<,perfy:-

'.fhat pa:r-t-of the 'lfeplat_of Met11aif PM'k. 3J or.dm;t: tu Flat- k Q, f"'lie, 18,,. ¢ the- Public Records_ of Orange County, .mor.l4!t! ¢e;_ iid as :lol!o\'1$:

Begin O)l fhe N'or-f_effi: rtg!it of. ',yey Iti!B I.?#le 4-YB, and tlte ·Jfouthe t corne.!' or t M BolU.j-owmwll Plcrk of"'Butlel.'- Bav' Jhut Cine;, fis rec»ildEld-·m Pfu,t .!;loe 11, $)Jt:lirugh_ 4 o:J Hie P bli f.ec;oi s y 9,,. $jl, t,ounty, 11lorida;; th.= I the ox.tneriy xigh1 o f lini:, of Par'k Ave. $A.$- fhl_ 'tfomi-da1ly· line of satd B:µtler Bay Unit One N.aoo4t-4-o-iw,. 395.!IO fe 't; thenee continue· along) said boun:clliry line 1:lJli. N.81054.12·6'1 w 3'-0ll-,M: ¢,1ef'1 thenca lsav.Ltig. sllid boundary gf Butle1• Bll.y Unit One \ill N,-ft2º ·5J'11:"E, 6SS-,01 fuetJ tb,¢il1ce- N,01°11 211E. 13(10.86 .feet to the· SouJ 11ly· l' gM, \lcy' line of Wlndel'J1leile Road; thence thrpt11.;h the to'llo:w,ing: C5U11,Ell im distences r.un. al ng: the oi;therly right of. -way· Une <f' aid WinqeJ'melle: Road, thimce fl.,88?38'104"'L 4 92 feet;. thence S_Bltd all'3l "1 L 1l distnnce of 519.4.il fe.et to the pbint of cul'.v:nture of a tll1lve· coneave Soutbe-rly· an(l. having- a :radiut:l 0E 613. :U foet with a cenf;mu- ang'le of Cl º a6'11n; thence Easterly ala."ig. the a-tc· of smd cur¥e lr3c27 feet \0 tlie point of a r vexse c_urve concave Nort r:tY ·an J)avirig· ;; r;+-df,$ o!' 811L9S feet with:. a ce;n'trcl angle of 0Z-º 54.!0{}"; t nce Easiro:Jy al(?ng' the arc of flldd curve· 117.20 .feet to the· p obt of tangency:; thence S,87.°10'20"E. a distance of 201Hf.10 feet- to o -pojnf on the Westerly right of way of the Seaboard Coast Line Railroad; thence lea:vin·g the Sou'th right of way of Windermere Road, rmi lr.10'27'59"W, alollg: said l)'este lr right of way. 519_.45 *feet* to. tne- point of curvatui-e of a curve 11oncave Sontheast y and ,having a lc'ar.ius of 1,490:·.9!! feet; thimce ·S0.uth1ve.ste_rly $5,.07 feet lll.long: the arc of said curve through a _central an,rle of 03°16'09" 40- a poiht. on said. curvia. and also being, ·the Northeast x>ner of an Orange. Cowrty SchOQl Property as :zeco'rded. in Official Recol:'d Book 1708, Pages 267· and 268 of Ute. Public Recol'ds of Orange· Courit:y, Florida-;. thence leaving said Seaboard Coast f4.!ne R.llill'oad ru.n .ong" mud scho.ol pr perty bo dary iine through_ the fajlow_fug ci) ses l[,Jd distances; thence N.87°!l/23 ¼W. ·510.56 feet (5'["0.00 fee:t per deed),; hence, S.J4°ta·-401'W,· 400.0(1 _feet; thence S, l804,0'17."E. S10,35 feet fo tile Sauthwest COf.ner of said school propei·ty and sale\ poin-t being 'Ofl the Northetly right cf way of -Park Ave.; thence through the :fQllowi.'lg courses aud dista.nces rm; alol·g said No the.rly right of wa'!{ 1iner- tpence S. 60° 38'17"\". 270.9_9' feet to: tho- point i;if ·curi"ature of a cu,rve ,;onc:ve Northe.rly and having a ,:.adfos of 267,52· feat; thence West-erly 187.61 reej; along the are of siJJd c vll tJ.nog4 central angll of 4!º44·33u to point of ton·gency;. thence N.77037':LO"W. tilt_60 feet to .the point of curvatm:-e of a curve concave s·outherly ·and having· ii radius of 853.,51 feet; thence Westerly 641,.61 feet il.long the al'c of said CUtVe thl'Olligfi a central angle,· 43oo4·:w· to the point Of tangency, ce S.59°1J!'20nw·. 588.44 ·f t fu the point a beginning-, g,mtaining 10:J.956. acre.s, bject to Easements !!!!!i aeso:ictions of "Record. ('l,JO!'E! Legal reflects peaceful ocClup-e.tion for Westerly- property lfo.e)..

001122

orr-lp. wtH

·eomme:ncing at the Not>fheast c<lrilfir:of the ·Nodhwest 1/4 <If Section 7, ·Tow,uscnip· 2a So)ith, g 28' t. Wi\n'ge' eou ff., sFiotick", ·tun t 1'1 So20 21M;·w,, $,g tne · st Une elUi#d N" µii st Jt 9.fi1.-ill .feet to t - .No1,t11-er:r right·Of wa,1 jlqe _of .P8i"ltA-yenue; "tbef\Ce un · s·.s oa1z1ww. 15-. feet, !!Jon; s/dd Northe,.ly .1';fgM <f. way-::tine fo, the .fQint nf Beginning :2t Roiljt :of cue-v.ae. of a cttrve ·oon ave ·Npl'therly havi:1W. a l)aditrs- ot 16&1" 37" fem and- a central. an le o Of? ·19'00"·1 ·mence l'tm ·Sou.tli#eatet- along ·the ar·0 of eaid <ttt1Wc 21Sc r.3 feet. tci t point Cif tgene?y_; theii.ee S.,fnl° V20 W, along· 6 d ·t1ght t;I Wry)me 2.90$.,()'1 feet.t 11/ellce, 3. ;l0.3jlcl !.Jffe ; J.0.0Q ·f; t nce S:. /\$O oil ZO". -..iong aid)li'ghi 91 Vay i- ffl,QQ ;i' t-to tbe nt tlini;I of :existuig- cenall thence a:vi11g a:(mied 'No,tthfuly· right of wny line,.. n m w.1505.9,40nW, -elo.ng s w t ellnal mm'ter.line: 11!Sl fe-et i.nl)re :of less fo t ·ivatei Mg_e-.of: Lake <?rescimt) t'hen il'n.' Eart-e ly &lo.n. &aid wate£s. e4'g., 1:000 -eat· more qr Jess -t-bb.e West :of-afyresaid. Se64on 'i; thence· r n. N. 02°S2! 8ul3: rig sidd -le%t .Jinc' J.10 feet Jnt>fe i,· le$& t9 th NortW.e!>t co er. :ot the. South 1/1: of t Nori"h 1/ll Qi' the Nol'tbwe.ll't 114 Of' s aill Sectjon i. tbenee i?Ql- S. 87°54'26nE, along'- t ® NQ-rtli- Jme, o f safll Soutll. 1/2, of tlie NGrth 1/2· of· the North1vest 1/4 a distance of-191-0'.JlO ,feet 4o t11e- SQT,ttlnvest rnei'· o£ 'the Bast 1/2 of. the North 1/2 of the. '.Nort-he t l/4. of tlie Northwmrt· ·l/4 of said Seotiim 7; then-c.e e-0Jifin-ae . ,!f7064'26"E. 312 ·.20 feet to -point. 395,90 feet Jt ·;1l0041 !40 1W. fi,9in- lhW Po4i,t of Beginning; I:! ee. tµh_ S; 0041 40 "E, >95. 90 et to he Pofut of Begi:n@lg.

t?inir;g therein \ill.-0- Mre-s. mo!·- Of less..

T-OGE'I'H R WLTH'

FUr' 11 Poh:it or Beginning begin lii· the S0u.'tn1vest ooriier. Ilf·the.- N.ot,tMast .l.ft of S,:mtfon 12-, ToW'llship ZJI Sou1;lh Range. 'f'l .East, Orai1 County, Ji1otilia; s d P.Oi.i" ei»g the. Sbutlfaeirt eornel! of Butfoi-" Bai' {}mt 'fWO as: i cpfd&d in)?lat Bok 113, Pages 5g and 60 of the rubliti Rel;i>l'ds of Otan.ge Ciro , FJQnd:r, and snid point also being a point on the $qu:Uilil ly iiig-1,t; of' 1vey l?np Qf Pa1•k_Avenue d the _point c,f eurvat\11'e f' 'ft eUfV,(I'· COncaye. Hor.thmis.wly and having- ti ,aoo.oo- foot radius: thel';[Ca through· the followfng <fources and distances along ,said Southerly boundaq of Butlel' .Bay ·Unit Two; :run Nortbenstel'l;Y· 322.31 -feet itlot.Jg tlfo i! ¢ stii4 etfr</ 'thl! ugll, a central angt¢ ·tjl: 23° 05'0Z"' to the. point of t;in ncy; tenee lf,&!0000)0Q'E; ;1119.82- feet· the point of c:urv-atul'e a£· a cul'ye con- S01,1e aste.it,tY ap.d having a 740.0Q foot 'l.'adl,us; thence Nor_tbell,lltterly 3 6. lly ·te 11long_ the' arc ·of said .ve througll a (lentrai angle of 01'(lll7-" to the .JJQm-t of tang .ney; thence s.a7042!S3"E. 656 .69 :feef.t-0, the polltt ·of cuw tttre of ·:n'itU-v.e concave North1vesterly rd havin_g" il 'Tgll:t:.-a .fu9t, ra us; tlienee -,ei'l.y 1 .99 feet alcng: the ar of. srod CIII'Ve timol.lgh_ a cein'fraL atigle-.o(01Q!51.11, to the point of tangency; ·thenqe s. 0124s·tl:;, 21a.i;t·re1; .to ·a_.Pl>iiit·on tbe :1-forlherly right of way of I\'f_tealf lLo-il-l ai ±_?mprded in O;fflpfal Eeeurd Book 1098,. ·Page 15ll of the. F:ubllc Record of Orange unt Florida; thence lee.vmg said S'QUtliei,ly boundat>y Ime l'Un S, o9000!ZOIW,. !659. 4j feet al.eng said ·:right of t9il.)(of Metcialf· Rbad, tfi-enee s.,21°69'40 11W. 60.0JJ fl/-1 theJt lil·,o8° 0lt'ZU'\t, 2411,4T. £ ·: thetl-ee Jeaym . said Ml"itcalf Rbad ft:"g)i- of" m\f. line f;µh_ S·:51°49'110")\1. ZO, 6 i f eft ·thence_: S, <f9 2'00!W ·: lti7. &; fe9t to· Pi so.u'theat J'il©! ,of· a Q.JlO: £0qt wi<t: .road. l'ight of WQI a[_ r.MO):'ded. i µ Official Rol:}:fO: Bog.k ·l.2fla)'QQfd 427- ·of {[t;e- ·Public .Reeords f. .O.tnge Coun.ty, ¥lorl:d.ar tntlE!_ fi.long .th b(llllldaey of said· ad rlg)rl o(way m n N,2 5'0:0!'V?·· 30;00' feet,;·,uwnece iU;o°92'oo"w, 43,lUIS. feet, thenee .s,iwoss100' E. a.0:.110 ·teeti 'to,·the- Sou.th-west <)o:rtiet' of said right. 0£ ,ray; the.Me' leav:ihl) sid:d ri_ght df way :run .S. S<?Oi 'oo"w. 435; 16: feet to the waws- edge .of. Llike Rutlen: Uienae 'through tlJe fqllowfng. urses anq di.Slll;l(Ce. Jlo,l2-.g Jhe ws.fe:fS dge l .1"lll. Sc:lt°22' W W, 61,31 fuet;: 'thenile S,q S2.:l43-'Sl"tl. l6;4•.i 7 feet; thence S.1)2Q4.Ll 2l.'W, 1.i .3:l 'ffl1let; . $ciree; ,-?1<" ·•ll ™M. Ifil.1IS feeti th ee ·s ..w0(&• 4/.tlW, ·n:il. f.'t ·feet_; the11ee: S·:o$0Z.lll 20 ™W l20', !V. fer;tJ theill.10' S•. lll,::,l,li' 5!IW, !JZ.l!; feet;.. 'lhen<ltJ S,J:'(01fi l1 1)$', l)3:, f e.t; fhenrui S.2'6·4.4·so"B. _58,;4:l feet; th. e S."68°U'Oll' . :l22.Z9 .fe!3t,;. thencte S,510l8"1.0:"B. 12:6.'16 feet; thence- S.450-f636.11 E; lZS·.9-7 feet.;: thenee $.,,33o33·:zr·B. ULOS' feet; th'czme. ·s_.oS.031i11'11E, 139.0Ir feetJ 'thence S, Jl1° 17-IO 1W H:t.30 fe t1 1l\ - s-.os.°36:'%l"W, 107.4-2 feet; taanae s. Ol1'16"W;, is-hµ: fe t; Uie,n.<e .S. i:QP{O'fir":W- '1:lJ,.ri f<iel, fllen.c S: ·1.Q!.r.30"W; lp'_.J\) feet: til@.ee. $_.119,730"\V. 1)6:.Glf h tll_e)l jS".ll6 U'46'1E, 4.J,S- fuet; thenae. N.4So4'8;l111E. 6th-all fue.t.; 'the4ce :i_l .liSP27'149 1E. .:l3645 feet: thence leavmg· said vmtera iid. run S,,31\o2V 2i "W, lo.7-;5-0' feet- to the· Northm!Ly. jlght of ·way· line of Wet Lake 8-u-tie:t' a(),; thenoo ·i,uolig saj"d ?foriherly- -gUt - war_line r N,.g3047 1HP 1W, '18.61! ,feet fo the point qf ellll'Vitt:µ11e a cur coi,cave: f>ou:theasterly and having l- l'lO·. 88 foot

:fo,dN$f tM◆◆◆ \v.etteHy M◆Or21 feet al®If fht; are of Sll◁ "eiji:◆ "(AN◆lgll
L ¢,eDJ'lll..$tli:l. pf 21°S540ff to the point of-t(\rrgl]lioy; fm◆nce. S.1.4◆.W
94,"W. ◆9T\96 ,fee\ to- the -point of· c1lrvatur◆ 9 l 't curv◆ CQ,nd'he North1vcsterly
M d haaving a ¾10, 76' foot :imdius: thence Southlvesterly 17. 7B◦ feet along
the a:o of said· c!mu$◆ thrcr<gh a central angle of .02928 '46'' to a point on
free W◆st line of tne .East 1/2 of .fhe Southwest .1/4 of sala Section .LU
{'eijcec li;a"4◆ *aid f'{◆erJy 'il_ght of 'lay from a tange◆t t;e;uh1g of
8. ?(6°45'1O'W. :tun i-.JQ94U'1S'E. 4036,12 fu◆t n_orig said_ West line of lhc
.East 1/2 'Of the Southwest .'1/4 of said. Section '12 to. the Nol'lthwest corne1·
·Of the Nor.fhea◆t 1/4 of ha- Sou◆west 1/4 of .Section '12 lttid being 'a f)Qint
'on the; Sl:nil-herly right of way line of. Lake Butler Blvd. .and also b'eing
th◆ Sotlthw.est corner of Lnite Buyn:a" Estates lls recoi·dded in Plat Mdck 3,
Pa. t;5, d(t1"10: Pupl(c. Record◆ of Orange -County; . .Floridlt, the◆ce. S 8l°
P<11'1HE 'WEI .20 fe◆t .along the tlouthetly ·bounda_fy Of Lake Buyn◆k fo the
Poil),r' of .Beginning.
Gont(lining therein 59.6027 acr¢-s; srf'bjoot to;easeroents and rest;rwilons of
l'e®l.'d.
:r:OGBTHEit WtiH
Butler Ilay Unit Twol Plat· Bobk 1:l, l?(l◆es ◆6 0
RO2 s Point of Beginning, begin at tlle l3onthV:est C.)hl1' of the· t'o-1'1leAst
1/4 e◆ S'ection 12, Town.ship ◆8 Still.th, Range· 1'1 Ea◆sf, Olaaa)'e, Co.luify,
m()Me_: thence N.010'395.7'B- 1291. 88 feet· along the West Jina ur· slfrl
l/To>_fneast 1/4 e◆D being the ◆s t b9und◆y pne of take Buynak Es.tates
as r a ◆ e d in Rt◆ }look 3, Plige 115 of the Pl).blicl Reoolds o(9l'ange
County,. Florida; to tlle Northeast corner of· the Sq.uiheas.f 1(4 of Ute
North\vest l.J4 of said. /3ection 12- thence N.28°5.029 '' E 41f85f feet; then·ce
N.32.04:fll0'E, 474◆20 feet to the waters ed,, .of. Lake. Cresl:lent; thence run
◆ong the water.s edge tlroug)'.! the followirl-g courses'; then.cc S 44.0t◆53"
· lll 69,12 feet; thence S· 28°25'38"E 120.56 fue-t; thence· S 64000'10" E 1'19. 11
f◆et-; fhomoq_ S 23.0500t,"E 161.45 ;feet; tbenc¢.e N 68P2434"E 11(1·.Zl feet;
tp.ence· S 5.503.fmnE 2.73,80 feet; (}tence $4301536.'E 265.51· feet; thence
S 5go50·14"B 'U5.<ll feet; tbence· S 69°45'31" I 246.979 tset.; thencoi S ·45o4lt
$6ll I Gl .02 feet to a pefnt on the· eentef _fne o(un exlstin_g c,rnal also
ba.ing the- Northweste:l;ly line of Lot. 102 of "Butlell Bay Unit One as le<lDrded
·in Bll.:t Book 11, Pages 92;13 and 94 of the· Public Records of Orange
C.o◆tlty, Flo:dda; thence s 15°59'40"E 1010, 84 feet alorig the Westc'fly line
ht. said Butler BllY Unit One to a point dh the Nrirthcrly right of way· line
of :Park Avenue-; thence S 6S0¿0120" W t6"1. lll feet llong-_ said r_ight of way
Una; ·thence N 88°12'4ll" W 239.34 fee◆ to the point- of curvature. of a
pru:ve concave Northwesterly and ha◆,ing a 7651. 38 "foot J-adlUs; thence
Wea'terly 199,-89 feet along the arc: of srud cnrwe through a centritl angle
oJHm.02951" to tlie point Of tangencx; thence N 8104-tll3" lt' jl56,69 feet
to 'the point of curvature of a curve ·col'cave Sou.theallterly and havipg' e
"l-t;CO foot r.adius; llen◆e Southwesterly 3·26.Sf 'f.et a)ong the arc ·of ◆◆d
eyJlY8 tiplo,ugh a central angle of 25"17'071' to the point of tangen,cy;
tlle)lee $ 67'000011 W rag, Bl' feet lo the poin,J of cu:v-atUre. of 'll CUMe
conceve Northwestrn:ly- and having a 800.00 foot radius-; thence Soutlneste.cly
3l2 ·:31 feet along th(1 ·1lc of suid cur.ve through li centr.act angle of 23'·
05lO'J" to the P9lnt of .Beginning;
C-olitjllhing therejn 63.2.832 acrts?, $;dw◆h_ t0 ◆tpe1".Jnts .·◆d r◆◆trictlon,s
of l..e®rii..
T.0.GE'HER, Wf.lH
A "parcel of la'nd ◆1tuate. in Sea<'U 1 mtl U. _Jownstip- 2c :south, Range 2l·
Ilentt., b1·ange County, "Florida, clescdbed as follow◆ ·
l'Qr a Point of Beginning begin at the Southeast corner of the. Not·theast l/4
of· fille Northwest 1/4 of said Section: 12 , and said point being. the Nodheast
_corndt .of Lake :Suvrtak Estates as recorded Ill Plat Book" 3, Pege 115 of·
·(ltc POblllo Re◆o;tidl 4 f 0:tange CO_unly , Florjqa;- thence N.8◆ °11'43" W
'l2ll1'. 38 leet along the Nol·th boundary line ot said Lake Buynnk- Estates
aa<f tlll) South line of the Northeast .l/4 of the N'ortli.west 1/4 of said
Section l2 to tlle No:tth.flest corner of' Lake Buy-nak Estates and said
point also being the Esskn1Y. right of l'lay Jloe of McKinnon ·Road· and a
{-POlt on a cuNe eoqucave Northwesterly and ha.Ying a ·118.10 foot :radius.;
t)Jbm a tangent ◆,earihg N. 43°26'Q5"E. thence th,Lough the follQ◆ng tzAUses
®.d distnnees ajong said- Easterly right of way .run Nor:thenstetly 8'6.01
;feel along the arc: of said ,curve through a cenfral angle of 4i°45'2l" to
the _point of tangency;thenee N: 0-1°.J040 ·, B, 1230.Qll feet to s point on
the. NOrth line of said ◆c.tion u., thence N: 02"1.9'14" E. 1200.00 feet;
tMn.4e- .leaving said rig/:l.t of way Jne run S. Sll<40.'l6'E, Hll-, D feet to a
point of curvature of a cut've cqmcave S01,1.tleastert'y and having- a ·411. 6'
fi(jut; rii4,lus-; tbenpe. from a ◆angent bearing of N- 'l&°30'0{lnB. :rJun
Nolt.hea◆te◆ly _961.l◆ feet along the arc Qf said curve tlrl>11gh, a <entral
mJgle [if ;1.'3".5).'52" to the point of tangen_ey; th<nCe S. 2l°3T'08" E:
12S,,52, feet to. the point of ·curvature of' a curve concave Northeasterly

and naving a 0.-0.0- fqot .rl!di ; t)lenc·e .Ei!s1!n'hr °Sq|;. :l'iiet alonf' the· r¢e. of sai9. eut>dce hre4g1t a.. ttt:i-at -angle Q{ 9ft'OOf.JP" .W tne p9in.t qf a. <t1mg<rW\$ c_.-· s»Maye, N.o!"'tn-west!)rly··ari li vmg- 1 -410: !)!): f.Qet radius;. tlie.n Jiforthe:mn.s;ly zttQ.,()d "feet along the ar trf $rod ¢mV13" through a eentrhl. angle -of; M>22'S2" to a. pofut; thlmce- fttoul a tangent bet¢ng' of bL 3!80 '® E :tun S, 52ll00100P E. 4QQ,OO· feet to. the· ,vaten;: dl§ll; 0£ .Lat-' ht 0. _(ng li,t cr,.m.tow· ¢eff-p<il:\ of lo:ll, . :iee-t· (<h'l$ge Oo ty Datu.m);:. .1:)lenee Alonft t wate s ed,ge· .al}d tlj.e _102,8 foot. contour ele.vatj.on .tfil'oug-h the followln-g -c,ours d @tan\?. , r - thenee. S.]S° 41'44·, 1. 141/:0ll fe.eil th ce S-. w'oi'4'J,9" W. S1 1 2 :feet: tlience N, 81°43'55" W. ·1.i 'll5"feet thence· S. 3-4P05"8·" \Y. 1c.J!..62 feet; thence: s. 2.5°2l.J'52."-E, 99·,m; feett thence. s. V.5"34'55"£. 146 :15 feet; thence s, n°33'42 H E, ll Ot,98 f.e.t;. thence s. &{° 1or.w 111. 107.24 ·feeati tf¢en,ce_ s, }l3 o ia1 " \\'. -s: p feet; t nke s J:.J ll 'l 3"W• .-13: -6 ·feeti thence - M "'54'4l -W. i.r'0,81. feet; fhonee· S 2533- 1 Q" W 1;7 ,lilt fye_t; then<:a -S. 16;';41)149'. i-a. 74 fee-ti the110e .s. '70.Qi3'1'f' II\ .9&...5f feet, thenee 2. 3l"'l:l'24" E. \l7 .63 feet: .tb.ance .lea"lillig snud 1Ell1:1ll) .ellge. ®J f 102.8" eont,,l11r elevation r n S. <>31:zou w, 18-JtO feet to the Nort11west ·001'{le> of l.e5f .1:t3 of But!ei-' -Bay Unil 'fw'o as ·:reoor.iied' ill ·Plat Book 13, 1'1¢g5" 51 -a'ld t f;lle Puhtk? -CtQ.cdS o£ OL'ge Co'llrrlf,, Flcriiida; ·fli con:ijnue S' S.2"43'20" "(, 414.26 feet along the Nor.thwe erly b'oundaey line· of sai4.13ut1e1• Ray. Ll,nit l'wo:, then-ce eontinua along said :B-utie1 Bay tlni.t Tw¢y boundaMy, "$, 28'41m1.t9'11'. 468.57 et ro tne ▷"oinf of E-eginn"ing.-

C.Ontninllig therein- .l!1L ccg ac'l'as. $'Ubject w eos'ement -and Pe:Strictiona of record-.

TC¥lETitER WI'I'IJ

A pa.reel of land ®te.in· Se tion I', Tow $ip. 2 South, Raug;i 21 Eas.t, Or.'J]lge Qoun'ty·, F,Jprfda., dei,erib,ed; ml follawiu

Colirinence· at thu Souflieast M:i:ner of the Noi>.flieasf. 1/4. of the Nd:tthwllst 1/4 of Seuti U, and· said point heihg on tlie Ni;ilitneast ®rne:c- ¢Yf Lake-Jtu\mek]tstaro?, as recorded in Piaf Book 3 , l'ag-e 115 of tlie Publie-l)eeo:r4s Q;i'i;hirw ·coupty, Flo1id13,; then!: 1:f.89 ' W4 3 W. ·l'. U,.3ll'"teErl: CD§ the N1)t bonm:lary .line of said take- Bicy: Ilsi;ates and' the South ·nne of the NQrtheast l/4 of the .Northwest· U4 of s,aid Seetion 12-to: the Northwest corhe'l'• of Lake Btiynak .Estates anli said ▷oi.ht" also beuitt tne ·.Easterly right tif way line of McK:inl'on. Road and a pmnt on : cuJve concave Northwesterly and havfo.{t a 118.10 foot radius; frem a 1;an_gm1 bearing f N.43_°26'06'll. thence through the following courses and dlstimces along said Easterly right of way, r_un. Northeastel'ly 66.1>7" feet m(?ng the SJc of said cu\v.e through, a, eentl'al apgle or 41"45'26" t;:r the pomt of tllliig,i;;ncy-r ·thence N.01°40'40"E. 12:m.rui-·feet to a :p.oint 6n the. NOJ.'th -line ot· said. S-ection 12; thence N, o<? 19' 1411E 1:200, 00 ·feet for a Po-mt 01 ,l3 mngt t e ci>pnnile along said ctg-M of 1my line l'Un Na OZ<'}JL'H"E ▷ lS3_J'-U fo_et the pofnt of curvature of a curve concave southeas-forly -alld ha'l/ing. i 3M, 1l: foot -radius; thence Northeasterly 264. 02 f et alOllo{t the ;mo 9 f ?.ai'd _eurve -through a central. angle ?f 41"0.6'29" to the, point of:-tangenq , ilienee N,43°2:5'43"E. !307.ti5 feet·to the point· of cu:i:vature of. a eu!v.e,: concnve .Southeasterl.y and hnv.ing a 3il!, 1 :fl>ot ra,qfus ; :the:nee ortn.ea$fu;i:ly 26ih 5$ feet along the .axe of said Cl/.1'Vll ttu"?ug1i" a C entral angle- of 40" 56'16""f 9 J)ie point of tangerrqy; tl'leruie. S,ll ,° .1Ufll "E, 1035.51). foet, to· tlt p t qf .:;utvature- of a . u.rve _conC;)yQ Nprth_te1•ly "r he;v1ng l 1181. Ojf-1.bo} rauius; henae Ni::irtheQstel?l;Y .3.4l,29 feet ;along, tb:e nucc of. said ourv() tltrough a central. angle of +6' JW.26" to !)oint on said eur.ve; te:nce leaving ,said right of ·way'"lme from n t.i.n nt ti.eating of' N-.'14 a4'03"E. ·rUh S, .(J1°4S.'56"W. 7,91 fu t io the· ort)l lin of the S):ii;fast l/4 of· ti.on 1t Township 23 .So.uth Ran@ 27 st, Ommge County, _'Flo¢daJ thence S0,S8"12'2&"E. ji9,$. .feet along sai4 North ili;1e of fhe. Southeast- l/4 to- .Ule -lat.s dge. of C1'G$OOt illso \)eing a wnjour elevation qf L0-2,ll· f et {O:eange Qo nty D;\tum):· thence a)ong- Ute -waters edge·. and, the l02.8 foot ·OOntour· elevlrtion_ ougll fn<1 following oo1ll'ses and aislancesr 11un .thene-e $-, l-8'5111111,"\y,. SG,96' feet; thence" run: il.00 4l'461'W. UO.i9 foet; thel'lctl s·, aJ'"$4!53''W,· 11'1'61 feet-{ 'Fh13nce· S.lt8 42:'40"W, 170.M "fi!et; th"el)de S', H ° 25'1U!W, 1.11. Tei:ft tli(!l) e :.2S"3.011' W. a:i..11 .fliet; then!)l:l· s:·ll8' 50'41'W. 131,8:6' feEitf t!;L'enee S-1.6?:U'M'1W·, ·14:g;37 feet; th$1¢e S:.03.0'44'l 8"W: 14:f'.86 fe h t'hel,\ce 'S..1::i.-"251WW, iM,86 feet; thence s., a:°St !.4"W, 193-9 fee{; then{; $.•;S00.0'14.HW. f'l6 ia. feet; thence S.36."IIPiil"W· 10·6.47 feat;, thence: S,.21! 49'-U "iv. t.J2.07 fee.t·· 'thence· leavmg' slud water.s ltdlle· and: 10!1;.8 aontom, elevaffu run· Na 52'-0.01.00'W, 4'00,00 feet io a .[Q'fnt on, n eutv..e eoncave Nmtthwesterly. and having; Alff ,10 f®t r{tdi.US 'Uie¡.i cC from a tangent elll'¥!g' b f N.; $'P o<1,JOO'E- ;tun So_utc1iw;tlily 200QQ. f.eet s,lortg the nre of said cqrve· ,throng:h a cenP,-a1, angle of 242'S21' t9. the p_cit <µ.a)lLJ;lP}lnd 9-uvve CQ.ilc ve NorthP/.!stei•l;y' ·.mi.t ha'l'ing a rll.dius ·of 230. 00 .f¢ei:;. .fhen<?e Northw:estei'ly 361.RS feet· along the lll'c of ·said oulive th:i'ough a:central

an 11[0°00-00'11 w· are pqinJ -of trang-eney;. -tliMil.e. .:'1 ' ;t;1 oll"W·
J.M).:ai· f et ! ·ml'f, poil\.t. of ew,'yatur <if a cm conl?air.e Sou-therfy·.
Wl.d It!)..,'fn1t a· ;r-q ·a/ l,6?· t; theiie S6u. tedy \\GL9.J <feet
-along th al< i,f' $'8<1 eu:i: tfUt® a \?eim:al angli} of· 133"52152" to the
int of tangenay1 tn nce fr.om a tangent oe n, JiLI3"30'00"E. l'nn
N. 819.40!46" W :i-40,00 feet to. tlle Point of 'Beginning.
·ct»j'fi!ining therein 76.fi169 acl'es.;
°!:lilbjiet tn :ease.inents Qnd restri(!tions "J.lec.o;t<t
No'tS: T M .t,oll?1vtng section was pl'E>pll.i'lld by; otliers·
l'b.ll.t part of the ·south 1/2 of. Government Lot 2 lying North ef I\ n
R rJg-M of 1vay {Less the EilSI 18. feet the1·eo£), Sei:tion 1; .:rewnstap
.i:i South·, Range 27 fi11St, lying with the West I/4 -0f the Northeast 1/4
-of smd Section I
·'roG:&Tinm· WITS·
'fhe Southeast I/4 o f t)„e, NodhWU;1Sf 1/4 cE cfu}.n .1„ 'fu<nsiu.Ji 23 South·,
J,lange 21 East (Less. McK,inno. <I =gl,u o:t W41. oy_er th ·s'oeJ,y
portion th!,;1'£0[?
•.toGE'I'IlliR Wt'I'H
.An U1at land l:r'ing ·North:we t,em.y Of !vicXinnQn 1tor.d in the· lfus.f 1/2 of
the Soutluye.st 1/4 of Sciitfon 1, 'I'ownship :Ta ;;Jouth, R!l.nge ·27 East,
.LJ3{fation.: 1fotween. Miks· Robert, Oresee.ut, Bu-,jliak ·arui fuitlel"
mstrict i3

A ptibl1e-)1e!U'i g' ·ytas held !!ffll, °1'%.=ing i De Qllme Dir-ectm: Tr,aay. \'.tion
i'GVlel'le.d. admtioo:al, reeommandaU s anbtnj_tfygf by thG riev.$1pment I?eyiew'.
Cim1mict U!lder t_Jatia 6£ N0-\'embe< H,. lS8!t for this pl'ojt3'et. Mr, Watson·
rllvie.we.d 14 con4itii)n$ of ;epl'<W=ai .fo Butler Bay·•.
.AtU\I'.nlo/ '.rmn Rllss, repl'Cs.ent'ing: tbe ·deveJowe,i:, stated that tiw- i,ondt;i<m!, or
app.xqv-al were nccceptable. He .discussed the niqui1'etnents 1or mru.ntennnce of
th!;I t;e.v s,_ums ,m th<l .rnrnt. IQtli
A ehm;t diseussten .foliow.eil. feg di ng_mtmmucn -0ne -Mr 1Qft; on iiQufa !; tfo4
f the p:ooje-i;t,
,A.tt(l ey 'tom 'RQL5 stp.te, Ul.!lt; J1w developer agreed to a murimttm of· 0!1e aere
lUts south of Lake !!ti.tli:lr toulevard.
1'1Je fe'Uwi?,g' pso_pk1 11:ddrei;Md th B'Q.1'id concerning the llutl<,r Bay project":

L 'Pave lUtey-, iepresentfug, Lake es-cent l:lG;lll owne!'s &aooiatao11·
2. twrncy Me Chotas, re_presenting Mr, n.d Mrs, ffill.
3, '.lltacy Dent
4. J. B. fu)gers:. 3725 -fiak-e B"ynnk D:n¥e

D'e'feloper Emory Conway:· was- present and answered ·qul.lstforts eon mng t11ke
CitesOO!lt',
The· 'Jwai'.d and stint tliscm;sed appi:ov.ll1 q f the n itn p(9Jfion anti Jjav. tlle
ill>P#t witbdl'a,<i t M sonlh p-ortion {-Lal\'.e- !luUer..Cavel. as that p;om ll(\J.JUT<s-
rede . o·- -add _f-ddfij?,:im slip.ufuuens 16 pro 'i.d f!li' Tl<1;tdweys and dlminagu.
Upon a metion by (:!l)ffimissi9ner Marston., seoon&d by (;QnimfQn. 'IJart· and·
<r1le<f, with !ill present Cammi$liiGnel's· -voting .A-Y!lt O:omm1.$sioner Tree.d1va.y wm·
e.hs nt, the. .Boar:d !l-Pll;OV-e t.Jw .tvel,urtinMiy Sub-1A.ll\bn]?!nn· fott Butret< 11-iy,
subject lo! the ·folia1'/ing t1meaqed ean:dtii"(),n.$;

1, Da pmen.1' in aooordro:lce-wltb tne C1uster approv.al conditions by the PtZ
Coin!oissl.ou on February n 1,l-S5, the Preliminary Sub"diVl.$hm Pian aated
R ni'lived 8{!1/85, the Subillcvisfon &.,gulations, and the Zoning Resol:uti(L'l,
unl,,ss herein waived, Ptelim.in11r.y Submvision Pl app1:oval automatically

e'i(Pfres· Cll Novcmher 18 J.♦♦♦, fn ae♦l/danqe ,♦lll lfi:lbdivlajC♦ Regu}(ltl♦,M ·(li. ani♦m.d♦.

z E;.tistl♦g wetJ#nd vegawtion ♦llmg th♦ shorelint: o.f t.♦-s Bl.1rlel1, Cr♦cent an-d Mbel'!tS ·snall be left in• its :natural sblte♦ .exl:elit full' the: lake. aaaess as allowed ♦y- the o.tang-e -Co.uhfy. ·Llites!u;ir-e Yrotection Ordinanee.,]5(" boundart (lf. ♦Ml·♦foe wetland y♦geta:f;la]l @all be- f l a m d an<j -surveyed_ an♦ mw1t be s♦own as a Oonservation._ Basement· Cl) the .co♦?.t;i:®tion plan .and plil.f. ?@mUtrus. ,v.tth devel,opmem l'lght-s d(jl_dicl'taJi tj. Orange· County. Upon OOJIPle#P;n 0E 'flegging of-this ipea,_ and prior· to constru:ction pl.m .submittlll, the: ;ippifoant 'shall notuy the Orange County Plan.nin1t and En'v:hwnroentm Protentfon- Deps.♦t♦ mtmts so that a fielll. ,,eri.flcatlon 08Jl be pett'ormbd,. -Tflls. r1sStrlefl-0n on vegetation cLea1T).g witl]m the ea♦eint ·ara.a -shlUl be l'Odord♦d Ju each fufaded lot an_i a copy of"-sq-el deed pccqvidE:& to the' t.J♦lid-ge Coil♦ty n♦♦♦g Departmimt a♦ t_)jl tjme. of plat .app1l0Vlll: ♦l:'e ♦llall o♦. ILQ fill -be♦'l' the \01.' -contol.rt' m ♦a-lle liu"tlat·,

3, ·the two, lowland lu-eas- east of Lots l'l'5 - 122 {Phatl"e IV"} 1;1ball be lncorpt>rst-ed into t l» design. of the~ prejec.t and ·must, com♦y- with' the, Mifigatlen Plan (t:la♦ed reeelved Aprll ♦t. 1885.h ♦d thl} :l;el:=♦en5l,'l-l:l)J?;s of. th♦ Col).ser-taµq♦ Area An.,alysfs ♦eport_ J.jy ♦tspel♦· end 4-'ssclalate.ll' l:da♦d 2/7 lll♦), ,4fteJl (lOmpletfon of tree TJjtig..ation. p:rog_fwn, the :i.ppifQ:,,µ.t shal.l' notlfy ·tJ♦ O♦♦ Count11 Pl'(lnning a]'d ·:e;rnm:,runen-tal J?rotection. .De.parhnents- so that field · vecifieation call Œ perf<h.'m.ed.

4. Development Plan for the Clubhous♦· and Trlct· F shtll be. proaesse-d thraug,h the Commetafal Site Plan p'!.QC8S,

6. The applionnt s:hall ent<il' _into ll. Povelope1♦s Agroi.ment_ with the. County to addr_ess ownershi.p ·and mainfan.an♦ of- ah common p:ri,nrte t:acilifiel;,

6. The .ap_plic:nit sh.all provide· si-de.walks--ln a<Jn'l♦♦:ee with .th♦ Suhdivfsion eguJ?t ns.

'!. Lots· u'3 - 140 of Butle;l- B4y, Unit 'rwo, shtJJ b♦ va.ctited, prior t~ plat LJJ)?l1-0Yll •

8. Any building area containing· muck -shall- be. deinucired m d :replaeed with suitable fill material p1ller to construction..

♦. All l♦kefropf lots,, at µme: of 1?lllti:t):1r, snail b_v(l a minimUtll l<lt wtdtlUlf 110• at the. normal lligb wate:i, ♦e"Vat♦>♦. ·

10. A $Cll]}g, will be :requ-h'ed -on Jlaeh- lot PJ.l.Jor. th; -1.sstauce of. s♦_p-Hl lenk ·_permit.

11. Thee develop.e-1· slfa:ll snbmit a Storm Water- lllllan♦ell.t Plan m eonformanlle \\ith state: Regu-l♦flons-. for disch♦ge· Jnfo ♦♦g'. lll1onld1" ,vaters:.

U, lJevelop♦nt :rights· to the C9w;♦rvati.Qn Areas ♦d. _gqtiqom.-se., ♦♦cJl♦t for th9 Club]wuse @d 'lnall11enance· facili_ty, sh&l be_de'fQ♦1:1;ed to Orim:g♦ ·(:county.

l:r. Tlra La♦. But1m· Gova ·Plan·, tQ be submitted at a later date, shall ltave minimum one. (1)- acre sfae lots·

14, 'the di:alnage· sysf♦m shall not _be .designell ♦ rf"15ctlafge ♦l'ftnratlr _µll9 ♦a)(e' 9l'♦c♦n"t whicir, J.,µ. fe♦,) l(l♦ ♦ de♦adatfu._n of t.♦1-♦ C;resqent w♦ter quP.lity, Prio:r to c.ons♦uctjon. of <l-alnagee s,.etem, IF/e.$.W;Ound_ ltat-er qualify $tnd be: d-et@line-d·. fo-f' L(lk-e Cl>escent .and used. as a stmda11.t.d for lle.te>ftdning wat'el' qllalti♦. The De'lteloper shall _pi-<lv.l& to ♦e h property ownet' a eopy ofi the recorded restricllens,":l:lr orqelr. t0 ·pr.went del;rlitla:tfoll of llle· watell. qu♦lity.

Public Works Ho♦rcratt, 1ne. ♦.est of. Boats · Lake; Mnson/ .Taft Retentl0n Pnd'd

Ll/ron. a .m♦flon].ly Commissloner- Ha:rrell ,. seclmd,elj by· Colnm♦sloner Marl;to:ll. a:nlt -c♦rred:, wtt-l, a]1 pmrent Coljupissiof).ers- v l)♦g A,YE:; 9b-ljlml♦.µ)ner. :Cre♦♦y \'8.$ absllBi, tlle· ♦Qard granJed. a tempor♦ ·permit fh.r a peiciod Qf mnely (90) dllYJa for ·resting of l:iom l]y :aov:E-rc.llaft, Ino. , at the "l.'nft -Retenlion. Pend (Lalte ·Mason:) off Boggy Cleek B.oaa:,

j)

248027 4oMNGE 10 fl
12,462811N Q316186

DEVELOPER'S AGREEMENT OR3757. ff;f536

THIS AGREEMENT is made by and between 'ORANGE COU TY, FLORIDA, a political. subdivision of the state of Florida ("Orange county;.] an(j WINDERMERE LAKES,. LTD., a 'Florida." limit c. partner_ship·,." 5-401 Kirkman Road,. Suite 60·0, Orlando,· Florida ·3281_9:· ("Owner'.'-),·

R.E C1 TA LS:

1. Owner owns certain real property locat d in the unincor porated area of Orange _County· (the "-Property") more particularly described in Exhibit "A" attached hereto.

2. owner applied to subdivide- the Property.

3. -on November 18, 1965, ·orange.County conducted a public hearing to cons der owner's.request for Preliminary Subdivision Plan Approval f r the Property.

4. Orange-county has authority to regulate - he subdividing of real property located in the unincorporated-area of .Orange County and has the authority to impose necessary conditions in .connection with the ·review and pproval of any sµch Prelitninary S bdivis on· Plan.

5. At the public hearing on November ia·; 1985, ··the Bi::>ard of··· County Commissioners of Orange CouIJty a o ted c ;;;t in condition . ?-f approval for. the Preliminary Subdivision- Plan for:,the Property based upon the Orange county Subdivision ·Regulations and·b sed UP.On considerations relating to the area surrounding the-Property,. including without limitation, developments abutting the _Property_, water bodies abutting the Property nd other circumstances affecting the Pr-0 erty.

6. The conditions of approval adopted by Orange County _assure compliance with the O ange County Subdivision Regulations and ·assur.e. compatibility of development on the Prope,;ty. wi h. suir i,i.nding. deveJ.op- ment and witn the_ surrounding· envir6 ent.

7. Orange Cou_nty and Owner desirE:!' 'to· memorialize the conditio,ns of approval.

NOW, THEREPO , in coQsideration of the foregoing and of the. terms and conditions tated below,. Orange Cou ty_ and O per agree as follows:

1. Recitals, 'l.'heforegoing reci'tals are true and form a material pa:rt. of this Agree_men_t

2. Conditions of 'Approval. The ·foll9win9 c'ondition of approval apply to the Prope:r.ty and shall control all. future .development. of thG Property permitted by the Preliminary ·subdivision -Plan'appr val granted· by orange county o N vembe_ 10, ·1 as (L.Jcnl said c ditions of approval .a:re amended ;;,rmodi'.Hed· y'_?rang County): see Exh:i.bit nA". attached.

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS AT THEIR MEETING
FEB 24 1986

Florida Rec Fee $ Paid
Doc Tax $
Int Tax $
Total $ 37.00

THOMAS H. LOCKER
Orange County Comptroller
By: Deputy Clerk

Return Clerk to: BCC - 5th Floor, County Administration Building - Beverly

001128

3. Recordin9, The parties hereto agree that an executed copy of this Agreement shall be recorded at the_ Peveloper 's expense in the Official Records of Oran_ge County, Florida, prior to platt.ing all or any part of the Property.

4. Letter from Orange county. -Upon written request. from the Owner: orange County, or any SUCCeSSO agency' or entity, will execute document the form of which is as nably sati fact ry to Owner) which evidences the status of compl ance by own e wi.th. the attached conditions of approval. Said doc\lllent shall be prepa ed in re ordable form and shall be delivered to owner within ten. (10)_ days at receipt by the County of the request ror same.

5. Recording Modifications to-Conditions of Approval. Any modifications to the Conditions -of Appr.oyal: referenced in paragraph 2. atiove shall be recorded in the _Public Re oriis of Orarig'e county, Florida.

6. Effective Date. '1,'his Agreement takes effect on the lat,:er of the dates stated below,

ORANGE COUNTY, FLORID

By: Bob Hall
Vice-Chairman, Board of County Commissioners

DATE: FEB 24 1986

ATTEST: THOMAS H, LOCKE R,
Clerk to Board of County
Commissioners

By: Mary J. Harrison
Deputy Clerk

WINDERMERE LAKES, LTD., a Florida

Raymond G. Conway
General Partner

(co_rporate seal)

E! Janua C Y, 31 9 8 6

ATTEST:

By: Beverly L. Halloran
Secretary

OR 3757 PG 1537

001129

STATE OF FLORIDA:

COUNTY OF ORANGE

I HEREBY CERTIFY, that on this day, before me an officer duly authorized in the state and county aforesaid to take acknowledgments, personally appeared ROBERT S. HARRELL, VICE Chairman of the Board of County Commissioners of Orange County, Florida, to me known to be the person described in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 24th day of FEBRUARY, 1986.

My commission Expires:

Notary Public

Notary Public State of Florida [illegible]
[illegible]
Bonded Thru Brown & Brown, Inc.

STATE OF FLORIDA

COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and county aforesaid to take acknowledgments, personally appeared Raymond G. Conway, General Partner Of Windermere Lakes, Ltd. a Florida limited partnership, to me known to be the person described in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 2[illegible] day of [illegible] 19[illegible].

My Commission Expires:

Notary Public

Notary Public State of Florida at Large
My Commission expires April 19, 1986

Off3,J.'57 rG: I 3 8.

001130

File

uno compliance with· revis.,d st_u, Ctw ,u,t! :c :e:no,e ;;;;;;;;;;;;;;;e:::::e.s. .:.r. clarify portions of the existing ord.Ulance.

Mr. Ray West, member of the H.A.R.V. Board. was present to answe:r questions from the Commisltiooers.

Upon a motion by Commissioner Carter, seconded by Co.mmissioner Ba.re.11 and ca.med, with all present Commissipners voting AYE, Commissioner !'::-eadway was absent, the Board adopted im Ordinance to amend Article IV, as described above.

(Ordinance on file i!1 the office oi the Clerk to Boa:rd o! CoUDty Commissioners).

.Iblic ea..-ing

::.e.limina_y :.ibdinsion ..llil

Notice was given th.at the Board of County Commissione:::-s would hold a public hearing to consider the Prellininary Subdivision Plan !or· Butler Bay on the following <ies=ibed property:

That part of the Replat of Metcalf Pule, as recorded in Plat Book .Q, l'age IB, of the l'ubli.c Records o! Onn CoWlty, Florida; described as!ollows:

Begin on the Northern right of way line o! Park Ave. and the Southeast corner of the Bomeonwers Park o! Butler Bay Unit One, as reco:-ded in Plat Book 11, Pages 92 th.rough 94 of the Public RecoJ:'ds of Orange COUI1ty, Florida; thence leaving the Northerly right of line o! Park Ave. :nm along the boanda..ry line of said Butle: Bay Onit One N. 30C?41'40'W, 395. 90 feet; thence continue along said boundary line ru.n N. 8705.«'26" W. 308.39 feet; thence leaving said hoa:nda..-y o! Butler Bay Unit One ran N.02051'17":E. 655.01 feet; thence N.01' 11'U "E. 1300.86 feet to the Southerly l'i.irht of way line of Winde...-men Itoad; thenct1 tilroug-b the following C:OII'Ses and distances run along the Southerly rig.ht o! way line of said W'mde.rmen Iload, thence S.88°38'04":E. 44.92 feet; thence S.s7' 42'31"E. a disUnce of 519.40 feet to the point of cu_-vatu.-e Of a C1ll'Ve concave Southerly and ba'Ving a radius of 673.31 feet with a cenual 11Xgle of 07056'11": thence Easterly along the arc of said curve 93,27 feet to the point of a reverse curve co.acave Northerly BDd h.aVin.g a radiui; of 849. 98 feet with a centtal IUI;je o! 07' 54'00"; thence terly along the art: of said curve 117•20 feet to the point of tangency; thenett s.s1040•2o"E. a distance of 2069.10 feet to a point on the Westerly right of way of the Seaboa.rd CCast Line Il.ailroad; thence lea'Ving the South rig-ht of way of Windermere Road, :run s. 10' 21'59"W. along said Westerly :rig'ht oi way 519. 45 -f t to tho point of ""V'at=e oi a CU'Ve concave Southeaste:r.iy and Il.aw.g a ndius of 1,490.98 fHt; thence Southwesterly 85. 07 fee.: along the a:rc of said C'tOVe throug-h a central angle of 03°16'09" to a point on said C'tirll'e and also being the Northeast cornin- of an Orange County School Property as recorded in Official Record Book 1708, Pa(res 261 Slld 268 of the Public Itecord!S of Onng-e County, Florida; thence leaving. said Seaboard Coast l.me R.a:ilroad l'llln along said school property boundary line through the follDwing- courses and distances; thence N.s1011•l31tw. 570.56 feet (570.00 feet per deed); thence .S.34048'40"W. 400.00 ·feet; thence S. I8°40'I7"E. 810.35 feet to the Southwest corner of s:dd school property and said pou,.t bain&" on tbe Northerly right of way of Park .Ave. ;. thence through the following r::otll'ses and distances :"till along said Northerly rig-ht of way line; thence s.soo3s•1111W. 270.99 feet to tbe point of curva"tUre of 11 cune concave Nortb ly and having a radius of 257 52 feet; th@ce Wes.terly J.87. Gl feet along the arc of said curve through a central angle of 41o44•33" tp. pomt of tangency;· thmice N. 71°37'10"W: 20'1. 60 feet to·. the. paint o! c:m-vature of a curve concave Southe:-ly imd having a radius ot·ss.3.51.feet; thence .Westerly 641·01 feet a.lon5r the arc of said eu-.-ve ugh a.centl'al angle 4oo4•3o " to ,the pomt of tangency; thence·· S.·S I8' 0 "W. 586;44· f t 1O the point Of bagi..,D.:"i·· .. Contaming 103. 556 acres.

Subject to Easements mcl Restrictions of Record.

(NO.TE: Legal reflects peaceful occupation for Westerly· property 'line).·

EXHIBIT "A"

TOGETHER WITH

Commencing at the Northeast corner of the Northwest 1/4 o(Section 7, Township 23 South, Range 28 East, Orange County, Florida, rim thence S_02052•2.s"W. along the East line of said Northwest 1/4 901. 60 fB1lt to the Northerly tight of way line of ParkAvenue; thence run S. 59018'2D"w. 155•22 feet along said Northerly rig-ht of way line for the Point o! Beginning- at the point of curvature of a curve concave Northerly having a ?adius of 1683.37 !eet and a central angle of 090 19'00"; thence run Southwesterly along the .arc of said curve 27:l. 73 feet to tbe point of tangency; thence run S, S8° J7'20"W. along said rig-ht of way line 2906. 07 feet; thence S, 21°38'40"J;a. 10. oo fee-t; thence S, S3D 00'20"W-, along said right of 'lffay line 235. 00 ! t to the centerline of an existing canal: thence leaviilg aforesaid Nor'therly rig.ht of way line, N,l5°59'40"W. along said =a J centerline 1055 feet more or lesa to the water edge of Laxe Crescent; thence run Easterly along said waters edge 1000 feet more or *lesa* tothe West line *of* a.lo:resaid Section 7; thence run N, 0:?052'28":E. along said West line 540 feet more or less to the Northwest corner of the South 1/2 of the North 1/2 of the Northwest 1/4 of said Section 7; thence run S. B7°54'26"E. along tbe North line of said South 1/2 of the North 1/2 of the Northwest 1/4 a di.stance of l97D.80 feet to the Southwest corner of the East 1/2 of the North 1/2 of the Northeast l H of the Northwest l/4 of said .Section 7; thence continue S.87054'26"E. 312.21! feet to a poillt 395, 90 feet N,30° 41'40"W, from the Point of Begil:ming; thence .:-1lll S.30°41'4.0"E. 395.90 feet to the Point of Beginning.

Contaming- therein 59. O acres more or less. OH37S7 p;; !5! Q

TOGETHER WITH

For a Point oi Beginning begjn at the Southwest co=er of the Northeast 1/4 of Section 12, Township 23 S0t1th. R u g e 27 East, Orange County, Florida; said point being the Southwest corner of Butler Bay Unit Two as recordec. in Plat Book 13, Pages 59 l!lld 60 of the Public Records of Onnge Counzy, Florida; and said point· also bemg a point on the Southerly right o! way line oC Psark Aven11e and the point of curvature of a cu"Ve concave Northwesterly and b.a:vin.g a 800 1.D foot radius; thence th.rough the f.ollowmg COU/6)es and disumces along said Soutlle:-ly boundary of Butle: Bay Onit Two; :run Northeasterly 322.31 feet along the aro of said. curve through a ca1tral ang:le of :?3°05'02" to the point of tangency; thence N. s1°oo•oo"E. 189. 82 f t to the point of curvature of a c:nrve concave Southeasterly and having a 740. DO foot radius; thence Northeasterly 326. 57 feet .along tbe a.-c of said curve th.rough a central angle of 25017'07" to the point of tangency; thence S. 87°42'53"E. 656. 59 feet to the point of curvature of a curve concave Northwest1ttly and having a 7651. 33 foot radius; thence Easlerly 199. 99 feet along the arc of said curve through a cent=al. angle of 01°29'51" to the point of tangency; thence S.Bg012'45"::E. 213.51 feet :to a point on the Northerly right of way line of Metcalf Road as recorded in Official Record Book 1098, Page 150 of the Public: Recol'ds of OrBD.ge Councy-, Florida; thence leavmir said Southe:-ly boundary line l'Uil S.68° 00'20"W, 1659.42 feet along said right of way of Metcalf Road; thence s.21° 59 40"W. so.Do feet; thence N. saooo•2o"E. 248. 47 feet; thence leaving said MeTcalf Road right of way line run S.s7049•oonw, 220.62 feet; thence S.69° 02'00"W. 167. 63 feet to the Southeast corner of a 30. 00 *ioot* wide road right of way as recorded in Official Record Book 157.3, Pa 427 *of* the Public Records of Orange County, Florida: thence along the boundary of sidd road right of way ruD N.20058'00"\f, 30.00 :fe11t thence S.69°02'00"W.. 430.08 feet: thence S.2oosa'00"£. 30.00 feet; to the Southwest corner of said right of way; thence les:ving said right of way run S.69° D2'00"W. 435.16 feet to the waters edge of Lake Butle:t; thence through the following courses and distance!! along the waters edge: run S. 31°22• 40"W, 61.31 feet; thence S. s2°43'5l"W. 164.27 feet: thence S.62° 45' 21"W. 119.33 feet;_thencs Na10:11 '31"W. 148.23 feet; thence S.72° 49' 49"W. 110,17 feet; thence s,55020•2ti"W 126. 77 feet: thence S. 19° 16' 45"W. 92.96.!eet; .thence S,17011•20"'£. 93.63 feet; thence S.26D44'59"E. sa.u feet; thence s.sao11•oa"E. 122•29 feet; thence s.s1°53'10"E. 126.45 feet; thence S. 45045•35" £. 128.97 feet; theneil: S.33° 33'Z'l"E. 124.06 feet: thence s,o5°3S'l7'"E:: 133.06 !eet; thence s. si0l7'01"W. g 3 30 ·feet-; ·tll.enc.. S. 08036'27"W. 107. 42 feet-; th nca- S.1.9° 11'15J1W. 163•.ll.feet; thence S.20000•1J"W. 113.72 feet; thence S. l5°17'30"W. 123;39 feet; thence S.09057'30"W.. 96. 60 fen; thence S.86° 12'46"E 64..55 fe.it: thence N.4.SD48'2'7"E. 60.89 feet; then N,66P27'49"E. 66.45 feet; thence leaving said waters edge 7!1l S, 36°:77".l4"W, 107. 50 feet to tile Northe:-ly right of way line of \Vest Lake Bu"tle:- Road: thence along said Northe:-ly :r.irht o{ waV line :-un .s3047•1fi"W, 7R ;!1 f,.. tn rho nnin 'lf

001132

radius; llience Westerly 180.21 feet along the arc *of* smd curve through a central angle of :i1°55'40" to the point oi tangency; tnence s. ,4v17• 04"W, 196.23 feet to the point of curvature o! a curve concave Nonhwesterly snd having a 410.76 foot radius: thence Southwesterly 17.78 feet along the arc of said curve th:r,,ugh a central angle of 02° 28'46" to a point on the West line *of* the East 1/2 of the Southwest 1/4 of said Section 12; thence l&aVing said Northerly right of way from a tangent bearing *of* S.76045'50"W. run N.01040•1s"E. 2636.92 feet a.long said West line o! the East l/2 o! the Southwest 1/4 of said Section l.1 to the Northwest corner of the Northeast 1/4 of the Southwest l/4 of Section l:l and being a point on the Southerly right of way line of Lake Butler Blvd. and also being the Southwest corner of .Lake Buyna.k Estates as recorded in Plat Book 3, Page 115 *of* the Public .Records of Orange Ccw:rry, ·Florida: thence S. B9° 5f58"E. 1325.!l0 feet along the Southerly boWldary o! Lake Buyna.k to the Pomt of Beginning.

Conuin.ing therein 59.6027 ael"es; subject to easements and rest!"ictions of record.

TOGETHER WITH

Butler Bay. Onit Two, Plat <Book 13, Pages 59-60 DR3757 PG f54 J

For a Point of Begilming. begin at the Southwest comer *of* the Northeast 1/4 *of* Section 12, Township 23 South, ltmlge 27 East, Qrange County, Florida.: thence N. 01039•57"E .1291.88 feet' along the West line of said Northeast 1/4 also being the East boundaJry line of Lake Buynak Esta.tes as recorded in Plat Book 3. Page 115 *of* the .Public Records of Orange County, Florida; to the Northeast corner of the Southeast 1/4 of the Northwest 1/4 of said Section 12; thence N,28°50'29" E 468.57 feet; thence N. 32043•zo"E. 474..20 feet to the wate:rs edre of Lake Crescent: thence run along the waters edge th1'0ugh the folloWlllg courses; thence S.4'!024'53" E 69.12 feet; thence S 2s025'38"E 120.56 feet; thence S 64°.00'10" E 159.i'l feet; thence S 23050•01"E 161,45 feet; the:nce N 5goz4,34"E 110.ZS feet: thence S 55°36'31"E 273.80 feet: thence S43015'36"E 265.58 feet; tbe.oce S 5go50'U "E 185.0! feet; thence 5 6904537·" E 246.99 feet; thence 5 45°41' son E 62.02 feet to a point on the center !me of an existing =a l also. being the Northweste::-ly line of Lot 10Z of.Butler :Say Unit One·as NtCOl'ded Ill Plat Book 11, Pages 92, 93 and 94 oi the Public Records of Orange Comlty, Florida;. thence 5 1.5°59'40"E 1010,84 feet along the Westerly llile of ·said Butler Bay Unit One to a point on the Northerly right of way line of Park Avenue: thence S saOoo•zo" *W* 167,56 feet along said right *of* way line; thence N 89°12.'45" W 239.34 feet to the point *of* cu.-vat1Jl'e of a curve cancave Northwesterly and having a 7651.33 foot radius; ·thence Westerly 199.99 feet along the arc o! sa:id cm-ve through a central angle of D1b2S'51" to the point of tang,ancy; tbence N 87°42'53" W 656.69 feet to the point cf Clll'"Vature of tl curve concave S01Jtheasterly and having a 740.CD foot radius; thence Southwesterly 326.57 feet along the uc of said curve th:rollgh a central angle of ZS°17'07" to the point of tl!llgency; thence S 6'!°00'00" W 189.82 feet to the point of curvature of a cu"Ye concave Northweste:rly and ba:ving a 800.00 foot radius; thence Southwesterly 322.31 feet along the arc of said curve through a c:en'l:t'al angle of 23° 05102" to the Point ·of Beginning

Contailling therein 63.2832 acres. Subject to easements and resttlr:rt:ions of record.

TOGETHER WITH

A parcel oi land situate ·in Section 1 and lj, Township 23 South, Range 27 East, Orange Conney, norida, described as follows:

For a Point of Beginning begin at the Southeast come:.- of the Northeast l/4 of the Northwest 1/4 of said Section 12, and said point being the Northeast corner of Lake Buynalt :Estates as l'eeorded in Plat Book 3, Page 115 of the Public Records cf Orange COUlity, Florida.; tb.E!llce N.B.9° 11'43" W. 1324.38 fee't along the North boundary lin *of* said Lake Buynak Estates and the South line of the Northeast 1/4 o! the Northwest 1/4 of said Section 12 to the North est come o! Lue Buynak Estates and said point also being the Easterly right of way line of McKilmon Road and a point on a curve ccncs.ve Northwesterly and having a llB.10 foot radius; frQm a tang-ent bearing N. 43°26'06"E. thence through the 1llowing- courses and disumces slang said Easterly right of way run Northeasterly 86.07 feet alo11g the arc of·said curve through a central angle *of* 41°45'26" to the pDint of tml.gency:thence N. 01°40'40" l. 1230.0li feet to a point on the North line of said Section 12; thence ·N. 02°19'14" .E. 1.200.00 feet; thence leaving said right.of.way line r.m S. S7°40'46"E. J.40.00 f t to a point" of curvature of a cu concave Southeasterly and having a 411.67 foot radius; thence from a tangent bearing' of N. 18°30'00"E. run Northeasterly 961.94 feet along the arc *of* said cu:-ve th:rough a central angle of 133°51'52" to the point ·or tangency; thence S. 27"3';'08" E. 129.82 feet to the point of curvature of a curve concave Northeasterly

and having a 230.00 foot radius; them:e Eastf.?fly· 361.28 feet along the arc of said CUI'Ve through a centtal angle of 90°00'00" to the point o! a compo"1Jnd curve concav Northwesterly and having a 470. DO feet radius thence Northeasterly 200. DO feet along the arc of said cu.-ve through a centl'al. angle of 24° 22'52" to a poin1: thence from a tangent bearing of N. 38°00'00"E run S. 52° 00'00" E. 400. CO feet to the waters edge of Lake Crescent also being at s contour elevation of 102. 8 feet (Orange County Datum); thence along the. waters edge and the 102,8 foot contour elevation tlll:'ough the !ollowmg courses and di5ta.nces r\1.ll thence S• .29°49144ttW. 140.00 feet; thence S. 70° 24'19" W. 61.02 feet; thenca N• 87° 43'55" W. 72.88 feet: thence S. I4"06'48" W. 134.52 feet; thence S. 25°29'52":E. 99.65 feet; thence S. 75 34'55"E. 146. 75 feet; thence S. II"33152" E.· 201.95 .feet; thence S. 0(° 10'19"W. 107.24 feet; thence S. 23°03'37" W. 89.96 feet; thence S. 31"31'13"W. 235.66 feet; thence S. 56°54'41" W. 170.83 feet; thence S. Z5"38T35[1]W. 127.58 feet; thence S. 16°40149"E. 131.74 feet; thenoe S. 70° {3'14" E. ·98,57 feet, thence S. 31"11'24" E. 97.03 feet; thence lea'9:lng said ·waters edgpe and 102.8 contour elevation run S. 32° 4J'20" W. I8,00 feet to the Northwest ctir.cer of Lot 123 of Bu.tler·Bay ODit Two as l'ecorded in Plat Book 13, Pages 59 and 60 of the Public Records of Oralige County, Florida: th,ence continue· S. 32°43'20" W. 474.20 feet along the Northwesterly boundary line of said Butler' Bay Unit Two; tbimc::e continue along said Butler Bay Oxdt Two boundary, S. 28°50'29"W, 468.57 feet to the Point of Beginning.

Containing the· 99.659 acres. Subject to I:I =nt &nd :l'estricticns of rect1rd.

'.COGETIil:R WITH

A parcel of !and situate in Section 1. Township 23 South, Range 27 East, Orange Co=cy, Florida, described as follows:

Co1IDlence at the Southeast co=er of the Nortlleast 1/4 of the Northwest 1/4 of Section 12, and said point being O?d the Ncrthel!.St coner of Lake Btcyna.k :Estates as recorded in Plat Book 3, Page 115 of the Public Records of Orange County, Florida; thence N.89.°11'43"W. 1324..38 feet along the North boundary liile of said Lake Buynak 'Estates and the Soutb line of the Northeast I H of the Nortlrnest 1/4 of said Section I2 to the Northwest corner of Lake Buyna.k Esutes and said point also being the Easterly right of wey lm.e of Mc.Kinno:c Road and a pol:Ut on a curve concave Northwesterly and having a I1B 10 ftPOt :radius; from a tangent bearing of N.43°2IP.06"E. thence tbroufl'h the follow..ng courses and distances along said Easterly right of v,ay, run Northeasterly 86. 07 feet along the arc of said curve through a cent:t'al angle of 4I° 45'26" to the point of tangency; thence N.DJ.°40'40"E. I.230.06 feet to a pomt on the North line of said Section 12; thence N.02° I 9'14TE. 1200.00 feet for a Point of Begilnning; thenee continue along said rig-ht o! way line run N. 02"19'14 .I!:. 883. 76 feet to the point o'f cunature of a CUI'Ve cgncave Southee.sterly and ha'VIl1g a 361.99 foot radius: thence Northeasterly 264. 02 feet along the arc of said: curve through a central angle o! 41°06129"' to the point of tangency; thenetl N. 43° ?5'43"E. 207. 55 feet to the point of CUI'Vatu:re of a CUI'Ve concave Southeasterly and having a 318.57 foot radius; thence Northeasterly 266.5B feat along the are of said cnll'Ve through a central angle of 40° 56'46" to the· point of tangency: thence S. 88°37'3I"E. 1035. SO feet to the point of curva.uu-e of a curve concave Northwesterly and having a 1187. 00 foot radius; thence Northeasterly 341.29 feet along- the arc of said curve. through a central angle of 16° 28'25" to point on said curve: theJ1ce leaving said right of way line from s tangent bearing of N.I4° S4'03CE. r11n S, Ol°45'56"W, I. 01 feet to the North line of the Southeast 1/4 o:f Section 1, Township 23 South, Range 27 East. Orange County. Florida; thence S. 88° 1!'22"E. 898.22 feet along said North line of the Southeast:- 1/4 to the waters edge of Lake Crescent also being a contOur elevation of 102.8 feet (Orange County Datum)-; thence along the waten edge and .the 101.8 foot conto= elevation through the following courses and distances; run thence S. 1B°5I'I9"W. 36.96 feet;.tnence run S.D0° 4I'46"W. 170.19 feet; thence S,33° 44'53"W. 177.61 feet; thence S.38° 42:40"W. 170.04 feet; th'ent:e S. 14ci2s !00"W. 125.17 feet; thence S.2S°3di'13"W. 9S. 71 ,feet; thence S.38° 50'4l:"W 131.86 feet; theU.ce S.I6°2I'54"W. 148.87 feet; thence S.D3° 44'I 8"W. I43.B6 feet: tbl!IIce S.1J°25'44"W. 154.86 feet; thence S,4gc.a5t14nw·. 193. 92 feet; then'ce S.S0°10'1:4"W. ·I71i. 73. feet; thence· ·S.36°III15I"W. 106.47 feet; thence S.ZS04.94'W, 92.07 feet; the.nee leavil:t1(said waiel's edge .Slld 102. 8 contour ·elevation run N. 52° DOOO'W. 00;00 feet to a·point on·a·cu e·concave Northwesterly and a 470.?0 foot !'adius thence from a tangent bea..-ing of N:38°

angle of 90°00'00" to ihe point of tangency: thence N.27°37'08"W. 129,82 feet to the point of curvature of a curve concave SOutner1y an<l haVIng a radius 0£ 411.6i feet; thence SouthY<>1;<tarly 961.94 feet · along the a.re of aeid cu..ve through·a central angle of 133° 52'52" to the point of tangency; thence from a tangent bearing of N 18° 30'00"E. r'llil N. 87° 40'46" W. 340.00 feet to the Point of Beginning.
Contaimn.g µierein 76.5969 acres;
Subject to easemenu and restrictions of record.
Note: The followinl{ se1:tion was prepU:"13d by others.
That pa.rt of the South 1/2 o! Government Lot ! lying North of McKinnon Road right of way (Less the East 758 ·feet ther@O!}, Section l, l'ownship 23 Sonth., Range 27 East, lying with the West 1/4 of the Northea.i.t 1/4 of said Section l
TOGETHE.ll WITH
The Southeast 1/4 of the Northwest 1/4 of Section 1, Township 23 South, Range 27 East (Less Me.K!llnon Road right of way over the Southe:dy portion thereof)
TOGETHER WITH
All tbat land lying Northwesterly of McKm...,on Road m the East 1/2 of the Southwest 1/4 of Section_l, Township 23 So. lange 27 East.

LoC?rtion: Between Lakes Robert, Crescent, B11ynak and Butler
District #3

A public hearing was held and Planning & Development Director Tracy Watson =iewed edditim:i,al f"eaommendations submitted by the .Development Review Committee under date of Novembel." 14, 1985, for this project. Mr. Watson reviewed the conditions of approval for Bntle;r Bay•.

Attorney Tom Ross, representing the developeJ:", stated that the conditions of approval. were acceptable Be discussed the requirements for maintenance of the rev se swales on the lakef:ront lots.

A short discnssion fullmled :-egarding arnim-wn one aC.I'e lots on south section of tl:ie project. OR3757 PGj543

Attomey Tom Ross stated th.at the developer agreed to s mimm= of one ac:-e lets south ·of Lake Butler Boulevc-d.

Th,;: following people addressed the Boarc1 concerning the Butler Bay project:

1. Dave Riley, representing Lake C r e s = t Homeowners Association.
2. A.tto::ney Lee Chotas, representing Mr. m d Mrs. mu.
3. Tracy Dent
(. J. B. Rogers, 3725 take Bynak Drive

Developer Emery Conway Wl5 present lttld answered questions concerning Lake Crescent.

The Board and staff dscrcu1e1:1" ii.pp al of the :"""rth -por:rlan and have the e.ppliCULt withdraw the souili portion. (Lake Butler _Ccv&): as that plan req1lil'es redesign·, or add additional. stipula.tions to· provide for roadways and drainage.

Opon 1t motion by Com.missioner Muston, saconded by Commissioner Caxter and camed. with all p sent Commissioners voting AYE. Commissioner Treadway was ab.sent, the - ar _epproved the Preliniin.ary Subdivision Plan for Butler Bay, subject tti the-following amended ccnditions:

l. Deve!Opinent in ac-_;dce -h the ·Cluster appl'O'lal conditions by the PrZ ·Commissillti n .February Zl, 1985, the Prelimma.-y Subdivision .Plan dated Received 8/9/85, the Subdivision Regulations, and the Zoning Resol.itio.n, unless herein wmved_ PM!liminary Subdivision Plan app:rova.l automatically

..m}.ice this page
.. Bay Prel. S/D
.#ils"of approval.
,]l[on #14 l'ew

:ED PAGE

er 18, 1985 Page

6, in accordance with Subdivision Regulations as amended.

2, Existing wetland vegetation along the shoreline o! Lakes Butler. Crescent and Roberts shall be left in its natural state, except !or the lake access as Rllowed by the Orange County Lakeshore Protection Ordinance. The boundai:-y of shqi:-eline wet d vegetation shall be flagged and surveyed and must be shown as a Ci:,n rvation Easement on the construction plan and plat submittals w:itn developmll.llt rights dedii:-a:ted to Orange County. Upon completion of flagging' of_this B'teli, and prior to constx-uction plan submittal, the applicant shall notify the. Orange County Planning and Environmental Protection Departments so that a field verification can be performed, This restriction on vegetation clearing within the easement area shfl.ll be recorded in e8ch deeded Jot d a copy of such deed provided .to the Orange County Planning Department at the time of plat approval, There shall be no fill below the 1(11' contour on Lake Butler,

3. The tlYO lowland areas east of Lots 116 - 122 (Phase IV) shall be incorporated Into. the design of the project and must comply with the Mitigation Plan (dated i:-eceived April 19, 1985). and the recommendations of the Conservation Area Analysis Report by Lotspeich and Associates (dated 2/7/85). After completion of the mitigation progTam. the applicant shall notify the .Orange County Planning and Environmental Protection Departments so that field verification can be performed.

4. Development Plan for the Clubhouse and Tract F shell be processed tbrpugh the Commercial Site Pllm process.

5. The .applicant shall enter into s Developer's Agreement with the Collnty to address ownership and maintenance of all common private facilities.

6. The applicant shall provide sidewalks in compliance wlth the Subdivision Regulations.

7. Lots 123 - 140 of Butler Blly, Unit Two, shall be vacated prior to plat app:r-oval.

8. Any builcli:ng area containing muck: shall be demucked and replaced with suitable fill mate.rial prior to construction.

9, All lakefront lots, st time of.platting, shall have a minimiun lot width o! 110' at the normal high water elevation.

10. A soil log will be req1.lired on each lot priO?' to issuance of se_ptic tank permit.

11. The deve oper shall submit a Storm Water Management Plen in conf.ormance with State Regulations for discharge into outstanding florida waters.

12. Development rights .to the Conse:r-t"ation. Areas and golfcourse, except for the clubhouse and maintenance fac:llity, shall be dedicated to Orangti County.

13. The. Lake Eutlex- cove Plan, to be submitted at ll later date, shall have minimum one (1) acre size lots.

14. The drainage system shall not be designed to discharge stox-mwater into Lake Crescent which will result in a degTadati n of Lake Cr_escent water quality. Priox to construction of drainage_ sys_tem, background wate:t' quality shall be determined for Lake Crescent and used as a: standard for dfltermining water quality The "Developer shall '.provide to each property owner a copy of the recorded restrictions in order to px-event. de!P'8dation _of the water qu tj.

Public Works!

Hovercraft, ! lnc.

Test of Scats

[.ake Nason/ : Taft Retention Pond

Upon a motion by Commissione1 Harrell," se_conded .by Commissioner Marston &.ld cariie.d, with all present Commissioners V.0W/ y .-om ssi er :Treadway was absent, the Board granted a t"e porary permit for a period. of ninety (llii) deys for: testing of boa.tx by .Hovercraft,. Inc,, at th., :l:aft ReJ.entipn :Poi;i', (Lake Mason) off t Boggy Creek_ Road.

2

PR, 757 fG/544:

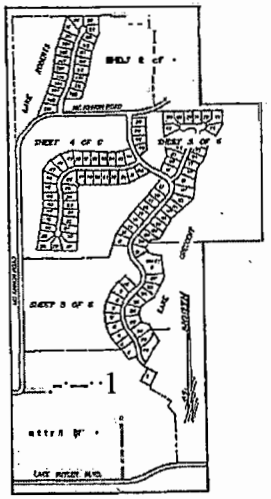
Nove111bex- 15, 1985 PUBLIC ;JOilKS & Pag
DEVELOPMENT DIRECTOR

001136

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO PB. 13 PGS 59 & 60
SECTIONS 11, 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA

PLAT BOOK 18 PAGE 4



KEY MAP

BUTLER BAY - UNIT THREE

DEDICATION

CERTIFICATE OF SURVEYOR

CERTIFICATE OF APPROVAL BY ZONING DIRECTOR

CERTIFICATE OF APPROVAL BY COUNTY ENGINEER

CERTIFICATE OF APPROVAL BY BOARD OF COUNTY COMMISSIONERS

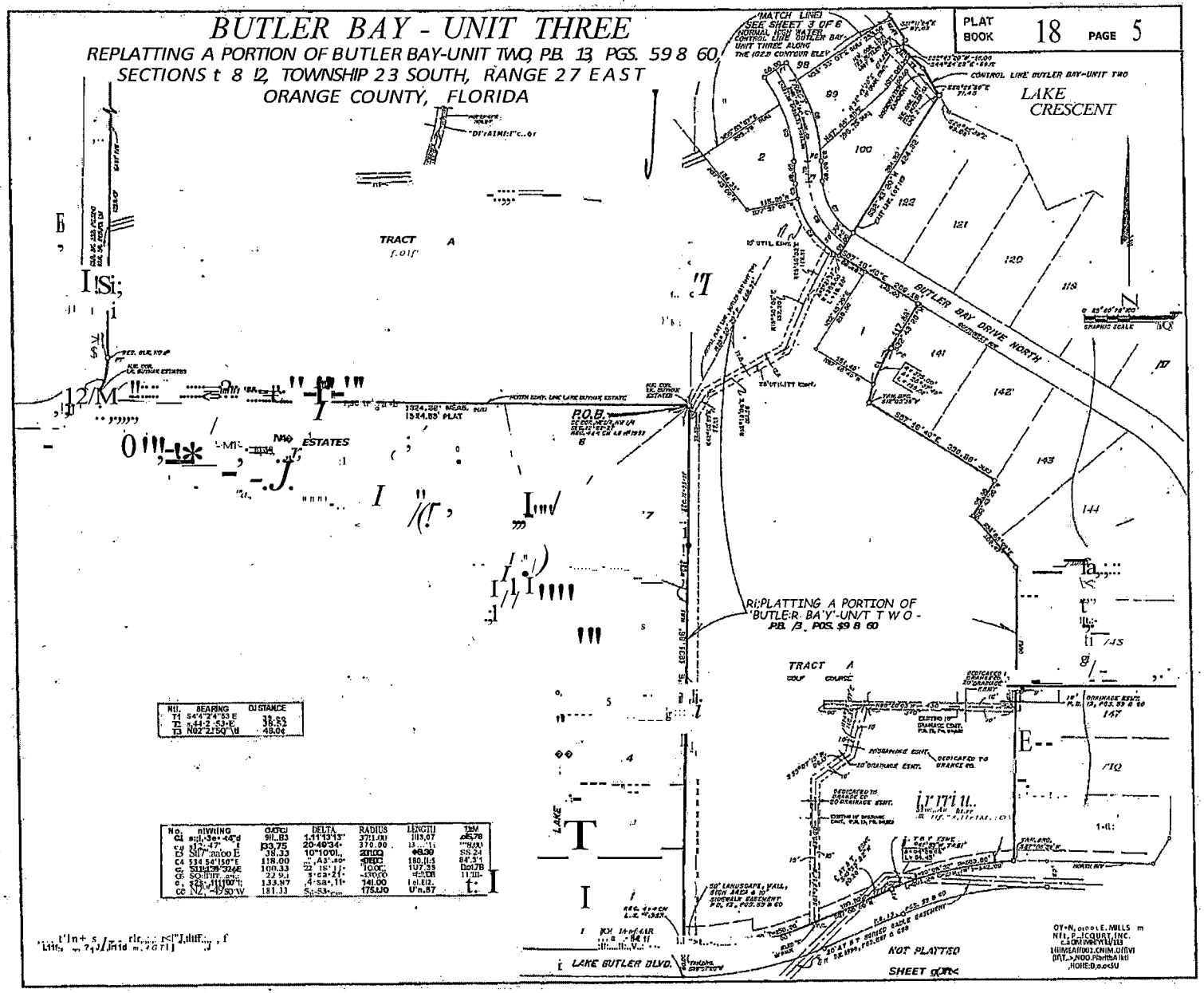
CERTIFICATE OF CLERK OF THE CIRCUIT COURT

001137

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 8 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA

PLAT BOOK 18 PAGE 5

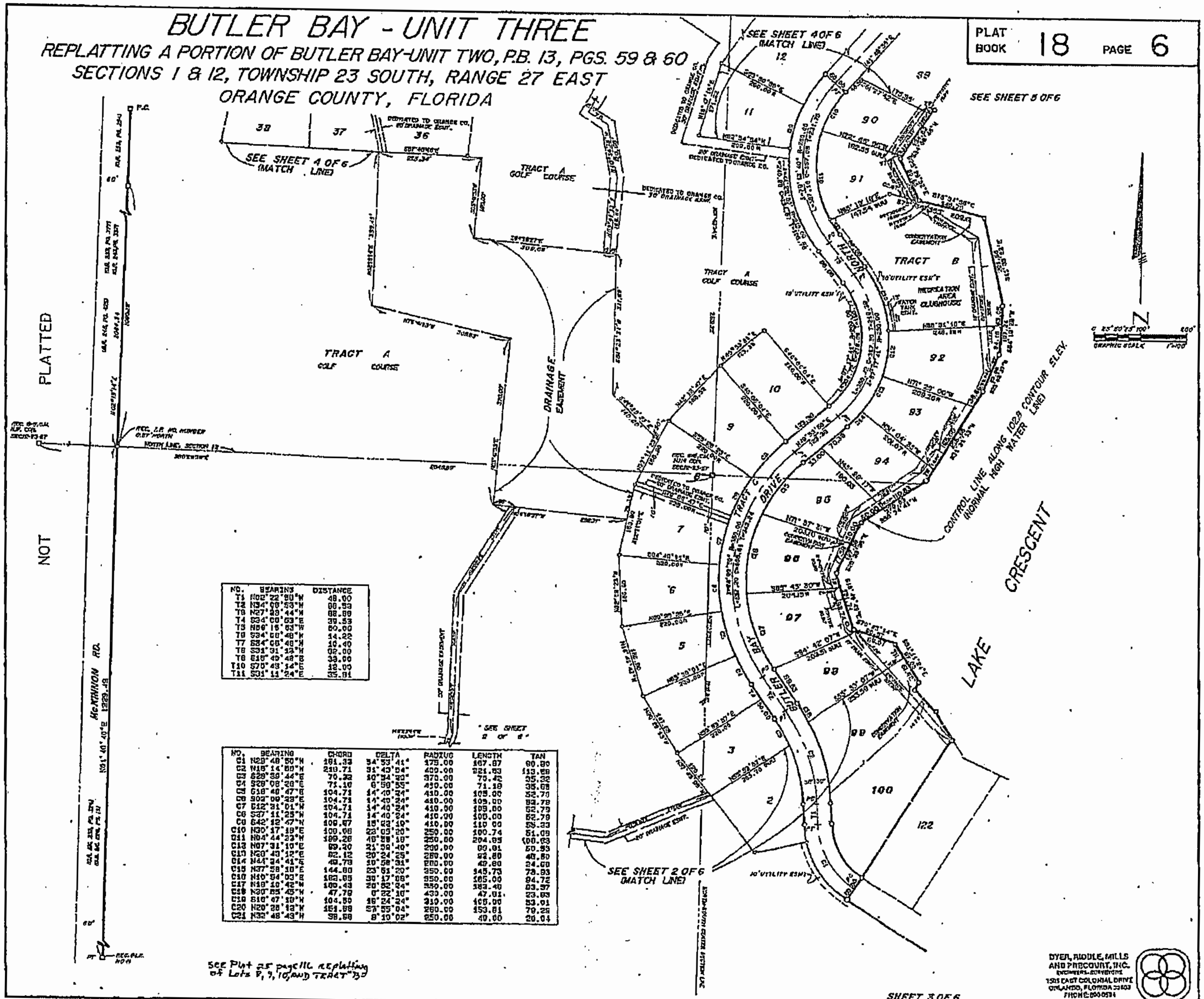


NO.	BEARING	DISTANCE
L1	S44°24'53"E	38.83
L2	S44°24'53"E	39.52
L3	N02°21'50"W	48.06

NO.	BEARING	CHORD	DELTA	RADIUS	LENGTH	TAN
C1	S31°36'46"E	91.83	1°15'13"	3711.00	119.07	59.54
C2	S12°47'[illegible]	193.75	20°49'34"	370.00	[illegible]	[illegible]
C3	S07°[illegible]E	38.33	10°10'01"	215.00	38.20	55.24
C4	S34°54'50"E	118.00	[illegible]	[illegible]	180.[illegible]	64.37
C5	S31°[illegible]E	108.33	22°15'[illegible]	[illegible]	107.33	[illegible]
C6	S01°[illegible]E	22.91	[illegible]	[illegible]	[illegible]	[illegible]
C7	S24°[illegible]W	133.87	[illegible]	141.00	[illegible]	[illegible]
C8	N2[illegible]W	181.33	5°53'[illegible]	175.00	[illegible]	[illegible]

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA



NO.	BEARING	DISTANCE
T1	N02°22'50"W	48.00
T2	N34°08'53"W	88.53
T3	N27°23'44"W	88.88
T4	S34°00'53"E	39.53
T5	N56°16'53"W	60.00
T6	S34°00'48"W	14.22
T7	S84°08'48"W	10.40
T8	S31°31'13"W	02.00
T9	S18°40'48"E	33.00
T10	S70°43'34"E	12.00
T11	S31°11'24"E	35.81

NO.	BEARING	CHORD	DELTA	RADIUS	LENGTH	TAN
C1	N28°48'50"W	161.33	54°53'41"	175.00	167.87	90.80
C2	N15°14'00"W	218.71	31°43'54"	400.00	221.53	113.68
C3	S28°38'44"E	70.32	10°54'30"	370.00	70.42	35.32
C4	S28°08'20"E	71.10	8°58'55"	450.00	71.18	35.68
C5	S18°40'47"E	104.71	14°40'24"	410.00	105.00	52.70
C6	S02°00'28"E	104.71	14°40'24"	410.00	105.00	52.78
C7	S12°31'01"W	104.71	14°40'24"	410.00	105.00	52.79
C8	S27°11'25"W	104.71	14°40'24"	410.00	100.00	52.79
C9	S42°12'47"W	109.67	15°22'19"	410.00	110.00	55.33
C10	N30°17'18"E	100.06	23°05'20"	250.00	100.74	51.09
C11	N04°44'33"W	189.26	46°55'10"	250.00	204.85	100.63
C12	N07°31'10"E	99.20	21°39'40"	200.00	99.01	50.93
C13	N30°43'12"E	82.12	20°24'25"	280.00	92.80	40.50
C14	N44°34'41"E	48.78	10°58'31"	200.00	48.80	24.00
C15	N37°58'10"E	144.80	23°51'20"	350.00	145.73	73.83
C16	N10°54'03"E	182.85	30°17'08"	350.00	185.00	94.72
C17	N18°10'42"W	180.43	20°52'24"	350.00	183.40	93.57
C18	N30°55'45"W	47.78	6°22'10"	430.00	47.81	23.93
C19	S16°47'18"W	104.50	18°24'24"	310.00	105.00	53.01
C20	N20°28'13"W	151.88	57°55'04"	280.00	153.81	78.28
C21	N32°48'43"W	38.88	8°10'02"	250.00	40.00	20.04

See Plat 25 page 116 replatting of Lots 8, 9, 10, and Tract "B"

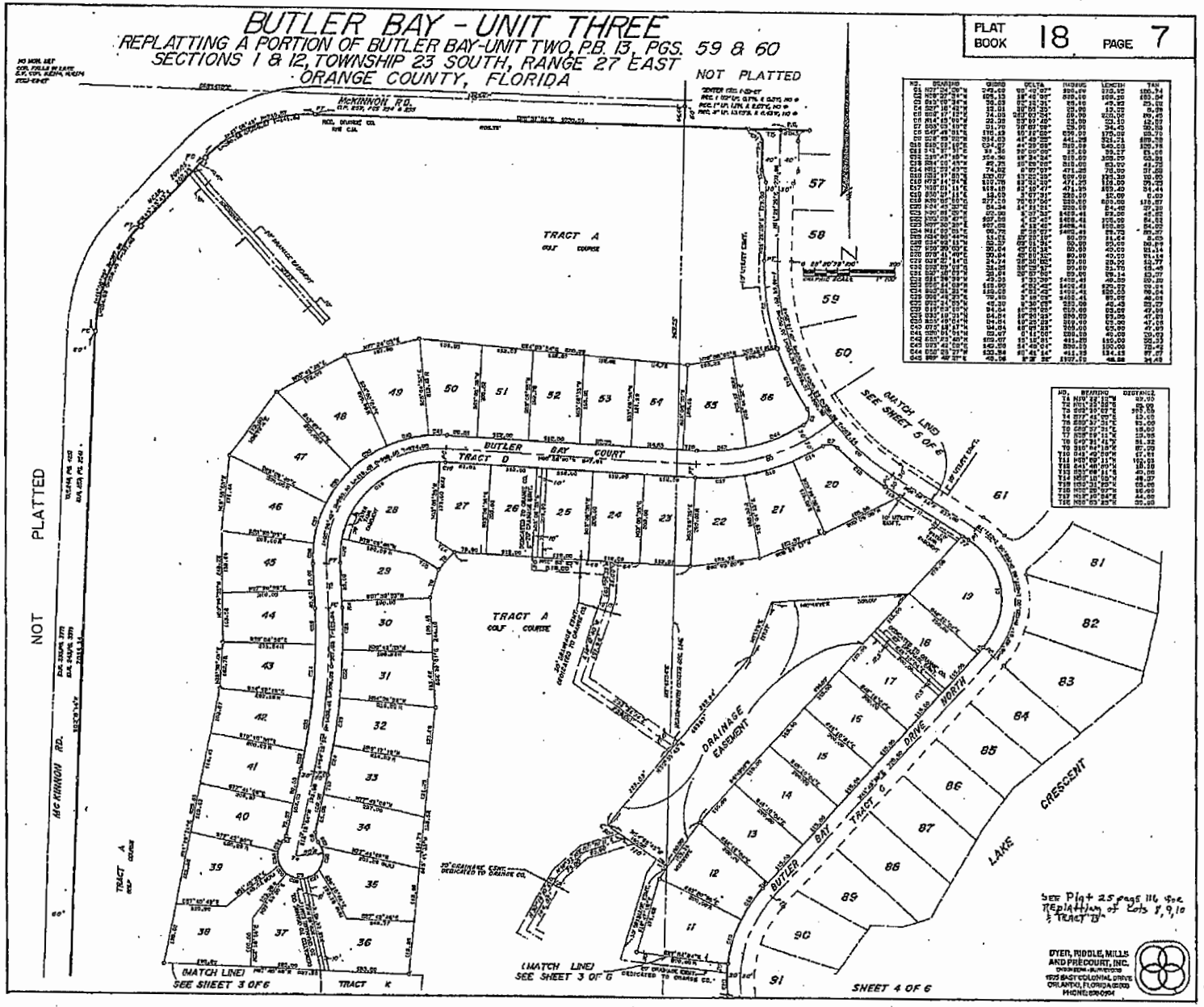
DYER, RIDDLE, MILLS AND PRECOURT, INC.
ENGINEERS-SURVEYORS
1505 EAST COLONIAL DRIVE
ORLANDO, FLORIDA 32803
PHONE: 896-0594

001139

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA

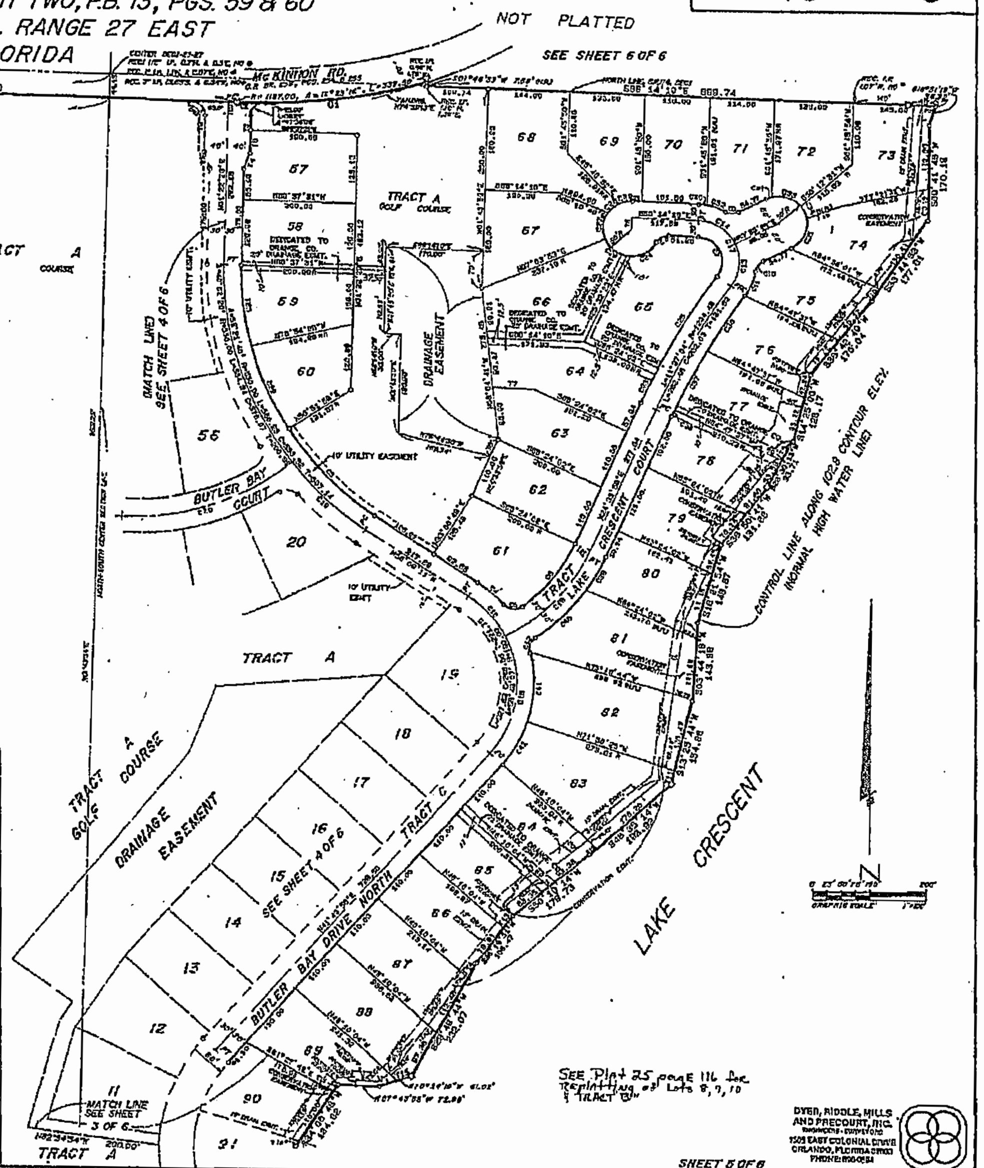
PLAT BOOK 18 PAGE 7



001140

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA



NO.	BEARING	DISTANCE
T1	N10°22'12"W	20.00
T2	N01°22'28"E	53.00
T3	S01°22'28"W	56.03
T4	S31°07'11"W	28.60
T5	S01°45'50"W	20.00
T6	N01°22'28"E	40.28
T7	S88°14'10"E	72.81
T8	N88°14'10"W	18.08
T9	S28°50'13"W	40.12
T10	S32°44'53"W	27.20
T11	S13°23'44"W	24.38
T12	S48°39'14"W	17.73
T13	S38°19'51"W	27.00
T14	S28°48'44"W	32.28
T15	S70°24'15"W	27.88
T16	S34°08'40"W	14.22
T17	S03°44'18"W	32.10
T18	S34°08'40"W	10.40
T19	N08°13'10"E	58.50
T20	S88°37'37"E	15.00

NO.	BEARING	CHORD	DELTA	RADIUS	LENGTH	TAN
C1	N61°18'55"E	289.50	14°01'24"	1187.00	290.52	145.99
C2	S69°48'27"E	48.98	2°21'38"	1187.00	48.98	24.49
C3	S48°03'38"E	214.92	23°51'08"	520.00	218.48	108.83
C4	S49°04'18"E	60.59	15°48'50"	220.00	60.79	30.59
C5	S84°07'01"E	34.09	85°53'22"	25.00	37.49	23.28
C6	N30°48'30"E	148.28	28°10'20"	303.07	148.81	76.47
C7	N28°00'34"W	79.83	124°27'12"	45.00	97.75	85.49
C8	S00°40'28"W	25.82	62°10'55"	25.00	27.13	15.08
C9	S00°37'38"E	23.00	54°49'58"	25.00	23.90	12.98
C10	S88°38'28"W	23.00	54°47'58"	25.00	23.90	12.95
C11	S22°43'16"W	48.01	26°58'32"	105.00	49.47	25.20
C12	S20°15'27"W	28.84	70°27'50"	25.00	30.75	17.00
C13	N05°08'14"E	77.81	62°12'38"	75.00	81.45	45.27
C14	N57°07'22"W	77.81	62°13'36"	75.00	81.45	45.27
C15	S42°08'18"E	87.70	29°47'53"	180.00	88.81	50.55
C16	S07°10'17"W	215.28	89°01'17"	180.00	328.80	130.64
C17	S28°00'34"E	132.72	124°27'12"	75.00	182.91	142.41
C18	S47°49'31"E	175.13	18°18'20"	550.00	175.88	88.70
C19	N43°42'18"E	218.04	30°12'41"	333.07	222.13	115.37
C20	S72°13'22"W	314.03	41°46'25"	441.25	321.71	168.38
C21	N08°47'21"W	147.80	16°19'41"	520.00	148.19	74.60
C22	N24°02'37"W	104.31	10°10'40"	520.00	103.00	83.80
C23	S25°51'20"W	58.08	2°30'45"	1324.48	58.08	29.05
C24	N84°40'21"E	57.48	70°11'13"	50.00	61.25	35.13
C25	S31°38'52"W	210.20	9°08'19"	1324.48	210.48	105.46
C26	S61°35'00"E	47.84	57°17'45"	50.00	50.00	27.32
C27	S00°07'17"W	48.87	58°08'50"	50.00	50.71	27.78
C28	S49°30'00"W	24.74	28°38'52"	50.00	25.00	12.77
C29	S77°47'42"W	24.14	27°58'15"	50.00	24.30	12.44
C30	N84°18'01"W	14.54	7°50'18"	105.00	14.55	7.29
C31	S88°48'00"W	10.12	11°37'19"	50.00	10.14	5.08
C32	N70°48'16"W	34.75	19°03'13"	105.00	34.92	17.62
C33	N72°05'22"W	59.43	84°35'49"	50.00	58.37	31.81
C34	N20°20'08"W	24.74	28°38'52"	50.00	25.00	12.77
C35	N20°23'24"E	80.87	75°08'02"	50.00	65.57	38.40
C36	N23°20'03"E	120.68	5°20'58"	1284.48	121.00	60.65
C37	N27°58'13"E	121.85	5°31'41"	1284.48	122.00	61.05
C38	N34°54'10"E	13.40	0°30'25"	1284.48	13.40	6.70
C39	N30°07'22"E	69.90	11°07'40"	383.07	70.00	35.11
C40	N48°34'04"E	125.12	18°50'30"	383.07	125.74	63.64
C41	N01°42'33"E	125.32	33°22'03"	220.00	128.18	65.94
C42	N30°08'48"E	89.37	23°20'21"	220.00	90.00	45.84
C43	N43°37'37"E	35.36	90°00'00"	25.00	39.27	25.00

SEE Plat 25 page 116 for Replatting of Lots 8, 9, 10 & TRACT "B"

DYER, RIDDLE, MILLS AND PRECOURT, INC.
ENGINEERS · SURVEYORS
1505 EAST COLONIAL DRIVE
ORLANDO, FLORIDA 32803
PHONE: 896-0594

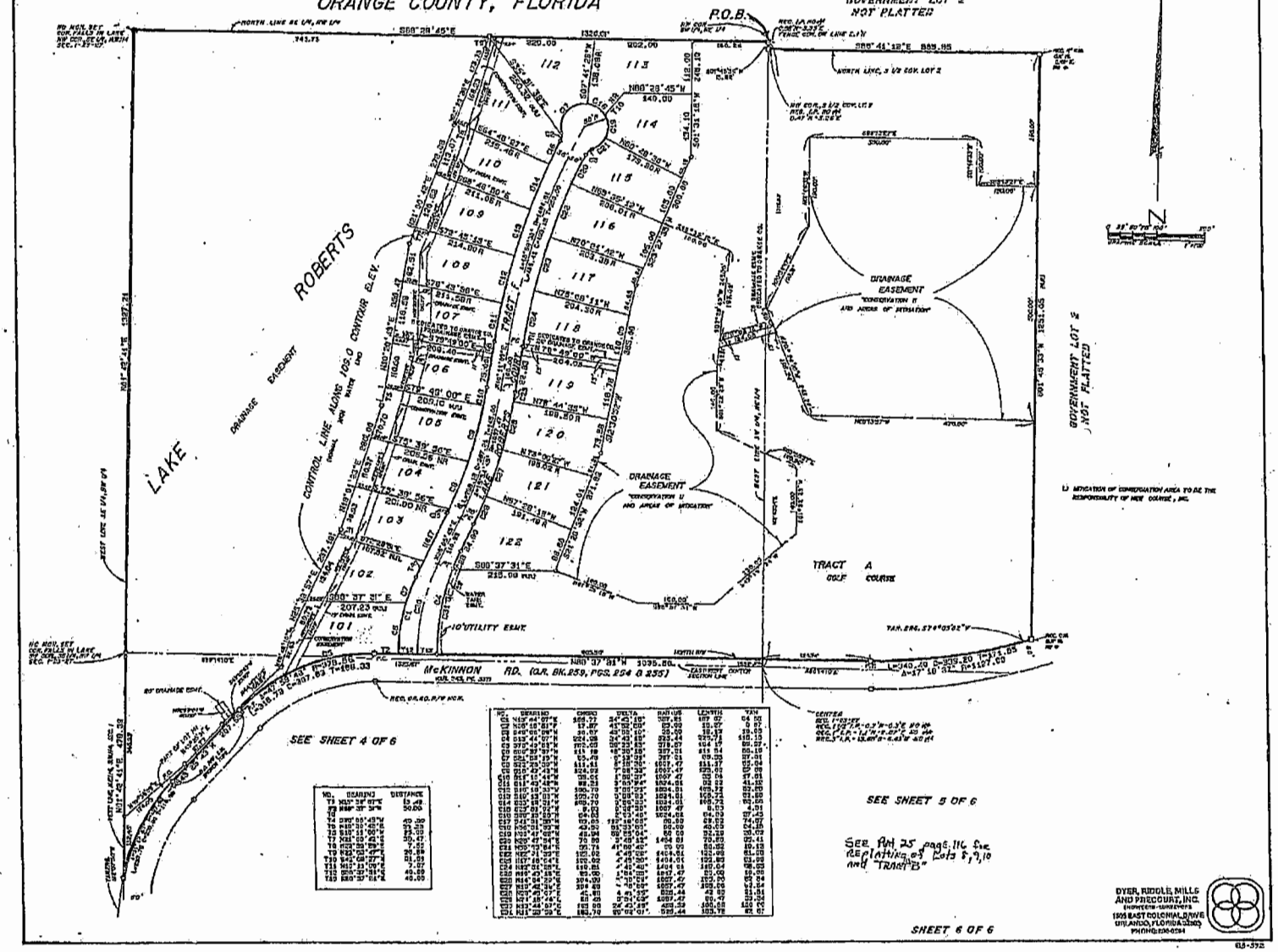
SHEET 5 OF 6

001141

BUTLER BAY - UNIT THREE

REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA

PLAT BOOK 18 PAGE 9



001142

F

RESOLUTION VACATING AND ANNULING PLAT

WHEREAS, pursuant to the provision of Florida Statutes, Section 177.101 (4), a petition has been filed by Ray Conway

to vacate and annul a portion of a recorded plat, to wit: 2567961 ORANGE CO. FL. 10:19:40AM 07/29/86

Legal Description (See Exhibit "A" Attached)

OR3808 PG2058

WHEREAS, the Petitioners own the fee simple title to the above-described lands; and

WHEREAS, a Notice of Application for such vacating of said Plat was given by legal notice, published in the Orlando Sentinel, a newspaper of general circulation published in Orlando, Florida, and in the County in which the Plat is located, in not less than two (2) weekly issues as provided by Florida Statutes, Section 177.101 (4), as shown by Proof of Publication attached to the Petition; and

WHEREAS, all State and County taxes for 1985, have been paid as shown by the Certifications of the Tax Collector of Orange County, Florida, attached to said Petition; and

WHEREAS, the tract to be vacated is not within the corporate limits of any incorporated city or town; and

WHEREAS, the plat vacation will not affect the ownership or right of covenient access of other persons owning other parts of the subdivision and;

WHEREAS, no person or persons have appeared in opposition to the granting of said Petition; and

WHEREAS, the Board of County Commissioners finds that said Petition and supporting documents are in accordance with the requirements of Florida Statutes, Section 177.101, and the applicable provisions of the Orange County Code;

NOW THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Orange County, Florida that the release sought by said Petition with respect to the following described property be and the same is hereby granted:

Legal Description (See Exhibit "A" Attached)

and

RESOLVED FURTHER, that the aforedescribed portion of the Plat is hereby vacated and annulled and the streets and alleys in said Plat be and the

RETURN TO CLERKS OFFICE - B.C.C. - 5TH FLOOR, CO. ADMIN BLDG. - ROY

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS AT THEIR MEETING
JUL 21 1986

Florida Rec Fee $ Paid 13.00
Doc Tax $
Int Tax $
Total $ 13.00

THOMAS H. LOCKER, Orange County Comptroller
By _____ Deputy Clerk

$13.00

001143

same are hereby vacated and abandoned, and the County renounces any rights in said streets and alleys and said property is hereby returned to acreage for the purpose of taxation.

RESOLVED FURTHER, that a certified copy of this Resolution be filed with the Clerk of the Circuit Court of Orange County, Florida and duly recorded among the Public Records of Orange County, Florida.

BOARD OF ORANGE COUNTY COMMISSIONERS

Bern Dearman

Chairman

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that the foregoing is a true and correct copy of a Resolution vacating a portion of the Plat of Butler Bay / Unit Two adopted by the Board of County Commissioners of Orange County, Florida, on the 21st day of July, 19 86.

WITNESS my hand and official seat this 23rd day of July, 19 86, at Orlando, Florida.

THOMAS H. LOCKER, Clerk
Board of County Commissioners

BY Mary Jo Garrison
Deputy Clerk

OR3808 PG2059

DRMP #84-392
November 11, 1985
Petition to Vacate Plat

Legal Description

EXHIBIT "A"

That part of "Butler Bay - Unit Two" as recorded in Plat Book 13, Pages 59 and 60 of the Public Records of Orange County, Florida more particularly described as follows:

All of Lots 123 through 140 inclusive and all of "Marabou Court" and that part of "Butler Bay Drive North" lying adjacent to and contiguous with Lot 123, being 60.00 feet in width, as shown on said plat of Butler Bay - Unit Two

Subject to:

The landscape, wall, sign area and sidewalk easement along the South line of Lots 132 through 135 as shown on said plat

Subject to:

That 15.00 foot drainage easement along the East line of Lot 133 and the West line of Lot 134 as shown on said plat

Subject to:

That 18.00 foot drainage easement along the North line of Lot 136 and the South line of Lot 137 as shown on said plat.

and subject to that 20.00 foot American Telephone and Telegraph easement as recorded in Official Record Book 1598, Pages 687 and 688 of the Public Records of Orange County, Florida.

All of the above as shown on the attached "sketch of description" made a part of and attached to this description.

ORB 3808 PG 2060

RECORDED & RECORD VERIFIED
County Comptroller, Orange Co., FL

A REPLAT OF LOTS 8, 9, 10 AND TRACT B, BUTLER BAY - UNIT THREE

A REPLAT OF LOTS 8, 9, 10 AND TRACT B, BUTLER BAY - UNIT THREE, AS RECORDED IN PLAT BOOK 18, PAGES 4-9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, BEING A PORTION OF SECTIONS 1 AND 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST, ORANGE COUNTY, FLORIDA.

PLAT BOOK 25 PAGE 116

LEGAL DESCRIPTION:

ALL OF LOTS 8, 9 AND 10, BUTLER BAY - UNIT THREE, AS RECORDED IN PLAT BOOK 18, PAGES 4, 5, 6, 7, 8 AND 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, BEING A PORTION OF SECTIONS 1 AND 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST, ORANGE COUNTY, FLORIDA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

FOR POINT OF BEGINNING "A", BEGIN AT THE MOST SOUTHEASTERLY CORNER OF SAID LOT 8, BUTLER BAY - UNIT THREE BEING A POINT ON THE WESTERLY RIGHT OF WAY LINE OF BUTLER BAY DRIVE NORTH, AS SHOWN ON THE PLAT OF SAID BUTLER BAY - UNIT THREE; THENCE RUN ALONG THE BOUNDARY OF SAID LOTS 8, 9 AND 10, BUTLER BAY - UNIT THREE, THE FOLLOWING SEVEN COURSES AND DISTANCES; THENCE RUN N.70°08'47"W. 220.00 FEET; THENCE RUN N.27°11'25"E. 100.50 FEET; THENCE RUN N.42°12'47"E. 156.82 FEET; THENCE RUN N.40°53'56"E. 123.38 FEET; THENCE RUN S.40°05'04"E. 220.00 FEET; THENCE RUN S.49°53'56"W. 123.38 FEET TO THE POINT OF CURVATURE OF A CURVE CONCAVE SOUTHEASTERLY AND HAVING A RADIUS OF 410.00 FEET AND A CENTRAL ANGLE OF 30°02'43"; THENCE FROM A CHORD BEARING OF S.34°52'38"W. RUN SOUTHWESTERLY ALONG THE ARC OF SAID CURVE A DISTANCE OF 215.00 FEET TO THE POINT OF BEGINNING.
SAID LANDS CONTAINING 1.873 ACRES, MORE OR LESS.
TOGETHER WITH:

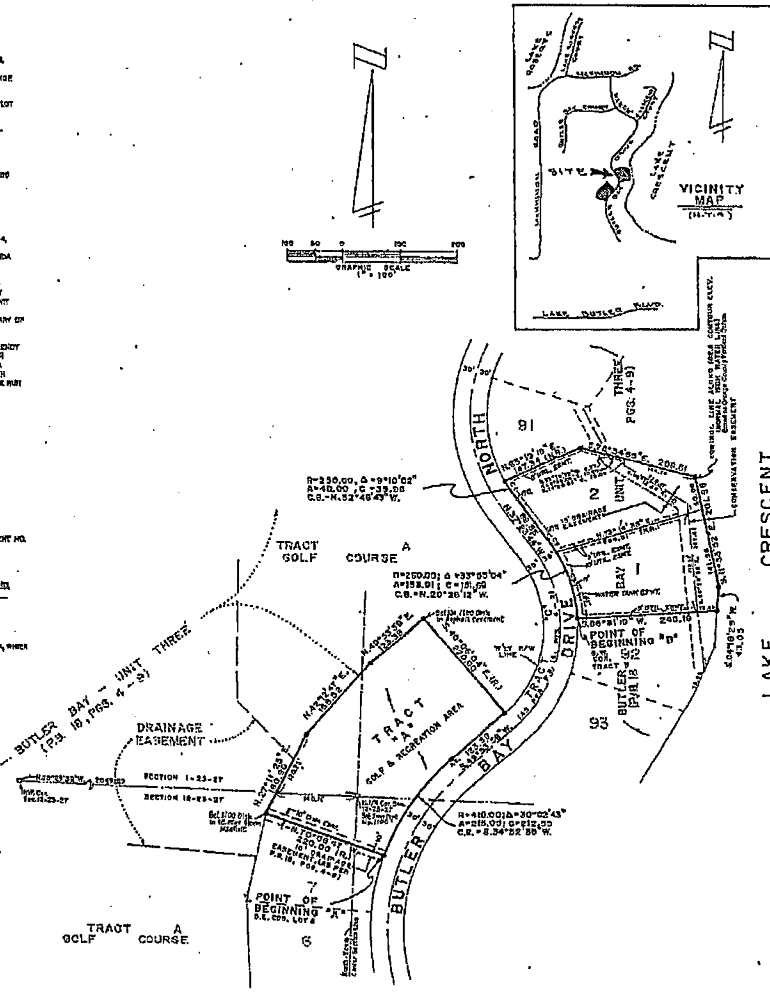
ALL OF TRACT B, BUTLER BAY - UNIT THREE, AS RECORDED IN PLAT BOOK 18, PAGES 4, 5, 6, 7, 8 AND 9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, BEING A PORTION OF SECTION 1, TOWNSHIP 23 SOUTH, RANGE 27 EAST, ORANGE COUNTY, FLORIDA BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

FOR POINT OF BEGINNING "B", BEGIN AT THE MOST SOUTHWESTERLY CORNER OF SAID TRACT B, BUTLER BAY - UNIT THREE, BEING A POINT ON THE EASTERLY RIGHT OF WAY LINE OF BUTLER BAY DRIVE NORTH, AS SHOWN ON THE PLAT OF SAID BUTLER BAY - UNIT THREE, SAID POINT LYING IN A CURVE CONCAVE WESTERLY AND HAVING A RADIUS OF 250.00 FEET AND A CENTRAL ANGLE OF 33°55'04"; THENCE RUN ALONG THE BOUNDARY OF SAID TRACT B, BUTLER BAY - UNIT THREE, THE FOLLOWING EIGHT COURSES AND DISTANCES; THENCE FROM A CHORD BEARING OF N.20°26'12"W. RUN NORTHWESTERLY ALONG THE ARC OF SAID CURVE A DISTANCE OF 153.91 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE RUN N.37°23'44"W. 68.55 FEET TO THE POINT OF CURVATURE OF A CURVE CONCAVE NORTHEASTERLY AND HAVING A RADIUS OF 250.00 FEET AND A CENTRAL ANGLE OF 9°10'02"; THENCE FROM A CHORD BEARING OF N.32°48'43"W. RUN NORTHWESTERLY ALONG THE ARC OF SAID CURVE A DISTANCE OF 40.00 FEET; THENCE RUN N.65°12'10"E. 147.54 FEET; THENCE RUN S.78°34'55"E. 206.61 FEET; THENCE RUN S.11°33'52"E. 201.96 FEET; THENCE RUN S.04°16'29"W. 43.05 FEET; THENCE RUN S.85°31'10"W. 240.18 FEET TO THE POINT OF BEGINNING.

SAID LANDS CONTAINING 1.821 ACRES, MORE OR LESS.

NOTES:

1. —■— DENOTES SET PERMANENT REFERENCE MONUMENT (CONCRETE MONUMENT NO. 1100), UNLESS OTHERWISE INDICATED.
2. —○— DENOTES SET IRON PIPE NO. 1100, UNLESS OTHERWISE INDICATED.
3. NOTICE: THERE MAY BE ADDITIONAL RESTRICTIONS THAT ARE NOT RECORDED ON THIS PLAT THAT MAY BE FOUND IN THE PUBLIC RECORDS OF THIS COUNTY.
4. (R.) DENOTES RADIAL LINE.
5. (N.R.) DENOTES NON-RADIAL LINE.
6. BEARINGS BASED ON THE PLAT OF BUTLER BAY - UNIT THREE, AS RECORDED IN PLAT BOOK 18, PAGES 4-9 OF THE PUBLIC RECORDS OF ORANGE COUNTY, FLORIDA, WHICH SHOWS THE NORTH LINE OF LOT 92 AS BEING S86°31'10"W.
7. DEVELOPMENT RIGHTS TO THE CONSERVATION EASEMENT ARE DEDICATED TO ORANGE COUNTY, FLORIDA.



CURVE TABLE						
NO.	BEARING	CHORD	DELTA	RADIUS	LENGTH	TAN
C1	N.29°48'49"W.	39.00	[illegible]	[illegible]	40.00	[illegible]
C2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
C3	N.17°25'14"W.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

PREPARED BY:
DYER, RIDDLE, MILLS AND PRECOURT, INC.
1505 E. COLONIAL DRIVE
ORLANDO, FLORIDA 32803
896-0594

A REPLAT OF LOTS 8, 9, 10 AND TRACT B, BUTLER BAY - UNIT THREE
DEDICATION

KNOW ALL MEN BY THESE PRESENTS, That the Corporation named below being the owner in fee simple of the lands described in the foregoing caption to this plat, hereby dedicates said lands and plat for the uses and purposes therein expressed and dedicates the EASEMENTS shown hereon to the perpetual use of the public, and
IN WITNESS WHEREOF, has caused these presents to be signed and attested to by the officers named below and its corporate seal to be affixed hereto on 1/5/89

EURO ACTIVIDADE GOLF, INC.

By: [signature]
KLAUS E. MOELLER, JR., PRESIDENT

Attest: ______

Signed and sealed in the presence of: [signatures]
Witness Witness

STATE OF Florida COUNTY OF Orange
THIS IS TO CERTIFY, That on January 5, 1989 before me, an officer duly authorized to take acknowledgements in the State and County aforesaid, personally appeared KLAUS E. MOELLER, JR. and ______ respectively President and ______ of EUROACTIVIDADE GOLF, INC. to me known to be the individuals and officers described in and who executed the foregoing Dedication and severally acknowledged the execution thereof to be their free act and deed as such officers thereunto duly authorized; that the official seal of said corporation is duly affixed thereto; and that the said Dedication is the act and deed of said corporation.

IN WITNESS WHEREOF, I have hereto set my hand and seal on the above date.
[signature]
NOTARY PUBLIC My Commission Expires: 10/17/93

A REPLAT OF LOTS 8, 9, 10 AND TRACT B, BUTLER BAY - UNIT THREE
DEDICATION

KNOW ALL MEN BY THESE PRESENTS, That the Corporation named below, being the owner in fee simple of the lands described in the foregoing caption to this plat, hereby dedicates said lands and plat for the uses and purposes therein expressed and dedicates the EASEMENTS shown hereon to the perpetual use of the public, and ______
IN WITNESS WHEREOF, has caused these presents to be signed and attested to by the officers named below and its corporate seal to be affixed hereto on JANUARY 9, 1990

WEDTO DEVELOPMENT, INC.

By: [signature]
C. PHILIP WALLIS, President

Attest: ______

Signed and sealed in the presence of: [signatures]

STATE OF FLORIDA COUNTY OF ORANGE
THIS IS TO CERTIFY, That on JANUARY 9, 1990 before me, an officer duly authorized to take acknowledgments in the State and County aforesaid, personally appeared C. PHILIP WALLIS and ______ respectively THE President and ______ of the above named corporation incorporated under the laws of the State of FLORIDA to me known to be the individuals and officers described in and who executed the foregoing Dedication and severally acknowledged the execution thereof to be their free act and deed as such officers thereunto duly authorized; that the official seal of said corporation is duly affixed thereto; and that the said Dedication is the act and deed of said corporation.
IN WITNESS WHEREOF, I have hereto set my hand and seal on the above date.
[signature]
NOTARY PUBLIC
My Commission Expires 04-30-91

CERTIFICATE OF SURVEYOR

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, being a licensed and registered land surveyor, does hereby certify that on MARCH 14, 1989 he completed the survey of the lands as shown in the foregoing plat or plan; that said plat is a correct representation of the lands therein described and platted or subdivided; that permanent reference monuments have been placed as shown thereon as required by Chapter 177, Florida Statutes; and that said land is located in Orange County, Florida. Dated MARCH 15, 1989

Signature [signature]
Registration No. 1188

CERTIFICATE OF APPROVAL BY ZONING DIRECTOR

Examined and Approved: Sharon Smith 4/3/90
Zoning Director Date

CERTIFICATE OF APPROVAL BY COUNTY ENGINEER

Examined and Approved: George W. Cole 3-22-90
County Engineer Date

CERTIFICATE OF APPROVAL BY BOARD OF COUNTY COMMISSIONERS

THIS IS TO CERTIFY, That on 4-2-90 the foregoing plat was approved by the Orange County Commission of Orange County, Florida.

Bill Donegan
Vice Chairman, Board of County Commissioners
Attest: Martha O. Haynie
Clerk of the Board of County Commissioners
BY: [signature] D.C.

CERTIFICATE OF COUNTY COMPTROLLER

I HEREBY CERTIFY, That I have examined the foregoing plat and find that it complies in form with all the requirements of Chapter 177, Florida Statutes, and was filed for record on 4/12/90 at 9:17 A.M. File No. 3403383
Martha O. Haynie
County Comptroller
In and for Orange County, Fla.
BY [signature] D.C.

I

Paul H. Chipok

From: Steven.Thorp@ocfl.net
Sent: Thursday, November 19, 2015 12:38 PM
To: Paul H. Chipok; jpoulos@poulosandbennett.com
Subject: PZC Recommendation - Butler Bay

Paul/Jamie,

This is the motion made by the PZC this morning:

To CONTINUE the requested R-CE-C (Country Estate Cluster District) zoning and amended Butler Bay Cluster Plan to April 21, 2016, in order to allow the applicant an opportunity to:

(1) Submit a Petition-to-Vacate ("PTV") application pursuant to Section 177.101(3), Florida Statues, requesting that and receiving approval by the Board of County Commissioners (if at all) to remove all notes/restrictions regarding development rights and access to Tract A on the Plat, and
(2) Request and receive approval by the Board (if at all) an amendment to that certain Developer's Agreement by and between Windermere Lakes, Ltd., a Florida limited partnership, and County, approved by the Board on February 24, 1986, and recorded at OR Book 3537, Page 1536, in order to amend and/or remove the references to the restrictions regarding development rights and access to Tract A.

Thank you,

Steven Thorp
Planner II - Current Planning

Orange County Planning Division
Community, Environmental, and Development Services Department
201 S. Rosalind Ave., 2nd Floor, Orlando, FL 32801
Tel: 407-836-5549 Fax: 407-836-5862
Email: Steven.Thorp@ocfl.net

Sec. 34-155. - Public sites and open spaces.

(a) *Open spaces.* Developers may include private parks and recreation areas in subdivisions provided that: (i) the proposed areas are clearly designated as "tracts" on the plat; (ii) the proposed area is adequate for the intended purpose; and (iii) assurance is given in the form of subdivision deed restrictions or covenants, conditions and restrictions that they will be adequately maintained. Private parks and recreation areas shall be identified on the plat as common areas for the owners of property within the subdivision. A mandatory homeowners' association shall own and maintain the facilities. For parks or recreation areas over fifty (50) acres in size, the applicant may petition the county to own, operate and maintain the park or recreation area for public use.

(b) *Public school sites.* In proposed subdivisions as defined in subparagraph (1) below, public school sites shall be designated on the preliminary plan prior to acceptance of such plan. Where reservation of school sites is determined, an executed deed or the required reservation and maintenance agreement, as noted in subparagraph (2), shall be approved by the board of county commissioners.

(1) Multiplier of students per dwelling unit. The school age population shall be determined based on the following rate:

Single-Family	0.431
Multifamily	0.259
Mobile Home	0.287

a. *Public elementary school sites.* One (1) public elementary school site shall be reserved to the Orange County School Board if fifty (50) percent of the projected school-age population will be between three hundred seventy-five (375) and seven hundred fifty (750) inclusive. Thereafter, one (1) additional public elementary school site shall be reserved for the school board for each bracket or partial bracket of seven hundred fifty (750) students.

b. *Public middle school sites.* One (1) public middle school site shall be reserved for the school board if twenty-three (23) percent of the projected school-age population will be between six hundred fifty (650) and one thousand three hundred (1,300) inclusive. Thereafter, one (1) additional public middle school site shall be provided to the school board for each bracket or partial bracket of one thousand three hundred (1,300) students.

c. *Public senior high school sites.* One (1) public senior high school site shall be reserved to the school board if twenty-seven (27) percent of the projected school-age population will be between one thousand three hundred (1,300) and two thousand six hundred (2,600) inclusive. Thereafter, one (1) additional public senior high school site shall be provided to the school board for each bracket or partial bracket of two thousand six hundred (2,600) students.

d. *School site sizes and location.* School site sizes shall be a minimum of fifteen (15) acres for elementary school sites, twenty-five (25) acres for middle school sites, twenty (20) acres for free-standing ninth grade centers, and sixty-five (65) acres for high school sites.

School site locations shall comply with the requirements of sections 38-1753 through 38-1755 of the Orange County Code regarding school site guidelines and criteria.

Prior to platting the first section of the subdivision, the owner/developer shall submit copies of the following to the board of county commissioners:

a. An agreement between the owner/developer and the school board which "reserves" the school site until certificates of occupancy for seventy-five (75) percent of the approved lots in the subdivision which generated the reservation are issued. Such agreement shall set forth the maintenance and ownership responsibilities during the reservation period and stipulate an agreed-upon price for the purchase of such site or outline the methodology for the establishment of a "fair market price" should the school board choose to purchase.

b. The owner/developer shall provide a schematic development plan for the use of the property designated for a school site in the event the property is not used for school-related development.

(3) After approval by the board of county commissioners, reservation of land for public school sites shall be made by noting on the plat "reserved" for public school site, subject to planned construction by the school board.

(Ord. No. 91-29, § 2(Exh. A), 12-10-91; Ord. No. 92-28, § 3.09, 9-22-92; Ord. No. 92-42, § 14, 12-15-92; Ord. No. 94-4, § 1(Exh. A), 2-8-94; Ord. No. 2000-14, § 1, 6-27-00; Ord. No. 2011-05, § 3, 6-7-11)

Florida Paid THOMAS H. LOCKER,
Rec Fee $ 77.00 County Comptroller
Doc Tax $ —
Int Tax $ —
Total $ 77.00 By Deputy Clerk

2567410 ORANGE CO. FL.
03:41:40PM 07/28/86

DECLARATION OF COVENANTS CONDITIONS AND RESTRICTIONS FOR BUTLER BAY UNIT THREE

OR3808 PG1478

WHEREAS, Windermere Lakes, Ltd. and Lake Butler Estates, Ltd. (collectively the "Declarant") are the owners of certain real property located in Orange County, Florida, which property is more fully described on the attached Exhibit "A" (the "Property"); and

WHEREAS, the Property is a portion of the "Additional Property" described in previously recorded covenants and Restrictions for Lake Butler Estates and Butler Bay, which covenants and restrictions are recorded in O.R. Book 3182, page 2532; O.R. Book 3183, Page 2035; O.R. Book 3325, Page 2260; O.R. Book 3360, page 1772; O.R. Book 3454, Page 1086; O.R. Book 3474, Page 798; O.R. Book 3664, page 1467; O.R. Book 3670, Page 48; all in the Public Records of Orange County, Florida; and

NOW, THEREFORE, in order to maintain the quality of the Butler Bay subdivision and the atmosphere of the community, the Property described herein shall be held, sold and conveyed subject to the following restrictions, which are for the purpose of protecting the value and desirability of and which shall run with the Property and shall be binding on all parties having any right, title or interest in the subdivisions or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

ARTICLE I.

DEFINITIONS

Section 1. "Association" shall mean and refer to Butler Bay Association, Inc. a Florida corporation not for profit, its successors and assigns.

Section 2. "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, all real property including the improvements thereon owned by the Association for the common use and enjoyment of the Owners, and any Lot or parcel of land subsequently deeded by the Declarant to the Association for use by the Members.

Section 3. "Declarant" shall mean and refer to Windermere Lakes, Ltd., a Florida Limited Partnership,** successors and assigns if such successors or assigns should acquire any part of the undeveloped Properties for the purpose of development and shall have received an assignment of Declarant's rights with respect to such real estate.

Section 4. "Lot" shall mean and refer to any parcel of land shown upon any recorded subdivision map of the Properties with the exception of any Common Area unless made subject to this Declaration in accordance with the provisions of Article II.

Section 5. "Member" shall mean and refer to every Owner of a Lot.

Section 6. "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any Lot which is a part of the Properties, including contract sellers, but excluding those having such interest merely as security for the performance of an obligation.

** and Lake Butler Estates, Ltd., a Florida limited partnership, and their

RETURN TO CLERKS OFFICE - B.C.C. - 5TH FLOOR, CO. ADMIN BLDG. - ROY

$97.00 PAID

001150

Section 7. "Properties" shall mean and refer to the Subdivision, as hereinafter defined, together with such additions thereto as may hereafter be made subject to this Declaration by any subsequent Supplemental Declaration filed in accordance with the provisions of Article II.

Section 8. "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.

ARTICLE II.

ADDITIONS TO PROPERTIES

Section 1. Additional land within the area described in that certain deed recorded in O. R. Book 3141, Page 293, of the Public Records of Orange County, Florida, may be annexed to the Properties by the Declarant without the consent of Members. The Declarant from time to time may, in its discretion, cause such additional lands and other lands owned by Declarant to become subject to this Declaration; but, under no circumstances shall Declarant be required to make such additions, and until such time as such additions are made to the Properties in the manner hereinafter set forth, only the Subdivision described on page one of this Declaration shall be affected by or subject to this Declaration.

Section 2. The additions authorized under this Article II shall be made by filing of record a Supplemental Declaration of Covenants, Conditions and Restrictions with respect to the additional property which shall extend the scheme of the covenants and restrictions of this Declaration to such property. Such Supplemental Declaration may revoke, modify or add to the covenants established by this Declaration as may be necessary to reflect the different character, if any, of the added properties; provided, however, that no Supplemental Declaration shall revoke or diminish the rights of the Owners of the lots in Butler Bay, Unit Three to the utilization of the Common Area as established hereunder or revoke, substantially diminish or materially change the rights of an Owner of any lot within the Subdivision described in Article I Section 8 of this Declaration; however, a Supplemental Declaration may change the original and annual assessments set forth in Article V, Section 3, as to any additional land made subject to this Declaration.

Section 3. Additional land may also become subject to this Declaration upon a merger or consolidation of the Association with another association. Upon such a merger or consolidation as provided in its Articles of Incorporation, its properties, rights and obligations may, by operation of law, be transferred to another surviving or consolidated association, or, alternatively, the properties, rights and obligations of another association may, by operation of law, be added to the properties, rights and obligations of the Association as a surviving corporation pursuant to a merger. The surviving or consolidated association may administer the covenants and restrictions established by this Declaration within the Properties together with the covenants and restrictions established by a Supplemental Declaration upon any other properties as one scheme. No such merger or consolidation, however, shall revoke, diminish or change the rights of the Owners of the Lots in Butler Bay, Unit Three to the utilization of the Common Area except to grant the owners of the properties being added the right to use the Common Area.

ARTICLE III.

PROPERTY RIGHTS IN THE COMMON AREA

Section 1. Every Owner shall have a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

(a) the right of the Association to charge reasonable admission and other fees for the use of any recreational facility situated upon the Common Area;

(b) the right of the Association to suspend the voting rights and right to use of the recreational facilities by an Owner for any period during which any assessment against an Owner's Lot remains unpaid; and for a period not to exceed sixty (60) days for an infraction of the Association rules and regulations;

(c) the right of the Association to borrow money for the purpose of improving the Common Area and in aid thereof, to mortgage the Common Area;

(d) the right of the Association to dedicate or transfer all or any part of the Common Area to any public agency, authority or utility for such purposes; provided, written notice of the proposed agreement and action thereunder is sent to every Member at least ninety (90) days in advance of any action taken;

(e) the rights of Members of the Association shall in no way be altered or restricted because of the location of the Common Area in a subdivision of the Properties in which such Member is not a resident. Common Area property belonging to the Association shall result in membership use entitlement, notwithstanding the particular subdivision of the Properties in which the Lot is acquired.

ARTICLE IV.

MEMBERSHIP AND VOTING RIGHTS

Section 1. Every person or entity who is a record Owner of a fee or undivided fee interest in any Lot shall be a Member of the Association, provided that any such person or entity who holds such interest merely as a security for the performance of any obligation shall not be a Member.

Section 2. The Association shall have two classes of voting membership, as follows:

(a) Class A. Class A members shall be all those Owners as defined in Section 1 with the exception of the Declarant. Class A members shall be entitled to one vote for each Lot in which they hold the interests required for membership by Section 1. When more than one person holds such interest or interests in any Lot, all such persons shall be Members, and the vote for such Lot shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any such Lot.

(b) Class B. Class B member shall be the Declarant. The Class B member shall be entitled to forty (40) votes for each Lot in which it holds the interest required for membership by Article IV, Section 1 hereof.

Section 3.. The Association shall have a class of non-voting membership (Class C) for those Owners in Butler Bay Unit Three, which membership shall relate solely to the construction, use, maintenance, repair and replacement of the private roads in Butler Bay Unit Three. In addition to the assessments provided for in Article V hereof, each Owner in Butler Bay Unit Three shall pay an assessment of four dollars ($4.00) per front foot of Owner's lot (Road Assessment), which sum shall be reserved for repair and resurfacing of the private roads in Butler Bay Unit Three. These sums shall be held in an interest bearing escrow account by the Declarant or the Association and disbursed as required for repairs and maintenance pursuant to a "Developer's Agreement" to be entered into between Windermere Lakes, Ltd. and Orange County, a political subdivision of the State of Florida. To the extent that funds are not available for the resurfacing of the roads when necessary, there shall be an assessment of the Class C members for the additional amount required to resurface the roads. Thereafter, there shall be an assessment of the Class C members after every resurfacing for the then current cost per foot (times the number of front feet on each Owner's Lot) of repair and resurfacing of the private roads in the Unit in which the Owner's Lot is located, which assessment shall be held in escrow by the Association and disbursed when necessary for resurfacing and repairs. The assessments referred to herein shall be a lien upon the Lot(s) owned by a Class C Owner (at the time of such assessment) until paid. If the assessment referred to in this section is not paid, the Association shall have the rights and remedies set forth in Article V, Sections 7 and 8.

ARTICLE V.

COVENANT FOR ASSESSMENTS

Section 1. Except for the Declarant, each Owner of any Lot by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, hereby covenants and agrees to pay to the Association: (1) an original assessment, (2) annual assessments or charges, and (3) special assessments for capital improvements, such assessments to be fixed, established and collected from time to time as hereinafter provided. All such assessments shall be alien upon the Lot(s) owned by an Owner (at the time of such assessment) until paid.

Section 2. The assessments levied by the Association (except for the assessment referred to in Article IV, Section 3 above) shall be used exclusively for the purpose of promoting the recreation, health, safety, and welfare of the residents in the properties and in particular for the improvement and maintenance of properties, services, and facilities devoted to the purpose and related to the use and enjoyment of the Common Area and of the homes situated upon the Properties, including, but not limited to:

(a) Payment of operating expenses of the Association;

(b) Lighting, improvements and beautification of roads, access ways and easement areas; the acquisition, maintenance, repair and replacement of directional markers and signs and traffic control devices; and costs of controlling and regulating traffic on the access ways;

(c) Maintenance, improvements, and operation of drainage swales, easements and systems;

(d) Management, maintenance, improvement and beautification of parks, lakes, ponds, buffer strips, conservation areas and recreation areas and facilities;

(e) Garbage collection and trash and rubbish removal but only when and to the extent specifically authorized by the Association;

(f) Providing police protection, night watchmen, guard and gate services, but only when and to the extent specifically authorized by the Association;

(g) Doing any other thing necessary or desirable, in the judgment of said Association, to keep the Subdivision neat and attractive; to preserve and enhance the value of the properties therein; to eliminate fire, health, or safety hazards; or, that in the judgment of said Association, may be of general benefit to the owners or occupants of lands included in the Subdivision; and

(h) Repayment of funds and interest thereon borrowed by the Association.

Section 3. Original, Annual and Special Assessments.

(a) The original assessment shall be Three Hundred Fifty Dollars ($350.00) per Lot. Declarant reserves the right to change the amount of the original assessment in subsequent Supplemental Declarations but only as to additions made to the properties.

(b) In addition to the above mentioned original assessment, there shall be an annual assessment payable in advance on January 1 of each year (except for the year of the initial purchase when it shall be prorated until the end of that year and paid at closing. The annual assessment shall be as set by the Board of Directors subject to the provisions of this Article V, but for the period ending December 31, 1986 shall not exceed Six Hundred Dollars ($600.00) per Lot.

The Declarant, as the Class B Member, is hereby exempt from the payment of the original, annual or special assessments and from payment of the Road Assessment.

(c) In addition to the annual assessments authorized by Section 3(b) hereof, the Association may levy in any assessment year a special assessment, applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of a described capital improvement upon the Common Area, or within or upon any storm water drainage and retention easement, including the necessary fixtures and personal property related thereto; provided that any such assessment shall have the assent of two-thirds (2/3) of the votes of all members who are voting in person or proxy at a meeting duly called for that purpose, written notice of which shall be sent to all members at least thirty (30) days in advance which shall set forth the purpose of the meeting.

Section 4. The Association may change the basis and amount of the annual assessments provided that any such change shall have the assent of two-thirds (2/3) of the votes of all Members who are voting in person or by proxy, at a meeting duly called for that purpose, written notice of which shall be sent to all Members at least thirty (30) days in advance and shall set forth the purpose of the meeting; provided further that the

limitations of Section 3 hereof shall not apply to any change in the basis of the assessments undertaken as an incident to a merger or consolidation in which the Association is authorized to participate under its Articles of Incorporation and under Article II, Section 3 hereof.

Section 5. The quorum required for any action or approvals authorized for Member consideration under Sections 3 and 4 hereof shall be as follows:

(a) At the first meeting called, as provided in Section 3 or Section 4 of this Article V, the presence at the meeting, in person or by proxy, of Members entitled to cast sixty (60) percent of all the votes of the membership entitled to vote thereon shall constitute a quorum.

(b) If the required quorum is not in attendance at the meeting, in person or by proxy, another meeting may be called, subject to the notice requirement set forth in Sections 3 and 4, and the required quorum at any such subsequent meeting shall be one-half (1/2) of the required quorum at the preceding meeting, provided that no such subsequent meeting shall be held more than forty (40) days following the preceding meeting.

Section 6. The Association shall upon demand at any time furnish to any Owner liable for said assessments a certificate in writing signed by an officer of the Association, setting forth whether said assessment has been paid. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Section 7. If any assessment is not paid on the date when due, then, and in such event, such assessment shall become delinquent. If the assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the highest rate allowed by law. Such assessment, together with such interest thereon and costs of collection thereof, including attorneys fees, whether or not judicial proceedings are commenced and including attorneys fees incurred in trial or appellate proceedings, shall become a continuing lien on the property (upon recording by the Association of a claim of lien in the Public Records of Orange County, Florida) which shall bind such property in the hands of the then Owner, his heirs, devisees, personal representatives and assigns. The Association may bring an action at law against the Owner personally obligated to pay the same or may foreclose the lien against the property, or both. The personal obligation of the then Owner to pay such assessment, together with interest and such costs of collection, shall remain the personal obligation of such Owner for the applicable statutory period under the laws of the state of Florida and shall not pass to his successors in title unless expressly assumed by them. Provided, however, this shall in no way affect the validity or enforceability of a claim of lien previously recorded against the property.

Section 8. The lien of an assessment provided for in this Declaration shall be absolutely subordinate to the lien of any first mortgage now or hereafter placed upon the Lots subject to assessment. The subordination shall not relieve any such Lot or Owner from liability for any assessments now or hereafter due and payable.

Section 9. The following property subject to this Declaration shall be exempted from the assessments, charges and liens created by this Declaration: (i) the Properties, to the extent of any easement or other interest therein dedicated and

accepted by the local public authority and devoted to public use; (ii) all Common Areas as defined in Article I, Section 2 hereof; (iii) all properties exempted from taxation by the laws of the state of Florida upon the terms and to the extent of such legal exemption; and (iv) the Properties owned by the Declarant and any other land owned by the Declarant.

ARTICLE VI.

MAINTENANCE

Section 1. In addition to maintenance upon the Common Area, the Association shall have the right to provide maintenance and cleaning upon any vacant Lot (including a Lot experiencing construction activity), upon any improved Lot, or exterior maintenance on any structure on an improved Lot, subject, however, to the following provisions. Prior to performing any maintenance on a Lot or a structure, the Association shall determine that said property or Lot is in need of repair or maintenance and is detracting from the overall appearance of the Properties. Prior to commencement of any maintenance work on a Lot, the Association must furnish ten (10) days' written notice to the Owner at the last address listed in the Association's records for said Owner, notifying the Owner that unless certain specified repairs or maintenance are made within a twenty (20) day period from the date of the notice, the Association shall make said necessary repairs and charge same to the Owner. Upon the failure of the Owner to act within said period of time, the Association shall have the right to enter in or upon any such Lot or to hire personnel to do so to make such necessary repairs, maintenance or cleaning as is so specified in the above written notice. In this connection the Association shall have the right to paint, repair, replace and care for roofs, gutters, downspouts, exterior building surfaces, trees, shrubs, grass, walks and other exterior improvements, and to mow or cultivate such Lot and to keep such Lot free of litter and debris (including construction debris).

Section 2. The cost of such maintenance shall be assessed against the Lot upon which such maintenance is done and shall be added to and become a part of the maintenance assessment or charge to which such lot is subject under Article V hereof and, as part of such assessment or charge, it shall be a lien and obligation of the Owner and shall become due and payable in all respects as provided in Article V hereof, including but not limited to the right of the Association to record a lien against the Lot for the cost of maintenance along with any attorney's fees and costs and administrative fees and costs. Provided, the Board of Directors of the Association, when establishing the annual assessment against each Lot as required under Article V hereof, may add thereto the estimated cost of the exterior maintenance for that year but shall thereafter make such adjustment with the Owner as is necessary to reflect the actual cost thereof.

ARTICLE VII.

ARCHITECTURAL REVIEW BOARD

Section 1. The Association shall form a committee known as the "Architectural Review Board", hereinafter referred to as the "ARB". The ARB shall function as follows:

(a) The original composition of the ARB shall consist of three (3) persons who shall be appointed by the Board of Directors of the Association and shall serve at the pleasure of

said Board; provided, however, that in its selection, the Board shall be obligated to appoint Declarant or its designated representative to such Board for so long as Declarant owns any membership; provided, however, that the ARB shall consist of at least three (3) members and not more than five (5) members. A quorum of the ARB shall be 2/3 of the members.

(b) The Declarant, in order to give guidelines to Owners concerning construction and maintenance of Lots, has promulgated the Architectural Review Board Planning Criteria ("Planning Criteria") for the Subdivision. The Properties shall be held, transferred, sold, conveyed and occupied subject to the Planning Criteria, as amended from time to time by the ARB.

(c) The ARB shall have the following duties and powers:

(1) To approve, in writing, prior to the commencement of construction, all buildings, fences, walls or other structures which shall be erected or maintained upon the Properties and to approve any exterior additions, changes or alterations thereto. For any of the above, the ARB shall be furnished plans and specifications showing the nature, time of construction, shape, color, height, materials and location of the same and shall approve the harmony of the external design and location of the same and shall approve the harmony of the external design and location in relation to surrounding structures and topography;

(2) To approve any building plans and specifications, lot grading, and landscaping plans;

(3) To require to be submitted to it for approval any samples of building materials proposed or any other data or information necessary to reach its decision.

(4) To include within the Planning Criteria such other restrictions and regulations as it shall deem appropriate regarding design, development, construction and maintenance of the Subdivision. Once the ARB promulgates such restrictions, the same shall become as binding and shall be given the same force and effect as the restrictions set forth herein until the ARB modifies, changes, or promulgates new restrictions or the Association modifies or changes restrictions set forth by the ARB.

(d) The conclusion and opinion of the ARB shall be binding, if in its opinion, for any reason, including purely aesthetic reasons, the ARB should determine that any structure, location of any structure, improvement, alteration, color selection, landscaping design, building plans and specifications or lot grading is not consistent with the planned development of the Properties, the Planning Criteria or lands contiguous thereto.

(e) In the event the ARB fails to approve or disapprove such design and location within thirty (30) days after plans and specifications have been submitted to it, approval will not be required and this Section will be deemed to have been fully complied with.

Section 2. The Owner who initially constructs a home on a Lot must complete such construction in a timely manner and substantially in accordance with all plans and specifications approved by the ARB, including plans for Lot grading, building plans and specifications, landscaping plans, pool plans and any

other plans for construction of any improvement on the Lot (the "Construction"). The Owner shall notify the ARB in writing when the Construction has been completed and the ARB shall, within ten (10) days of receiving such notice, make an inspection to verify compliance with the approved plans.

Should the ARB or the Declarant determine that the Construction has not been completed in accordance with the approved plans and specifications, either the ARB or the Declarant shall notify the Owner in writing citing deficiencies and the Owner shall within fifteen (15) days after receipt of notice commence correction of the deficiencies and continue in an expeditious manner until all deficiencies have been corrected.

Should such Construction not be completed in a timely manner as determined by the ARB or the Declarant, or not be completed in accordance with the plans and specifications approved by the ARB, the ARB or the declarant shall have the right to seek specific performance of the Owner's obligations to complete the Construction as approved by the ARB; or in the alternative, to enter upon the Lot and complete the Construction as approved at the expense of the Owner, subject, however, to the following provisions. Prior to commencement of any work on a Lot, the ARB or the Declarant must furnish prior written notice to the Owner at the last address listed in the records of the Association for the Owner, notifying the Owner that unless the specified deficiencies are corrected within thirty (30) days, the ARB or the Declarant shall correct the deficiencies and charge same to the Owner. Upon the failure of the Owner to act within said period of time, the ARB or the Declarant shall have the right to enter in or upon any such Lot or to hire personnel to do so to complete the Construction as approved by the ARB. The cost of such work, including labor and materials, shall be assessed against the Lot upon which such work is performed and the Association or the Declarant shall record a Claim of Lien against the Lot for the work performed, and it shall be a lien and obligation of the Owner and shall become due and payable upon the recording of the Claim of Lien and shall be enforced and collected as provided in Section 7 of Article V hereof.

The obligation to complete the Construction as approved and pay the lien provided above shall be binding upon and enforceable against all current and future Owners of the Lot.

Any attorneys' fees or costs and any administrative costs incurred by the ARB or the Declarant in enforcing the provisions hereof, including attorneys' fees and costs on appeal of any lower court decision, shall be payable by the Owner, and the claim of Lien against the Lot shall further secured the payment of such sums.

Section 3. Upon completion of the Construction, or upon correction of deficiencies cited by the ARB or the Declarant, the Owner shall notify the ARB and the Declarant in writing to inspect the Lot. If the ARB and the Declarant determine that the Construction has not been completed in accordance with the approved plans and specifications, the ARB shall issue to the Owner a "Notice of Non-Compliance" in recordable form, execute by a majority of the members of the ARB with the corporate seal of the Association affixed. If the Owner shall not correct the deficiencies the Notice of Non-Compliance may be recorded in the Public Records; if the deficiencies shall thereafter be corrected the Notice of Non-Compliance shall be discharged by an instrument executed by the ARB in recordable form.

Failure to record a Notice of Non-Compliance after construction completion shall be conclusive evidence that the Construction as approved by the ARB has been completed but shall not excuse the Owner from the requirement that future changes to such plans be submitted to and approved by the ARB.

Section 4. The Owner who makes exterior additions to, or changes or alterations to, any improvement or constructs any new improvements on the lot after the initial construction and recording of a Certificate of Approval as described in Section 3 must complete all such work (the "Alterations") in a timely manner and substantially in accordance with all plans and specifications approved by the ARB. The Owner shall notify the ARB and the Declarant in writing when the Alterations have been completed and the ARB and the Declarant shall, within ten (10) days of receiving such notice, make inspections to verify compliance with the approved plans.

Should the ARB or the Declarant determine that the Alterations have not been completed in accordance with the approved plans and specifications, the ARB or the Developer shall notify the Owner in writing citing deficiencies and the Owner shall within fifteen (15) days after receipt of notice commence correction of the deficiencies and continue in an expeditious manner until all deficiencies have been corrected.

If correction of the deficiencies is not commenced within fifteen (15) days, or if such correction is not continued thereafter in a expeditious manner, the ARB or the Declarant shall be entitled to record in the Public Records a "Notice of Non-Compliance" setting forth that the Owner has not completed the Alterations in accordance with approved plans and specifications and that the ARB or the Declarant has the right to seek legal action to force the Owner, or any grantee of the Owner, to complete the Alterations in accordance with the plans and specifications. Said "Notice of Non-Compliance" shall contain the legal description of the Lot. Once recorded, the "Notice of Non-Compliance" shall constitute a notice to all potential purchasers from the Owner that the ARB or the Declarant have the right to enforce completion of the Alterations against the Owner, or any grantee of the Owner.

Should the Alterations not be completed in a timely manner as determined by the ARB or the Declarant, or should the correction of the deficiencies not be commenced within fifteen (15) days after notice and continue thereafter in an expeditious manner until completion, or should the Alterations not be completed in accordance with the plans and specifications approved by the ARB, the ARB or the Declarant shall have the right to enter upon the Lot, make such corrections or modifications as are necessary to cause the Alterations to be completed in accordance with the approved plans and specifications and charge the cost of any such corrections or modifications to the Owner. The Association or the Declarant may cause a lien to be recorded in the Public Records giving notice to all persons that the Owner owes the Association or the Declarant for the cost of such corrections or modifications, plus interest thereon and costs of collection, which shall include administrative costs and legal fees and costs.

Once the ARB and the Declarant determine that the Alterations have been completed in accordance with the approved plans and specifications, and if a Notice of Non-Compliance has been previously recorded, the ARB or the Declarant shall issue to the Owner a Certificate of Approval in recordable form, which shall make reference to the recorded "Notice of Non-Compliance"

and be executed by a majority of the members of the ARB with the corporate seal of the Association affixed or by the Declarant. The recording of the Certificate of Approval in this instance shall be conclusive evidence that the alterations as approved by the ARB have been completed but shall not excuse the Owner from the requirement that future changes, modifications or alterations be submitted to and approved by the ARB.

Section 5.

(a) Subject to the conditions hereinafter set forth, the Association shall indemnify all members of the ARB or former members of the ARB against reasonable expenses, including attorney's fees, settlement payments, judgments and fines actually incurred by them in connection with the defense of any action, suit or proceeding, or threat or claim of such action, suit or proceeding, no matter by whom brought or in any appeal in which they or any of them are made parties or a party by reason of being or having been a member of the ARB, except in relation to matters as to which any such member of the ARB shall be adjudged in such action, suit or proceeding to be liable for willful misconduct. Notwithstanding anything herein to the contrary, members of the ARB shall not be entitled to indemnification for any settlement payment unless such settlement payment be approved in advance by non-interested members of the Board of Directors of the Association.

(b) Expenses incurred in defending a civil or criminal action, suit or proceeding may be paid by the Association in advance of the final disposition of such action, suit or proceeding if authorized by all of the non-interested members of the Board of Directors of the Association upon receipt of an undertaking by or on behalf of the members of the ARB to repay such amount if it shall ultimately be determined that he is not to be indemnified by the Association as authorized herein.

(c) The Association shall have the power to purchase and maintain insurance on behalf of any person who is or was a member of the ARB, against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Association would have the power to indemnify him against such liability under the provisions of the Articles of Incorporation of the Association.

ARTICLE VIII.

GENERAL RESTRICTIONS

Section 1. All Lots shall be used for single family residential purposes. No building or structure shall be erected, altered, placed or permitted to remain on any Lot unless approved by the ARB prior to construction in accordance with the provisions of Article VII, which, for each Lot, shall be restricted to one detached single-family dwelling, boat dock, private garage, and maid's room, storage room or tool room attached to the garage. No old structures shall be relocated thereon. Construction commenced shall be diligently prosecuted to completion, including the installation of landscaping.

Section 2. No carports shall be permitted, and each living unit shall include a garage which shall be at the minimum adequate to house two (2) standard-sized American automobiles. All garages and garage doors must be maintained in a usable condition. No garage shall be constructed in such a manner that

the garage door would face the main access road for such lot. All garage doors shall be operated by an automatic closing device.

Section 3. No building shall be located nearer than ten (10) feet to any side lot line, or nearer than 50 feet to the front or rear lot line. In the case of a lake lot, no building shall be located nearer than 100 feet to the lake as determined by the Plat of Butler Bay Unit Three. In the case of a corner lot, no building shall be located nearer than 50 feet to lot lines.

Section 4. No structure of a temporary character, trailer, basement, tent, shack, garage, barn, or other out building shall be used on any Lot at any time as a residence either temporarily or permanently, except that temporary structures may be used on lots during the development of Butler Bay by the Declarant or its agents for maintenance, development or sales of any of the Properties.

Section 5. No residence shall be constructed with a living area which is less than 1,800 square feet for a one or two-bedroom residence, less than 2,000 square feet for a three bedroom residence, or less than 2,250 square feet for a four-bedroom residence, which living area shall have finished walls, ceilings and floors, shall be insulated, heated and cooled by a central system. Central heating and cooling systems may include, but shall not be limited to, systems of heating and cooling by active or passive solar, wind and other forms of energy, other than gas or electric, subject to the approval of the ARB. Such living area shall not include garages, breeze-ways, porches or storage spaces. The height of any residence to be constructed shall be subject to approval of the ARB.

Section 6. No livestock, fowl or other animals shall be kept on the Properties, except domestic cats or dogs. No animals shall be kept on the Properties for the purposes of breeding or raising for sale. No doghouses, pens or animal shelters of any kind shall be permitted on any Lot unless the same is enclosed and hidden from view from the street and from any other lot. The design of such structure and the means of concealing same is subject to approval of the ARB.

Section 7. Owners are hereby notified that Orange County imposes special regulations regarding the location of septic tank drainfields, drainage and land clearing.

Section 8. Owners shall keep Lots reasonably clean before, during and after construction. Citrus grove areas shall be kept cultivated and mowed prior to construction.

Section 9. No noxious or offensive activity shall be carried on upon any Lot nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

Section 10. No sign of any kind shall be displayed to the public view on any Lot, except one professional sign of not more than ten square feet advertising the property for sale or signs used by a builder to advertise the property during construction. The ARB shall have the right to establish guidelines so as to require a uniform standard for signs in the Subdivision.

Section 11. Owners of lots located on lakes shall maintain beaches in accordance with applicable governmental statutes, ordinances and regulations and will remove no shoreline vegetation unless said removal is done in accordance with the Orange County Shoreline Alteration Ordinance, as the same may be amended from time to time.

Section 12. Unless otherwise permitted by ARB, only finished materials such as brick, stone, stucco and wood shall be used for the exterior surfaces of buildings and other structures.

Section 13. All trash and garbage shall be kept in sanitary containers within a structural enclosure at least 42 inches in height, including a gate or door. If required to be placed at the curb for pickup, trash and garbage containers shall not be placed at the curb sooner than 5:00 p.m. of the day before pickup. All exterior pumps, motors, air conditioning compressors, storage tanks and other mechanical features shall be screened from view from the street and adjacent property either by a decorative structure 42 inches in height or approved landscaping materials.

Section 14. Landscaping easements where indicated on the plat are for landscaping and sidewalk purposes only. No encroachments shall be permitted.

Section 15. The composition, location and height of fences and walls must be approved by the ARB prior to installation. Except for fences around tennis courts, such fences and walls must not be more than six feet high, and no painted block fences, chainlink fences or walls shall be allowed unless screened from view by mature landscaping.

Section 16. No mailbox or paperbox or other receptacles of any kind for use in the delivery in mail or newspapers or magazines or similar material shall be erected on any lot unless and until the size, location, design and type of material for said boxes or receptacles shall have been approved by the ARB. If and when the United States mail service and the newspaper or newspapers involved shall indicate a willingness to make delivery to wall receptacles attached to the residence, such Owner, upon the request of the ARB, shall replace the boxes and receptacles previously employed for such purpose or purposes with wall receptacles attached to the residence.

Section 17. Except for loading and unloading purposes, there shall be no parking of commercial vehicles, trucks, recreational vehicles or trailers, self-propelled motor homes and boats on the premises, except within fenced enclosures substantially preventing view from any adjacent lot, beyond the rearline of the residence constructed thereon. Such definition of "commercial vehicles" shall include but not be limited to trucks or vans in excess of 3/4 ton, truck-tractors, semi-trailers and commercial trailers. In the event of a dispute, the Association, in its sole discretion, shall determine wheat constitutes a "commercial vehicle".

Section 18. There shall be no major repair performed on any motor vehicle on or adjacent to any lot in the subdivision.

Section 19. Exterior antennas installed or located on a Lot shall require the approval of the ARB, which approval may be denied.

Section 20. Sidewalks (if required or permitted by the ARB) and driveways shall be installed by Owners in accordance with requirements and specifications of Orange County and in accordance with the storm water drainage and retention plan approved by Orange County, Florida. All dwellings shall have a

paved driveway approach from the curb to the right-of-way line of stable and permanent construction and a paved apron of at least sixteen (16) feet in width at the entrance to the garage. Where curbs are required to be broken for driveway entrances, the curb shall be repaired in a neat and orderly fashion and in such a manner as is acceptable to the ARB.

Section 21. Removal of existing trees and shrubbery from any Lot shall not be permitted (except within the foundation perimeter line for the dwelling) unless landscaping of an equivalent or higher quality is substituted therefor.

Section 22. Treehouses or platforms of a like kind or nature and plan structures shall not be constructed on any part of a Lot without the express approval of the ARB.

Section 23. No clotheslines shall be placed on a lot.

Section 24. No window air-conditioning units shall be permitted. Permanently mounted wall air-conditioning units shall not be permitted unless first approved by the ARB.

Section 25. No inoperative cars, trucks, trailers or other types of vehicles shall be allowed to remain either on or adjacent to any Lot for a period in excess of forty-eight (48) hours; provided, however, this provision shall not apply to any such vehicle being kept in an enclosed garage. All vehicles shall have current license plates.

Section 26. No fence, wall, hedge or shrub planting which obstructs sight lines and elevations between two and six feet above the roadways shall be placed or permitted to remain on any corner lot within the triangular area formed by the street property lines and a line connecting them at points 25 feet from the intersection of the street lines, or in case of a rounded property corner from the intersection of the property lines extended. The same sight-line limitations shall apply on any Lot within ten feet from the intersection of a street property line with the edge of a driveway or alley pavement. No trees shall be permitted to remain within such distances of such intersections unless the foliage line is maintained at sufficient height to prevent obstruction of such sight-line.

Section 27. Every Owner shall be responsible for taking such measures as are necessary to prevent erosion of its Lot and for protecting other Lots from damages arising out of erosion.

Section 28. Use of any communication equipment on any Lot or in any Living Unit including, but not limited to, CB radios, antennas, ham radios, etc., for private or commercial purposes of any kind shall be prohibited.

Section 29. No exterior radio, television, electronic antenna or aerial or dish antenna may be erected or maintained on any Lot; provided, however, that the ARB may grant temporary permission to erect and maintain television antennas to the Owners which cannot be served by existing cable television facilities because of the present unavailability of such facilities and which do not have sufficient space between the roof of such Living Unit and the ceiling immediately below such roof, to install an indoor antenna. Such temporary outdoor antenna must be removed at such time as cable television facilities are available to serve such Living Unit.

Section 30. No exterior lighting fixtures shall be installed on any Lot or Living Unit without adequate and proper

shielding of fixture. No lighting fixture shall be installed that may be or become an annoyance or a nuisance to the residents of adjacent Living Units.

Section 31. Flat roofs shall not normally be permitted. The ARB may, however, in the ARB's sole discretion, approve flat roofs on buildings or other structures of contemporary or modern design, if the ARB determines that the harmony of surrounding structures and topography will not be disturbed or adversely affected. No built-up roofs shall be permitted, except on approved flat surfaces. The composition of all pitched roofs shall be tile, cedar shake shingle, slate shingle, asbestos shingle, asphalt shingle or fiberglass shingle, provided that any such shingle shall be premium grade with a minimum weight of 290 lbs. per 100 square feet of roof area.

Section 32. Orange County, Florida has required Declarant to install a storm water drainage and retention system within the boundaries of the Properties. No structure, fence or landscaping that interferes with the flow or retention of storm water and no refuse shall be placed upon or allowed to remain on any part of a Lot within any easement area for storm water drainage or retention, and the storm water drainage and retention areas, including drainage swales or retention ponds, shall not be filled or otherwise changed so as to alter or block the flow or the quantity of water. Owners of Lots within which any easement for storm water drainage or retention lies shall be responsible for the maintenance of such areas to permit the flow and retention of water in accordance with the storm water drainage and retention system plan required and approved by Orange County, Florida. If any Owner shall fail to comply with any part or all of the restrictions contained in this Section, the Association shall notify the Owner in writing, shall have the right to correct such failure to comply herewith, to assess and collect the cost thereof and shall have a lien upon the Lot upon which the work was performed all in accordance with the provisions of Article V governing the collection of assessments.

Section 33. Orange County, Florida, has requested Declarant to form one or more municipal service tax units (hereinafter "MSTU") for any one or more of the following purposes: (i) maintenance and operation of street lights that will be installed on the Properties, (ii) maintenance of the storm water drainage and retention systems on the Properties, (iii) maintenance of Common Areas, (iv) maintenance of parkways and landscaping, or (v) maintenance of recreational facilities for the use of the Owners. All Lots shall be encompassed within any such MSTU and shall be subject to the restrictions, limitations and tax assessments as may be imposed upon the property within any such MSTU.

Section 34. Any swimming pool, tennis court and screening or fencing of either to be constructed on any Lot shall be subject to the approval of and the requirements of the ARB, which shall include, but which shall not be limited to the following:

(a) Above-ground swimming pools shall not be allowed;

(b) Lighted tennis courts shall not be allowed;

(c) Materials, design and construction shall meet standards generally accepted by the industry and shall comply with applicable governmental regulations; and

(d) The location shall be approved by ARB.

Section 35. Heating and cooling of residences with systems of active or passive solar, wind and other forms of energy other than gas or electric may be approved by the ARB. Components of such systems that are affixed to the exterior of a residence shall not be permitted unless the design thereof shall have first been approved by the ARB. Exterior components of any cooling or heating system (or combination thereof) shall be substantially screened from view from the street fronting the residence.

Section 36. Declarant will mow and cultivate the citrus trees on each Lot after purchase by an Owner and, in consideration therefor, shall retain the ownership of each and every citrus fruit crop growing and to be grown in the future on such Lot and the proceeds of sale thereof. Upon written notice to the Owner from the Declarant or upon commencement of construction of improvements on a Lot, whichever occurs first, the responsibility of Declarant to mow and cultivate citrus trees on such Lot shall terminate; provided that Declarant shall retain the ownership of the unharvested fruit then growing on the trees and the right to the proceeds of sale of such fruit until such fruit is harvested.

ARTICLE IX.

EASEMENTS

Section 1. Owners' Rights and Duties; Utilities. The rights and duties of the Owners with respect to electricity, gas and telephone lines, drainage facilities and other utilities shall be governed by the following:

(a) Wherever electricity, gas and telephone lines, drainage facilities or any other utilities are installed within the Subdivision, the Owners of any Lot served by said connections, lines or facilities shall have the right to enter upon the Lots owned by others, or to have utility companies enter upon the Lots owned by others, in or upon which connections, lines or facilities, or any portion thereof, to repair, replace and generally maintain connections, lines or facilities, as and when the same may be necessary as set forth below. There is hereby reserved by the Declarant, its successors and assigns, an easement to the full extent necessary therefore, together with the right to grant and transfer the same to the Owners, to enter upon Lots owned by others, or to have utility companies enter upon the Lots owned by others, in or upon which connections, lines or facilities, or any portion thereof lie, to repair, replace and generally maintain connections, lines or facilities as and when the same may be necessary.

(b) Wherever electricity, gas and telephone lines, drainage facilities or any other utilities are installed within the Subdivision, which connections serve more than one (1) Lot, the Owner of each Lot served by said connection shall be entitled to the full use and enjoyment of such portions of said connections as service his Lot. In the event that an Owner or a public utility company serving such Owner enters upon a Lot or any portion of the Properties in furtherance of the foregoing, it shall be obligated to repair such Lot and restore it to its condition prior to such entry.

Section 2. Construction and Sales. There is hereby reserved to the Declarant, its successors and assigns, including, without limitation, its sales agents and representatives, and prospective purchasers of Lots together with the right of the Declarant, its successors and assigns, to grant and transfer the

same, over the Common Area easements for construction, utility lines, display, maintenance, and exhibit purposes in connection with the erection and sale of homes and other structures within the Subdivision; provided, however, that such use shall not be for a period beyond the earlier of (i) ten (10) years from the conveyance of the first Lot to an Owner; or (ii) the occupancy of all homes by persons other than the builder of such homes (unless the builder pays all assessments required by Article V); and provided further, that no such use by the Declarant and others shall otherwise restrict the Members in the reasonable use and enjoyment of the Common Area.

Section 3. Utilities. Easements over the Subdivision for the installation and maintenance of electric, telephone, gas, and drainage facilities as shown on the recorded plat of the Subdivision are hereby reserved by the Declarant, its successors and assigns, together with the right to grant and transfer the same. Developer, its successors or assigns, or the Association hereby reserve the right to use or to authorize the use of said Easements for the purpose of providing cable television service to the Lots in the subdivision. The terms upon which the cable television services shall be provided shall be mutually agreeable to the Developer or its successors or assigns or the Association and the person or entity providing said cable television service.

ARTICLE X.

AMENDMENT BY DECLARANT

The Declarant reserves and shall have the sole right (i) to amend these covenants and restrictions for the purpose of curing any ambiguity or any inconsistency among the provisions contained herein, (ii) to include in any contract or deed hereafter made any additional covenants and restrictions applicable to the land which is the subject of such contract or deed that do not lower standards of the covenants and restrictions herein contained, (iii) to amend these covenants and restrictions in whole or in part as to any additional land annexed to the Properties, and (iv) to release any Lot from any part of the covenants and restrictions that have been violated (including, without limiting the foregoing, violations of building restriction lines and provisions hereof relating thereto) if the Declarant, in its sole judgment, determines such violation to be a minor or insubstantial violation.

ARTICLE XI.

AMENDMENT

Except as to provisions relating to amendments and Supplemental Declarations as set forth in this Declaration regarding certain specific items and the method of amending or altering same as set forth in connection with such particular item, and except as to Article IV, Section 3, which Article and Section may be amended only in accordance with this Article and with the prior, written approval of Orange County, any other provision, covenant or restriction set forth herein may be amended only in accordance with this Article. The Owners of Lots holding at least seventy-five (75) percent of the votes of Members of the Association may change or amend any provision hereof, in whole or in part, except as above mentioned, by executing a written instrument in recordable form setting forth such amendment and having the same duly recorded in the Public Records of Orange County, Florida. A proposed amendment may be instituted by the Declarant, the ARB, the Association, or by petition signed by twenty-five (25) percent of the then Owners of

Lots. A written copy of the proposed amendment shall be furnished to each Owner at least ninety (90) days but not more than one hundred twenty (120) days prior to a designated meeting to discuss such particular amendment. Said notification shall contain a time and place of said meeting. The recorded Amendment shall contain a recitation that sufficient notice was given as above set forth, said recitation shall be conclusive as t all parties, and all parties of any nature whatever shall have the right to rely solely upon said recitation in such recorded amendment. Provided, however, so long as the Declarant shall own any Lots in the Properties, all such proposed amendments shall require Declarant's consent.

ARTICLE XII.

COVENANTS AND RESTRICTIONS RELATING TO GOLF COURSE

Section 1. All Owners of Lots on the Property acknowledge the existence of a private golf course on lands adjoining the Property. The golf course is for the use and enjoyment of the members of the private golf club.

Section 2. All Lot owners shall extend to all golfers lawfully using the Windermere Country Club Golf Course the courtesy of allowing such golfers to retrieve any errant golf balls which are on said lots, provided such golf balls can be recovered without damaging the Lot in general. The above right shall apply to the entire Lot until the ARB has approved plans and specifications for construction of a residence on the Lot, after which golfers shall be limited to the easement used for a buffer zone as stated in Section 3 below.

Section 3. An easement 10 FEET in width is reserved over the rear of each Lot located adjacent to the golf course now known as Windermere Country Club is hereby retained and reserved for the purpose of maintaining a natural buffer area between golf and residential uses. No fence, wall, hedge or shub planting which would obstruct access to the easement area shall be placed or permitted to remain on lots. The Association may grant permission to Newcourse Development Inc. "Newcourse", or its successors and assigns, to make selected plantings of trees and other vegetation within the easement area, at Newcourse's expense, in order to establish and maintain a buffered relationship between golf and residential uses. The Association and Newcourse agree to provide any Lot owner with a description of the work to be done at least 20 days in advance of the actual work so the mutual interests and desires of the Lot owner and Newcourse may be properly coordinated. Any landscaping placed on or in the easement area by Newcourse shall be maintained at the expense of Newcourse.

Section 4. The Association reserve the right to grant to Newcourse such easements over the Common Areas or the roads in Butler Bay Unit Three which easements are reasonably necessary to enable golf carts and golfers to cross from one hole to the next or from the golf course to the Windermere Country Club Clubhouse.

ARTICLE XIII.

ADDITIONAL COVENANTS AND RESTRICTIONS

No Owner, without the prior written approval of the Declarant, may impose any additional covenants or restrictions on any part of the Properties.

ARTICLE XIV.

DURATION

The covenants, conditions and restrictions of this Declaration shall run with and bind the land for a term of twenty (20) years from the date this instrument is recorded, after which they shall be automatically extended for successive periods of ten (10) years.

ARTICLE XV.

ENFORCEMENT

The Association, the Declarant, or any Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by or in accordance with the provisions of this Declaration against any person, firm or corporation, or other entity (other than a governmental agency) who violates or attempts to violate these Covenants and Restrictions. The terms and conditions of this Declaration shall be construed in a uniform and reasonable manner. Failure by the Association, the Declarant, and by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so hereafter. In the event enforcement action is undertaken by the Association or Declarant (but not any Owner) will be entitled to receive as part of its damages and remedy reasonable attorney's fees and Court costs. In connection with said enforcement proceedings, the Association, the Declarant or any Owner may seek to recover damages against such person or person, to prevent or enjoin such violations or attempted violations or to require compliance with the Covenants and Restrictions. These remedies shall be cumulative of all other remedies provided by law.

ARTICLE XVI.

LIABILITY OF ASSOCIATION

The Association, its directors and officers, former directors and officers, and members or former members of all committees appointed by the Board of Directors or the Declarant shall not be liable for any action, or omission, by it or any Director, officer or member of a committee, except in relation to matters as to which any such Director, officer and/or member of a committee shall be adjudged in any action, suit or proceeding to be liable for willful misconduct. No Member or Owner may collect any judgment against the Association, a Director or former Director, officer or former officer, or a member or former member of any committee appointed by the Declarant or the board unless the Association or such person, either individually, or as an agent for the Association, shall be adjudged guilty of willful misconduct.

ARTICLE XVII.

MISCELLANEOUS

Section 1.. The invalidity or unenforceability of any provision or provisions contained in this Declaration by judgment or court order shall not affect or modify any of the other provisions contained in this Declaration which shall remain in full force and effect.

Section 2.. The headings contained in this Declaration are for convenience only and shall have no significance in the

interpretation of the body of this Declaration and shall be disregarded in construing the provisions of this Declaration.

IN WITNESS WHEREOF, the Declarant, WINDERMERE LAKES LTD., has caused this instrument to be executed by its duly authorized partner as of the day and year first above written.

Signed, sealed and delivered in the presence of:

WINDERMERE LAKES, LTD.

By: _____
As its General Partner

Borg Warner Mortgage, the holder of a mortgage on all or part of the Properties, hereby gives its consent to this Declaration of Covenants and Restrictions for Butler Bay Unit Three.

BORG WARNER MORTGAGE

_____ By: _____
As its _____

LAKE BUTLER ESTATES, LTD.

By: _____
Robert A. Davis, its General Partner

By: _____
William E. Coggin, its General Partner

Barnett Bank of Central Florida, the holder of a mortgage on all or part of the Properties hereby gives its consent to this Declaration of Covenants and Restrictions for Butler Bay Unit Three.

BARNETT BANK OF CENTRAL FLORIDA, N.A.

By: _____
As its _____

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and county aforesaid to take acknowledgments, personally appeared Raymond G. Conway, the

interpretation of the body of this Declaration and shall be disregarded in construing the provisions of this Declaration.

IN WITNESS WHEREOF, the Declarant, WINDERMERE LAKES LTD., has caused this instrument to be executed by its duly authorized partner as of the day and year first above written.

Signed, sealed and delivered in the presence of:

WINDERMERE LAKES, LTD.

By: _____
As its General Partner

Borg Warner Mortgage, the holder of a mortgage on all or part of the Properties, hereby gives its consent to this Declaration of Covenants and Restrictions for Butler Bay Unit Three.

BORG WARNER MORTGAGE

By: _____
As its Vice Pres

LAKE BUTLER ESTATES, LTD.

By: _____
Robert A. Davis, its General Partner

By: _____
William E. Coggin, its General Partner

Barnett Bank of Central Florida, the holder of a mortgage on all or part of the Properties hereby gives its consent to this Declaration of Covenants and Restrictions for Butler Bay Unit Three.

BARNETT BANK OF CENTRAL FLORIDA, N.A.

By: _____
As its Senior Vice President

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and county aforesaid to take acknowledgments, personally appeared Raymond G. Conway, the

General Partner of Windermere Lakes, Ltd., a Florida limited partnership, and he acknowledged executing the foregoing Declaration in the presence of two subscribing witnesses for the purposes therein expressed.

WITNESS my hand and official seal in the County and State last aforesaid this 4 day of June, 1986.

Stephen D. Lemmler
Notary Public, State of Florida at Large

(Notary Seal)

My Commission Expires:

Notary Public State of Florida at Large
My Commission expires April 19, 1990

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ____ day of _____, 1986, by _____, as the _____ of Borg Warner Mortgage, a _____ corporation, on behalf of the corporation.

_____
Notary Public

(NOTARIAL SEAL)

My commission expires:

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this 2nd day of June, 1986, by William E Coggin and Robert A Davis, as the General partners of Lake Butler Estates, Ltd. a Florida ~~corporation~~ limited partnership, on behalf of the partnership.

Pamela J. Nee
Notary Public

(NOTARIAL SEAL)

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT 17,1988
BONDED THRU GENERAL INS. UND.

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ____ day of _____, 1986, by _____, as the _____ of Barnett Bank of Central Florida, N.A., a _____ corporation, on behalf of the corporation.

_____
Notary Public

(NOTARIAL SEAL)

My commission expires:

General Partner of Windermere Lakes, Ltd., a Florida limited partnership, and he acknowledged executing the foregoing Declaration in the presence of two subscribing witnesses for the purposes therein expressed.

WITNESS my hand and official seal in the County and State last aforesaid this 4 day of June, 1986.

Stephen D. Leonhiser
Notary Public, State of Florida at Large

(Notary Seal)

My Commission Expires:

Notary Public State of Florida at Large
My Commission expires April 19, 1990

STATE OF CALIFORNIA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this 10th day of June, 1986, by B. B. Caplinger, as the Vice President of Borg Warner Mortgage, a Delaware corporation, on behalf of the corporation.

X Margaret M. Robertson
Notary Public

(NOTARIAL SEAL)

My commission expires: 3-27-89

OFFICIAL SEAL
MARGARET M ROBERTSON
NOTARY PUBLIC - CALIFORNIA
ORANGE COUNTY
My comm. expires MAR 27, 1989

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this 2nd day of June, 1986, by William E Coggin and Robert A Davis as the General partners of Lake Butler Estates, Ltd. a Florida limited partnership on behalf of the partnership.

Pamela M. Ake
Notary Public

(NOTARIAL SEAL)

My commission expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT 17,1988
BONDED THRU GENERAL INS. UND.

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this 17th day of June, 1986, by C. Thomas Beck, as the Sr. Vice Pres. of Barnett Bank of Central Florida, N.A., a National corporation, on behalf of the corporation.

Maureen W. Wabnitz
Notary Public

(NOTARIAL SEAL)

My commission expires:

Notary Public, State of Florida at Large
My Commission Expires July 21, 1989

21

OR3808 PG 1500

001172

EXHIBIT "A"

Lots 1-123, BUTLER BAY UNIT THREE, as recorded in Plat Book 18, Page 4-9, Public Records of Orange County, Florida.

RECORDED & RECORD VERIFIED
Lou G. Parker
County Comptroller, Orange Co., FL

OR3808 PG 5021

Florida Rec Fee $ 25.00 Paid
Doc Tax $ —
Int Tax $ —
Total $ 25.00

THOMAS H. LOCKER, Orange County Comptroller
By KCK Deputy Clerk

2567607 ORANGE CO. FL.
03:40:40PM. 07/28/86

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS AT THEIR MEETING

JUL 21 1986

DEVELOPER'S AGREEMENT

OR3808 PG1466

This Agreement is entered into this 4 day of ~~May~~ June, 1986, between Orange County, a political subdivision of the State of Florida, hereinafter referred to as "County", and Windermere Lakes, Ltd., a Florida limited partnership, hereinafter referred to as "Developer".

PREMISES

1. The Developer owns or has an option to purchase property in Orange County, Florida, described as follows:

See Exhibit "A", which is attached hereto and incorporated herein by reference.

hereinafter referred to as the "subject property".

2. The Developer desires to subdivide and develop the subject property as a development to be known as "Butler Bay, Unit III", pursuant to Chapter 65-2015, Laws of Florida, (the Orange County Land Development and Use Law) and the Orange County Subdivision Regulations, adopted pursuant thereto, except as those Regulations may be specifically waived by the County during the subdivision review process.

3. As part of its plan of development for the subject property, Developer wishes to design and construct private common facilities which will not be dedicated to Orange County nor to the use and enjoyment of the general public, but which will be dedicated to the common use and enjoyment of the owners of the subject property. The term "common facilities" as used herein includes private internal road and drainage systems, street lighting systems and other private facilities as may be provided.

4. The County is authorized to regulate the development of the subject property.

5. The County is willing to permit the use of common facilities in the development of the subject property under the terms of this Agreement.

NOW, THEREFORE, the parties agree as follows:

1. Provided that all of the terms and conditions of this Agreement are met, the County waives any requirement for the dedication to the public of the common facilities, including the internal road and drainage systems shown on those plans for the development of the subject property, dated 2/13/86, on file in the Orange County Zoning Department.

2. The common facilities shown on the plans shall be designed and constructed by the Developer in accordance with the conditions of approval and the development plans for the subject property dated 11/18/84, a copy of which is on file and available for inspection in the Orange County Zoning Department.

$25.00

RETURN TO CLERKS OFFICE - B.C.C. - 5TH FLOOR, CO. ADMIN BLDG. - ROY

3. The County shall not be required or obligated in any way to construct or maintain, or participate in any way in the construction or maintenance of, the common facilities on the subject property. It is the intent of the parties that the common facilities shall be private and that there shall be no dedication of public rights-of-way for road purposes within the subject property except those which may be specifically shown on the plans or indicated in the conditions of approval. The common facilities shall not be dedicated to the use and enjoyment of the general public, but are to be dedicated to the common use and enjoyment of the owners of the subject property. It is the intent of the parties that the Developer, its grantees, successors or assigns in interest, or some other association and assigns satisfactory to the County, shall be responsible for the maintenance of the common facilities.

4. The Developer shall establish a method satisfactory to Orange County of maintaining the common facilities. Such methods shall include the creation of a homeowner's association, a property owner's association or some other association (hereinafter referred to as "Assocation"), acceptable to Orange County, which shall be solely responsible for maintaining said facilities.

5. The Developer shall provide and record documents satisfactory to the County for the maintenance of the common facilities. The documents shall provide a method for the Developer, its grantees, successors or assigns in interest, or the Association to assess the owners of the subject property the cost of maintaining the common facilities. The assessment may be separate from or included in a general assessment of the property owners for maintenance of other commonly owned areas within the subject property. The method of assessment shall be satisfactory to the County and shall provide the legal right for the Developer, its grantees, successors or assigns in interest, or the Association to impose liens against those properties for which payment of any assessment is not made. Furthermore, the documents shall provide notice to purchasers and prospective purchasers of the subject property that the Developer, its grantees or successors and assigns in interest, or the Association shall have the authority to make assessments for maintenance of the common facilities and impose liens against those properties for which payment of any assessment is not made. Collection of the assessments and enforcing the payment thereof through placement of liens against the properties shall be the responsibility of the Developer, its grantees or successors and assigns in interest, or the Association and shall not be the responsibility of Orange County.

6. Failure of the Developer, its grantees or successors and assigns in interest, or the Association to maintain the common facilities or to impose and collect assessments for the maintenance of the facilities

shall not in any way create or impose any obligation, burden, responsibility or liability upon the County, directly or indirectly, to maintain the facilities. The responsibility for maintenance of the facilities shall be solely that of the Developer, its grantees or successors and assigns in interest, or the Association.

7. The assessments imposed by the Developer or the Association for maintenance of the common facilities shall not relieve the owners of the subject property from any other taxes, fees, charges or assessments imposed by the County or any other governmental agency.

8. The common facilities shall be designed, constructed and maintained so as to prevent any adverse impace of effect upon any other properties, including road systems and drainage systems external to the subject property..

9. The Developer shall deed or dedicate to Orange County emergency access easements to the private drainage system for emergency maintenance purposes in the event inadequate maintenance of the drainage system creates a hazard to the public health, safety and general welfare. Recording of such deed or dedication shall not be deemed to impose any obligation, burden, responsibility or liability upon Orange County to enter upon the subject property and take any action to repair or maintain the drainage system.

10. The Developer shall deed or dedicate to delivery, pick-up and fire protection services, police and other governmental agencies, including private utility companies or other private companies providing necessary services to the subject property or to the owners of the subject property, perpetual non-exclusive ingress and egress easements over the private road systems and other common areas within the subject property.

11. The following special provisions are set forth in the attached "Schedule A" and are incorporated herein as a part of this Agreement: NONE.

12. This Agreement shall be recorded in the Public Records of Orange County, Florida. This Agreement and the obligations created herein shall run with the land and shall be enforceable against the parties, the grantees of any or all of the "subject property", or their successors and assigns in interest.

13. Developer has an option to purchase a portion of the subject property from Lake Butler Estates, Ltd., a Florida limited partnership. Lake Butler Estates, Ltd. joins in the execution of this Developer's Agreement to evidence its agreement to be bound by its terms and conditions in the event Developer does not exercise and close on its option to purchase the remaining portions of the subject property not yet owned by Developer.

IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the day and year first above written.

ATTEST: THOMAS H. LOCKER, Clerk

By: Mary Jo Garrison
Deputy Clerk

ORANGE COUNTY, FLORIDA

By: Tom Dorman
Chairman, Board of County Commissioners

ATTEST:

By: _____

WINDERMERE LAKES, LTD.

By: _____
Developer

ATTEST:

By: _____

LAKE BUTLER ESTATES, LTD.

By: Robert A. Davis
Robert A. Davis, General Partner

BY: William E. Coggin
William E. Coggin, General Partner

STATE OF FLORIDA)
COUNTY OF ORANGE)

I HEREBY CERTIFY that on this day personally appeared before me, the undersigned authority Tom Dorman and Mary Jo Garrison, well known to me and known by me to be the Chairman and Clerk of the Board of County Commissioners, to me well known to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same for the purpose therein expressed.

WITNESS my hand and official seal at Orlando, County of Orange, State of Florida, this 21st day of July, 1986.

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires: March 26, 1989
Bonded Thru Brown & Brown, Inc.

(SEAL)

Roy J. Pfiesting
Notary Public

OR3808 PG 1469

STATE OF FLORIDA)
COUNTY OF ORANGE)

I HEREBY CERTIFY that on this day personally appeared before me, Raymond G. Conway, general partner of the Developer, to me well known to be the person described in and who executed the foregoing instrument and he acknowledged before me that he executed the same for the purpose therein expressed.

WITNESS my hand and official seal at Orlando, County of Orange, State of Florida, this 4 day of June, 1986, 1986.

My Commission Expires:

Notary Public

(SEAL)

Notary Public, State of Florida at Large
My Commission expires April 19, 1990

STATE OF FLORIDA)
COUNTY OF ORANGE)

I HEREBY CERTIFY that on this day personally appeared before me, Robert A. Davis and William G. Cossio of Lake Butler Estates, Ltd., to me well known to be the person described in and who executed the foregoing instrument and acknowledged before me that they executed the same for the purpose therein expressed.

WITNESS my hand and official seal at Orlando, County of Orange, State of Florida, this 2nd day of June, 1986.

My Commission Expires:

Pamela M. Ross
Notary Public
NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. OCT 17,1988
BONDED THRU GENERAL INS. UND.

(SEAL)

NOTARY PUBLIC STATE OF FLORIDA

OR3808 PG 1470

EXHIBIT "A"

Lots 1-123, BUTLER BAY UNIT THREE, as recorded in Plat Book 18, Page 4-9, Public Records of Orange County, Florida.

RECORDED & RECORD VERIFIED
Thomas H. Locke
County Comptroller, Orange Co., Fl.

DR3808 PG 1471

Sec. 38-556. - Site and building standards.

(a) *Standards.* Development under this article shall meet the following standards:

	Minimum Lot Size	Minimum Lot Width (Feet)	Minimum Living Area (Square Feet)	Building Height (Feet)
R-CE-Cluster	½ acre*	100**	1,500	2-story/ 35

If central water service is provided, the minimum lot size is one-third (frax;1;3) acre. Lakefront lots are one-half (½) acre. The minimum lot size for lakefront lots on the Butler Chain of Lakes is one (1) acre.

Lot width is measured at the building front yard setback line.

(Ord. No. 97-03, § 7, 2-25-97)

(b) *Setbacks.* The following minimum setbacks shall apply:

	Front (Feet)	Rear (Feet)	Side (Feet)
R-CE-Cluster	30	25	10

There shall be a minimum of a fifty-foot setback from the normal high water elevation from natural water bodies.

(Ord. No. 97-03, § 7, 2-25-97)

(c) *Maximum lot coverage.* The maximum coverage of all impervious surfaces on a lot shall not exceed sixty (60) percent of the land area of the lot.

(P & Z Res., art. XXXVI, § 6)

Sec. 38-557. - Common open space.

(a) The amount of common open space, as required by Orange County Code, chapter 24, article II, open space regulations, shall be shown on the R-CE-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. The county shall not be responsible for the maintenance of common open space areas.

(Ord. No. 92-42, § 6, 12-15-92; Ord. No. 97-03, § 8, 2-25-97)

(b) The owner shall offer to dedicate development rights for all common open space areas to the county. The county may accept the offer of dedication. If, however, the county refuses to accept the offer, an alternative method acceptable to the 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.

(P & Z Res., art. XXXVI, § 7)

Sec. 24-29. - Open space requirements.

(a) In the following residential zoning districts, residential private open space shall be forty (40) percent:

R-A

RCE-5

RCE-2

A-R

R-CE

R-1AAAA

R-1AAA

R-1AA

R-1A

R-1

R-2 (single-family detached housing only)

R-3 (single-family detached housing only)

R-L-D

Provided, however, that when a variance to the building setbacks for an addition to the principal residence is successfully obtained from the board of zoning adjustment, then the residential private open space requirements shall be automatically reduced by an amount sufficient to accommodate the setback variance.

(b) In the following residential zoning districts, residential private open space shall be forty-five (45) percent:

R-2 (excluding single-family detached housing)

R-3 (excluding single-family detached housing)

(c) In the nonresidential zoning districts, open space shall be provided as follows:

Office—Twenty-five (25) percent

Commercial—Twenty (20) percent

Industrial—Fifteen (15) percent

Institutional—Thirty-five (35) percent

Big box development:

One (1) story and two hundred thousand (200,000) square feet or greater: Thirty (30) percent.

One (1) story and less than two hundred thousand (200,000) square feet: Twenty-five (25) percent.

Two (2) stories, provided that the second story is forty (40) percent or more of the gross floor area that is open to customers: Twenty (20) percent.

Two (2) stories with multilevel structured parking, provided that the second story is forty (40) percent or more of the gross floor area that is open to customers: Fifteen (15) percent.

(d) For planned development zoning districts, open space shall be provided in accordance with section 38-1234 of the Orange County Code.

(e) For residential cluster districts, common open space shall be provided as follows:

Gross Residential Density	% Common Open Space Required
Less than or equal to 1 unit/acre	None required
Greater than 1 unit/acre	10%

(f) For urban village zoning districts, open space shall be provided outside of the village center as follows:

Residential private open space—Twenty-five (25) percent.

Institutional open space—Thirty-five (35) percent.

(Ord. No. 92-42, § 1, 12-15-92; Ord. No. 93-11, § 15, 4-27-93; Ord. No. 2007-01, § 8, 3-20-07)

Sec. 24-26. - Definitions.

As used in this article, the following terms shall have the meanings given herein.

Open space shall mean lands set aside for the following:

(1) 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 soils);

(2) Recreation areas; or

(3) The enhancement of the developed urban environment (including buffer areas, landscaped areas, plazas and hardscapes).

Common open space shall mean a type of open space designed and intended for use or enjoyment of the occupants of a project.

Residential private open space shall mean the usable open space on individual lots maintained by the required front, rear and side yards of the residential zoning district and excluding paved driveways, principal and accessory structures. However, for purposes of this article, recreational structures such as, but not limited to, pools, tennis courts and porches shall not be considered accessory structures and shall be included in calculating residential open space.

(Ord. No. 92-42, § 1, 12-15-92)

Sec. 24-27. - Legislative findings.

(a) Open space provides protection of natural resources by encouraging preservation of aquifer recharge areas, floodplains, wetlands and wildlife habitat.

(b) Open space enhances the quality of life by providing space for recreation.

(c) Open space enhances the urban environment by providing visual relief, and improving light infiltration and air circulation in developed areas.

(d) Private open space can be provided in residential areas by required lot setbacks and minimum lot sizes.

(e) Consistency in the definition of open space and the provisions for open space are necessary for the balance between private property rights and the protection of the public health, safety and welfare.

(Ord. No. 92-42, § 1, 12-15-92)

Sec. 24-28. - Applicability.

The regulations herein are applicable to all development applications permitted by the county. The percentages listed below are considered minimum standards; however, an applicant may provide a greater percentage of open space but a greater percentage will not be required by the county.

(Ord. No. 92-42, § 1, 12-15-92)

5

Sec. 24-30. - Open space design guidelines.

The following design guidelines are provided to encourage proper design, location and use of open space. For facilities that serve a primary purpose other than open space, performance standards are established for use in obtaining open space credits for these areas.

(a) *Location.* Open space, other than private residential open space, should be located within the project to enhance its functions as follows:

(1) Landscape buffers should be located on the perimeters of the project and along major collectors and arterials to provide maximum screening from adjacent land uses.

(2) Recreational open space should be located internal to the project and be easily accessible to all residents and employees.

(3) Open space areas that provide natural resource protection should be located to preserve floodplains, wetlands, aquifer recharge areas, wildlife habitat and other unique natural resources.

(b) *Size.* Open space areas should be the appropriate size for their primary function.

(c) *Distribution.* Open space should be distributed with reasonable uniformity throughout the project so that remnant open space areas are not created that are unusable or function as private open space to only a small percentage of the development.

(d) *Integration.*

(1) Integrated open space systems, i.e., connected by greenways, bike paths and/or walkways, are encouraged.

(2) If the project is located next to off-site open space whose primary function is conservation of natural resources, connection of open space with compatible functions is encouraged.

(e) *Ownership and maintenance.* Common open space areas shall be the responsibility of a property owners' association or a method shall be provided for assuring the maintenance of and access to all common open space areas in perpetuity, either by transferring ownership and maintenance responsibilities for the open space areas to a trustee or mandatory homeowners' association, or by some other method acceptable to the board of county commissioners. The county shall not be responsible for the maintenance of common open space areas.

(f) *Irrigation.* All development containing a contiguous irrigated open space tract or parcel greater than twenty (20) acres, including golf courses, shall be required to accept reclaimed water for irrigation when such reclaimed water is available adjacent to the development's boundary and has sufficient capacity and pressure. Connection shall be consistent with the connection policies of the applicable utility provider.

(g) *Open space credits.* All of the uses below shall be credited towards open space if all performance standards are met. The amount of credits depends on the category of open space, but in no case shall category A open space constitute less than twenty-five (25) percent of the total open space required:

(1) *Category A open space.* All of the uses listed below shall count one hundred (100) percent towards meeting the total open space required:

a. Buffer zones and greenbelts;

b. Recreational areas (active and passive);
c. Landscaped areas;
d. All other permanently undeveloped uplands;
e. Dry bottom stormwater management ponds that meet the following requirements:
   1. Sodded;
   2. Unfenced;
   3. Must be dry within seventy-two (72) hours after a twenty-five-year storm event;
   4. A skimmer must be provided to minimize the accumulation of trash and pollutants;
   5. At least five (5) percent of the area above the peak state elevation must be landscaped with at least fifty (50) percent of the required area landscaped with plant materials other than ground cover (the use of native plant species is encouraged).

(2) *Category B open space.* All of the uses listed below may be credited towards meeting the minimum open space requirements if the performance standards are met, but shall not account for more than fifty (50) percent of the total open space required:

a. Wet bottom stormwater management ponds that meet the following requirements:
   1. Minimum of one (1.0) acre;
   2. Five-to-one (5:1) side slopes;
   3. Sodded or an equivalent ground cover;
   4. Unfenced;
   5. Curvilinear in shape rather than angular;
   6. Landscaped in accordance with the following criteria:
      i. *One to two and one-half acres.* At least ten (10) percent of the land above the design high water level excluding maintenance berms shall be landscaped with at least fifty (50) percent of the required area landscaped with plant materials other than ground cover (the use of native plant species is encouraged); or a littoral zone band of at least five (5) feet in width for at least fifty (50) percent of the shoreline established with native aquatic or semiaquatic plant species;
      ii. *Two and one-half to five acres.* At least five (5) percent of the land above the design high water level excluding maintenance berms shall be landscaped with at lest fifty (50) percent of the required area landscaped with plant materials other than ground cover (the use of native plant species is encouraged); or a littoral zone band of at least five (5) feet in width for at least thirty-five (35) percent of the shoreline established with native aquatic or semiaquatic plant species;
      iii. *More than five acres.* A littoral zone band of at least five (5) feet in width for at least twenty (20) percent of the shoreline established with native aquatic or semiaquatic plant species.
   7. Access provided for all residents/employees.
b. Easements that meet the following requirements:

1. Minimum twenty-five (25) feet wide;
2. Accessible for public use;
3. Written verification from the easement holder authorizing unrestricted access.

c. Plazas/hardscapes that meet the following requirements:
1. Twenty (20) percent landscaped;
2. Seating areas;
3. Thirty (30) percent or gross pedestrian accessible (excluding sidewalks) for area remaining after landscaping and water features/sculptures.

d. Natural lakes that meet the following requirements:
1. Only that portion of lakes which are within the legal description of the project shall be credited towards open space;
2. Must be accessible to all residents/employees. Common access to natural lakes shall be at least equal to the minimum lot size established by the zoning districts or one-half (½) acre, whichever is greater.

(3) *Category C open space.* Areas within a project, phase or tract which are classified as conservation areas (including mitigation area) pursuant to chapter 15, article X (conservation ordinance) shall be identified at the time of plan submission. Conservation areas shall qualify as open space. However, to ensure that conservation areas or mitigation areas which comprise a high percentage of a project or tract do not constitute the only open space for the project, the amount of open space credit shall be limited to no more than seventy-five (75) percent of the total open space required.

(4) *Open space categories B and C.* Open space categories B and C cannot count more than seventy-five (75) percent of the total open space required for the project, phase or tract.

(5) *Big box development open space.* All of the uses listed below may be credited towards meeting the minimum open space requirements if the performance standards are met, but shall not account for more than fifty (50) percent of the total open space required:

a. All retention ponds, fenced or nonfenced, which are meant to fulfill a portion of the open space requirements, shall be designed as a project landscaping amenity. As such, they shall have curvilinear water edges which incorporate substantial curve off-sets along the water perimeter. Furthermore, all ponds shall incorporate a continuous row of drought-tolerant shrubs and understory trees along their top edge. Understory trees shall be planted at a rate of one (1) per twenty-five (25) feet of perimeter edge. Clustering of understory trees is acceptable.
1. Nonfenced ponds may fulfill up to fifty (50) percent of the project's open space requirement, provided they meet the curvilinear requirements above. Decoratively-fenced ponds may fulfill up to fifty (50) percent of the project's open space requirements. However, the decorative fencing shall be constructed with black wrought iron-styled post and railing system, and incorporate landscaping along the exterior of the fencing. The post and railing system, while including a gated access system for pond maintenance purposes, shall incorporate masonry columns, minimum twenty-four (24) inches in diameter, spaced at a maximum of fifty (50) feet

on-center. The columns shall incorporate a decorative cap feature, and the surface (or veneer) and trim of the columns shall replicate those of the principal structure. Furthermore, the decoratively-fenced ponds shall incorporate the required shrubs and understory trees mentioned above along the exterior base of the fence.

2. Ponds which are fenced with chain link, or with any other system which fails to meet the decorative fence description above, shall not fulfill any of the required project open space.

(Ord. No. 92-42, § 1, 12-15-92; Ord. No. 2007-01, § 9, 3-20-07)

	Unit 3N	Unit 3S	Unit 2	Unit 1	Chain Du Lac	Manor 1	Manor 2	Proposed Development*	TOTAL
Rec Area/Open Space				9.52			4.44	4.15	18.11
Landscape Tract						2.33	3.05	6.9	12.28
Landscape Buffer			0.39	1.41					1.8
Undeveloped Area in Lots 94/95								17.7	
Lake	17.96					1.33			19.29
Conservation Area	1.13	1.39			2.62	6.81	3.35	12.6	27.9
Stormwater Pond			3.76		1.82	5.04	1.46	33.83	45.91
TOTAL	19.09	1.39	4.15	10.93	4.44	15.51	12.3	75.18	125.29 ac 25.0%

* Proposed Development does not include the area containing the existing Clubhouse area

Cluster Plan Gross Area	502 ac
38% Open Space of Gross Area of Cluster Plan	190.76 ac

Information on areas is approximated based on copies of plats.

4

		Unit 3_2	Unit 2_2	Unit 1_2	Chain Du Lac_2	Manor 1_2	Manor 2_2	Proposed Development$_1$	TOTAL
A.	Recreation Area/ Open Space	--	--	9.5	--	--	4.4	4.2	18.1
B.	Landscape Tract	--	--	--	--	2.3	3.1	6.9	12.3
C.	Landscape Buffer	--	0.4	1.4	--	--	--	--	1.8
D.	Undeveloped Area in Proposed Lots 94/95	--	--	--	--	--	--	17.7	17.7
E.	Lake	18.0	--	--	--	1.3	--	--	19.3
F.	Conservation Area	2.5	--	--	2.6	6.8	3.4	12.6	27.9
G.	Stormwater Pond	--	3.8	--	1.8	5.0	1.5	33.8	45.9
H.	Private Open Space w/in Lots$_3$	24.4	5.8	7.0	8.8	10.6	8.8	19.0	84.4
	TOTAL GROSS OPEN SPACE	**44.9**	**10.0**	**17.9**	**13.2**	**26.1**	**21.1**	**94.2**	**227.4**
	PERCENTAGE OF GROSS AREA							**60.6%**	**45.3%**

All units are in acres

Total Required Common Open Space: 0.0 ac (Per Sec. 24-29(e) - Residential Cluster Districts less than or equal to 1 unit/acre)

Cluster Plan Gross Area: 502.0 ac

38% of Gross Area of Cluster Plan: 190.76 ac

NOTES:

1. Proposed Development does not include the open space acreage for the area containing the existing Clubhouse, tennis courts, and pool.
2. Information on acreages for existing developments is approximated based on copies of plats.
3. Per Section 38-556(c). Maximum lot coverage of 60%. Open space calculated as 40% of lot areas. Conservatively assumed all lots at 0.5 acre in size.

Prepared by Poulos & Bennett, LLC on 2015-11-24

I

POULOS & BENNETT

Poulos & Bennett, LLC • 2602 E. Livingston Street • Orlando, Florida 32803 • (407) 487-2594 • www.poulosandbennett.com

December 7, 2015

Michael R. Jernigan
Century Link
33 N Main Street
Winter Garden, FL 34777-0339

Subject: Partial Plat Vacation Request
Windermere Golf & Country Club
Poulos & Bennett – Job # 5-101

Dear Mr. Jernigan:

We are in the process of requesting that Orange County vacate that portion of a plat located within the property shown on the attached boundary description, situated in Sections 1 and 12, Township 23S, Range 27E, whose parcel # is 01-23-27-1108-00-001.

In order to have this action heard, we must provide letters of no objection from utility companies who have jurisdiction in this neighborhood.

Please review your records, complete the form below, and return this letter to me via scan to email and original via mail. If you have any questions, please contact me.

Thank you in advance for your expediency.

Sincerely,

Candice H. Hawks
Land Development Coordinator
407-487-2594

____ The subject parcel is not within our jurisdiction.

__X__ The subject parcel is within our jurisdiction. (We do) / do not (circle one) have any facilities within the easement / plat. We have no objection to the vacation.

Additional Comments: If our cable needs to be relocated it ~~will~~ will be at the Developers Expense.

Signature:
Print Name: Ashley Bryan Title: Engineer II
Date: 12/30/2015 Phone Number: 407-814-5047

POULOS & BENNETT

Poulos & Bennett, LLC • 2602 E. Livingston Street • Orlando, Florida 32803 • (407) 487-2594 • www.poulosandbennett.com

December 12, 2015

Michael VanHorn
Senior Engineering Technician
Orange County Utilities
9150 Curry Ford Road
Orlando, FL 32825

Subject: Partial Plat Vacation Request
Tract A on the Butler Bay Unit 3 Plat, PB 18, Page 4 as amended by A Replat of Lots 8, 9, 10 and Tract B Butler Bay – Unit 3 Plat, PB 25, Page 116
Windermere Golf & Country Club
Poulos & Bennett – Job # 15-101

Dear Mr. VanHorn:

We are in the process of requesting that Orange County vacate that portion of a plat located within the property shown on the attached boundary description, whose Parcel IDs are 01-23-27-1108-00-001 and 01-23-27-1117-00-001. The portion of the plat to be vacated is limited to Tract A. All existing utility easements currently located within Tract A of the plat will be maintained via recordation by separate instrument.

In order to have this action heard, we must provide letters of no objection from utility companies who have jurisdiction in this neighborhood.

Please review your records, complete the form below, and return this letter to me via scan to email and original via mail. If you have any questions, please contact me.

Thank you in advance for your expediency.

Sincerely,

Candice H. Hawks
Land Development Coordinator
407-487-2594

____ The subject parcel is not within our jurisdiction.

✓ The subject parcel is within our jurisdiction. We do / (do not) (circle one) have any facilities within the easement / plat. (We have no objection to the vacation.) ✓

Additional Comments: _____

Signature: Laura Woodbury
Print Name: Laura Woodbury Title: OCU Senior Engineer
Date: 1-12-16 Phone Number: 407 254-9928

POULOS & BENNETT

Poulos & Bennett, LLC • 4625 Halder Lane, Suite B • Orlando, Florida 32814 • (407) 487-2594 • www.poulosandbennett.com

January 12, 2015

Mr. Mark LoCastro
AT & T
Director/Construction Engineering
500 N Orange Avenue, Suite 400
Orlando, FL 32801

Subject: Plat Vacation Request
Windermere Golf & Country Club
Poulos & Bennett – Job # 5-101

Dear Mr. LoCastro:

We are in the process of requesting that Orange County vacate that portion of a plat located within the property shown on the attached boundary description, situated in Sections 1 and 12, Township 23S, Range 27E, whose parcel # is 01-23-27-1108-00-001.

In order to have this action heard, we must provide letters of no objection from utility companies who have jurisdiction in this neighborhood.

Please review your records, complete the form below, and return this letter to me via scan to email and original via mail. If you have any questions, please contact me.

Thank you in advance for your expediency.

Sincerely,

Candice H. Hawks
Land Development Coordinator
407-487-2594

✓ The subject parcel is not within our jurisdiction.

___ The subject parcel is within our jurisdiction. We do / do not (circle one) have any facilities within the easement / plat. We have no objection to the vacation.

Additional Comments: _____

Signature: _____
Print Name: Ingrinel Braschi Title: Mgr Ops Plng & Engrg Design
Date: 1/19/2016 Phone Number: 0407-351-8190

POULOS & BENNETT

Poulos & Bennett, LLC • 2602 E. Livingston Street • Orlando, Florida 32803 • (407) 487-2594 • www.poulosandbennett.com

December 7, 2015

Todd Boyer
Duke Energy
3300 Exchange Place, NP4D
Lake Mary, FL 32746

Subject: Partial Plat Vacation Request
Windermere Golf & Country Club
Poulos & Bennett – Job # 15-101

Dear Mr. Boyer:

We are in the process of requesting that Orange County vacate that portion of a plat located within the property shown on the attached boundary description, situated in Sections 1 and 12, Township 23S, Range 27E, whose parcel # is 01-23-27-1108-00-001.

In order to have this action heard, we must provide letters of no objection from utility companies who have jurisdiction in this neighborhood.

Please review your records, complete the form below, and return this letter to me via scan to email and original via mail. If you have any questions, please contact me.

Thank you in advance for your expediency.

Sincerely,

Candice H. Hawks
Land Development Coordinator
407-487-2594

____ The subject parcel is not within our jurisdiction.

✓ The subject parcel is within our jurisdiction. We (do) / ~~do not~~ (circle one) have any facilities within the easement / plat. ~~We have no objection to the vacation.~~

Additional Comments: Duke Energy Distribution + Transmission depts Object to this vacate. We have facilities in the area. Any facilities that need to be relocated will be at the customers cost.

Signature: [signature]
Print Name: ERIKA CUADRA Title: Research Support Spec. II
Date: 1/19/16 Phone Number: 407-905-3510

Duke Objection

POULOS & BENNETT

Poulos & Bennett, LLC • 2602 E. Livingston Street • Orlando, Florida 32803 • (407) 487-2594 • www.poulosandbennett.com

December 7, 2015

Rick Gullett
Lake Apopka Natural Gas
P O Box 783007
Winter Garden, FL 34778-3007

Subject: Partial Plat Vacation Request
Windermere Golf & Country Club
Poulos & Bennett – Job # 15-101

Dear Mr. Gullett:

We are in the process of requesting that Orange County vacate that portion of a plat located within the property shown on the attached boundary description, situated in Section 01, Township 23S, Range 27E, whose parcel # is 01-23-27-1108-00-001.

In order to have this action heard, we must provide letters of no objection from utility companies who have jurisdiction in this neighborhood.

Please review your records, complete the form below, and return this letter to me via scan to email and original via mail. If you have any questions, please contact me.

Thank you in advance for your expediency.

Sincerely,

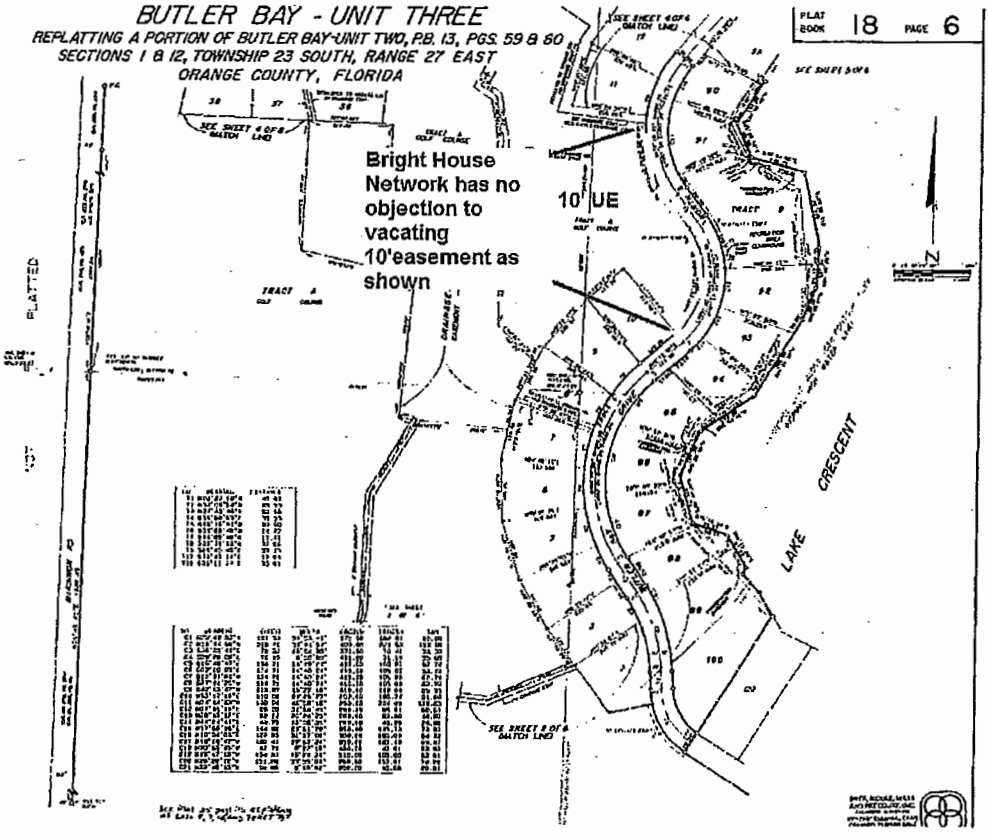
Candice H. Hawks
Land Development Coordinator
407-487-2594

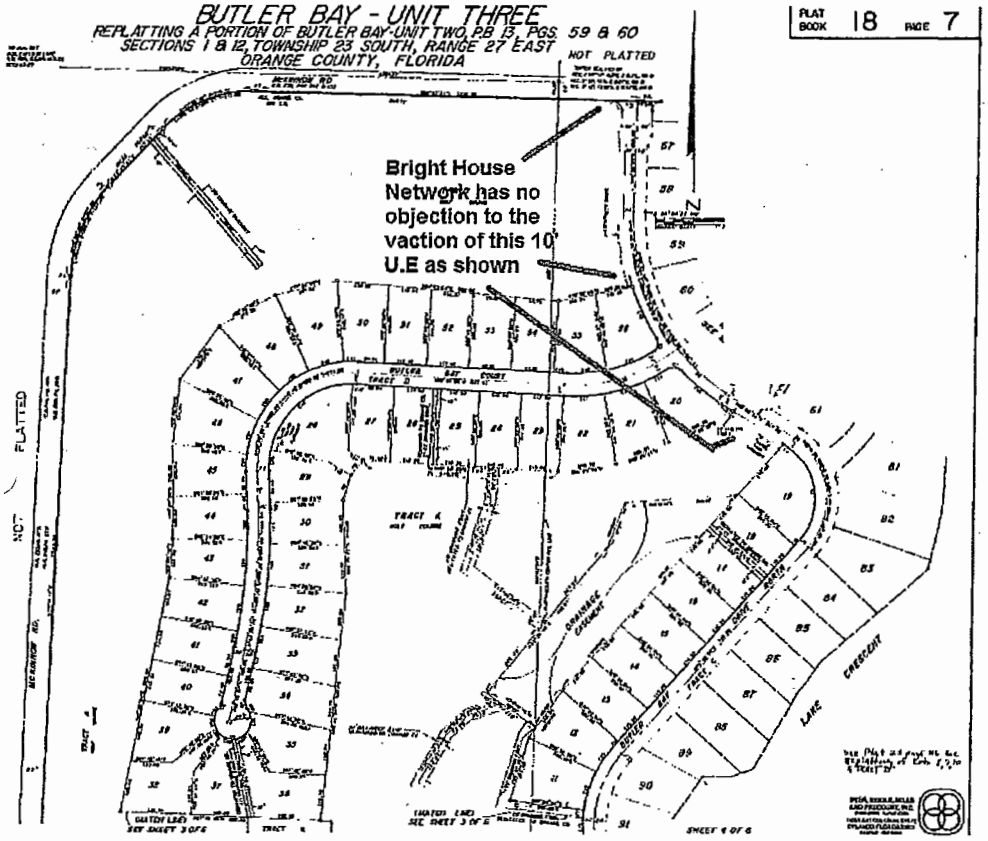
____ The subject parcel is not within our jurisdiction.

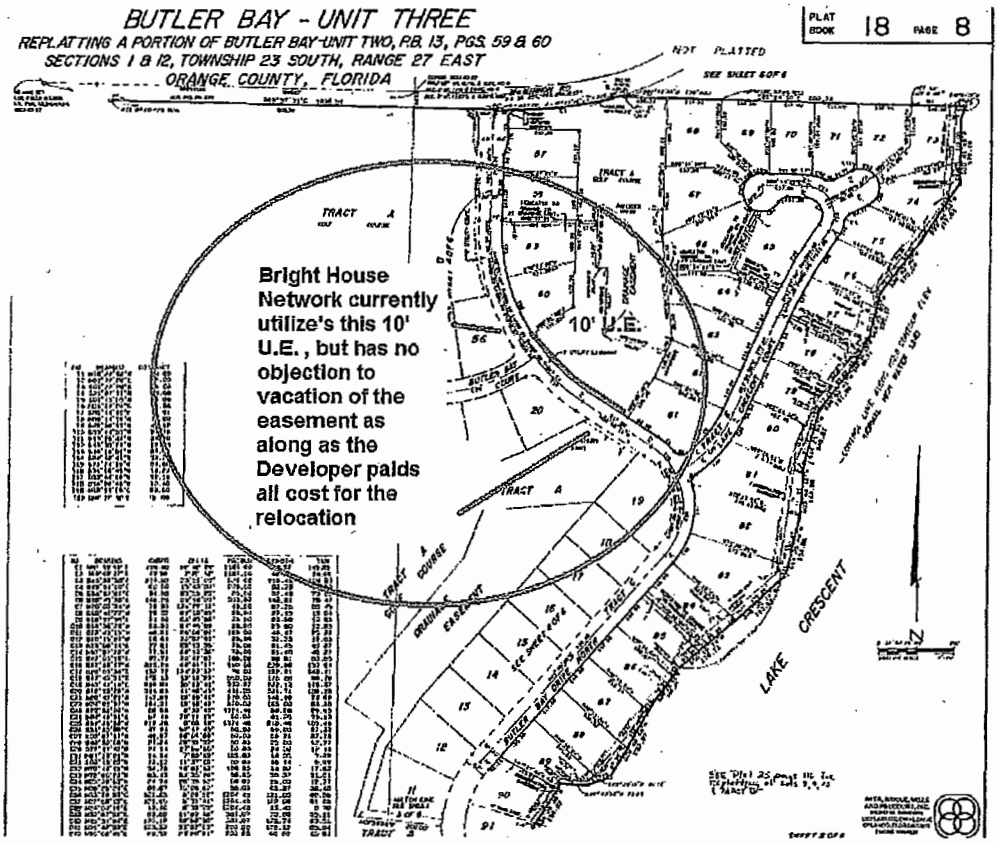
____ The subject parcel is within our jurisdiction. We do / do not (circle one) have any facilities within the easement / plat. We have no objection to the vacation.

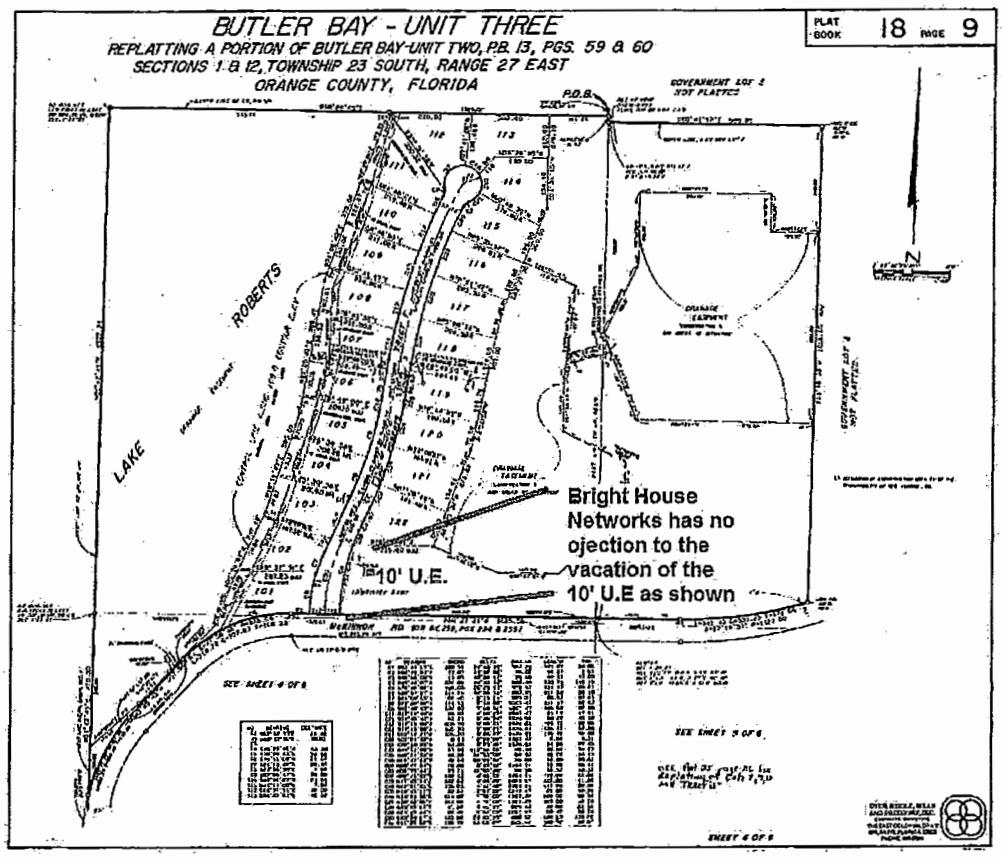
Additional Comments: _____

Signature: _____
Print Name: Rick Gullett Title: Senior Estimator
Date: 01/15/16 Phone Number: 407 656 2734 x108


BUTLER BAY - UNIT THREE
REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA
PLAT BOOK 18 PAGE 6
Bright House Network has no objection to vacating 10'easement as shown
10' UE
PLATTED
LAKE CRESCENT


BUTLER BAY - UNIT THREE
REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, PB 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA
PLAT BOOK 18 PAGE 7
NOT PLATTED
NOT PLATTED
Bright House Network has no objection to the vaction of this 10' U.E as shown
LAKE CRESCENT


BUTLER BAY - UNIT THREE
REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, PB. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA
PLAT BOOK 18 PAGE 8
NOT PLATTED
SEE SHEET 6 OF 6
TRACT A
GOLF COURSE
10' U.E.
Bright House Network currently utilize's this 10' U.E., but has no objection to vacation of the easement as along as the Developer paids all cost for the relocation
LAKE CRESCENT
N


BUTLER BAY - UNIT THREE
REPLATTING A PORTION OF BUTLER BAY-UNIT TWO, P.B. 13, PGS. 59 & 60
SECTIONS 1 & 12, TOWNSHIP 23 SOUTH, RANGE 27 EAST
ORANGE COUNTY, FLORIDA
PLAT BOOK 18 PAGE 9
ROBERTS
LAKE
10' U.E.
Bright House Networks has no ojection to the vacation of the 10' U.E as shown
N

Notice of Plat Vacation

Notice is hereby given that Windermere Country Club, LLC, a Florida limited liability company, at 2710 Butler B ay Drive, N., Windermere, Florida 34786 intends to vacate the plat of its property described as follows: Tract A, BUTLER BAY -UNIT THREE, according to the map or plat thereof as recorded in Plat Book 18,Page 4, Public Records of Orange County, Florida and Tract A, REPLAT OF LOTS 8,9, 10 AND TRACT B, BUTLER BAY -UNIT THREE, according to the map or plat thereof as recorded in Plat Book 25, Page 116, Public Records of Orange County, Florida.

K

Orange County Tax Collector Scott Randolph
Independently elected to serve only you.

Pay Online > Make An Appointment >

ABOUT LOCATIONS DRIVER LICENSES TAG & TITLE PROPERTY TAX BUSINESS TAX CAREERS OTHER CONTACT

REQUIRED DOCUMENTS FOR TRANSACTIONS MANAGER WAITTIME VIEW AWARD NOTICE

Important Notice: The Orange County Tax Collector's office will begin serving only Orange County residents due to volume and budgetary constraints. Please refer to your county's Tax Collector for locations.

Property Tax Search

The Orange County Tax Collector makes every effort to produce and publish the most current and accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use, or its interpretation. The assessed values are NOT certified values and therefore are subject to change before being finalized for ad valorem tax purposes. Utilization of the search facility indicates understanding and acceptance of this statement by the user. This Site Should not be relied upon for a title search.

Property Appraiser Details

Parcel/Tangible Number: 01-23-27-1108-00001
Date: 1/29/2016
Tax Year: 2015
Total Assessed Value: $1,998,019
Taxable Value: $1,998,019
Gross Tax Amount: $35,331.78
Millage Code: 75 ORG
Comments:

Owner & Address:
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110
Legal Description: BUTLER BAY UNIT 3 18/4 TRACT A
Location Address: 2710 BUTLER BAY DR 34786

Current Taxes and Unpaid Delinquent Warrants:

Year	Owner Information	Amount Due	Download Taxbill	Make Payment
2015	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2014	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2013	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2012	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2010	SPE GO HOLDINGS INC	* PAID (View Taxbill For Receipt) *	Taxbill	
2009	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2008	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2007	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2006	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	

Unpaid Real Estate Certificates:

Year	Current Payoff	If Paid By	Current Payoff	If Paid By	Make Payment
* NONE *	* NONE *	* NONE *	* NONE *	* NONE *	* NONE *

Other Real Estate Certificates:

Year	Face Value	Certificate Number	Status	Amount Paid
2011	$48,511.53	2012-0001462.000	Paid	$50,943.36

* UNPAID DELINQUENT TAXES MUST BE PAID BY A CASHIERS CHECK, MONEY ORDER, OR CERTIFIED FUNDS AND ARE DUE BY THE LAST BUSINESS DAY OF THE MONTH.

IMG **Scott Randolph, Tax Collector** 2015 REAL ESTATE

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	ESCROW CODE	MILLAGE CODE
0025397-1	0	75 ORG

TAX AMOUNT			
	Nov/2015	Feb/2016	
	Dec/2015	MARCH GROSS TAX	
	Jan/2016	INTEREST/ADV	

01-23-27-1108-00001
BUTLER BAY UNIT 3 18/4 TRACT A

SITUS ADDRESS 2710 BUTLER BAY DR 34786

WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

PAID 0099-01272633 $33,918.51 11/25/2015

PO Box 545100
Orlando FL 32854-5100

To pay by credit card, call 1-855-414-9014 or visit www.octaxcol.com. A fee will be charged by Point and Pay for this service.
Or to mail in your payment, return the top portion of your bill with your check.
Make checks payable to Scott Randolph, Tax Collector • PO Box 545100 • Orlando FL 32854-5100

Scott Randolph, Tax Collector
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

RETAIN FOR YOUR RECORDS 2015 REAL ESTATE

01-23-27-1108-00001
BUTLER BAY UNIT 3 18/4 TRACT A

SITUS ADDRESS 2710 BUTLER BAY DR 34786

Receipt will be mailed upon request.

AD VALOREM TAXES

TAX AUTHORITY	ASSESSED VALUE	EXEMPT VALUE	TAXABLE VALUE	MILLAGE*	TAX LEVIED
STATE SCHOOL	1,998,019	0	1,998,019	4.9700	$9,930.15
LOCAL SCHOOL	1,998,019	0	1,998,019	3.2480	$6,489.57
GEN COUNTY	1,998,019	0	1,998,019	4.4347	$8,860.61
CNTY FIRE	1,998,019	0	1,998,019	2.2437	$4,482.96
UTD	1,998,019	0	1,998,019	1.8043	$3,605.03
LIBRARY	1,998,019	0	1,998,019	.3748	$748.86
SFWM	1,998,019	0	1,998,019	.3551	$709.50
WIND CANAL	1,998,019	0	1,998,019	.2528	$505.10

TOTAL MILLAGE*:	17.6834	*DOLLARS PER $1,000 OF TAXABLE VALUE	AD VALOREM TOTAL:	$35,331.78

NON-AD VALOREM ASSESSMENTS

LEVYING AUTHORITY	AMOUNT

NON-AD VALOREM TOTAL: $0.00

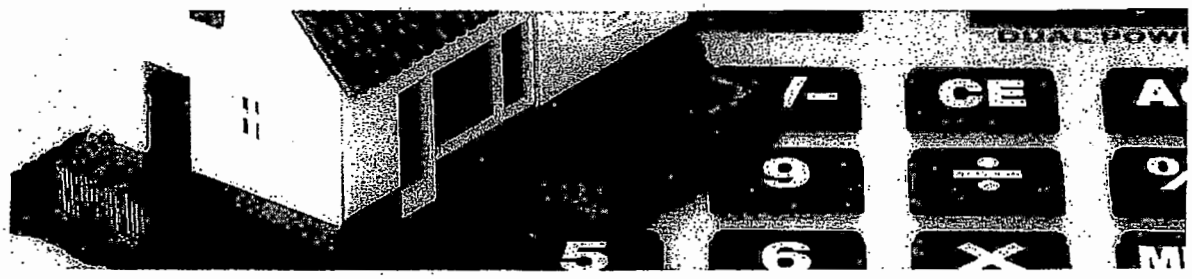
TOTAL TAXES AND ASSESSMENTS: $35,331.78

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	MILLAGE CODE	ASSESSED VALUE	EXEMPTIONS	L.I.S. EXEMPTION	TAXABLE VALUE
0025397-1	75 ORG	1,998,019	0		1,998,019

Nov/2015	Dec/2015	Jan/2016	Feb/2016	MARCH GROSS TAX	INTEREST/ADV	ESCROW CODE
						0

Important Notice: The Orange County Tax Collector's office will begin serving only Orange County residents due to volume and budgetary constraints. Please refer to your county's Tax Collector for locations.



Property Tax Search

The Orange County Tax Collector makes every effort to produce and publish the most current and accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use, or its interpretation. The assessed values are NOT certified values and therefore are subject to change before being finalized for ad valorem tax purposes. Utilization of the search facility indicates understanding and acceptance of this statement by the user. This Site Should not be relied upon for a title search.

Property Appraiser Details

Parcel/Tangible Number: 01-23-27-1117-00001
Date: 1/29/2016
Tax Year: 2015
Total Assessed Value: $211,430
Taxable Value: $211,430
Gross Tax Amount: $3,738.80
Millage Code: 75 ORG
Comments:

Owner & Address:
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110
Legal Description: A REPLAT OF LOTS 8 9 10 & TRACT B BUTLER BAY UNIT 3 25/116 TRACT A
Location Address: 2730 BUTLER BAY DR 34786

Current Taxes and Unpaid Delinquent Warrants:

Year	Owner Information	Amount Due	Download Taxbill	Make Payment
2015	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2014	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2013	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2012	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2010	SPE GD HOLDINGS INC	* PAID (View Taxbill For Receipt) *	Taxbill	
2009	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2008	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2007	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2006	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	

Unpaid Real Estate Certificates:

Year	Current Payoff	If Paid By	Current Payoff	If Paid By	Make Payment
* NONE *	* NONE *	* NONE *	* NONE *	* NONE *	* NONE *

Other Real Estate Certificates:

Year	Face Value	Certificate Number	Status	Amount Paid
2011	$6,521.90	2012-0001466.000	Paid	$6,854.25

* UNPAID DELINQUENT TAXES MUST BE PAID BY A CASHIERS CHECK, MONEY ORDER, OR CERTIFIED FUNDS AND ARE DUE BY THE LAST BUSINESS DAY OF THE MONTH.

IMG **Scott Randolph, Tax Collector** 2015 REAL ESTATE

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	ESCROW CODE	MILLAGE CODE
0025518-2	0	75 ORG

TAX AMOUNT			
	Nov/2015	Feb/2016	01-23-27-1117-00001 A REPLAT OF LOTS 8 9 10 & TRACT
	Dec/2015	MARCH GROSS TAX	B BUTLER BAY UNIT 3 25/116 TRACT
	Jan/2016	INTEREST/ADV	A

SITUS ADDRESS 2730 BUTLER BAY DR 34786

WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

PAID 0099-01272634 $3,589.25 11/25/2015

PO Box 545100
Orlando FL 32854-5100

To pay by credit card, call 1-855-414-9014 or visit www.octaxcol.com. A fee will be charged by Point and Pay for this service.
Or to mail in your payment, return the top portion of your bill with your check.
Make checks payable to Scott Randolph, Tax Collector • PO Box 545100 • Orlando FL 32854-5100

Scott Randolph, Tax Collector
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

RETAIN FOR YOUR RECORDS 2015 REAL ESTATE

01-23-27-1117-00001
A REPLAT OF LOTS 8 9 10 & TRACT B BUTLER BAY UNIT 3 25/116 TRACT A

SITUS ADDRESS 2730 BUTLER BAY DR 34786

Receipt will be mailed upon request.

AD VALOREM TAXES

TAX AUTHORITY	ASSESSED VALUE	EXEMPT VALUE	TAXABLE VALUE	MILLAGE*	TAX LEVIED
STATE SCHOOL	211,430	0	211,430	4.9700	$1,050.81
LOCAL SCHOOL	211,430	0	211,430	3.2480	$686.72
GEN COUNTY	211,430	0	211,430	4.4347	$937.63
CNTY FIRE	211,430	0	211,430	2.2437	$474.39
UTD	211,430	0	211,430	1.8043	$381.48
LIBRARY	211,430	0	211,430	.3748	$79.24
SFWM	211,430	0	211,430	.3551	$75.08
WIND CANAL	211,430	0	211,430	.2528	$53.45

TOTAL MILLAGE*: 17.6834 *DOLLARS PER $1,000 OF TAXABLE VALUE

AD VALOREM TOTAL: $3,738.80

NON-AD VALOREM ASSESSMENTS

LEVYING AUTHORITY AMOUNT

NON-AD VALOREM TOTAL: $0.00

TOTAL TAXES AND ASSESSMENTS: $3,738.80

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	MILLAGE CODE	ASSESSED VALUE	EXEMPTIONS	L.I.S. EXEMPTION	TAXABLE VALUE
0025518-2	75 ORG	211,430	0		211,430

Nov/2015	Dec/2015	Jan/2016	Feb/2016	MARCH GROSS TAX	INTEREST/ADV	ESCROW CODE
						0

Appendix 21.

LETTER OF TRANSMITTAL

To: Whitney Evers
Orange County Attorney's Office
201 S. Rosalind Avenue – 3rd Floor
Orlando, Florida 32801

Date: 02/01/16

Re: Windermere Country Club – Petition to Vacate Plat

Project No.: 15-101

The documents below are being sent via: Courier

☒ Applications	☐ Plans	☐ Specifications	☐ Floppy/ZIP/CD
☐ Change Order	☐ Prints	☐ Invoice	☐ FYI
☐ Copy of Letter	☐ Shop Drawings	☐ Request	☒ Other

Quantities	Dated	Description
1		Petition to Vacate Plat Request

These are transmitted as checked below:

☐ For Approval	☐ Approved As Noted	☐ For Review	☐ For Your File
☐ For Your Use	☐ Approved As Is	☒ As Requested	☐ Other

Remarks: **Please find attached for your review. 7 copy of this document along with the application fee of $752.00 has been provided to Joe Kunkel at OCPW for review and processing.**

Thank you!

Copies to: FILE

SIGNED _____
Jamie T. Poulos, PE
Partner

POULOS & BENNETT

2602 East Livingston St. | Orlando, Florida 32814 | Tel: 407.487.2594 | Fax: 407.487.2594 | www.poulosandbennett.com

RECEIVED
MAR 29 2016
Orange County Attorney's Office
JDP WEE

LETTER OF TRANSMITTAL

To: **Whitney Evers**
Orange County Attorney's Office
201 S. Rosalind Avenue – 3rd Floor
Orlando, Florida 32801

Date: 03/29/16

Re: Windermere Country Club – Petition to Vacate Plat

Project No.: 15-101

The documents below are being sent via: Courier

☐ Applications	☐ Plans	☐ Specifications	☐ Floppy/ZIP/CD
☐ Change Order	☐ Prints	☐ Invoice	☐ FYI
☒ Copy of Letter	☐ Shop Drawings	☐ Request	☐ Other

Quantities	Dated	Description
1		Petition to Vacate Plat – Response Documents

These are transmitted as checked below:

☐ For Approval	☐ Approved As Noted	☐ For Review	☐ For Your File
☐ For Your Use	☐ Approved As Is	☒ As Requested	☐ Other

Remarks: Please find attached for your review. 7 copies of this document along with the CD PDF files has been provided to Joe Kunkel at OCPW for review and processing.

Thank you!

Copies to: FILE

SIGNED

Jamie T. Poulos, PE
Partner

7 hand delivered

POULOS & BENNETT

2602 East Livingston St. | Orlando, Florida 32814 | Tel: 407.487.2594 | Fax: 407.487.2594 | www.poulosandbennett.com

WINDERMERE
COUNTRY CLUB

March 28, 2016

Mr. Joe Kunkel
County Engineer
Orange County
4200 South John Young Parkway
Orlando, Florida 32839

Subject: Petition to Vacate
Windermere Country Club
Parcel ID 01-23-27-1108-00-001 and 01-23-27-1117-00-001

Dear Mr. Kunkel

In response to comments received during the meeting with County staff on March 8, 2016, please find enclosed the follow revised items.

Please see the specific items below with regard to this request for a PTV:

1. Please see the attached sketch and legal description prepared by a registered land surveyor showing and describing the area included in the golf course. **(Attachment A)**.
2. Please see the attached Developer's Agreement **(Attachment B)**.
3. In support of the PTV, please see the attached "Memorandum re: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space" **(Attachment C)**.
4. A legal notice will be published in a newspaper of general circulation in Orange County in not less than two (2) weekly issues of the paper **(Attachment D)**.
5. Please see the attached certificates showing that all state and county taxes have been paid on the subject property to be vacated **(Attachment E)**.
6. A notice of petition to vacate will be posted on the subject property in a conspicuous and easily visible location no later than ten (10) days prior to the public hearing on the petition. It is assumed that this notice will be available at the Orange County Public Works Division after the public hearing has been scheduled.

The undersign submits these items as grounds and reasons in support of this petition.

Sincerely,

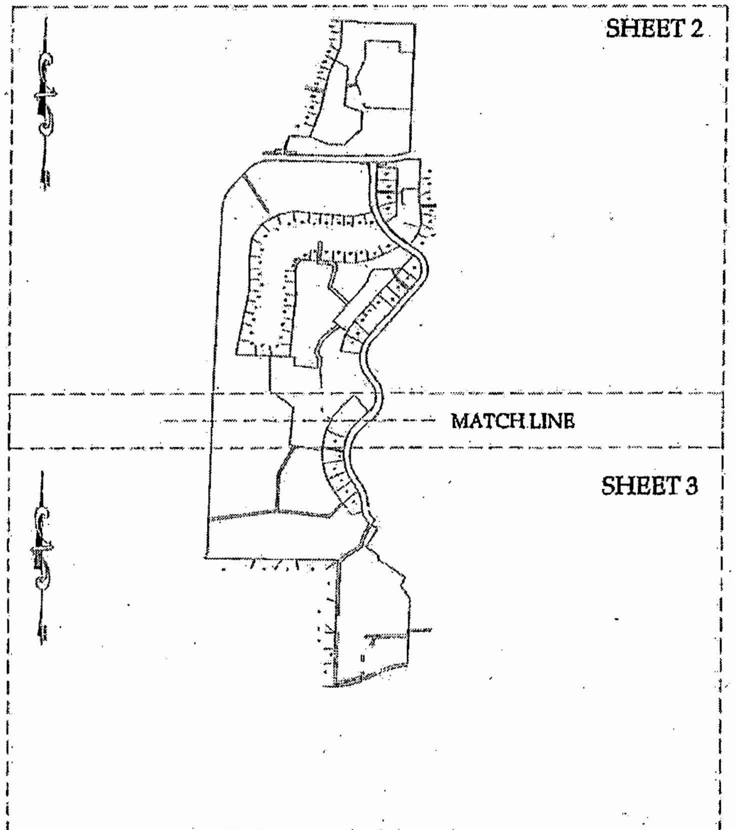
Bryan DeCunha
Owner
Windermere County Club

CC: Whitney Evers, Orange County Attorney's Office

2710 Butler Bay Drive North • Windermere, Florida 34786
(407) 876-1112 • fax (407) 876-0700
www.windermeregolf.com

Attachment 'A'

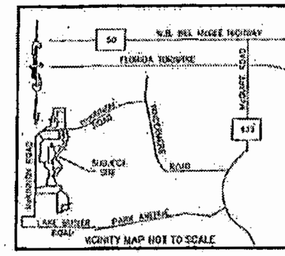
ALTA / ACSM LAND TITLE AND BOUNDARY LOCATION SURVEY OF:
Windermere Golf and Country Club



SHEET MAP
NOT TO SCALE

SCHEDULE B-2 (EXCEPTIONS)

4. All matters contained on the Plat of Butler Bay – Unit Two, as recorded in Plat Book 18, Page 58; Resolution recorded in O.R. Book 3556, Page 2058, Public Records of Orange County, Florida. (As to Parcel C) PLOTTED
5. All matters contained on the Plat of Butler Bay – Unit Three, as recorded in Plat Book 18, Page 4; Resolution recorded in O.R. Book 4173, Page 2062, Public Records of Orange County, Florida. (As to Parcels A, C, D and E) PLOTTED
6. Easement in favor of American Telephone and Telegraph Company recorded in O.R. Book 1598, Page 657, Public Records of Orange County, Florida PLOTTED
7. Agreement between Orange/Seminole Cablevision and Windermere Lakes Limited recorded in O.R. Book 3176, Page 2740, Public Records of Orange County, Florida. BLANKET NOT-PLOTTABLE
8. Use Agreement by and between The Country Club of Windermere and Orange County recorded in O.R. Book 3755, Page 1261, Public Records of Orange County, Florida. (As to Parcel A) NOT PLOTTABLE
9. Developer's Agreement by and between Orange County and Windermere Lakes, Ltd. recorded in O.R. Book 3757, Page 1534, Public Records of Orange County, Florida. NOT PLOTTABLE
10. Grant of Easement for Ingress, Egress and Utilities recorded in O.R. Book 4043, Page 4175, Public Records of Orange County, Florida. (As to Parcels A and C) PLOTTED
11. Restrictive Covenants and Exchange and Option Agreement recorded in O.R. Book 4243, Page 4735; Amended in O.R. Book 5028, Page 4713, Public Records of Orange County, Florida. NOT PLOTTABLE
12. Landscape Maintenance Easement recorded in O.R. Book 4070, Page 3212, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED
13. Landscape Maintenance Easement recorded in O.R. Book 4070, Page 3932, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED
14. Lifetime Membership Agreement recorded in O.R. Book 4115, Page 713, Public Records of Orange County, Florida. NOT PLOTTABLE
15. Orange County / Consolidated Golf, Inc. Interim Wastewater Facilities Agreement recorded in O.R. Book 4305, Page 2353, Public Records of Orange County, Florida. NOT PLOTTABLE
16. Easement Agreement recorded in O.R. Book 4251, Page 3602; re-recorded in O.R. Book 4257, Page 3057, Public Records of Orange County, Florida. (As to Parcels A, C and E) BLANKET NOT PLOTTABLE
17. Orange County / Atlantic Golf Partners Interim Water Facilities Agreement recorded in O.R. Book 4278, Page 1778, Public Records of Orange County, Florida. NOT PLOTTABLE
18. Agreement recorded in O.R. Book 4282, Page 3771, Public Records of Orange County, Florida. NOT PLOTTABLE
19. Pipeline Easement in favor of Orange County recorded in O.R. Book 5184, Page 1793, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED
20. Easement in favor of Butler Bay Association, Inc. recorded in O.R. Book 5743, Page 819, Public Records of Orange County, Florida. (As to Parcel A) PLOTTED
21. Declaration of Covenants, Conditions and Restrictions for Butler Bay Unit Two recorded in O.R. Book 3174, Page 713, as amended in O.R. Book 3581, Page 1487 and O.R. Book 3170, Page 48; and Declaration of Covenants, Conditions and Restrictions for Butler Bay Unit Three recorded in O.R. Book 3805, Page 1478, as amended in O.R. Book 3377, Page 1415, O.R. Book 3874, Page 779 and O.R. Book 8508, Page 923, O.R. Book 10178, Page 2374, O.R. Book 10178, Page 2160 and O.R. Book 10178, Page 2450, Public Records of Orange County, Florida, which contain provisions creating easements and/or assessments. (As to Parcels C, D and E Book 3583, Page 26; said Declarations amended in O.R. Book 6533, Page 812, O.R. Book 8558, Page 314, O.R.) NOT PLOTTABLE



LEGAL DESCRIPTION. (SCHEDULE "A" OF TITLE POLICY)

PARCEL A:

[illegible]

PARCEL B:

[illegible]

PARCEL C:

[illegible]

PARCEL D:

[illegible]

PARCEL E:

[illegible]

SURVEYOR'S NOTES:

1. BEARINGS ARE BASED ON THE MONUMENTED EAST RIGHT-OF-WAY LINE OF McKINNON ROAD AS N01°10'40"E ASSUMED.
2. FIELD SURVEY ACCOMPLISHED WITH A PENTAX 325N REFLECTORLESS TOTAL STATION. ALL TIES ARE DIRECTLY MEASURED OR COMPUTED USING REDUNDANT MEASUREMENTS.
3. ALL BOUNDARY DIMENSIONS AS PER PLAT UNLESS NOTED WITH (M) WHICH DENOTES MEASURED IN FIELD.
4. SURVEYOR RELIED ON OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY TITLE POLICY COMMITMENT NO. 07-2011-0036, WITH AN EFFECTIVE DATE OF FEBRUARY 24, 2011 AT 11:00 P.M. FULL COPIES OF EXCEPTIONS PROVIDED TO SURVEYOR.
5. SURVEY PERFORMED IN THE FIELD ON 26 FEBRUARY 2011.
6. GRAPHIC REPRESENTATION OF SYMBOLS EXAGGERATED FOR CLARITY.
7. NO UNDERGROUND FOUNDATIONS, UTILITIES OR IMPROVEMENTS WERE LOCATED.
8. ALL BEARINGS AND DISTANCES SHOWN ARE BY ACCORD WITH THE RECORD PLATS EXCEPT AS SHOWN.
9. THIS SURVEY UPDATES AN ORIGINAL SURVEY BY THIS SURVEYOR DATED DECEMBER 15, 1999.
10. TOTAL ACREAGE SURVEYED (PARCEL A–153.35, PARCEL B–1.82) = 155.17 ACRES.
11. BUTLER BAY DRIVE (NORTH – TRACT C) IS A PRIVATE ROAD OWNED AND MAINTAINED BY THE HOMEOWNERS ASSOCIATION.
12. NO GREENS, TEES, CART PATHS, HAZARDS OR WATER FEATURES WERE LOCATED.
13. ADDITIONS OR DELETIONS TO THIS SURVEY WITHOUT THE EXPRESSED CONSENT OF THE SIGNING SURVEYOR ARE EXPRESSLY FORBIDDEN.

SURVEYOR'S CERTIFICATION:

[illegible]

MICHAEL T. RUDD, PLS
FLORIDA REGISTERED SURVEYOR No. 3380

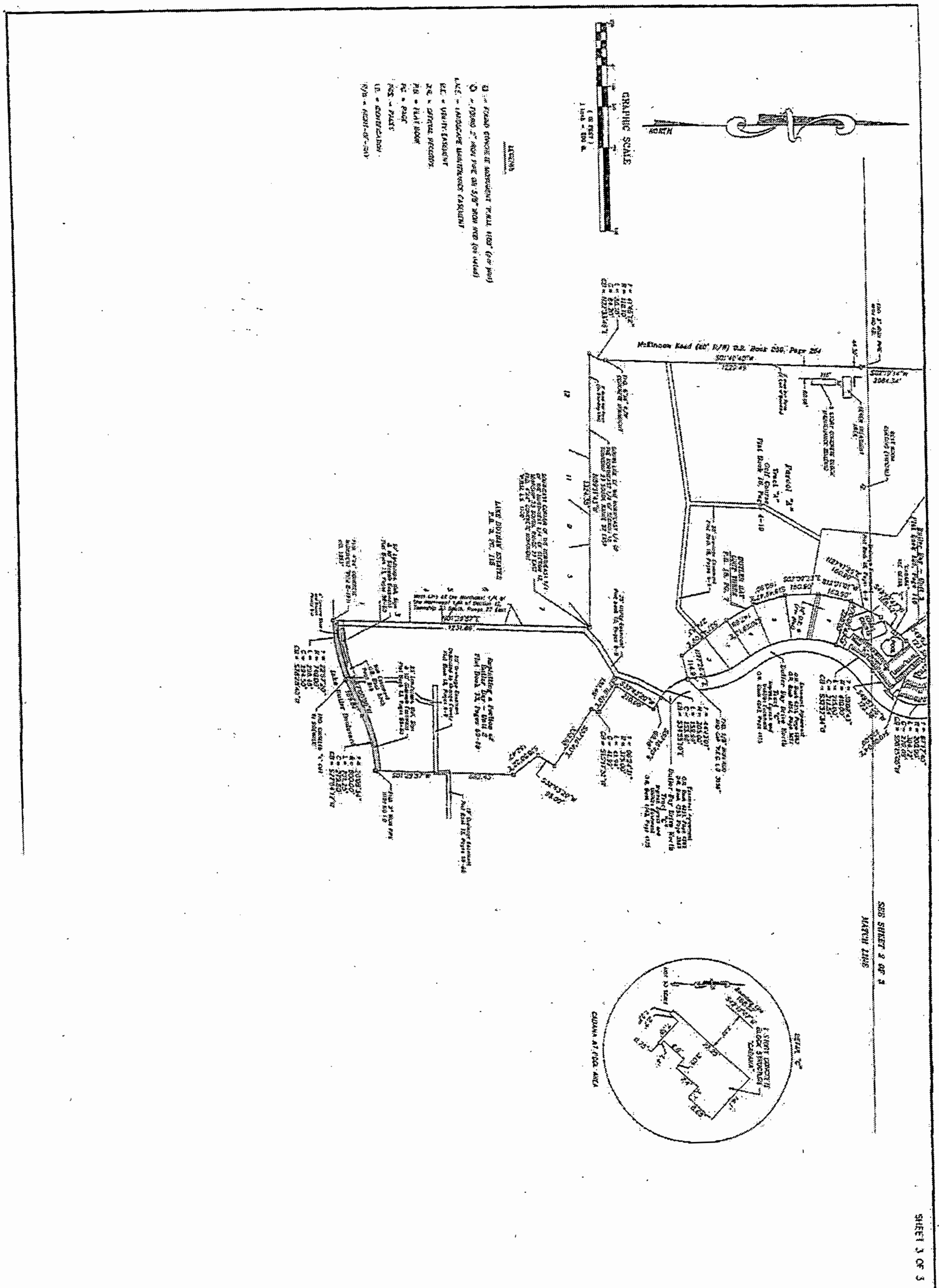
DATE SIGNED 29 Sept 2015

NOT VALID WITHOUT THE EMBOSSED SEAL OF THE SIGNING SURVEYOR.

ALTA / ACSM LAND TITLE SURVEY & BOUNDARY and LOCATION SURVEY
Windermere Golf & Country Club
SECTION 12 TWP 23 S RGE 27 E
ORANGE COUNTY, FLORIDA

PREPARED FOR:
BRYAN DECUNHA

Michael T. Rudd
REGISTERED FLORIDA LICENSED SURVEYOR 3380



Michael T. Rudd

PREPARED FOR:

BRYAN DECUNHA

ALTA / ACSM LAND TITLE SURVEY & BOUNDARY and LOCATION SURVEY

Windermere Golf & Country Club

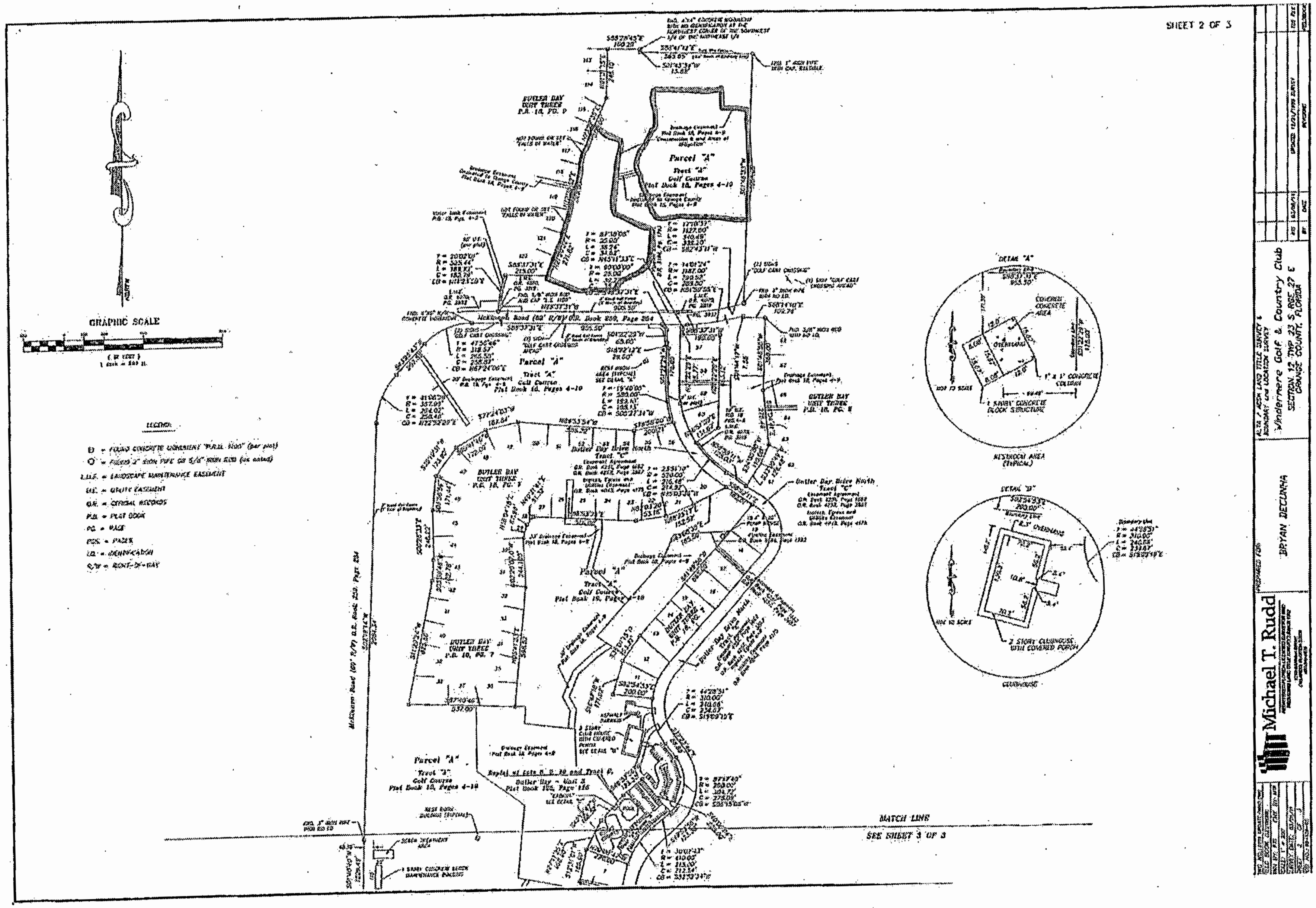
SECTION 12 TWP 23 S RGE 27 E
ORANGE COUNTY, FLORIDA

UPDATED 12/21/1998 SURVEY

REVISIONS

001212

001213


SHEET 2 OF 3
GRAPHIC SCALE
LEGEND
Parcel "A"
Tract "A"
Golf Course
Plat Book 10, Pages 4-10
BUTLER BAY UNIT THREE
P.B. 10, PG. 7
MATCH LINE
SEE SHEET 3 OF 3
DETAIL "A"
RESTROOM AREA (TYPICAL)
DETAIL "B"
2 STORY CLUBHOUSE WITH COVERED PORCH
CLUBHOUSE
Michael T. Rudd
PREPARED FOR:
BRYAN DECUNHA
Windermere Golf & Country Club
SECTION 12, TWP 23 S, RGE 27 E
ORANGE COUNTY, FLORIDA

Attachment 'B'

This Developer's Agreement, in addition to other conditions, terms and covenants below, also amends that certain Developer's Agreement adopted February 24, 1986 and recorded at OR Book 3757, Page 1536, Public Records of Orange County, Florida (the "Original Developer's Agreement"), by deleting and removing condition of Approval #12 as contained in Exhibit A of the Original Developer's Agreement.

DEVELOPER'S AGREEMENT

THIS AGREEMENT is made by and between ORANGE COUNTY, FLORIDA, a political subdivision of the State of Florida ("Orange County") and WINDERMERE COUNTRY CLUB, LLC, a Florida limited liability company, 2710 Butler Bay Drive North, Windermere, Florida 34786 ("Owner").

RECITALS:

1. Owner owns certain real property located in the unincorporated area of Orange County (the "Property") more particularly described in Exhibit "A" attached hereto, which is the 155± acre parcel listed as Tract A on the Butler Bay Unit 3 Plat, PB 18, Page 4 (the "Plat") as amended by A Replat of Lots 8, 9, 10 and Tract B Butler Bay – Unit 3 Plat, PB 25, Page 116.

2. Owner applied for a Petition to Vacate (i) Note No. 12 of the Plat ("Plat Note 12"), which Plat Note 12 dedicated the development rights to Tract A and platted conservation easements/areas, to Orange County and (ii) Vacate Note No. 13 ("Plat Note 13"), which Plat Note 13 dedicated access rights from Lot 101 and Tract A to McKinnon Road and Lake Butler Boulevard, to Orange County.

3. At the public hearing on November 18, 1985, the Board of County Commissioners of Orange County adopted certain conditions of approval for the Preliminary Subdivision Plan, which included the Property, based upon the Orange County Subdivision Regulations and based upon considerations relating to the area surrounding the Property, water bodies abutting the properties adjacent to the Property and other circumstances affecting the adjacent properties and the Property.

4. The conditions of approval adopted by Orange County assure compliance with the Orange County Subdivision Regulations and assure compatibility of development on the Property with surrounding development and with the surrounding environment.

5. Orange County memorialized the conditions of approval in a Developer's Agreement adopted February 24, 1986 and recorded at OR Book 3757, Page 1536, Public Records of Orange County, Florida (the "1986 Developer's Agreement") between Orange County and Windermere Lakes, Ltd. (the "Original Developer").

6. Condition of Approval #12 as contained in Exhibit A of the 1986 Developer's Agreement required the Original Developer to dedicate the development rights to Tract A and conservation areas, to Orange County.

7. The 1986 Developer's Agreement recognized that the Conditions of Approval control all future development in the Butler Bay Unit 3 Plat, including the Property, "unless said conditions of approval are amended or modified by Orange County".

8. Now, 30 years after the original 1986 Developer's Agreement, Owner is closing the golf course, ceasing utilization of the Property as a golf course, and desires to utilize the Property in a manner consistent with the FLU designation of R1 to 1 and the R-CE-C zoning regulations.

9. To accomplish redevelopment of the Property, Orange County, through its actions of November 19, 2015, has directed Owner to file a Petition to Vacate Plat Note 12.

10. To accomplish redevelopment of the Property, Owner has filed a Petition to also Vacate Plat Note 13.

NOW, THEREFORE, in consideration of the foregoing and of the terms and conditions stated below, Orange County and Owner agree as follows:

1. Recitals. The foregoing recitals are true and form a material part of this Agreement.

2. Conditions of Approval. The following conditions of approval apply to the Property and shall control all future development of the Property as follows:

2.01 Acknowledgement of Petition to Vacate Plat Note .

Orange County acknowledges Petition to Vacate Plat Notes 2015-_____. .

2.02 Release of Development Rights/Plat Note 12.

Condition of Approval #12 as contained in Exhibit A of the 1986 Developer's Agreement is deleted and removed from the 1986 Developer's Agreement, and is no longer applicable to the Property. The development rights to the Property are hereby released and reconveyed by Orange County to the Owner. Similarly, Orange County acknowledges and agrees that Plat Note 12 is deleted and removed from the Plat, and not applicable to the Property.

2.03 Limited Release of Access Rights/Plat Note 13.

Access rights from Tract A to McKinnon Road and Lake Butler Bay Boulevard which were dedicated to Orange County by Plat Note 13 as set

forth in Plat Book 18, Page 4 are acknowledged by Orange County as being released and reconveyed to Owner. Similarly, Orange County acknowledges and agrees that Plat Note 13 is deleted and removed from the Plat, and not applicable to the Property. The Owner and Orange County acknowledge and agree that upon any future replatting of the Property into lots, such plat shall reflect that those newly created lots shall not have direct access to McKinnon Road and Butler Bay Boulevard, but that the local road system within the Property shall be permitted to access McKinnon Road and Lake Butler Boulevard consistent with the Orange County Land Development Regulations. Notwithstanding the prior sentence, if a lot is platted on a parcel within the Property that does not create and contain a local road system, then such lot shall be granted direct access to McKinnon Road.

3. Recording. The parties hereto agree that an executed copy of this Agreement shall be recorded at the Owner's expense in the Official Records of Orange County, Florida, prior to platting all or any part of the Property.

4. Letter from Orange County. Upon written request from the Owner, Orange County, or any successor agency or entity, will execute a document (the form of which is reasonably satisfactory to Owner) which evidences the status of compliance by Owner with the conditions of approval contained herein. Said document shall be prepared in recordable form and shall be delivered to Owner within 10 days of receipt by Orange County of the request for same.

5. Recording Modifications to Conditions of Approval. Any modifications to the Conditions of Approval referenced in Paragraph 2 above shall be recorded in the Public Records of Orange County, Florida.

9. Effective Date. This Agreement takes effect on the later of the dates stated below.

ORANGE COUNTY, FLORIDA

By:_____
Mayor, Board of
County Commissioners

ATTEST: MARTHA HAYNIE,
Clerk to Board of County
Commissioners

DATE:_____

By:_____

WINDERMERE COUNTRY CLUB, LLC,
a Florida limited liability company

By:_____
Bryan DeCunha, Manager

DATE:_____

STATE OF FLORIDA
COUNTY OF ORANGE

I HEREBY CERTIFY that on this day, before me, an officer duly authorized in the State and County aforesaid to take acknowledgments, personally appeared Bryan DeCunha, as Manager of Windermere Country Club, LLC, to me known to be the person described in and who executed the foregoing Developer's Agreement, and he acknowledged before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this _____ day of _____, 2016.

_____
Notary Public
Printed Name:
My Commission Expires:

EXHIBIT "A"

Legal Description of the "Property", Windermere Country Club, LLC

Attachment 'C'

GRAY|ROBINSON
ATTORNEYS AT LAW

301 EAST PINE STREET
SUITE 1400
POST OFFICE BOX 3068 (32802-3068)
ORLANDO, FLORIDA 32801
TEL 407-843-8880
FAX 407-244-5690
gray-robinson.com

BOCA RATON
FORT LAUDERDALE
FORT MYERS
GAINESVILLE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

407-244-5683
PAUL.CHIPOK@GRAY-ROBINSON.COM

MEMORANDUM

TO: Mayor Jacobs and Board of County Commissioners

FROM: Truong M. Nguyen

DATE: March 28, 2016

SUBJECT: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space

---

Petitioner, owners of a soon to be defunct former golf course, is requesting the Board approve a Petition to Vacate the Tract A portion of the Butler Bay Unit 3 Plat as amended. As the information in this Memorandum makes clear, Petitioner's request fully complies with all relevant County Code provisions and should be approved.

Windermere Country Club has filed a rezoning application, Application #RZ-10-038, to modify the Cluster Plan to 1) bring the 155 acres under the current standard of 1 unit per 1 acre and 2) change the 155 acres from golf course (a referenced use and not open space) to residential area to accommodate 95 lots. At the November 19, 2015 Planning and Zoning Commission meeting, the Planning and Zoning Commission continued the rezoning application to April 21, 2016 and directed Windermere Country Club to file a Petition to Vacate the 155 acre Tract A/golf course property and to modify the 1986 Developer's Agreement applicable to the Butler Bay, Unit 3 Plat[1].

The modification to the 1986 Developer's Agreement and Plat Conditions 12 (development rights) and 13 (access rights) are being addressed through a new Developer's Agreement and Petition to Vacate #16-____.

BACKGROUND

The Butler Bay Cluster Plan, where the Tract A/Golf Course Property is located, received its zoning approval on February 21, 1985. There was no mention of conveyance of development

[1] Tab I

rights from the Golf Course Property in this zoning approval.[2]

Language regarding dedication of the development rights to the Golf Course Property to Orange County first emerged during PSP review on November 18, 1985.[3] That condition to convey development rights was included in the "1986 Developer's Agreement"[4]. When the Butler Bay Unit 3 Plat[5], was approved, a Resolution Vacating and Annulling a portion of the Butler Bay Unit 2 Plat was approved at the same time.[6] Further, when the Replat of Lots 8, 9, 10 and Tract B was approved on April 2, 1990[7], a second Resolution Vacating and Annulling Plat was approved by the BOCC on the same day.[8]

GOLF COURSE PROPERTY IS NOT "COMMON OPEN SPACE", "COMMON AREA", OR "COMMON PRIVATE FACILITIES."

The Windermere Country Club golf course is privately held property and maintained by the Golf Course Property owner. It is not common open space. The County's ordinances and a review of the history of the County approvals associated with the Golf Course Property make this very clear.

Section 34-155(a)[9] defines "open space" and states it may include private parks and recreation areas provided: (i) they have been designated as a tract on the plat, (ii) they are adequate for the intended purpose, (iii) assurance has been given by deed restriction or Covenants, Conditions and Restrictions ("CCRs") that the area will be maintained and (iv) the area must be identified on the plat as 'common areas' for owners of property within the subdivision. In this case, the Golf Course Property is not identified as 'common area' on the plat. There is no plat dedication of Golf Course Property to any other lot or property owners. The CCRs do not include the Golf Course Property nor provide for maintenance of the golf course. In fact, the "Property" as defined in Exhibit A to the CCRs is limited to Lots 1-123, PB 18, Pages 4-9 and notably does not include the Tract A/Golf Course Property. The CCR definition of "Common Area" requires that common area be owned by the "Association". Article XII of the CCRs is titled "Covenants and Restrictions Relating to Golf Course". Section 1 states "All Owners of Lots on the Property acknowledge the existence of a private golf course on lands adjoining the Property. The golf course is for the use and enjoyment of the members of the private golf club". Section 3 creates a 10 foot easement in favor of the golf course across the

[2] See Minutes of February 21, 1985 Planning and Zoning Commission Meeting (Tab A) and Minutes of February 25, 1985 Board of County Commission Meeting (Tab B).
[3] Attached Tab C
[4] Development Agreement recorded at OR 3757/1536 (Tab D) and hereinafter "1986 Developer's Agreement."
[5] PB 18/4 (Tab E)
[6] See OR 3808/2058 (Tab F).
[7] Replat of Lots 8, 9, 10 and Tract B, Butler Bay Unit 3, PB 25/116 (Tab G).
[8] See OR 4173/3662 (Tab H)
[9] Tab J

rear of each lot adjacent to the golf course. The easement prohibits fences, walls or shrub planting. See OR Book 3808, Page 1478 (Tab K). The plat note 12 and 13 on PB 18, Page 4, which are applicable to the golf course are between the Golf Course Property owner and the County, the subdivision owners are not parties to those plat note restrictions. Clearly, there is no dedication or identification on the plat that the Tract A/Golf Course Property is common area for the owners of property within the subdivision. Further, the subdivision lot developer and their successors, the individual lot owners, were on notice through the CCRs that the golf course was not common area or common open space for the benefit of the lot owners. Rather, the lot owners acknowledge through the CCRs the existence of a private golf course for the use and enjoyment of the members of the private golf club. There is no documented expectation that the lot owners have any legal or equitable interest in the Tract A/Golf Course Property.

The 1986 Developer's Agreement (Tab D) approved by the Board of County Commissioners on February 26, 1986 incorporated the November 18, 1985 Preliminary Subdivision Plan conditions of approval (Tab C). That 1986 Developer's Agreement recognizes that the conditions shall control all future development of the property "(unless said conditions of approval are amended or modified by Orange County)".

The 1986 Developer's Agreement, Condition 5, provides: "The applicant shall enter into a Developer's Agreement with the County to address ownership and maintenance of all common private facilities." The "Developer's Agreement - Common Private Facilities" was approved by the Board of County Commissioners on July 21, 1986[10]. That Development Agreement was executed by "Windermere Lakes, Ltd." who was not the owner of the Golf Course Property. Further, the "Property" subject to that Developer's Agreement is Lots 1-123 of "Butler Bay Unit 3" not the Tract A/ Golf Course Property. The Tract A/Golf Course Property by the terms of that 1986 Developer's Agreement is not "common private facilities."

In regards to open space, the Tract A/Golf Course Property is zoned R-CE-C. Section 38-556[11], requires 40% of each lot to be pervious surface. Section 38-557[12],Common Open Space, Subsection (a) refers to Chapter 24 for open space regulations. Section 24-29(e)[13] provides, that for residential cluster districts, when the density is less than or equal to 1 unit per acre, there is no common open space required. Section 24-26[14], Definitions, states "Common Open Space" shall mean a type of open space designed and intended for the use or enjoyment of occupants of a project. That Section also defines "Residential Private Open Space" to include front, rear and side yards excluding parcel driveways and structures. Both common open space and residential private open space are included as part of the definition of "Open Space."

[10] Tab L. Recorded at OR Book 3808, Page 1466.
[11] Tab M.
[12] Tab N.
[13] Tab O.
[14] Tab P.

Section 24-27[15], Legislative findings, at Subsection (e) states:

> "Consistency in the definition of open space and the provisions for open space are necessary to balance between private property rights and the protection of the public health, safety and welfare."

Section 24-28[16], Applicability, provides, in part, that the open space standards are minimum standards, "however, an applicant may provide a greater percentage of open space but a greater percentage of open space will not be required by the county." Section 24-30[17], Open Space Design Guidelines, subsection (e), Ownership and Maintenance, states common open space areas shall be the responsibility of a property owners' association or a mandatory homeowner's association. In Butler Bay Unit 3, this responsibility is addressed through the July 21, 1986 "Developer's Agreement – Common Private Facilities" (Tab L), which does not include the Tract A/Golf Course Property.

Notwithstanding the foregoing, in 1985 the standard for common open space was 25%. Attached as Tab T is a chart prepared by Poulos and Bennett making clear that the owners' proposed revision to Tract A/Golf Course Property within the Cluster Plan retains total Butler Bay Cluster Plan gross common open space at 25%.

Notwithstanding the foregoing, the 1985 approved Cluster Plan (Tab A) does not define the term "Gross Open Space". As defined by the Orange County Code, "Open Space" includes "Residential Private Open Space" and "Common Open Space". In the 1985 Cluster Plan, reference is made to having 38% "Gross Open Space" within the Butler Bay Cluster Plan. Attached as Tab U is a chart prepared by Poulos and Bennett which establishes that the total Butler Bay Cluster Plan open space (calculated utilizing both common open space and residential open space) after redevelopment of Tract A to 95 lots will be 45.3% of the total area. For just the 155 acres within Tract A after redevelopment to 95 lots the open space will be 60.6%.

CONCLUSION

Under the current Orange County Code there is no common open space requirements for an R-CE-C project when density is less than or equal to 1 unit per acre. The County, by releasing the development rights for 95 units back to the Tract A/Golf Course Property, maintains an overall density within the Butler Bay Cluster Plan of 1 unit per one acre in full compliance with County Code.

---

[15] Tab Q.
[16] Tab R.
[17] Tab S.

Even if the old standard of 25% common open space was applied to the request for 95 units on the Golf Course Property, the overall common open space within the Butler Bay Cluster Plan will remain at 25% common open space, also fully compliant with the County Code.

In the event that the 38% "gross open space" as listed in the original 1985 Butler Bay Cluster Plan is interpreted to apply to the current cluster plan modification request, the resulting modified Butler Bay Cluster Plan, with 95 units assigned to the Tract A/Golf Course Property, will exceed the 38% gross open space, also fully compliant with the County Code.

This memorandum establishes that the release of the development rights back to the Tract A/Golf Course Property owner through the vacation of the plat as applicable to Tract A/Golf Course Property can be accomplished in compliance with the open space standards.

Attachment 'D'

Notice of Plat Vacation

Notice is hereby given that Windermere Country Club, LLC, a Florida limited liability company, with an address of 2710 Butler Bay Drive, N., Windermere, Florida 34786, the owner of (i) Tract A, BUTLER BAY - UNIT THREE, according to the map or plat thereof as recorded in Plat Book 18, Page 4, Public Records of Orange County, Florida and (ii) Tract A, REPLAT OF LOTS 8,9,10 AND TRACT B, BUTLER BAY -UNIT THREE, according to the map or plat thereof as recorded in Plat Book 25, Page 116, Public Records of Orange County, Florida, intends to vacate the Plat Notes 12 and 13 from said plat.

Attachment 'E'

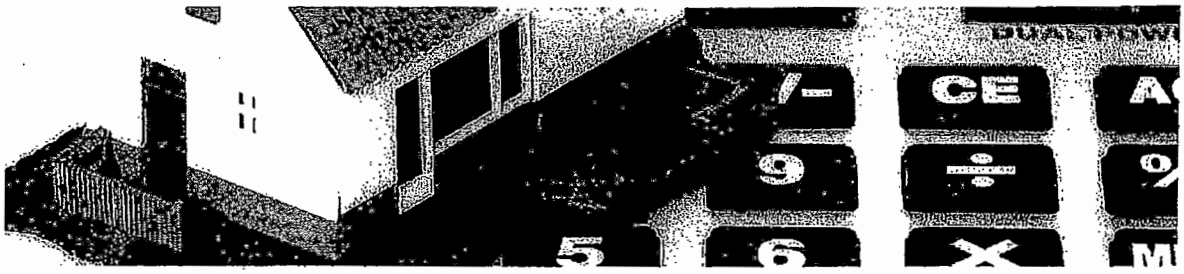
Orange County Tax Collector Scott Randolph
Independently elected to serve only you.

Pay Online › Make An Appointment ›

ABOUT LOCATIONS DRIVER LICENSES TAG & TITLE PROPERTY TAX BUSINESS TAX CAREERS OTHER CONTACT

REQUIRED DOCUMENTS FOR TRANSACTIONS MANAGER WAITTIME VIEW AWARD NOTICE

Important Notice: The Orange County Tax Collector's office will begin serving only Orange County residents due to volume and budgetary constraints. Please refer to your county's Tax Collector for locations.



Property Tax Search

The Orange County Tax Collector makes every effort to produce and publish the most current and accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use, or its interpretation. The assessed values are NOT certified values and therefore are subject to change before being finalized for ad valorem tax purposes. Utilization of the search facility indicates understanding and acceptance of this statement by the user. This Site Should not be relied upon for a title search.

Property Appraiser Details

Parcel/Tangible Number: 01-23-27-1108-00001
Date: 1/29/2016
Tax Year: 2015
Total Assessed Value: $1,998,019
Taxable Value: $1,998,019
Gross Tax Amount: $35,331.78
Millage Code: 75 ORG
Comments:

Owner & Address:
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110
Legal Description: BUTLER BAY UNIT 3 18/4 TRACT A
Location Address: 2710 BUTLER BAY DR 34786

Current Taxes and Unpaid Delinquent Warrants:

Year	Owner Information	Amount Due	Download Taxbill	Make Payment
2015	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2014	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2013	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2012	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2010	SPE GO HOLDINGS INC	* PAID (View Taxbill For Receipt) *	Taxbill	
2009	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2008	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2007	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2006	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	

Unpaid Real Estate Certificates:

Year	Current Payoff	If Paid By	Current Payoff	If Paid By	Make Payment
* NONE *	* NONE *	* NONE *	* NONE *	* NONE *	* NONE *

Other Real Estate Certificates:

Year	Face Value	Certificate Number	Status	Amount Paid
2011	$48,511.53	2012-0001462.000	Paid	$50,943.36

* UNPAID DELINQUENT TAXES MUST BE PAID BY A CASHIERS CHECK, MONEY ORDER, OR CERTIFIED FUNDS AND ARE DUE BY THE LAST BUSINESS DAY OF THE MONTH.

IMG **Scott Randolph, Tax Collector** 2015 REAL ESTATE

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	ESCROW CODE	MILLAGE CODE
0025397-1	0	75 ORG

TAX AMOUNT		
Nov/2015	Feb/2016	
Dec/2015	MARCH GROSS TAX	
Jan/2016	INTEREST/ADV	

01-23-27-1108-00001
BUTLER BAY UNIT 3 18/4 TRACT A

SITUS ADDRESS 2710 BUTLER BAY DR 34786

WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

PAID 0099-01272633 $33,918.51 11/25/2015

PO Box 545100
Orlando FL 32854-5100

To pay by credit card, call 1-855-414-9014 or visit www.octaxcol.com. A fee will be charged by Point and Pay for this service.
Or to mail in your payment, return the top portion of your bill with your check.
Make checks payable to Scott Randolph, Tax Collector • PO Box 545100 • Orlando FL 32854-5100

Scott Randolph, Tax Collector
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

RETAIN FOR YOUR RECORDS 2015 REAL ESTATE

01-23-27-1108-00001
BUTLER BAY UNIT 3 18/4 TRACT A

SITUS ADDRESS 2710 BUTLER BAY DR 34786

Receipt will be mailed upon request.

AD VALOREM TAXES

TAX AUTHORITY	ASSESSED VALUE	EXEMPT VALUE	TAXABLE VALUE	MILLAGE*	TAX LEVIED
STATE SCHOOL	1,998,019	0	1,998,019	4.9700	$9,930.15
LOCAL SCHOOL	1,998,019	0	1,998,019	3.2480	$6,489.57
GEN COUNTY	1,998,019	0	1,998,019	4.4347	$8,860.61
CNTY FIRE	1,998,019	0	1,998,019	2.2437	$4,482.96
UTD	1,998,019	0	1,998,019	1.8043	$3,605.03
LIBRARY	1,998,019	0	1,998,019	.3748	$748.86
SFWM	1,998,019	0	1,998,019	.3551	$709.50
WIND CANAL	1,998,019	0	1,998,019	.2528	$505.10

TOTAL MILLAGE*:	17.6834	*DOLLARS PER $1,000 OF TAXABLE VALUE	AD VALOREM TOTAL:	$35,331.78

NON-AD VALOREM ASSESSMENTS

LEVYING AUTHORITY	AMOUNT

NON-AD VALOREM TOTAL: $0.00

TOTAL TAXES AND ASSESSMENTS: $35,331.78

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	MILLAGE CODE	ASSESSED VALUE	EXEMPTIONS	L.I.S. EXEMPTION	TAXABLE VALUE
0025397-1	75 ORG	1,998,019	0		1,998,019

Nov/2015	Dec/2015	Jan/2016	Feb/2016	MARCH GROSS TAX	INTEREST/ADV	ESCROW CODE
						0

Orange County Tax Collector Scott Randolph
Independently elected to serve only you.

Pay Online › Make An Appointment ›

ABOUT LOCATIONS DRIVER LICENSES TAG & TITLE PROPERTY TAX BUSINESS TAX CAREERS OTHER CONTACT

REQUIRED DOCUMENTS FOR TRANSACTIONS MANAGER WAITTIME VIEW AWARD NOTICE

Important Notice: The Orange County Tax Collector's office will begin serving only Orange County residents due to volume and budgetary constraints. Please refer to your county's Tax Collector for locations.

Property Tax Search

The Orange County Tax Collector makes every effort to produce and publish the most current and accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use, or its interpretation. The assessed values are NOT certified values and therefore are subject to change before being finalized for ad valorem tax purposes. Utilization of the search facility indicates understanding and acceptance of this statement by the user. This Site Should not be relied upon for a title search.

Property Appraisor Details

Parcel/Tangible Number: 01-23-27-1117-0000
Date: 1/29/2016
Tax Year: 2015
Total Assessed Value: $211,430
Taxable Value: $211,430
Gross Tax Amount: $3,738.80
Millage Code: 75 ORG
Comments:

Owner & Address:
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110
Legal Description: A REPLAT OF LOTS 8 9 10 & TRACT B BUTLER BAY UNIT 3 25/116 TRACT A
Location Address: 2730 BUTLER BAY DR 34786

Current Taxes and Unpaid Delinquent Warrants:

Year	Owner Information	Amount Due	Download Taxbill	Make Payment
2015	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2014	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2013	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2012	WINDERMERE COUNTRY CLUB LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2010	SPE GO HOLDINGS INC	* PAID (View Taxbill For Receipt) *	Taxbill	
2009	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2008	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2007	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	
2006	LINKSCORP FLORIDA WINDERMERE LLC	* PAID (View Taxbill For Receipt) *	Taxbill	

Unpaid Real Estate Certificates:

Year	Current Payoff	If Paid By	Current Payoff	If Paid By	Make Payment
* NONE *	* NONE *	* NONE *	* NONE *	* NONE *	* NONE *

Other Real Estate Certificates:

Year	Face Value	Certificate Number	Status	Amount Paid
2011	$6,521.90	2012-0001466.000	Paid	$6,854.25

* UNPAID DELINQUENT TAXES MUST BE PAID BY A CASHIERS CHECK, MONEY ORDER, OR CERTIFIED FUNDS AND ARE DUE BY THE LAST BUSINESS DAY OF THE MONTH.

IMG **Scott Randolph, Tax Collector** 2015 REAL ESTATE
ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	ESCROW CODE	MILLAGE CODE
0025518-2	0	75 ORG

TAX AMOUNT			
	Nov/2015	Feb/2016	01-23-27-1117-00001 A REPLAT OF LOTS 8 9 10 & TRACT B BUTLER BAY UNIT 3 25/116 TRACT A
	Dec/2016	MARCH GROSS TAX	
	Jan/2016	INTEREST/ADV	

SITUS ADDRESS 2730 BUTLER BAY DR 34786

WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

PAID 0099-01272634 $3,589.25 11/25/2015

PO Box 545100
Orlando FL 32854-5100

To pay by credit card, call 1-855-414-9014 or visit www.octaxcol.com. A fee will be charged by Point and Pay for this service.
Or to mail in your payment, return the top portion of your bill with your check.
Make checks payable to Scott Randolph, Tax Collector • PO Box 545100 • Orlando FL 32854-5100

Scott Randolph, Tax Collector
WINDERMERE COUNTRY CLUB LLC
2710 BUTLER BAY DR N
WINDERMERE, FL 34786-6110

RETAIN FOR YOUR RECORDS 2015 REAL ESTATE

01-23-27-1117-00001
A REPLAT OF LOTS 8 9 10 & TRACT B BUTLER BAY UNIT 3 25/116 TRACT A

SITUS ADDRESS 2730 BUTLER BAY DR 34786 **Receipt will be mailed upon request.**

AD VALOREM TAXES

TAX AUTHORITY	ASSESSED VALUE	EXEMPT VALUE	TAXABLE VALUE	MILLAGE*	TAX LEVIED
STATE SCHOOL	211,430	0	211,430	4.9700	$1,050.81
LOCAL SCHOOL	211,430	0	211,430	3.2480	$686.72
GEN COUNTY	211,430	0	211,430	4.4347	$937.63
CNTY FIRE	211,430	0	211,430	2.2437	$474.39
UTD	211,430	0	211,430	1.8043	$381.48
LIBRARY	211,430	0	211,430	.3748	$79.24
SFWM	211,430	0	211,430	.3551	$75.08
WIND CANAL	211,430	0	211,430	.2528	$53.45

TOTAL MILLAGE*:	17.6834	*DOLLARS PER $1,000 OF TAXABLE VALUE	AD VALOREM TOTAL:	$3,738.80

NON-AD VALOREM ASSESSMENTS

LEVYING AUTHORITY	AMOUNT

NON-AD VALOREM TOTAL: $0.00

TOTAL TAXES AND ASSESSMENTS: $3,738.80

ORANGE COUNTY NOTICE OF AD VALOREM TAXES AND NON-AD VALOREM ASSESSMENTS

ACCOUNT NUMBER	MILLAGE CODE	ASSESSED VALUE	EXEMPTIONS	L.I.S. EXEMPTION	TAXABLE VALUE
0025518-2	75 ORG	211,430	0		211,430

Nov/2015	Dec/2015	Jan/2016	Feb/2016	MARCH GROSS TAX	INTEREST/ADV	ESCROW CODE
						0

Appendix 22.

RECEIVED
MAR 29 2016
Orange County Attorney's Office
JDP

LETTER OF TRANSMITTAL

To: **Whitney Evers**
Orange County Attorney's Office
201 S. Rosalind Avenue – 3rd Floor
Orlando, Florida 32801

Date: 03/29/16

Re: Windermere Country Club – Petition to Vacate Plat

Project No.: 15-101

The documents below are being sent via: Courier

- ☐ Applications
- ☐ Change Order
- ☒ Copy of Letter
- ☐ Plans
- ☐ Prints
- ☐ Shop Drawings
- ☐ Specifications
- ☐ Invoice
- ☐ Request
- ☐ Floppy/ZIP/CD
- ☐ FYI
- ☐ Other

Quantities	Dated	Description
1		Petition to Vacate Plat – Response Documents

These are transmitted as checked below:

- ☐ For Approval
- ☐ For Your Use
- ☐ Approved As Noted
- ☐ Approved As Is
- ☐ For Review
- ☒ As Requested
- ☐ For Your File
- ☐ Other

Remarks: **Please find attached for your review. 7 copies of this document along with the CD PDF files has been provided to Joe Kunkel at OCPW for review and processing.**

Thank you!

Copies to: FILE

SIGNED _____
Jamie T. Poulos, PE
Partner

POULOS & BENNETT

2602 East Livingston St. | Orlando, Florida 32814 | Tel: 407.487.2594 | Fax: 407.487.2594 | www.poulosandbennett.com

WINDERMERE
COUNTRY CLUB

June 21, 2016

Mr. Francisco Villar
Orange County Development Engineering Division
4200 South John Young Parkway
Orlando, Florida 32839

Subject: Windermere Country Club
Petition to Vacate
Parcel ID 01-23-27-1108-00-001 and 01-23-27-1117-00-001

Dear Mr. Villar:

In response to comments received during the meeting with County staff on June 16, 2016, please find enclosed three (3) hard copies and one (1) digital copy on CD of the following items:

1. Please see the attached copy of the existing plat for Butler Bay – Unit Three as well as a copy of the existing Replat of Lots 8,9,10, and Tract B, Butler Bay Unit Three. In addition please see the copy of the plat notes as requested.

2. In support of the PTV, please see the attached "Memorandum re: Support of Windermere Country Club Petition to Vacate: Property Referenced as Golf Course, Not Common Open Space" (Attachment B)

3. A legal notice will be published in a newspaper of general circulation in Orange County in not less than two (2) weekly issues of the paper (Attachment C).

4. Please see the attached certificates showing that all state and county taxes have been paid on the subject property to be vacated. (Attachment D).

5. A notice of petition to vacate will be posted on the subject property in a conspicuous and easily visible location no later than ten (10) days prior to the public hearing on the petition. It is assumed that this notice will be available at the Orange County Public Works division after the public hearing has been scheduled.

The undersigned submits these items as grounds and reasons in support of this petition.

Sincerely,

Bryan DeCunha
Owner
Windermere Country Club

cc: Whitney Evers, Orange County Attorney's Office (w/o attachments)
Joe Kunkel, Orange County Engineer
Matt Kalus, Development Engineering Division

2710 Butler Bay Drive North • Windermere, Florida 34786
(407) 876-1112 • fax (407) 876-0700

GRAY|ROBINSON
ATTORNEYS AT LAW

301 EAST PINE STREET
SUITE 1400
POST OFFICE BOX 3068 (32802-3068)
ORLANDO, FLORIDA 32801
TEL 407-843-8880
FAX 407-244-5690
gray-robinson.com

BOCA RATON
FORT LAUDERDALE
FORT MYERS
GAINESVILLE
JACKSONVILLE
KEY WEST
LAKELAND
MELBOURNE
MIAMI
NAPLES
ORLANDO
TALLAHASSEE
TAMPA

407-244-5683
PAUL.CHIPOK@GRAY-ROBINSON.COM

MEMORANDUM

TO: Mayor Jacobs and Board of County Commissioners

FROM: Truong M. Nguyen

DATE: March 28, 2016

SUBJECT: Support of Windermere Country Club Petition to Vacate; Property Referenced as Golf Course, Not Common Open Space

---

Petitioner, owners of a soon to be defunct former golf course, is requesting the Board approve a Petition to Vacate the Tract A portion of the Butler Bay Unit 3 Plat as amended. As the information in this Memorandum makes clear, Petitioner's request fully complies with all relevant County Code provisions and should be approved.

Windermere Country Club has filed a rezoning application, Application #RZ-10-038, to modify the Cluster Plan to 1) bring the 155 acres under the current standard of 1 unit per 1 acre and 2) change the 155 acres from golf course (a referenced use and not open space) to residential area to accommodate 95 lots. At the November 19, 2015 Planning and Zoning Commission meeting, the Planning and Zoning Commission continued the rezoning application to April 21, 2016 and directed Windermere Country Club to file a Petition to Vacate the 155 acre Tract A/golf course property and to modify the 1986 Developer's Agreement applicable to the Butler Bay, Unit 3 Plat[1].

The modification to the 1986 Developer's Agreement and Plat Conditions 12 (development rights) and 13 (access rights) are being addressed through a new Developer's Agreement and Petition to Vacate #16-____.

BACKGROUND

The Butler Bay Cluster Plan, where the Tract A/Golf Course Property is located, received its zoning approval on February 21, 1985. There was no mention of conveyance of development

[1] Tab I

rights from the Golf Course Property in this zoning approval.[2]

Language regarding dedication of the development rights to the Golf Course Property to Orange County first emerged during PSP review on November 18, 1985.[3] That condition to convey development rights was included in the "1986 Developer's Agreement"[4]. When the Butler Bay Unit 3 Plat[5], was approved, a Resolution Vacating and Annulling a portion of the Butler Bay Unit 2 Plat was approved at the same time.[6] Further, when the Replat of Lots 8, 9, 10 and Tract B was approved on April 2, 1990[7], a second Resolution Vacating and Annulling Plat was approved by the BOCC on the same day.[8]

GOLF COURSE PROPERTY IS NOT "COMMON OPEN SPACE", "COMMON AREA", OR "COMMON PRIVATE FACILITIES."

The Windermere Country Club golf course is privately held property and maintained by the Golf Course Property owner. It is not common open space. The County's ordinances and a review of the history of the County approvals associated with the Golf Course Property make this very clear.

Section 34-155(a)[9] defines "open space" and states it may include private parks and recreation areas provided: (i) they have been designated as a tract on the plat, (ii) they are adequate for the intended purpose, (iii) assurance has been given by deed restriction or Covenants, Conditions and Restrictions ("CCRs") that the area will be maintained and (iv) the area must be identified on the plat as 'common areas' for owners of property within the subdivision. In this case, the Golf Course Property is not identified as 'common area' on the plat. There is no plat dedication of Golf Course Property to any other lot or property owners. The CCRs do not include the Golf Course Property nor provide for maintenance of the golf course. In fact, the "Property" as defined in Exhibit A to the CCRs is limited to Lots 1-123, PB 18, Pages 4-9 and notably does not include the Tract A/Golf Course Property. The CCR definition of "Common Area" requires that common area be owned by the "Association". Article XII of the CCRs is titled "Covenants and Restrictions Relating to Golf Course". Section 1 states "All Owners of Lots on the Property acknowledge the existence of a private golf course on lands adjoining the Property. The golf course is for the use and enjoyment of the members of the private golf club". Section 3 creates a 10 foot easement in favor of the golf course across the

[2] See Minutes of February 21, 1985 Planning and Zoning Commission Meeting (Tab A) and Minutes of February 25, 1985 Board of County Commission Meeting (Tab B).
[3] Attached Tab C
[4] Development Agreement recorded at OR 3757/1536 (Tab D) and hereinafter "1986 Developer's Agreement."
[5] PB 18/4 (Tab E)
[6] See OR 3808/2058 (Tab F).
[7] Replat of Lots 8, 9, 10 and Tract B, Butler Bay Unit 3, PB 25/116 (Tab G).
[8] See OR 4173/3662 (Tab H)
[9] Tab J

rear of each lot adjacent to the golf course. The easement prohibits fences, walls or shrub planting. See OR Book 3808, Page 1478 (Tab K). The plat note 12 and 13 on PB 18, Page 4, which are applicable to the golf course are between the Golf Course Property owner and the County, the subdivision owners are not parties to those plat note restrictions. Clearly, there is no dedication or identification on the plat that the Tract A/Golf Course Property is common area for the owners of property within the subdivision. Further, the subdivision lot developer and their successors, the individual lot owners, were on notice through the CCRs that the golf course was not common area or common open space for the benefit of the lot owners. Rather, the lot owners acknowledge through the CCRs the existence of a private golf course for the use and enjoyment of the members of the private golf club. There is no documented expectation that the lot owners have any legal or equitable interest in the Tract A/Golf Course Property.

The 1986 Developer's Agreement (Tab D) approved by the Board of County Commissioners on February 26, 1986 incorporated the November 18, 1985 Preliminary Subdivision Plan conditions of approval (Tab C). That 1986 Developer's Agreement recognizes that the conditions shall control all future development of the property "(unless said conditions of approval are amended or modified by Orange County)".

The 1986 Developer's Agreement, Condition 5, provides: "The applicant shall enter into a Developer's Agreement with the County to address ownership and maintenance of all common private facilities." The "Developer's Agreement - Common Private Facilities" was approved by the Board of County Commissioners on July 21, 1986[10]. That Development Agreement was executed by "Windermere Lakes, Ltd." who was not the owner of the Golf Course Property. Further, the "Property" subject to that Developer's Agreement is Lots 1-123 of "Butler Bay Unit 3" not the Tract A/ Golf Course Property. The Tract A/Golf Course Property by the terms of that 1986 Developer's Agreement is not "common private facilities."

In regards to open space, the Tract A/Golf Course Property is zoned R-CE-C. Section 38-556[11], requires 40% of each lot to be pervious surface. Section 38-557[12],Common Open Space, Subsection (a) refers to Chapter 24 for open space regulations. Section 24-29(e)[13] provides, that for residential cluster districts, when the density is less than or equal to 1 unit per acre, there is no common open space required. Section 24-26[14], Definitions, states "Common Open Space" shall mean a type of open space designed and intended for the use or enjoyment of occupants of a project. That Section also defines "Residential Private Open Space" to include front, rear and side yards excluding parcel driveways and structures. Both common open space and residential private open space are included as part of the definition of "Open Space."

[10] Tab L. Recorded at OR Book 3808, Page 1466.
[11] Tab M.
[12] Tab N.
[13] Tab O.
[14] Tab P.

Section 24-27[15], Legislative findings, at Subsection (e) states:

> "Consistency in the definition of open space and the provisions for open space are necessary to balance between private property rights and the protection of the public health, safety and welfare."

Section 24-28[16], Applicability, provides, in part, that the open space standards are minimum standards, "however, an applicant may provide a greater percentage of open space but a greater percentage of open space will not be required by the county." Section 24-30[17], Open Space Design Guidelines, subsection (e), Ownership and Maintenance, states common open space areas shall be the responsibility of a property owners' association or a mandatory homeowner's association. In Butler Bay Unit 3, this responsibility is addressed through the July 21, 1986 "Developer's Agreement – Common Private Facilities" (Tab L), which does not include the Tract A/Golf Course Property.

Notwithstanding the foregoing, in 1985 the standard for common open space was 25%. Attached as Tab T is a chart prepared by Poulos and Bennett making clear that the owners' proposed revision to Tract A/Golf Course Property within the Cluster Plan retains total Butler Bay Cluster Plan gross common open space at 25%.

Notwithstanding the foregoing, the 1985 approved Cluster Plan (Tab A) does not define the term "Gross Open Space". As defined by the Orange County Code, "Open Space" includes "Residential Private Open Space" and "Common Open Space". In the 1985 Cluster Plan, reference is made to having 38% "Gross Open Space" within the Butler Bay Cluster Plan. Attached as Tab U is a chart prepared by Poulos and Bennett which establishes that the total Butler Bay Cluster Plan open space (calculated utilizing both common open space and residential open space) after redevelopment of Tract A to 95 lots will be 45.3% of the total area. For just the 155 acres within Tract A after redevelopment to 95 lots the open space will be 60.6%.

CONCLUSION

Under the current Orange County Code there is no common open space requirements for an R-CE-C project when density is less than or equal to 1 unit per acre. The County, by releasing the development rights for 95 units back to the Tract A/Golf Course Property, maintains an overall density within the Butler Bay Cluster Plan of 1 unit per one acre in full compliance with County Code.

---

[15] Tab Q.
[16] Tab R.
[17] Tab S.

Even if the old standard of 25% common open space was applied to the request for 95 units on the Golf Course Property, the overall common open space within the Butler Bay Cluster Plan will remain at 25% common open space, also fully compliant with the County Code.

In the event that the 38% "gross open space" as listed in the original 1985 Butler Bay Cluster Plan is interpreted to apply to the current cluster plan modification request, the resulting modified Butler Bay Cluster Plan, with 95 units assigned to the Tract A/Golf Course Property, will exceed the 38% gross open space, also fully compliant with the County Code.

This memorandum establishes that the release of the development rights back to the Tract A/Golf Course Property owner through the vacation of the plat as applicable to Tract A/Golf Course Property can be accomplished in compliance with the open space standards.

Lots. A written copy of the proposed amendment shall be furnished to each Owner at least ninety (90) days but not more than one hundred twenty (120) days prior to a designated meeting to discuss such particular amendment. Said notification shall contain a time and place of said meeting. The recorded Amendment shall contain a recitation that sufficient notice was given as above set forth, said recitation shall be conclusive as t all parties, and all parties of any nature whatever shall have the right to rely solely upon said recitation in such recorded amendment. Provided, however, so long as the Declarant shall own any Lots in the Properties, all such proposed amendments shall require Declarant's consent.

ARTICLE XII.

COVENANTS AND RESTRICTIONS RELATING TO GOLF COURSE

Section 1. All Owners of Lots on the Property acknowledge the existence of a private golf course on lands adjoining the Property. The golf course is for the use and enjoyment of the members of the private golf club.

Section 2. All Lot owners shall extend to all golfers lawfully using the Windermere Country Club Golf Course the courtesy of allowing such golfers to retrieve any errant golf balls which are on said lots, provided such golf balls can be recovered without damaging the Lot in general. The above right shall apply to the entire Lot until the ARB has approved plans and specifications for construction of a residence on the Lot, after which golfers shall be limited to the easement used for a buffer zone as stated in Section 3 below.

Section 3. An easement *10 feet* in width is reserved over the rear of each Lot located adjacent to the golf course now known as Windermere Country Club is hereby retained and reserved for the purpose of maintaining a natural buffer area between golf and residential uses. No fence, wall, hedge or shub planting which would obstruct access to the easement area shall be placed or permitted to remain on lots. The Association may grant permission to Newcourse Development Inc. "Newcourse", or its successors and assigns, to make selected plantings of trees and other vegetation within the easement area, at Newcourse's expense, in order to establish and maintain a buffered relationship between golf and residential uses. The Association and Newcourse agree to provide any Lot owner with a description of the work to be done at least 20 days in advance of the actual work so the mutual interests and desires of the Lot owner and Newcourse may be properly coordinated. Any landscaping placed on or in the easement area by Newcourse shall be maintained at the expense of Newcourse.

Section 4. The Association reserve the right to grant to Newcourse such easements over the Common Areas or the roads in Butler Bay Unit Three which easements are reasonably necessary to enable golf carts and golfers to cross from one hole to the next or from the golf course to the Windermere Country Club Clubhouse.

ARTICLE XIII.

ADDITIONAL COVENANTS AND RESTRICTIONS

No Owner, without the prior written approval of the Declarant, may impose any additional covenants or restrictions on any part of the Properties.

RECEIVED

JUN 27 2016

Orange County Attorney's Office

LETTER OF TRANSMITTAL

To: **Whitney Evers**
Orange County Attorney's Office
201 S. Rosalind Avenue – 3rd Floor
Orlando, Florida 32801

Date: 06/27/16

Re: Windermere Country Club – Petition to Vacate Plat

Project No.: 15-101

The documents below are being sent via: [redacted]

- ☐ Applications
- ☐ Change Order
- ☒ Copy of Letter
- ☐ Plans
- ☐ Prints
- ☐ Shop Drawings
- ☐ Specifications
- ☐ Invoice
- ☐ Request
- ☐ Floppy/ZIP/CD
- ☐ FYI
- ☐ Other

Quantities	Dated	Description
1		Petition to Vacate Plat – Response Letter Copy
1		CD – PDF Attachments

These are transmitted as checked below:

- ☐ For Approval
- ☐ For Your Use
- ☐ Approved As Noted
- ☐ Approved As Is
- ☐ For Review
- ☒ As Requested
- ☐ For Your File
- ☐ Other

Remarks: Please find attached 1 response letter with the CD PDF files as provided to Francisco Villar.

Thank you!

Copies to: FILE

SIGNED _____

Jamie T. Poulos, PE
Partner

POULOS & BENNETT

001243

Appendix 23.

Evers, Whitney

From: Thorp, Steven T
Sent: Monday, April 04, 2016 1:59 PM
To: Overstreet, Doreen; Smogor, John; Vargas, Alberto A; Evers, Whitney
Cc: McGill, Jennifer
Subject: RE: Windermere questions

Doreen,

All I can really provide is some history of the zoning, the request of the applicant, and the status of the request. I cannot verify what the residents were told 30+ years ago when the property was being rezoned and developed. This may be too much information, but this is a summary of the application to date and clarifies a couple items (with context) the residents have claimed or told.

As far as the background, the original R-CE-C zoning and Butler Bay Cluster Plan was approved in 1985, which the plan itself indicated 38% open space. There was and is no requirement for a certain percentage of open space to be maintained. The intent of the cluster zoning is to maintain the densities allowed by the future land use designation, but allow for the clustering of lots, which in turn, increases the undeveloped area / open space. The minimum lot size in R-CE-C is ½ acre.

When this cluster plan was approved, the density allowed by code was 0.85 unit per acre, which the existing homes were built to. Between then and today, that number increased to 1.0 unit per acre, consistent with the maximum density allowed by the Rural Settlement 1/1 Future Land Use Map designation, of which the property in question is designated. The applicant has submitted the cluster plan rezoning application applying the increased density and requesting development of the golf course with 95 single-family detached dwellings. The lot sizes are consistent with the lots already developed around the golf course.

What was discovered during the rezoning review was is the development and access rights were dedicated to the County via notes on the recorded plat. Since those dedications were done on the recorded plat, the applicant needs to go through the Petition to Vacate (PTV) process in order to remove those notes off the plat and gain those rights back. I know the applicant has submitted the PTV application for review. The BCC public hearing for the PTV has not been assigned. Additionally and related, there is also a recorded Developer's Agreement that requires a revision addressing the issue of the development and access rights.

Now, as far as the status of the rezoning application, it was first heard at the November 19, 2015 Planning and Zoning Commission (PZC) meeting, which it was then continued to the April 17, 2016 meeting in order for the applicant to go through the PTV process and revise the Developer's Agreement, as the rezoning could not proceed until the development and access rights were returned. As the PTV process is just getting started and the BCC hearing date is uncertain, the rezoning has been continued to the July 21, 2016 PZC meeting. If the PTV process fails, the rezoning application essentially does as well.

I'm copying Whitney Evers from the CAO on this reply, as she may be able to provide further insight and address the questions of agreement terms.

Hope this helps. Please feel free to contact me if you have follow-up questions or need clarification.

Thank you,

Steven Thorp
Planner II - Current Planning

Orange County Planning Division
Community, Environmental, and Development Services Department
201 S. Rosalind Ave., 2nd Floor, Orlando, FL 32801
Tel: 407-836-5549 Fax: 407-836-5862
Email: Steven.Thorp@ocfl.net

From: Overstreet, Doreen
Sent: Monday, April 04, 2016 9:56 AM
To: Thorp, Steven T; Smogor, John; Vargas, Alberto A
Cc: McGill, Jennifer
Subject: Windermere questions

Is someone able to address? Thanks.

Doreen Overstreet, APR
Public Information Officer
407-836-5301 (work)
407-468-5851 (mobile)

Sent from iPhone. Please excuse typos.

Begin forwarded message:

> **From:** "Jones, Daralene (CMG-Orlando)" <Daralene.Jones@wftv.com>
> **Date:** April 4, 2016 at 9:51:21 AM EDT
> **To:** "'Doreen.Overstreet@ocfl.net'" <Doreen.Overstreet@ocfl.net>
> **Subject: Here you go**
>
> Hi there!
>
> Hope you had a great weekend!
>
> I'm working on a story today about the planned development for the Windermere Club subdivision.
> I'm looking to get background from the county's perspective. Here's what I'm hearing from the residents in the neighborhood.
>
> Some Orange County residents are upset because of a new development proposed for their neighborhood. They believe it could set a precedent, allowing a developer to cash in ($2.1 million) at the expense of homeowners, after the developer enticed the homeowners, to buy in the subdivision, with the promise of "open space."
> They claim --
> Years ago, the county allowed the developer to build 150 homes, in a Windermere neighborhood. The developer promised a county club, with a golf course, and more importantly to the homeowners, open space. The owner now wants to build an additional 95 homes on the open space, and has already shut down the golf course and country club.
>
> I'm told ---
> When the developer first built, the county forced them to sign an agreement, requiring 38% of the land to remain open space. In order to ensure this, the county to over rights to the open

property. In other words, the county now gets to decide what happens to the land, even though they don't own it. My question: Is the county now considering going back on that agreement? What are the terms of the agreement from the county's perspective?

Daralene Jones | Investigative Reporter/Anchor
Cox Media Group | 490 E. South Street | Orlando, Florida 32801
Ph: (407) 822-8326 | Cell: (407) 883-8977 | Email: daralene.jones@wftv.com

Appendix 24.

Chris Wilson

From: Villar, Francisco
Sent: Tuesday, October 11, 2016 9:41 AM
To: Kunkel, Joe
Subject: Windermere Country Club Staff Report
Attachments: BCC Report - Windermere Country Club Plat Vacation.doc

Good morning Joe,

Attached is the draft of the staff report. Please let me know if you have any comments. Thanks.

Regards,

Francisco J. Villar, P.E.
Engineer III
Public Works Department
Development Engineering Division
4200 South John Young Parkway
Orlando, FL 32839
Tel: 407-836-7921
Fax: 407-836-8003
francisco.villar@ocfl.net

ORANGE COUNTY GOVERNMENT FLORIDA

Interoffice Memorandum

DATE: October 18, 2016

TO: Mayor Teresa Jacobs
-AND-
Board of County Commissioners (BCC)

FROM: Joseph C. Kunkel, P.E., Deputy Director, Public Works Department

SUBJECT: **WINDERMERE COUNTRY CLUB PLAT VACATION**
Bryan DeCunha on behalf of Windermere Country Club, LLC

Reason For Vacation

The petitioner requests that Orange County vacate the development rights to Tract A (Golf Corse), as identified in General Note #12, and access rights from Tract A to McKinnon Road and Lake Butler Boulevard, as identified in General Note #13, dedicated to Orange County per the plat of Butler Bay – Unit Three. The petitioner wishes to vacate in order to allow for future development.

Location of Property/Legal Description

The property lies east of Winter Garden Vineland Road and north of Lake Butler Boulevard. Public interest was created per the plat of Butler Bay – Unit Three, as recorded in Plat Book 18, Page 4, of the Public Records of Orange County, Florida. The parcel address is 2710 Butler Bay Drive North and it lies in District 1.

Statement of No Objection

The Real Estate Management and Environmental Protection Divisions have no objection to the request. Development rights to the Conservation Easement, as identified in General Note #12, and access rights from Lot 101 to McKinnon Road and Lake Butler Boulevard, as identified in General Note #13 will remain dedicated to Orange County. The Relationship Disclosure and Specific Expenditure forms have been submitted.

Staff Findings

The Environmental Protection Division has expressed concerns regarding wetlands and the Conservation Easement, which will be addressed at a later time if the vacation is approved.

Staff Recommendations

Approval of this request will have no adverse effect on Orange County. Staff has no objection to this request.

ACTION REQUESTED: APPROVAL OF THE REQUEST TO VACATE THE DEVELOPMENT RIGHTS AND ACCESS RIGHTS TO TRACT A DEDICATED TO ORANGE COUNTY PER THE PLAT OF BUTLER BAY – UNIT THREE– DISTRICT 1

Appendix 25.

Cited
As of: January 11, 2017 5:13 PM EST

Blair Nurseries, Inc. v. Baker Cnty.

Court of Appeal of Florida, First District

September 13, 2016, Opinion Filed

CASE NO. 1D16-0423

Reporter
199 So. 3d 534 *; 2016 Fla. App. LEXIS 13744 **; 41 Fla. L. Weekly D 2121

BLAIR NURSERIES, INC., Petitioner, v. BAKER COUNTY, FLORIDA, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, AND THE BOARD OF COUNTY COMMISSIONERS OF BAKER COUNTY, FLORIDA, Respondents.

Core Terms

plat, vacation, circuit court, certiorari review, requirements, second-tier, ownership, County's, local governing body, judicial review, correct law, trial court, owning, minimum requirements, district court, governing body, due process, regulations, first-tier

Case Summary

Overview

HOLDINGS: [1]-The circuit court erred in denying a subdivider's petition for certiorari and mandamus relief because, while no dispute existed that the subdivider owned the platted property and that access to a second owner's home would be unaffected by vacation of the plat, the trial court's denial of judicial review was a miscarriage of justice, akin to a denial of due process, where it foreclosed any judicial review of the board of county commissioners' rejection of the subdivider's plat vacation application, *§ 177.101(3), Fla. Stat.* (2014) plainly did not grant unreviewable discretion, and the Board's decision was a discretionary one within the confines of the statutory criteria, but it was also one subject to judicial review.

Outcome
Decision quashed.

LexisNexis® Headnotes

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Real Property Law > Subdivisions > State Regulations

HN1 *Section 177.101(3), Fla. Stat.* (2014) requires a subdivider to show three things: (1) that it owned the property covered by the plat sought to be vacated; (2) that the vacation of the plat by the governing body of the county will not affect the ownership of other persons owning other parts of the subdivision; and (3) that vacation will not affect the right of convenient access of such persons.

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Real Property Law > Subdivisions > State Regulations

HN2 *Section 177.101(3), Fla. Stat.* (2014) plainly does not grant unreviewable discretion; and clearly established law limits the discretion to deny a facially valid plat application.

Real Property Law > Subdivisions > State Regulations

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Governments > Legislation > Interpretation

Governments > Local Governments > Duties & Powers

HN3 The word "may" in *§ 177.101(3), Fla. Stat.* (2014) is used primarily as a legislative grant of authority to a local governing body to be able to vacate plats under specified circumstances.

Real Property Law > Subdivisions > State Regulations

Governments > Local Governments > Duties & Powers

HN4 The purpose of Part I of Chapter 177, Florida Statutes (entitled "Platting"), is to establish consistent minimum requirements, and to create such additional powers in local governing bodies, as therein provided to

regulate and control the platting of lands. This part establishes minimum requirements and does not exclude additional provisions or regulations by local ordinance, laws, or regulations. § 177.011, Fla. Stat. (2014).

Real Property Law > Subdivisions > State Regulations

Governments > Local Governments > Duties & Powers

HN5 A central purpose of the "Platting" statutes is to grant "additional powers" to local government, which is precisely what § 177.101(3), Fla. Stat. (2014) does.

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Governments > Local Governments > Duties & Powers

HN6 The power of a county or municipality to vacate property dedicated to a public use is controlled by statute.

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Real Property Law > Subdivisions > State Regulations

Governments > Local Governments > Duties & Powers

HN7 A county is powerless to vacate a subdivision plat absent compliance with § 177.101(3), Fla. Stat. (2014), which requires an application from the landowner.

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Governments > Local Governments > Duties & Powers

Real Property Law > Subdivisions > State Regulations

HN8 There is no authority whatsoever under § 177.101(3), Fla. Stat. (2014) for a board of county commissioners to vacate, upon its own motion, a subdivision plat.

Governments > Local Governments > Duties & Powers

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Real Property Law > Subdivisions > State Regulations

HN9 Far from conferring unreviewable discretion, § 177.101(3), Fla. Stat. (2014) is a narrow grant of authority by which local governing bodies must govern their actions. It is restricted to those circumstances where a person owning platted property shows that vacation of the plat will not affect the ownership or right of convenient access of persons owning other parts of the subdivision. Local governing bodies do not have unbridled discretion to do what they want or believe is justified; instead, upon a showing of the statutory requirements (and, if applicable, local code-based requirements), the county commission has a legal responsibility to grant the vacation request unless they prove non-compliance with applicable law.

Real Property Law > Subdivisions > State Regulations

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Governments > Local Governments > Duties & Powers

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Evidence > Burdens of Proof > Allocation

HN10 To deny a plat application, a local government agency must show by competent substantial evidence that the application does not meet the published criteria. In other words, the burden is upon the local governing body to demonstrate by competent, substantial evidence that an applicant is not entitled to the requested action; whatever discretion the local governing body has is limited and not unbounded.

Governments > Local Governments > Duties & Powers

Real Property Law > ... > Transfer Not By Deed > Dedication > Termination

Real Property Law > Subdivisions > State Regulations

HN11 The conclusion that local governing bodies lack broad, unreviewable discretion in their processing of plat vacation applications is buttressed by the statutory requirement that grants and denials of plats "must be uniformly administered." § 177.101, Fla. Stat. (2014). Discretion is constrained where official action must be uniformly administered pursuant to consistent standards.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN12 First-tier certiorari review is not discretionary, but rather is a matter of right and is akin in many respects to a plenary appeal.

Counsel: [**1] T.R. Hainline, Jr., Emily G. Pierce, and Cristine M. Russell of Rogers Towers, P.A.,

Jacksonville, for Petitioner.

Richard C. Komando of Kopelousos, Bradley & Garrison, P.A., Orange Park, for Respondents.

Judges: MAKAR, J. ROWE, J., CONCURS; BILBREY, J. DISSENTS WITH OPINION.

Opinion by: MAKAR

Opinion

[*535] Petition for Writ of Certiorari.

MAKAR, J.

Blair Nurseries owns rural acreage in Baker County, Florida, which it subdivided in 2002 into twenty-two five-acre residential lots known as Smoke Rise II, a planned community for horse owners. In 2003, Celeste Reynolds purchased a lot and built a home, but no other lots have been sold, leaving her property adjoining native undeveloped lands for over a decade in the defunct equestrian community.

In 2014, Blair Nurseries filed an application with Baker County to vacate the subdivision plat (excepting Reynolds's lot) so its property could be returned to acreage for agricultural purposes. The Baker County planning staff and the County's Development Review Committee recommended approval of the application and the County's Director of Zoning and Planning stated that the application satisfied all requirements.

HN1 The applicable statute required Blair Nurseries to show three things: (1) that **[**2]** it owned the property "covered by the plat sought to be vacated;" (2) that "the vacation [of the plat] by the governing body of the county *will not affect the ownership* . . . of other persons owning other parts of the subdivision," and (3) that vacation "will not affect the . . . right of convenient access" of such persons. *§ 177.101(3), Fla. Stat.* **[*536]** (2014) (emphasis added). No dispute exists that Blair Nurseries owns the platted property and that access to Reynolds's home would be unaffected by vacation of the plat because her home directly abuts and accesses Mud Lake Road, which forms the southern border of much of the platted property. Instead, the only question—one that arose later in the process—was whether vacating the plat would affect Reynolds's "ownership" of her property within the meaning of the emphasized statutory language above.

The Baker County Board of County Commissioners held a public hearing on the matter at which Reynolds spoke. She opposed reversion, believing it would reduce the value of her home. A discussion arose about whether a potential reduction in value of her home was a sufficient legal justification to deny the application. Legal counsel for Blair Nurseries pointed out that Reynolds's **[**3]** ownership of her property would be unaffected, but some commissioners posited that the potential for reduced value was akin to "affect[ing] the ownership" of the property. In the end, the Commission unanimously denied Blair Nurseries' application.

Blair Nurseries sought certiorari and mandamus relief in the circuit court, arguing that the County failed to observe the essential requirements of law in denying the application; because its application met all criteria in the statute and county code, no basis existed to deny it. In addition, the County's consideration of the "value" of Reynolds's property as a basis for denial was legal error because the statute only permits consideration of whether vacation of a plat will "affect the ownership" of others who own property in the subdivision. The trial court issued a written order denying relief, but did not reach the value/ownership issue. Instead, it concluded that it lacked the judicial power to do so because the County's decision was a discretionary one:

> [B]ecause both the applicable statute *[section 177.101(3)]* and county code provision [section 8.06.01[1]] use the permissive 'may' and do not include any words requiring a board to reach a particular decision if certain criteria are met, Petitioner **[**4]** has not demonstrated entitlement to mandamus or certiorari relief, and the court need not reach the testimonial or valuation issues.

Because it viewed the Board as having essentially unreviewable discretion to grant or deny an application, it thereby foreclosed any judicial relief whatsoever.

On second-tier certiorari review in this Court, Blair Nurseries is correct that the trial court violated a clearly established principle of law that resulted in a miscarriage of justice by concluding that the word "may" in *section 177.101(3)*, precludes any judicial review of the Board's decision. *Nader v. Fla. Dep't of High. Saf. & Motor Veh., 87 So. 3d 712, 727 (Fla. 2012)*. ***HN2*** The

[1] Section 8.06.01 of the Clay County Development Code provides only that the County may require a survey or improvements for "equivalent access," but does not speak in terms of what discretion the Board may wield. As such, it is not relevant as to the issues raised in this proceeding.

statute plainly does not grant unreviewable discretion; and clearly established law limits the discretion to deny a facially valid plat application.

To begin, the Board's decision is a discretionary one within the confines of the statutory criteria, but it is also one subject to judicial review. In contrast, the trial court believed that the term "may" **[**5]** was the Legislature's way of saying that the Commission had discretion to do whatever it wants without judicial oversight. But that overlooks the remainder of the statute **[*537]** as well as caselaw and opinions of Florida's Attorney General contradicting such a conclusion. First of all, ***HN3*** the word "may" in *section 177.101(3)* is used primarily as a legislative grant of authority to a local governing body to be able to vacate plats under specified circumstances. ***HN4*** The purpose of *Part I of Chapter 177, Florida Statutes* (entitled "Platting"), is to "to establish consistent minimum requirements, and *to create such additional powers in local governing bodies, as herein provided to regulate and control the platting of lands.* This part establishes minimum requirements and does not exclude additional provisions or regulations by local ordinance, laws, or regulations." *§ 177.011, Fla. Stat.* (2014) (emphasis added).

As the italicized language makes clear, ***HN5*** a central purpose of the "Platting" statutes is to grant "additional powers" to local government, which is precisely what *section 177.101(3)* does, stating: "The governing bodies of the counties of the state may adopt resolutions vacating plats in whole or in part of subdivisions in said counties, returning the property covered by such plats **[**6]** either in whole or in part into acreage." *§ 177.101(3), Fla. Stat.* As the Attorney General has noted in construing this section, ***HN6*** the "power of a county or municipality to vacate property dedicated to a public use *is controlled by statute.*" *Op. Att'y Gen. Fla. 2005-11 (2005)* (emphasis added). ***HN7*** A county is powerless to vacate a subdivision plat absent compliance with the statute, which requires an application from the landowner. *See* Op. Att'y Gen. Fla. 72-169 (1972) (***HN8*** "[T]here is no authority whatsoever under *§177.101* . . . for a board of county commissioners to vacate, upon its own motion, a subdivision plat.").

HN9 Far from conferring unreviewable discretion, *section 177.101(3)* is a narrow grant of authority by which local governing bodies must govern their actions. It is restricted to those circumstances where a person owning platted property shows that vacation of the plat "will not affect the ownership or right of convenient access of persons owning other parts of the subdivision." *§ 177.101(3), Fla. Stat.* Local governing bodies do not have unbridled discretion to do what they want or believe is justified; instead, upon a showing of the statutory requirements (and, if applicable, local code-based requirements), the Commission has a legal responsibility to grant the **[**7]** vacation request unless they prove non-compliance with applicable law. As our supreme court has said: ***HN10*** "To deny a plat application, a local government agency must show by competent substantial evidence that the application does not meet the published criteria." *Broward Cnty. v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 842 (Fla. 2001).* In other words, the burden is upon the local governing body to demonstrate by competent, substantial evidence that an applicant is not entitled to the requested action; whatever discretion the local governing body has is limited and not unbounded.

Further, ***HN11*** the conclusion that local governing bodies lack broad, unreviewable discretion in their processing of plat vacation applications is buttressed by the statutory requirement that grants and denials of plats "must be uniformly administered." *Id.; see also § 177.101, Fla. Stat.* (establishing "consistent minimum requirements" as to platting). Discretion is constrained where official action must be uniformly administered pursuant to consistent standards.

Finally, the trial court's denial of judicial review is a miscarriage of justice, akin to a denial of due process, because it foreclosed *any* judicial review of the Commission's rejection of the plat vacation application. To be upheld, the denial of the **[**8]** **[*538]** application required that the Commission demonstrate by competent, substantial evidence that Blair Nurseries did not meet the statutory requirements, an inquiry that the trial court did not undertake (i.e., "the court need not reach the testimonial or valuation issues"). It is hard to imagine anything more manifestly unjust than a complete denial of judicial review when it should otherwise have been provided as a matter of right. *G.B.V., 787 So. 2d at 843* (***HN12*** "[F]irst-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal . . . ."). For these reasons, and because our role "is to halt the miscarriage of justice, nothing more," *id.*, we quash the circuit court's decision.

ROWE, J., CONCURS; BILBREY, J. DISSENTS WITH OPINION.

Dissent by: BILBREY

Dissent

BILBREY, J., dissenting.

I respectfully dissent. The trial court did not err in its denial of first-tier certiorari relief, and even if it had, such an error did not constitute a miscarriage of justice warranting second-tier certiorari relief.

The controlling procedure was set forth over thirty years ago in City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982), as follows:

> where full review of administrative action is given in the circuit court as a matter of right, one appealing **[**9]** the circuit court's judgment is not entitled to a second full review in the district court. Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law.[2]

In *Vaillant*, the Florida Supreme Court essentially equated the certiorari review afforded by a circuit court with the appellate review exercised by a district court. *Id.* Implicit in such an equation is the notion that second-tier certiorari review should be sparingly granted. As the Supreme Court has explained:

> a balance must be struck between respecting the finality of appellate review provided by the circuit court's appellate counties, returning the property covered by such plats either in whole or in part into acreage. **Before** such resolution of vacating any plat either in whole **[**10]** or in part shall be entered by the governing body of a county, it must be shown that the persons making application for said vacation own the fee simple title to the whole or that part of the tract covere decision [on first-tier certiorari review] and the necessity of having the availability of certiorari to use in a narrow group of cases, which "merit the extra review and safeguard provided by certiorari."

Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 727 (Fla. 2012) (quoting Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 531 (Fla. 1995)).

Since *Vaillant*, the Florida Supreme Court repeatedly has made it clear that second-tier certiorari relief is a remedy appropriate only in very narrow circumstances: Such a narrow circumstance does not include disagreement with a circuit court's evaluation of evidence. Educ. Dev. **[*539]** Ctr., Inc. v. City of W. Palm Beach Zoning Bd. of Appeals, 541 So. 2d 106 (Fla. 1989). Further, second-tier certiorari jurisdiction cannot be invoked "where the decision below [on first-tier certiorari review] recognizes the correct general law and applies the correct law to a new set of facts to which it has not been previously applied. In such a situation, the law at issue is not a clearly established principle of law." Nader, 87 So. 3d at 723 (citing Ivey v. Allstate Ins. Co., 774 So. 2d 679, 682-83 (Fla. 2000)).

Here, the circuit court certainly applied the correct law **[**11]** when it considered chapter 177, Florida Statutes, and section 8.06.01 of the Baker County Land Development Regulations. Construing these provisions, the circuit court concluded in pertinent part that "because both the applicable statute and county code provision use the permissive 'may' and do not include any words requiring a board to reach a particular decision if certain criteria are met, [Blair Nurseries] has not demonstrated entitlement to mandamus or certiorari relief." Section 177.101(3) provides:

> (3) The governing bodies of the counties of the state may adopt resolutions vacating plats in whole or in part of subdivisions in said d by the plat sought to be vacated, and it must be further 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.

(Emphasis added).

The majority reads this provision as setting forth the complete requirements for vacating a plat map. Thus, if two requirements are met — (i) demonstration of fee simple title and (ii) demonstration that ownership or right of access by other owners will not be affected — then, a county must vacate the plat. I read section 177.101(3) as instead only imposing minimal requirements before a request **[**12]** to vacate a plat can even be considered.

[2] The phrase applying the correct law is synonymous with observing the essential requirements of law. Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

Indeed, that is exactly what section 177.011, quoted by the majority, states: "[Part I of Chapter 177] establishes **minimum requirements** and does not exclude additional provisions or regulations by local ordinance, laws, or regulations." (Emphasis added). In other words, the elements of standing to seek a change in a plat map are stated in section 177.101(3); entitlement to such a change is a succeeding inquiry. That the minimum standards should be uniform is a fact which hardly dispossesses a local authority from exercising certain discretion over land-use planning.

There is ample case law holding that the use of the term "may" ordinarily denotes discretionary or permissive authority. *See, e.g.,* The Fla. Bar v. Trazenfeld, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'"); Sanders v. City of Orlando, 997 So. 2d 1089 (Fla. 2008). The majority does not offer a compelling reason for not construing the term "may" in its ordinary sense, and it is imminently reasonable that a local authority be given a measure of discretion over land use.

Assuming for the sake of argument that the circuit court did err in construction of chapter 177, it still does not follow that second-tier certiorari **[**13]** relief is warranted. As indicated, legal error, in and of itself, is not a basis for granting certiorari review. Citizens Prop. Ins. Corp. v. San Perdido Ass'n, 104 So. 3d 344, 351 (Fla. 2012). Indeed, the Florida Supreme Court has repeatedly emphasized that it is the "seriousness of the error" and not the mere existence of error which is the determinative factor. *See* Ivey, 774 So. 2d at 682 (quoting Combs v. State, 436 So. 2d 93, 95 ***[*540]*** (Fla. 1983)). Moreover, it is the seriousness of error allegedly committed *by the court on first-tier certiorari* which is the object of focus for a district court considering second-tier certiorari review — not any error which may have been made by the local authority (or county court) in the first instance, *Vaillant*, nor even the erroneous application of the correct law to the facts of the case, *Ivey*. Here, the trial court applied the correct law, chapter 177, to the facts of the case. That the majority would have reached a different result had it conducted first-tier certiorari review is of no moment. *See* Futch v. Fla. Dep't of Highway Safety & Motor Vehicles, 189 So. 3d 131 (Fla. 2016); *Educ. Dev. Ctr., Inc.; Ivey.*

Importantly, I submit that it is not correct to say, as the majority does, that the circuit court denied judicial review. It considered the applicable law and found that the County acted within the authority permitted to it by this law. Statutory construction does **[**14]** constitute judicial review, even if it results in an affirmance of the action taken below. *See, for example,* Mendenhall v. State, 48 So. 3d 740 (Fla. 2010). The majority simply disagrees with the result reached by the County and then by the circuit court. As Blair Nurseries cannot point to a denial of procedural due process and as the circuit court considered the arguments raised in the certiorari petition and rejected those arguments upon an application of the controlling law to the facts of the case, there can be no reasonable assertion that a manifest injustice occurred. *See* Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010) ("when a district court considers a petition for second-tier certiorari review, the 'inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law,' or, as otherwise stated, departed from the essential requirements of law"); *Heggs.*

By granting second-tier certiorari, this court is granting a *second* appeal. Such is an improper use of certiorari. Ivey, 774 So. 2d at 683. As the Florida Supreme Court has explained, improper expansion of certiorari jurisdiction would "afford a litigant two appeals from a court of limited jurisdiction, while limiting a litigant to only one appeal in cases originating in a trial **[**15]** court of general jurisdiction." Nader, 87 So. 3d at 723 (quoting Custer, 62 So. 3d at 1093).

Under the relaxed standard employed by the majority, certiorari is available to any party who could prevail if a direct appeal were available, contrary to well-established precedent which holds that "appellate courts must exercise caution not to expand certiorari jurisdiction to review the correctness of the circuit court's decision." Nader, 87 So. 3d at 723. Such a relaxed standard improperly "invite[s] certiorari review of a large number of the appellate decisions issued by circuit courts." Ivey, 774 So. 2d at 683 (quoting Stilson v. Allstate Ins. Co., 692 So. 2d 979, 982-83 (Fla. 2d DCA 1997)). Second-tier certiorari review is an "extraordinary power," Stilson, 692 So. 2d at 982, and as such, it should be invoked sparingly and cautiously.

In sum, I would deny the petition.

End of Document

Appendix 26.

LexisNexis

User Name: Vivian Villaran
Date and Time: Jan 11, 2017 17:02
Job Number: 41778721

Document (1)

1. *Davis v. State, 861 So. 2d 1214*
   Client/Matter: 2852.001

Davis v. State

Court of Appeal of Florida, Second District

December 10, 2003, Opinion Filed

Case No. 2D03-1819

Reporter
861 So. 2d 1214 *; 2003 Fla. App. LEXIS 18703 **; 28 Fla. L. Weekly D 2826

JEROME DAVIS, Appellant, v. STATE OF FLORIDA, Appellee.

Prior History: [**1] Appeal from the Circuit Court for Polk County; Charles B. Curry, Judge.

Disposition: Reversed and remanded.

Core Terms

mandamus, circuit court, writ petition, lack of prosecution, legally sufficient, alternative writ, writ of mandamus, public defender, facially, dismissing a petition, proper vehicle, trial court, show cause, depositions, ordering

Case Summary

Procedural Posture
Defendant appealed the decision of the Circuit Court for Polk County (Florida), which dismissed his petition for a writ of mandamus for "lack of prosecution." In the order dismissing the petition, the trial court stated that a writ of mandamus was not a proper vehicle for defendant's request. Defendant appealed the dismissal to the state supreme court, which transferred the appeal to the appellate court.

Overview
Defendant filed a letter with the state supreme court, seeking to compel his public defender to turn over certain trial transcripts and depositions to him. The state supreme court forwarded the letter to the trial court with instructions to treat the letter as a petition for a writ of mandamus. Rather than ruling on the petition, the trial court held it for 18 months. The appellate court concluded that the trial court erred in dismissing defendant's petition. The law was clear that an indigent defendant was entitled to his criminal trial transcripts, including depositions, prepared at public expense and that a writ of mandamus was a proper means to compel a public defender to furnish a defendant with such transcripts. Because defendant stated a facially sufficient claim for mandamus relief, the trial court erred by not issuing an alternative writ ordering the public defender to show cause why the relief should not be granted.

Outcome
The decision of the trial court was reversed and the case was remanded for the trial court to issue an alternative writ in mandamus.

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to Prosecute

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN1 A petition for a writ of mandamus may not be dismissed for the petitioner's "lack of prosecution."

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN2 When a trial court receives a petition for a writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. If it is not facially sufficient, the court may dismiss the petition. Otherwise, if the petition states a legally sufficient claim, the court must issue an "alternative writ in mandamus" ordering the respondent to show cause why the writ should not be granted. *Fla. R. Civ. P. 1.630(d)(3)*.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN3 To be valid, a petition for a writ of mandamus must show that the petitioner has a clearly established legal right to have the respondent public officer perform a nondiscretionary duty.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

HN4 The law is clear that an indigent defendant is entitled to his criminal trial transcripts, including depositions, prepared at public expense and that a writ of mandamus is a proper means to compel a public defender to furnish a defendant with such transcripts.

Counsel: Jerome Davis, Pro se.

Charles J. Crist, Jr., Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

Judges: VILLANTI, Judge. CASANUEVA and SILBERMAN, JJ., Concur.

Opinion by: VILLANTI

Opinion

[*1215] VILLANTI, Judge.

Jerome Davis challenges the circuit court's dismissal of his petition for a writ of mandamus. We reverse.

Davis filed a letter with the Florida Supreme Court seeking to compel his public defender to turn over certain trial transcripts and depositions to Davis. The supreme court forwarded the letter to the circuit court with instructions to treat the letter as a petition for a writ of mandamus. Rather than ruling on the petition, the circuit court held it for eighteen months and then dismissed it for "lack of prosecution." In the order dismissing the petition, the court also stated that a writ of mandamus was not a proper vehicle for Davis's request. Davis appealed this dismissal to the supreme court, which transferred the appeal to this court. Because **[**2]** the circuit court erred in dismissing Davis's petition, we reverse. We note initially that ***HN1*** a petition for a writ of mandamus may not be dismissed for the petitioner's "lack of prosecution." ***HN2*** When a trial court receives a petition for a writ of mandamus, its initial task is assessing the petition to determine whether it is facially sufficient. *Holcomb. v. Dep't of Corr., 609 So. 2d 751 (Fla. 1st DCA 1992)*. If it is not facially sufficient, the court may dismiss the petition. *Id.* Otherwise, if the petition states a legally sufficient claim, the court must issue an "alternative writ in mandamus" ordering the respondent to show cause why the writ should not be granted. *Fla. R. Civ. P. 1.630(d)(3)*; *Holcomb, 609 So. 2d at 753* (citing *Conner v. Mid-Fla. Growers, Inc., 541 So. 2d 1252, 1256 (Fla. 2d DCA 1989)*). Therefore, the circuit court could dismiss Davis's petition for failure to state a legally sufficient claim but not for "lack of prosecution."

[*1216] It appears from the circuit court's order that the court determined the petition was not legally sufficient because a writ of mandamus was "not the proper vehicle for this request." ***HN3*** To be **[**3]** valid, a petition for a writ of mandamus must show that the petitioner has a clearly established legal right to have the respondent public officer perform a nondiscretionary duty. *State ex rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (Fla. 1933)*; *McDaniel v. City of Lakeland, 304 So. 2d 515 (Fla. 2d DCA 1974)*. ***HN4*** The law is clear that an indigent defendant is entitled to his criminal trial transcripts, including depositions, prepared at public expense and that a writ of mandamus is a proper means to compel a public defender to furnish a defendant with such transcripts. *See Pearce v. Sheffey, 647 So. 2d 333 (Fla. 2d DCA 1994)*; *Thompson v. Unterberger, 577 So. 2d 684 (Fla. 2d DCA 1991)*; *Colon v. Irwin, 732 So. 2d 428 (Fla. 5th DCA 1999)*; *Harris v. Webb, 711 So. 2d 641 (Fla. 1st DCA 1998)*. Because Davis stated a facially sufficient claim for mandamus relief, the trial court erred by not issuing an alternative writ ordering the public defender to show cause why the relief should not be granted. Therefore, we reverse and remand for the circuit court to issue an alternative **[**4]** writ in mandamus.

Reversed and remanded.

CASANUEVA and SILBERMAN, JJ., Concur.

End of Document

Appendix 27.

Broward County v. Narco Realty

Court of Appeal of Florida, Fourth District

May 23, 1978

Nos. 76-1920, 77-868

Reporter
359 So. 2d 509 *; 1978 Fla. App. LEXIS 15648 **

BROWARD COUNTY, FLORIDA, a political subdivision of the State of Florida; L. A. HESTER, Broward County Administrator; GERALD F. THOMPSON, HUGH ANDERSON, R. B. BARKELEW, KEN JENNE, ANNE KOLB, JACK L. MOSS and J. W. STEVENS, as members of the Broward County Commission and constituting the Broward County Commission; JAMES V. DENKENBERGER, JR., County Surveyor of Broward County, and JOHN M. GERREN, JR., Director of Transportation and Planning of Broward County, Florida, Appellants, Case #76-1920, v. NARCO REALTY, INC., a Pennsylvania corporation licensed to do business in the State of Florida, Appellee, Case #76-1920 Appellant, Case #77-868

Subsequent History: [**1] Rehearing Denied June 28, 1978.

Core Terms

plat, approve, mandamus, writ of mandamus, recorded, legal requirements, plenary

Case Summary

Procedural Posture
Appellant county and county officials sought review of a peremptory writ of mandamus issued by the trial court (Florida), which commanded appellants to approve a subdivision plat of land in the county owned by appellee developer. Appellee sought review of the trial court's denial of its motion to hold appellants in contempt for not obeying the commands of the writ after appellant county failed to post a supersedeas bond.

Overview
Appellee developer proposed to subdivide a tract of land in appellant county. In furtherance of that objective, it submitted a subdivision plat for approval to the county commission. Although all the legal requirements for approval of a plat were met, the commission refused to give approval. Appellee obtained a peremptory writ of mandamus from the trial court requiring the commission to approve the plat. While the appeal from that order was pending, the appellate court entered an order requiring the county to post a supersedeas bond if it wished the appeal to supersede the writ. The county did not obey the writ and failed to post the bond, but the trial court denied appellee's motion to hold appellant county in contempt. The appellate court affirmed the issuance of the writ because the entire legal requirement for approval of a plat had been met, and there was no discretion to deny approval remaining in the commission. Approval had become a ministerial act that a court could compel through a writ of mandamus. Appellee's cross-appeal was dismissed as moot, and the case was remanded with directions to the county to approve the plat without conditions.

Outcome
Issuance of the writ of mandamus was affirmed, and the case was remanded with instructions that appellant county approve the plat in question in accordance with the writ and without conditions. Appellee's effort to hold appellant in contempt was dismissed as moot.

LexisNexis® Headnotes

Real Property Law > Subdivisions > General Overview

Real Property Law > Zoning > General Overview

HN1 The authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, made to rest upon specific standards of a statute or implementing ordinances. Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Real Property Law > Subdivisions > General Overview

Real Property Law > Subdivisions > Local Regulations

HN2 When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board is ministerial, and such act may be enforced by a writ of mandamus.

Counsel: Harry A. Stewart and Betty Lynn Lee, Gen. Counsel for Broward County, Fort Lauderdale, for appellants in case No. 76-1920, for appellees in case No. 77-868.

Robert E. Ferris, Jr., of Gustafson, Caldwell, Stephens & Ferris, Fort Lauderdale, for appellees in case No. 76-1920 and for appellants in case No. 77-868.

Opinion by: DOWNEY

Opinion

[*509] Broward County and certain officials thereof filed a plenary appeal in Case No. 76-1920 to review a Peremptory Writ of Mandamus commanding appellants to approve a subdivision plat of land located in the City of Parkland, Broward County, Florida.

Narco Realty, Inc., has filed an interlocutory appeal in Case No. 77-868 to review an order which denied appellant's (Narco Realty) motion for contempt and partially granted Narco's motion to compel.

Narco Realty, Inc., owns a tract of land in the City of Parkland which it proposes to subdivide. In furtherance of this plan Narco submitted its subdivision plat to the County Commission of Broward County for approval which was refused. Thereupon, Narco filed a Petition for Writ of Mandamus against the County and various county officials seeking to require them **[**2]** to approve the proposed plat so that it could be recorded. The plenary appeal by the County, et **[*510]** al., is from the granting of the Peremptory Writ.

While the plenary appeal was pending, this court entered an Order requiring the County to post a supersedeas bond if it wished its appeal to supersede the Peremptory Writ. However, the County chose not to post the supersedeas bond, whereupon Narco asked the trial court to hold the County and its officials in contempt for refusing to follow the commands of the Peremptory Writ. Narco also requested the court to compel the County to approve the plat for record. The trial court denied the motion for contempt and ordered the County to approve the plat with certain conditions. The interlocutory appeal from that Order has been consolidated with the plenary appeal.

With regard to the full appeal from the issuance of the Peremptory Writ, the main thrust of appellant's attack is that the approval of a plat by the County Commission is a discretionary act and cannot be made the subject of a *Writ of Mandamus*. The appellant relies heavily upon our decision in *State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla. **[**3]** 4th DCA 1974)*, to support that principle.

Appellee contends, on the other hand, that its Petition for *Writ of Mandamus* and the stipulation of counsel at the hearing which gave rise to issuance of the Peremptory Writ demonstrate that there was no discretion remaining in the Commission in this case. The petition and stipulation show that all of the legal requirements for approval of a plat for recordation have been met. Those legal requirements are contained in Chapter 177, Florida Statutes (1975) and the Broward County Plat Act. [1]

It appears to be the County's contention that, even though Narco has complied with all of the legal requirements for platting land contained in the general law and Special Act, the County Commission still has the discretion to approve or to refuse approval of any plat, because both Chapter 177 and the Special Act provide for approval by the County Commission. We reject the County's construction that those provisions **[**4]** of the statutes give the County unbridled discretion to deny approval.

All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend upon the whim or caprice of the public body involved. Yokley, in his work, Law of Subdivisions, § 52, states:

> "Thus, while public policy requires municipal control of such development, nevertheless, ***HN1*** the

[1] Chapter 28946, Laws of Florida, Special Acts, 1953, as amended.

> authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, made to rest upon specific standards of a statute or implementing ordinances. Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act."

Likewise, in Section 53 of the same work, the author states:

> "*HN2* When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board has been held to be ministerial, and such act may be enforced by a writ of mandamus."

4 Anderson, American Law of Zoning (Second Edition) § 26.04, (1976) states:

> "Mandamus to compel **[**5]** plat approval has been successful where the court, applying common-law principles, determined that when a subdivider has complied with all of the standards for plat approval, such approval is a ministerial act which the court may compel through a writ of mandamus . . .."

There are numerous cases which apply this same principle, among which are: *Knutson v. State, 239 Ind. 656, 157 N.E.2d 469 (1959)*; *People ex rel. Jackson & Morris, Inc. v. Smuczynski, 345 Ill.App. 63, 102 N.E.2d 168 (1951)*; *People v. Village of Deerfield, 50 Ill.App.2d 349, 200 N.E.2d 120 (1964)*; *Kling v. City Council of City of Newport Beach, 155 Cal.App.2d 309, 317 P.2d 708 (1957)*.

[*511] Section 14 of the Broward County Plat Act, which pertains to the granting of approval of a plat provides that such approval may be "subject to such conditions as the governing body of the municipality and/or the Boards of County Commissioners or Public Instruction may deem to be in the best interest of the public." Without pursuing the validity of that provision which has not been attacked here, we hold that, having met all of the legal requirements for obtaining plat approval, the county must approve Narco's **[**6]** plat so that it can be recorded. Inasmuch as Narco has met all of the legal requirements for platting land, the county had no discretion to refuse this plat approval and the trial court was correct in issuing the Peremptory Writ of Mandamus.

We would distinguish our case of *State ex rel. Zuckerman Corp. v. City of Miramar, supra.* In *Zuckerman* the court expressly held:

> "Here, clearly, the consideration of the plan involved the exercise of judgment and discretion. Did the plan meet the zoning requirements? Were the zoning requirements legal and binding? What was the effect of certain condemnation proceedings and other changes upon density requirements? Was the City estopped?" *Id. at 175*.

Whereas, in the case at bar, the property owner has done all the law required of him to entitle his plat to be recorded. At that point any discretion in the County Commission vanished. There are some rather broad statements in *Zuckerman* which might lead one to conclude that mandamus never lies to require approval of a plat. While Zuckerman is clearly correct on its facts, to the extent it might be interpreted to hold that mandamus will never lie to require approval of a plat, **[**7]** we recede therefrom.

Upon remand the county shall approve the plat in question in accordance with the Peremptory Writ of Mandamus issued August 16, 1976, and such approval shall not contain any conditions relative to this litigation as were contained on the plat approval in the resolution of the County Commission dated March 1, 1977, and recorded in Official Records Book 6927, page 518, of the Public Records of Broward County.

Our disposition of the plenary appeal in case No. 1920 renders the issues raised in the interlocutory appeal No. 868 moot. Accordingly, the interlocutory appeal is dismissed.

DAUKSCH, J., concurs.

CROSS, J., concurs specially, with opinion.

Concur by: CROSS

Concur

CROSS, Judge, concurring specially:

I concur in the conclusion reached by the majority only because the parties to the instant appeal have stipulated that all necessary standards prescribed by law for subdivision plats have been met by the appellee.

I perceive broad areas of discretion granted to the Board of County Commissioners which in ordinary circumstances would render the remedy of mandamus inappropriate. *E. g.*, Section 14, Ch. 28946, Laws of

Florida, Special Acts 1953. Moreover, **[**8]** I see no reason to recede from *State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla. 4th DCA 1974)*. That case dealt with the situation wherein the petitioner sought mandamus before any action, either for or against the proposed subdivision, was undertaken by the city council. Even so, the court therein recognized that mandamus would lie to compel action, but could not mandate the course of such action where discretionary matters remained unresolved. The *Zuckerman-Vernon* case has no application to cases such as that sub judice where all prerequisites established by law for the approval of subdivision plats have been met and the approving body has withheld its approval arbitrarily.

End of Document

Appendix 28.

Southern Cooperative Dev. Fund v. Driggers

United States Court of Appeals for the Eleventh Circuit

February 4, 1983

No. 82-5305

Reporter
696 F.2d 1347 *; 1983 U.S. App. LEXIS 30783 **

SOUTHERN COOPERATIVE DEVELOPMENT FUND, et al., Plaintiffs-Appellees, v. Louis E. DRIGGERS, et al., Defendants-Appellants

Subsequent History: [**1] Petition for Rehearing En Banc Denied March 23, 1983.

Prior History: Appeal from the United States District Court for the Middle District of Florida.

Disposition: AFFIRMED.

Core Terms

plat, subdivision regulation, requirements, streets, plaintiffs', ordinance, regulations, Statutes, district court, disapproval, facilities, proposed subdivision, complied, width, reasons, defendants', feet, connected, approve, county commission, county road, highway, zoning, staff, summary judgment, applications, provisions, provides, conform, planned

Case Summary

Procedural Posture
Appellants, county and board of county commissioners, sought review of summary judgment and injunctive relief from the United States District Court for the Middle District of Florida granted in favor of appellee agricultural development associations in appellees' action alleging violation of *42 U.S.C.S. § 1983* and *U.S. Const. amend. XIV* in appellants' refusal to approve preliminary subdivision plat.

Overview

Appellee agricultural associations purchased a tract of land in order to establish an agricultural cooperative and sought approval from appellants, county and board of county commissioners, for a preliminary subdivision plat. Although the subdivision met all the requirements of the county zoning ordinances and subdivision regulations, appellant commission voted to disapprove the plat after several citizens objected to the "low-income" subdivision. The district court granted appellees' motion for summary judgment and injunctive relief in a suit alleging violations of *42 U.S.C.S. § 1983* and *U.S. Const. amend. XIV*. The court affirmed the judgment, concluding that the district court did not err when it found that the applicable regulations had been complied with and that appellants, therefore, violated an administrative duty to approve the plat. The court agreed with the district court that there were no genuine issues of material fact that precluded the entry of summary judgment. The court rejected appellants' arguments that the denial was justified under the development code enacted after litigation was instituted and under the provisions of *Fla. Stat. ch. 336.05(2)* and 235.193.

Outcome
The court affirmed summary judgment and injunctive relief granted in favor of appellee agricultural development associations in appellees' action against appellants, county and board of county commissioners, alleging violation of due process in appellants' refusal to approve preliminary subdivision plat. The court held that appellants violated an administrative duty to approve the plat where the plan met applicable subdivision regulations.

LexisNexis® Headnotes

Governments > Local Governments > Administrative Boards

Real Property Law > Subdivisions > General Overview

HN1 See *Fla. Stat. ch. 336.05(2)*.

Governments > Local Governments > Administrative

Boards

Real Property Law > Subdivisions > General Overview

HN2 See Fla. Stat. ch. 235.193(4).

Governments > Local Governments > Administrative Boards

Real Property Law > Subdivisions > General Overview

HN3 All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise the official approval of a plat application would depend upon the whim or caprice of the public body involved.

Counsel: F. Craig Richardson, Jr., Ross, Hardies, O'Keefe, Babcock & Parsons, Boca Raton, Florida, (for Manatee), Nancy E. Stroud, Boca Raton, Florida, (for Manatee), Fred Bosselman, Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Illinois, Edward F. Ryan, Chicago, Illinois, Keith A. Klopfenstein, Jr., Chicago, Illinois, E. Clinch Kavanaugh, III, Bradenton, Florida, for Appellant.

James W. Jones, Arnold & Porter, Washington, District of Columbia, Chris R. Ottenweller, Washington, District of Columbia, Steven J. Hoffman, Washington, District of Columbia, Morris W. Milton, Williams & Milton, St. Petersburg, Florida, for Appellee.

Judges: Roney and Johnson, Circuit Judges, and Dyer, Senior Circuit Judge.

Opinion by: DYER

Opinion

[*1348] DYER, Senior Circuit Judge:

This is an appeal from a summary judgment, *527 F. Supp. 927*, entered in favor of the plaintiffs on two counts which alleged that the defendants, Manatee Board of County Commissioners, Manatee County, and individual County Commissioners, abridged plaintiffs' rights to due **[**2]** process in violation of *42 U.S.C. § 1983* and the *Fourteenth Amendment to the United States Constitution* (Count 1), and plaintiffs' rights to due process under the Florida Constitution (Count 4), in refusing to approve a preliminary subdivision plat. The court granted an injunction and directed the defendants to issue the plat to the plaintiffs. The defendants assign error in the court's findings that the applicable regulations had been complied with and that they therefore violated an administrative duty to approve the plat; that there were no genuine issues of material fact that precluded the entry of summary judgment; and that the denial of the plaintiffs' application was arbitrary and capricious. We affirm.

Plaintiffs Southern Cooperative Development Fund, Inc. (SCDF), Small Farm Development Corporation (SFDC), and Manatee County Community Development Corporation are associated with a joint private-public program called the Family Farm Cooperative Program (FFC Program) whose purpose is to foster the creation and development of agricultural cooperative communities as a means of addressing rural poverty by making it possible for low-income and disadvantaged persons interested **[**3]** in agriculture to own and operate small family farms. The program is funded by a combination of government grants and low-interest loans, private sector loans, and internally generated revenues. Plaintiff Rutledge is a resident of Manatee County who applied for and was eligible to participate in the FFC Program.

In 1979 SCDF purchased a 1631 acre tract of land near the Myakka-Wauchula Road, approximately six miles from the unincorporated town of Myakka and twenty five miles from the city of Bradenton, Florida. The property is in the unincorporated area of East Manatee County and is zoned for agricultural use. The SFDC representatives contacted officials of the Manatee County Planning Department, the county agency principally responsible for land planning and development, to discuss the establishment of the agricultural cooperative and to determine what county requirements would apply to the project. The Planning Department advised SFDC that it would be necessary to prepare a subdivision plat and obtain approval of the Manatee County's Board of County Commissioners in accordance with Manatee County's Subdivision Regulations.

Under the Subdivision Regulations a developer must **[**4]** submit pre-application plans for review with the Planning Department, the Health Department, the Highway and Engineering Department, and the Utility System, prior to making an application for subdivision approval. Plaintiffs prepared and submitted a detailed pre-application plan describing the proposed agricultural community. They subsequently received permission from the Planning Department to submit an application for preliminary plat approval. A plat application, titled the Long Creek Subdivision, was submitted on February

1, 1980, and showed a subdivision of 49 ten-acre tracts, 4 one-acre tracts, and two tracts larger than 460 acres. As a result of discussions with the county staff and agencies, plaintiffs agreed to modify the design of some streets within the subdivision and to improve a portion of the Myakka-Wauchula County Road abutting plaintiff's property. They also agreed to change dead-end streets to cul-de-sacs and established setbacks for a power line easement. **[*1349]** A revised plat reflecting the changes was submitted on February 29, 1980. As required by the Subdivision Regulations, the Highway and Engineering Department, the Health Department, and the Utility **[**5]** System reviewed the application for "conformity with all County regulations" and expressed no objections. The Planning Department, as required, recommended to the Manatee County Planning Commission (a public board appointed to advise the Commission on subdivision and zoning matters) that preliminary plat approval be granted, noting that the Long Creek Subdivision "meets all requirements of preliminary plat review" and that the other county departments had "no objections to the preliminary plat." The Planning Commission recommended to the County Commission that the plat be approved. Notwithstanding its compliance with all relevant county ordinances, SFDC's project was a subject of dissent among residents of Manatee County. At the first meeting of the Commission on the Long Creek Subdivision application on March 29, 1980, many members of the all-white community complained that the participants in the FFC program would be low-income blacks and Spanish-Americans and that the program was a federal "give away". During the hearing Commissioner Driggers wanted to consider factors other than compliance with the Subdivision Regulations because although the plat complied with the regulations **[**6]** he felt that this was not a "normal" subdivision. Rather than approve the plat, the Commission directed the Planning Department to undertake an additional study of the Long Creek Subdivision. This was accomplished and the Planning Department once again concluded that the SFDC's plat application complied with the Subdivision Regulations. [1] This report was submitted to each Commissioner before the May 1 hearing and noted that the "Long Creek Subdivision appears to meet all requirements of the Manatee County Zoning Ordinances and Subdivision Regulations. . . ." On May 1, 1980 the Commission voted unanimously to disapprove the plat. Although Section 23 of the Manatee County Planning Act expressly requires the Commission to publicly state its reasons for disapproval of the plat, neither the Commission nor any of the Commissioners gave any reason for disapproving the plat.

[7]** Plaintiffs filed suit on May 30, 1980 and undertook discovery. Depositions of the Commissioners established that the Commission accepted the fact that the plat complied with the County's Subdivision Regulations. Plaintiffs filed a motion for partial summary judgment. The defendants did not controvert the fact of SFDC's compliance with the Subdivision Regulations.

On July 2, 1981 the district court entered an order finding that only factors contained in the Subdivision Regulations could constitute grounds for denial of the plat application, and since the Commission had failed to state reasons for its May 1, 1980 denial, the district court directed that "the County Commission should be and is afforded the opportunity to again consider Plaintiffs' plat application within the guidelines set forth above (the Subdivision Regulations 'enacted pursuant to the Manatee County Planning Act, Chapter 63-1559 . . . which is attached . . . as Exhibit B ')." These were the Subdivision Regulations in effect at the time that the plat application and the suit were filed.

On August 11, 1981 the Commission again considered the plaintiffs' plat application. At the meeting the commissioners remained **[**8]** silent on the merits of the application. The conclusions of the Planning Department in their new review of the application were similar to those found in the first staff report in regard to the public facilities problem. After comments by the planning staff, plaintiffs' counsel, and an attorney representing local residents, the Commission proceeded immediately to vote unanimously against the subdivision. The Commission then instructed their legal staff to prepare a written order of their decision. **[*1350]** Shortly thereafter, the attorney representing the County in this litigation returned to the meeting with the order denying preliminary plat approval. [2] **[**9]** The order made findings of fact that the road access to the proposed subdivision would be unsafe and inadequate;

[1] An impact analysis which dealt with matters not included in the Subdivision Regulations such as school administration, medical services and road conditions was also submitted to the Commission.

[2] Since none of the Commissioners expressed reasons at the hearing, and since under the Florida "Sunshine Law," *Fla.Stat.Ann. § 286.011* commissioners may only discuss official business in public meetings, it is clear that the Order was not prepared by the Commission, but was apparently prepared by counsel in anticipation of this litigation.

that public school facilities made necessary by the proposed development were not available and were not planned to be constructed; that necessary public or private facilities and sewers were inadequate; that there was no proximity to recreation and shopping facilities and schools and the extra traffic could not be handled safely; and that the proposed subdivision would constitute urban sprawl. [3]

[3] The Order contained the following findings of fact:

1. The only road that provides access to the proposed subdivision is Wyakka-Wauchula Road, otherwise known as Nine-foot Road. For a distance approximately two miles to the south of the property and five miles to the north of the property this road is less than one standard lane in width, consisting only of patches of asphalt some eight to twelve feet wide. For the reasons stated in the staff report, the Board finds that the road access to the proposed subdivision would be unsafe and inadequate.

2. The proposed subdivision would add between sixty (60) and seventy (70) students in grades 2-8 to a school having an enrollment of two hundred fifty-two (252) and a capacity of two hundred seventy-five (275). Funds are not currently available to expand the school. For the reasons stated in the staff report, the Board finds that public school facilities made necessary by the proposed development are not available in the area which is proposed for development and are not planned to be constructed in the area concurrently with the development.

3. Because of the extremely remote location of the proposed subdivision and the facts set forth in the staff report, the Board finds that the following necessary public or private facilities and services are inadequate:

(a) emergency medical services;

(b) fire protection;

(c) law enforcement;

(d) traffic circulation;

(e) education.

4. The Board finds that the proposed subdivision is not located in close proximity to neighborhood recreation and shopping facilities and schools; is not designed to have convenient and easy access to highways, arterial streets, and major collector streets with direct connections to major recreation, shopping and working areas; and is not located where necessary transportation facilities are adequate to handle the expected additional traffic safely.

5. The Board finds that the proposed subdivision would constitute urban sprawl, would be located in the eastern portions of the East County sector where public services can least easily be provided, and would create a "leap frog" pattern of development.

[10]** Based on these findings the Commissioners determined that the application did not meet either the requirements of the Subdivision Regulations in effect at the time of the initial consideration of the application on May 1, 1980, or the requirements of the Development Code. [4] The Commissioners further determined that the proposed plat would be in violation of *Section 336.05(2) of the Florida Statutes* which, they argue, authorizes a county commission to reject a plat if road access is not adequate or safe, and in violation of Section 235.193, Florida Statutes, which, they argue, authorizes denial of a subdivision application if public school facilities are not available or will not be made available concurrent with development. Finally, the Commissioners decided that the subdivision was not consistent with the Manatee County Local Government Comprehensive Plan.

[11]** On December 3, 1981, following the Commission's second denial of SFDC's plat, the district court granted plaintiffs' motion for summary judgment on Counts 1 and 4, entered declaratory judgment for plaintiffs and ordered Manatee County to approve the plat. The defendants' cross-motion for **[*1351]** summary judgment on those counts was denied. The district court granted a stay pending appeal of its injunction.

The issues are sharply drawn. The defendants contend that the board's denial of the plat application was justified under the Subdivision Regulations in effect at the time the application was filed; was justified under the provisions of the Development Code, enacted after the plaintiffs' plat application had been filed and after this litigation had been instituted; and was justified under the provisions of *Florida Statutes, Section 336.05(2)*, [5] **[**12]** relating to the inadequacy of road access, and

[4] The current subdivision regulations are part of the Manatee County Comprehensive Zoning and Land Development Code adopted April, 1981 pursuant to state law which requires the county to adopt a comprehensive plan prior to July 1, 1979. All regulations thereafter are required to be consistent with the comprehensive plan. The Florida Local Government Comprehensive Planning Act of 1975, §§ 163.3161 et seq., Florida Statutes (1981).

[5] *Section 336.05(2), Florida Statutes*, provides that:

> ***HN1*** "The Commissioners are authorized to refuse to approve for recording any map or plat of a subdivision when recording of such plat would result in duplication of names and streets or roads or when said plat in the opinion of said Commissioners, will not provide adequate and safe access or drainage."

Section 235.193, [6] relating to inadequacy of schools.

The plaintiffs contend that since Manatee County enacted detailed and comprehensive Subdivision Regulations with which plaintiffs complied, the Commission had no discretion to disapprove the plat for reasons not contained in the Subdivision Regulations, nor could their disapproval be based upon the later enacted Development Code.

To put the case in proper perspective, we must, at the outset, reject the defendants' argument that this case involves a challenge to local land use laws, and therefore the standard enunciated in *Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)* should apply, i.e., whether the action of the Commission was arbitrary and capricious. The plaintiffs do not challenge the exercise of legislative **[**13]** function by Manatee County, or the validity or legality of the zoning ordinances. On the contrary, the plaintiffs urge that the Subdivision Regulations be applied as written. What we are called upon to decide is whether the Commission's actions were authorized as a matter of Florida law, and if so whether their actions were in violation of the *Due Process clause of the Fourteenth Amendment*.

The district court held that "Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations, and not upon any broad powers of discretion. As such, the County Commission does indeed act in an administrative, and not a discretionary, capacity." Defendants take issue with this holding. They argue that even assuming that only the Subdivision Regulations in effect at the time of the initial application apply, under Florida law the regulations of subdivisions require the use of reasonable discretion by the Commission in the application of standards and requirements to the specific circumstances of the subdivision application. They point to the preamble to the Subdivision Regulations [7] as authority for the **[**14]** position that prefatory language reserving discretion to provide for the general health, safety and welfare was sufficient to sustain their action. We disagree. The preamble contains no standards with respect to subdivision approval. It merely sets forth the underlying purpose for enacting the Subdivision Regulations. The language in the preamble cannot serve as an independent source of authority for disapproving plats. This would permit the Commission to hold in reserve unpublished requirements capable of general application **[*1352]** for occasional use as the Commission deems desirable.

[15]** Defendants also rely on an access requirement in the Subdivision Regulation which provides: "No subdivision shall be approved unless its street system is connected to an arterial highway by a public road which is county or state maintained." It is undisputed that the proposed plat satisfied this requirement since the subdivision connected to a county road, which in turn connected with an arterial highway. But the defendants contend that this is not enough. They base their discretion, they say, to deny this plat application because the Myakka-Wauchula county road was in such poor condition that it did not fulfill the minimum standards of design and maintenance. We think it is clear, however, that the defendants cannot impose *ad hoc* requirements regarding the condition of county roads adjacent to proposed subdivisions in order to implement the purpose of the Subdivision Regulations.

We agree with the district court that *Broward County v. Narco Realty, 359 So.2d 509 (Fla.App.1978)* enunciated the principle of Florida law that is controlling here. In that case even though Narco had complied with all of the legal requirements for platting its land, the Commission contended **[**16]** that it still had the discretion to approve or to refuse approval of any plat. The court rejected this argument saying:

> ***HN3*** All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise the official approval of a plat application would depend upon the whim or caprice of the public body involved.

---

[6] Section 235.193, Florida Statutes, provides that:

> ***HN2*** "(4) The local governing body is empowered to reject development plans when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area concurrently with the development."

[7] The Subdivision Regulations prefatory statement of the public purposes of the regulations, states in part, ". . . to provide for the harmonious development of the county . . . [and] to insure that each new residential subdivision results in an attractive living environment, which will maintain its value over the years." Further, that its purpose is "to secure adequate provision for light, air, open space, recreation, transportation, potable water, flood prevention, drainage, sewers and other sanitary facilities."

> . . . the property owner has done all the law required of him to entitle his plat to be recorded. At that point any discretion in the County Commission vanished.

Defendants maintain however that *Narco* must be read narrowly because the only principle that it established was that where a local governmental body *stipulates* that all legal requirements of the plat approval process are met, there is no discretion in the Commission. But it did not establish the principle that a Commission's action in reviewing a plat application is ministerial instead of discretionary in nature. We are unimpressed with this argument. Here the Commissioners admitted that the plat complied with the Subdivision Regulations and the case is therefore in the same factual posture as *Narco*. To argue that there is a difference between compliance **[**17]** with subdivision requirements established by stipulation in *Narco* vis-a-vis by an uncontroverted showing *sub judice*, is a bit of hyperbole in which we will not indulge.

Defendants further submit that *Narco* has been misinterpreted because *Garvin v. Baker, 59 So.2d 360 (Fla.1952)*, *State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla.App.1973)*, and *Broward County v. Coral Ridge Properties, 408 So.2d 625 (Fla.App.1981)* established the principle that the Commission had discretion in reviewing the Long Creek Subdivision plat application. An analysis of these cases fails to support the defendants' assertion that the plat approval process is discretionary in nature. In *Garvin*, the Commissioners denied approval of the plat because the streets were not sixty feet in width and the lots were too shallow. The city's ordinance required the streets to conform as nearly as practicable to existing streets and in no event should they be less than fifty feet. [8] Plaintiffs' proposed plat indicated street widths of 50 feet, where existing streets in the area were 60 feet wide. There was no ordinance concerning the depths of lots. The trial court **[**18]** held that it was proper to reject the plat on the basis of the ordinance governing street widths, but **[*1353]** that it was improper to reject it on the basis of lot depths since this was not covered by the ordinance. It is pertinent to note that the court said:

> Should the city desire to effectuate some sound public policy within its authority, this should be done by duly enacted ordinances setting up standards to guide a citizen in carrying on his affairs. Otherwise, a citizen could act only subject to the unknown and uncertain views of a public official or several public officials, as experienced from time to time.

Id. at 362. The Florida Supreme Court affirmed noting that the lower court passed "upon the authority of the City by ordinance to require streets to be comformable as nearly as practicable to existing streets. The court held that the City had not abused its discretion in requiring the streets shown upon the plat to have a width of sixty feet in conformity with other streets with which it connected. There was no error in this finding. . . ." The defendants argue that this holding means that the board had discretion in reviewing the plat application **[**19]** because it required a sixty-foot street width when the ordinance's language only required a fifty-foot width, ergo, if the board had no discretion in the plat approval process the court would have issued the writ, since the board denied the plat because the streets did not have sixty-foot widths. This argument misses the mark for two reasons. Plainly the language in the ordinance in question was in the disjunctive -- it required a minimum of fifty-foot width *or* that the proposed streets conform as nearly as practicable to existing streets. Moreover, the "discretion" that the court was talking about was with respect to that exercised in enacting an ordinance for a valid purpose, not a discretion in the application of the ordinance. "It requires no citation of authority to establish the fact that a wide street changing into a narrow street, or a narrow street changing into a wide street, constitutes a hazardous traffic condition . . . the changing of the width of streets and roads involves the public welfare and safety to a high degree, and public authorities having jurisdiction of such matters have a duty to perform in order to protect the public from hazardous and dangerous **[**20]** traffic conditions." *Id. at 362*.

Defendants' reliance on *Zuckerman* gives us little pause. A writ of mandamus filed by a developer to compel issuance of a plat approval was denied because at the time the city had not reviewed the plat or taken action since the developer's compliance with the applicable subdivision regulations were unresolved

---

[8] The controlling Lake Worth ordinance read:

> Section 2: Said land shall be so subdivided and platted or mapped so that the proposed streets or public ways shall conform as nearly as practicable to existing streets and public ways, in proximity to such tract of land.
>
> Section 4: As a minimum requirement for streets, avenues and sidewalks, the plat shall dedicate a width of at least fifty feet, being at least six feet on each side thereof for sidewalks and at least thirty-eight feet intervening between sidewalks.

through no fault of the city. Moreover, in *Narco* the same court took pains to distinguish *Zuckerman* noting that in that case there **[**21]** were unresolved questions whether the plan met the zoning requirements. To make certain that *Zuckerman* did not impinge on the principles set forth in *Narco* the court added, "There are some rather broad statements in *Zuckerman* which might lead one to conclude that mandamus never lies to require approval of a plat. While *Zuckerman* is clearly correct on its facts, to the extent that it might be interpreted to hold that mandamus will never lie to require approval of a plat, we recede therefrom." *359 So.2d at 511*. The exercise of discretion and judgment about which the court spoke is to determine whether a plan meets the zoning requirements. It is not a discretion to approve or disapprove a plan that does meet the requirements.

Defendants' reliance on *Coral Ridge Properties* is also misplaced. *Narco* was cited with approval, but mandamus was found not to be an appropriate remedy because the county contended that even though there was compliance with the requirements for filing a plat, nevertheless lack of access, in violation of *Section 336.05(2), Florida Statutes*, was an additional requirement that had not been met. The property owner disagreed that the statutory **[**22]** requirements were applicable. The court found that whether the county had misapplied or misapprehended the legal requirements for plat approval, i.e., whether in addition to the plat requirements the statute could be invoked, was a question properly dealt with by review because a merely erroneous decision would not support an **[*1354]** application for mandamus. Plainly, *Narco* is neither overruled nor limited by *Coral Ridge Properties.*

Defendants next assert that the Development Code, adopted April 30, 1981, after the rejection of plaintiffs' plat application on May 1, 1980 and after this litigation commenced, applies to the plaintiffs' plat application because it was the law existing at the time of the Commissioners' second decision of August 11, 1981. In its order of July 2, 1981 the district court made preliminary findings that the plaintiffs had apparently complied with all of the Subdivision Regulations and held that "Manatee County must base its approval or disapproval of plat applications upon the regulations and requirements contained in the Subdivision Regulations. . . ." The court also found that the county had not specifically stated the reasons for disapproval **[**23]** of the plat application as required by the Manatee County Planning Act, and stated, "Because the County Commission did not articulate its reasons for disapproving plaintiffs' application, and because it does indeed appear from the record that the disapproval may have been based upon criteria not contained in the Subdivision Regulations, the County Commission should be and is afforded the opportunity to again consider plaintiffs' plat application *within the guidelines set forth above.*" (Emphasis added.)

In its final order the court found that "the plaintiffs' rights would be violated if new regulations are used to deny a plat application which complied with the regulations in effect at the time the plat application was filed." The court then proceeded to again review the county's rejection of the plat under the Subdivision Regulations and refused to consider the applicability of the Development Code.

The defendants point out that the Development Code was adopted not to defeat this litigation but was made necessary by the requirements of the Florida Local Government Comprehension Planning Act of 1975, Chapter 163.3161 *et seq.*, Florida Statutes (1981), known as LGCPA, which **[**24]** mandates that all local governments in Florida adopt comprehensive plans not later than July 1, 1981. Subdivision Regulations enacted or amended must be consistent with the adopted comprehensive plan. There is no question that plaintiffs' plat application does not meet the requirements of the new Development Code. It follows, defendants argue, that the land use ordinance can be amended during the pendency of a controversy, and that the controversy must then be determined on the basis of the amended law. *See State Etc. v. Oyster Bay Estates, Inc., 384 So.2d 891 (Fla.App.1980); Lelekis v. Liles, 240 So.2d 478 (Fla. 1970); City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla.1954).* As we see it, however, these cases simply declined to apply the law of equitable estoppel when there was an absence of a factual basis for its application, a principle that is not open to question. But this line of authorities is inapposite here for several reasons.

First, we have a finding by the district court (with which we agree) that the prior denial or delaying action of the defendants was unlawful. It would therefore indeed be inequitable to permit the defendants to take advantage **[**25]** of a new law enacted while an application for plat approval, valid when filed, has been unlawfully delayed. *See Smith v. City of Clearwater, 383 So.2d 681 (Fla.App.1980), petition dismissed, 403 So.2d 407 (Fla.App.1981); Davidson v. City of Coral Gables, 119 So.2d 704 (Fla.App.1960), cert. dismissed, 126 So.2d 739 (Fla.1961).*

Second, the district court's order of July 2, 1981, made "preliminary findings . . . that plaintiffs have complied with all of the Subdivision Regulations . . . and that the defendants must base their approval or disapproval . . . upon the regulations and requirements contained in the Subdivision Regulations." Since, however, the defendants had given no reason for their rejection of the application, as required by the Subdivision Regulations, the court gave the defendants the opportunity, within 45 days, to again consider plaintiffs' application "within the guidelines set forth above." The clear language of the district court's order leaves no doubt that it did not intend to **[*1355]** give the defendants *carte blanche* authority for a *de novo* review of plaintiffs' application. It simply gave the defendants the opportunity to do what **[**26]** they were required to do in the first place, i.e., give the reason, if any, why the plaintiffs' application did not conform to the Subdivision Regulations. The district court's final order confirms this.

Finally, under the provisions of the ordinance which enacted the Manatee Plan, the new requirements of the Plan and its implementing regulations were not applicable to land use applications filed with the county prior to April 30, 1981, the effective date of the Plan. [9] Pursuant to LGCPA, the Development Code implemented the Manatee Plan and is required to be consistent with it. Since the plaintiffs filed this plat application in February, 1980 they were grandfathered out of the new regulations in the Development Code.

[27]** For the foregoing reasons the district court was correct in rejecting the defendants' application of later enacted ordinances to deny plaintiffs' plat application.

We now turn to the defendants' claim of error in the refusal of the district court to find that certain Florida statutory provisions authorized them to reject plaintiffs' plat application because of inadequate road access to the proposed subdivision, and because adequate school facilities were not available or planned to be constructed.

Defendants argue that *Section 336.05(2) Florida Statutes* [10] gave them discretion, independently of the Subdivision Regulations, to deny the plat application because of the inferior condition of the Myakka-Wauchula County Road, the only access to the subdivision site. The district court held this to be an enabling statute rather than a source of discretion, and therefore their reliance upon discretion, rather than on uniform standards was improper. Moreover, the district court found unpersuasive the defendants' argument that because the proposed subdivision was not connected with a completed highway sufficient for the anticipated traffic it failed to comply with both the statutes and **[**28]** the Subdivision Regulations. The court found "access" in both contexts not to require a completed road in advance of development.

The Subdivision Regulations contain specific and detailed requirements pertaining to access to a subdivision. They do not impose any requirements regarding the condition of roads *maintained by the county.* [11] In fact, they do not incorporate or in any way refer to any statutory provision. It is undisputed that the plaintiffs' proposed plat met the requirements of the Subdivision Regulations concerning access. Thus the narrow question is whether the statutes give the defendants discretion to deny a plat application because the connecting county road is, in their opinion, in a deteriorated and unsafe condition, even though the plat complies with the access requirements of the Subdivision Regulations. We agree with the district court that this is an enabling statute which would authorize a local government to establish specific land use standards, but it does **[**29]** not constitute an independent source of discretion. Were we to hold otherwise the statute would confer upon the defendants authority to grant plat approval to one and yet withhold it from another without guides of accountability, a result that would not meet the test of constitutionality. *See,* e.g., *Harrington & Co., Inc. v. Tampa Port Authority, 358 So.2d 168 (Fla.1978); Dickinson v. State, 227 So.2d 36* ***[*1356]*** *(Fla.1969); North Bay Village v. Blackwell, 88 So.2d 524 (Fla.1956); Drexel v. City of Miami Beach, 64 So.2d 317 (Fla.1953); City of Naples v. Central Plaza of Naples, Inc., 303 So.2d 423 (Fla.App.1974).*

---

[9] Section 4(c) of Ordinance No. 80-4 which enacted the Manatee Plan provides in pertinent part:

> Actions on applications for development permits which have been duly filed with the County of Manatee, its departments, or agencies, prior to the effective date of this ordinance shall not be subject to the prescriptive provisions of the Plan. . . .

Section 4(b) of the Ordinance defines "prescriptive provisions" to include "land development regulations."

[10] See Footnote 5.

[11] Paragraph F of the Subdivision Regulations provides: "Access: No subdivision shall be approved unless its street system is connected to an arterial highway by a public road which is County or State maintained."

We are not unaware of the defendants' reliance on *Chase Manhattan Mortgage & Realty Trust v. Wacha, 402 So.2d 61 (Fla.App.1981)*, in which, without discussion, **[**30]** in an alternative holding, the court affirmed the denial of a site plan, without prejudice, "on the basis of inadequate access" under *Section 336.05(2) Florida Statutes.* There is no discussion of the relationship of this statute to any specific standards the county may have had regarding access, or the applicability of such statutes when specific subdivision regulations exist. There is also no discussion whether the rejected site complied with the specific access requirements. Under these circumstances we are unpersuaded that the statute gives the defendants independent discretion to interpret what is "adequate and safe" and impose *ad hoc* requirements regarding the condition of the county road adjacent to the proposed subdivision.

Similarly, the defendants, relying on Section 235.193 Florida Statutes, [12] refused plaintiffs' plat application finding that the public school facilities were not adequate to serve the proposed development.

Without belaboring the point we reject this argument **[**31]** for the same reasons that we explicated concerning the "access" statute.

There was no genuine dispute of material fact regarding plaintiffs' compliance with the requirements of the Subdivision Regulations. Under these circumstances the defendants had an administrative duty to approve the plaintiffs' proposed plat and their refusal to do so was a violation of the plaintiffs' guarantee of due process. See *Washington ex rel. Seattle Trust Title Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928)*, *Hornsby v. Allen, 326 F.2d 605* (5 Cir.1964). The entry of summary judgment for the plaintiffs was proper.

AFFIRMED.

End of Document

---

[12] See Footnote 6.

Appendix 29.

City Nat'l Bank v. Coral Springs

Court of Appeal of Florida, Fourth District

September 18, 1985

No. 85-678

Reporter
475 So. 2d 984 *; 1985 Fla. App. LEXIS 15893 **; 10 Fla. L. Weekly 2169

CITY NATIONAL BANK OF MIAMI, as Trustee, Petitioner, v. CITY OF CORAL SPRINGS, FLORIDA, Respondent

Subsequent History: [**1] Rehearing Denied October 14, 1985.

Prior History: On petition for writ of certiorari from the Circuit Court for Broward County; Linda L. Vitale, Judge.

Core Terms

plat, circuit court, requirements, ordinances, legal requirements, further hearing, conditions, mandamus, procedural due process, administrative action, competent evidence, correct law, disapproval, moratorium, landowner, landscape, Statutes, complied, approve, roadway, delete

Case Summary

Procedural Posture

Petitioner bank sought a writ of certiorari to review the trial court's order which upheld the first two of three conditions that were imposed by respondent city in approving petitioner's proposed plat and invalidated the third condition and ordered that respondent delete the third condition or provide further hearing.

Overview

Petitioner bank challenged an order of the circuit court which upheld the first two of three conditions that were imposed by respondent city in approving petitioner's proposed plat and invalidated the third condition and ordered that respondent delete the third condition or provide further hearing. Petitioner requested a writ of certiorari, claiming that all legal requirements for its plat approval had been met because the additional requirements imposed by respondent were not properly promulgated standards. The court denied the petition, holding that the first condition was validly imposed according to respondent's code of ordinances, and that the second condition was similarly valid because it was based on safety and access requirements. The court held that the circuit court had properly determined that the third condition was invalid as a building moratorium that did not meet the formal requirements.

Outcome

The court denied petitioner bank's request for writ of certiorari, holding that it found no deficiency in the circuit court's decision upholding the conditions placed on approval of petitioner's plat by respondent city.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN1 The scope of review to be utilized by a district court of appeal considering an order of the circuit court entered on review of administrative action is limited to a determination of whether the circuit court afforded procedural due process and applied the correct law. Where no issues are raised based upon failure of the circuit court to afford procedural due process, then the sole inquiry is whether the correct law was applied.

Real Property Law > Zoning > General Overview

HN2 It is elementary that once a party complies with all legal requirements for platting there is no discretion in government authority to refuse approval of the plat. All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend upon the whim or caprice of the public body involved.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Real Property Law > Subdivisions > Local Regulations

Real Property Law > Zoning > General Overview

HN3 When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board is ministerial, and such act may be enforced by a writ of mandamus.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN4 Whether or not the holding of the circuit court was supported by substantial competent evidence is not an appropriate inquiry by this court on certiorari review of administrative action already reviewed by way of certiorari in the lower tribunal. The court reviews the evidence presented to the circuit court and only when an order or judgment has been entered without any competent evidence may we find a departure from the essential requirements of the law on the basis of the evidence or lack of it.

Counsel: Gerald L. Knight of Gustafson, Stephens, Ferris, Forman & Hall, P.A., Fort Lauderdale, for Petitioner.

John M. Wynn of Paul J. McDonough, P.A., Coral Springs, for Respondent.

Judges: Hersey, C.J. Dell and Barkett, JJ., concur.

Opinion by: HERSEY

Opinion

[*985] By petition for writ of certiorari we are asked to review an order of the circuit court approving in part and disapproving in part a resolution adopted by respondent city which approved a proposed plat subject to three conditions.

On approval of a plat for a Stop-N-Go market to be located on Royal Palm Boulevard in Coral Springs, Florida, the city commission imposed the following conditions:

1. A ten (10) foot buffer strip (landscape area) will be included on the plat along its northwesterly boundary;

2. All entrances and exits indicated on the plat will be labelled "Right Turn Out Only";

3. No building permit for construction will be issued until Royal Palm Boulevard has been improved (widened) to a four (4) lane roadway in the area immediately adjacent

to this [**2] plat.

City National Bank of Miami sought certiorari and mandamus in the circuit court which upheld the first and second conditions and further directed the city to "delete condition No. 3 or provide further hearing on said issue." The bank then filed its petition here for further review.

HN1 The scope of review to be utilized by a district court of appeal considering an order of the circuit court entered on review of administrative action is limited to a determination of whether the circuit court afforded procedural due process and applied the correct law. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982); *Cherokee Crushed Stone, Inc. v. City of Miramar*, 421 So.2d 684 (Fla. 4th DCA 1982). No issues are raised based upon failure of the circuit court to afford procedural due process; thus, the sole inquiry is whether the correct law was applied.

HN2 It is elementary that once a party complies with all legal requirements for platting there is no discretion in government authority to refuse approval of the plat. In *Broward County v. Narco Realty, Inc.*, 359 So.2d 509 (Fla. 4th DCA 1978), the proposition was explained in the following language:

> All persons [**3] similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend upon the whim or caprice of the public body involved. Yokley, in [*986] his work, Law of Subdivisions, § 52, states:
>
> > "Thus, while public policy requires municipal control of such development, nevertheless, the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, made to rest upon *specific standards of a statute or implementing ordinances.* Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act."

Likewise, in Section 53 of the same work, the author states:

> "***HN3*** When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board has been held to be ministerial, and such act may be enforced by a writ of mandamus."

Id. at 510 (emphasis added).

The petitioner's position is that all legal requirements were met inasmuch as the city commission's additional requirements [**4] were not properly promulgated standards and therefore were not legal. Respondent city points out the existence of certain standards made applicable by virtue of its home rule powers, in addition to the landscape standard contained in a city ordinance applicable to condition one. *See* section 166.021, Florida Statutes (1983).

We hold that condition one is validly imposed as a reasonable application of section 20-513 of the Code of Ordinances of the City of Coral Springs. Condition two is similarly valid based upon the legal requirement that an applicant demonstrate that there will be safe and adequate access to the area sought to be platted. *Broward County v. Coral Ridge Properties, Inc.*, 408 So.2d 625 (Fla. 4th DCA 1981).

The circuit court held the third condition invalid on the basis that

> The Court simply finds that to include such

> a condition on the plat without any indication in the record as to when or if said portion of the roadway will be four-laned could preclude the landowner from any reasonable use of owner's property indefinitely. CITY OF CORAL SPRINGS accordingly directed to delete condition No. 3 or provide further hearing on said issue.

Condition [**5] three was in the nature of a building moratorium directed to a specific parcel of land and without meeting any of the formal requirements for such a moratorium. As such it was appropriately stricken. The provision of the order permitting further hearings on this issue was a proper determination, *Page v. Lines*, 150 Fla. 433, 7 So.2d 599 (1942), the court thereby granting partial relief by way of mandamus.

HN4 Whether or not the holding of the circuit court was supported by substantial competent evidence is not an appropriate inquiry by this court on certiorari review of administrative action already reviewed by way of certiorari in the lower tribunal. We review the evidence presented to the circuit court and only when an order or judgment has been entered without any competent evidence may we find a departure from the essential requirements of the law on the basis of the evidence or lack of it. Finding no such deficiency here we decline to grant certiorari.

CERTIORARI DENIED.

DELL and BARKETT, JJ., concur.

End of Document

Appendix 30.

City of Lauderdale Lakes v. Corn

District Court of Appeal of Florida, Fourth District.

February 16, 1983.

No. 78-2438.

Reporter
427 So. 2d 239 *; 1983 Fla. App. LEXIS 19114 **

CITY OF LAUDERDALE LAKES, a Florida municipal corporation, Howard Craft, Mayor of the City of Lauderdale Lakes; Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald, Harry Kaufman, City Councilmen; and Ben Eigner, Building Official, Appellants, v. Herman CORN, Trustee, Appellee.

Core Terms

zoning, ordinances, site plan, plat, deficiencies, mandamus, requirements, appellee's, final judgment, classification, estoppel, expended, correction, equitable, approve, parcel

Case Summary

Procedural Posture

Appellant city challenged a final judgment from the trial court (Florida) that invalidated Lauderdale Lakes, Fla., Ordinances No. 548, 549, and 552 as they applied to appellee landowner and required appellant to approve a site plan for improvements to the land. Appellant claimed that the trial court improperly issued a writ of mandamus and that substantial competent evidence did not support application of equitable estoppel against appellant.

Overview

Appellant city challenged a judgment that invalidated Lauderdale Lakes, Fla., Ordinances No. 548, 549, and 552, as they applied to appellee landowner and his use of certain land and that required appellant to approve appellee's site plan for commercial improvements to the land. The court affirmed the judgment. The court ruled that the trial court properly found that appellant was equitably estopped from enforcing the new zoning regulations because appellant had originally zoned the land as suitable for commercial use and because appellee had expended substantial sums in developing the land before appellant amended the ordinances to prohibit appellee's commercial use of the property. Specifically, the court ruled that appellee was properly granted mandamus to compel approval of his site plan because the approval or disapproval of appellee's plan was not a discretionary function of appellant's and that there was competent substantial evidence to support application of equitable estoppel against appellant's enforcement of the new zoning regulations against appellee's intended use of the land.

Outcome

The court affirmed a judgment that invalidated certain of appellant city's zoning ordinances, as applied to appellee landowner, and required

appellant to approve appellee's site plan for improvements to his property. Appellant was properly estopped from applying its amended zoning ordinance, which prohibited commercial improvements of the property, because appellee had relied upon the pre-amendment zoning classification of the property.

LexisNexis® Headnotes

Civil Procedure > Remedies > Writs > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN1 Where all of the legal requirements for platting land have been met there is no residual discretion to refuse plat approval and mandamus will lie.

Environmental Law > Land Use & Zoning > Equitable & Statutory Limits

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN2 An owner of property acquires no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against a zoning authority have risen. Thus a municipality may be equitably estopped to enforce a change in zoning regulations against one who has substantially altered his position in reliance upon the original regulation.

Environmental Law > Land Use & Zoning > Equitable & Statutory Limits

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Finance

Business & Corporate Compliance > ... > Real Property Law > Zoning > Annexation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN3 The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property owner: (1) relying in good faith; (2) upon some act or omission of the government; (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Governments > Local Governments > Claims By & Against

HN4 Circumstances may be envisioned which would preclude an estoppel against a municipality as where the public health or safety is placed in jeopardy. In the absence of evidence of some such factor, however, a municipality will be held to the same standards of fair dealing that are applied to other entities.

Counsel: [**1] James C. Brady, Fort Lauderdale, and Mallory H. Horton of Horton, Perse & Ginsberg, Miami, for appellants.

Gary M. Farmer of Abrams, Anton, Robbins, Resnick, Schneider & Mager, P.A., Hollywood, for appellee.

Judges: Before HERSEY, ANSTEAD and BERANEK, JJ., concur.

Opinion by: HERSEY

Opinion

[*240] HERSEY, Judge.

The city appeals from a final judgment invalidating certain zoning ordinances as they refer to appellee and to specific read property owned by appellee, requiring the city to approve a site plan (conditioned upon the

correction by appellee of three specified deficiencies) and, ultimately, to issue a building permit.

Prior to June, 1966, appellee acquired 261 acres of real property in the unincorporated area of Broward County. After preliminary negotiations with the city (there is a conflict of testimony, unresolved in the circuit court, as to which party initiated these negotiations), appellee presented the city with a proposed development plan. The parcel was then annexed by the city and three ordinances were adopted zoning the property in accordance with the previously approved development plan. Appellee proceeded over the next several years to develop the property [**2] as permitted by the ordinances and as contemplated by the plan.

In 1969 the city attempted to change the zoning of a portion of appellee's property to prohibit a contemplated project permitted [*241] by the original zoning. Litigation ensued resulting in a judgment holding that the city was estopped from changing the zoning. No appeal was taken from that judgment.

The next activity of consequence concerns the portion of the property specifically in issue here. That parcel is zoned C-1A, a commercial use zone, and lies immediately north of a canal designated as C-13. According to appellee the canal was so located to insulate residential areas from this commercial property. Pursuant to applicable ordinances appellee filed, for approval, a proposed set of preliminary site plans for a shopping center in one area of the commercial property and a mini-warehouse complex on the westernmost portion of that parcel. The various city departments and officials processed the site plans and after sundry amendments and recommendations, the site plan along with the Planning and Zoning Board's recommendation of approval was presented to the City Council, at a public meeting on May 31, [**3] 1977. After discussion about the assessed valuation of the land and a comment directed toward aesthetics the matter was tabled. It was reconsidered and again tabled at meetings on June 14, 1977, and June 21, 1977, and at the latter meeting was rescheduled to be considered on July 12, 1977.

At the meeting of July 12, 1977, the City Council for the first time discussed changes in the zoning code to eliminate mini-warehouses as a use permitted in property zoned C-1A (Ordinance # 548) and to change the classification of appellee's parcel from C-1A to B-3 (Ordinance # 549). These ordinances were adopted. Another ordinance, # 552, imposing a building moratorium on appellee's property was also proposed and it was adopted at a subsequent meeting. After adoption of the two ordinances the council took up the matter of appellee's preliminary site plan. The council voted unanimously to deny approval. This litigation ensued.

The circuit court ultimately entered a final judgment which contained findings of fact concluding that events transpired much as recorded in the foregoing synopsis and including the following specific findings which are particularly pertinent to this appeal. [**4]

> The evidence presented in this case indicates that the Plaintiff's efforts were in accordance with the development plan submitted to and approved by the City, and further, that the entire cost of the initial land development was borne by the Plaintiff. These costs included, but were not limited to, land clearing, demucking, filling and grading of the land and the construction of a system of canals and waterways throughout the 261-acre parcel of land. This system of canals and waterways specifically included the canal

known as the C-13 canal, which separated the C-1A property from other residentially-zoned acreas [sic] within the 261 acres.

...

The evidence further establishes that the Plaintiff in this cause has expended in excess of $100,000.00 in preparing the C-1A property to be developed in accordance with the previously approved Ordinances # 103 and # 105. These sums were expended in reliance upon the City's action with reference to the assignment of the C-1A classification to the property in question. They would have not been expended had it not been for the action of the City in designating the property under the zoning classification of C-1A.

...

Prior to July 12, 1977, [**5] the City of Lauderdale Lakes sent or published no notices to the Plaintiff of any public hearing to be held on the question of whether or not Plaintiff's C-1A property should be rezoned or that a hearing would be held on any specific re-zoning proposal. In fact, the City of Lauderdale Lakes had made no effort whatever to re-zone Plaintiff's C-1A property from July 12, 1966, to July 12, 1977, a period of 10 years.

...

The Court finds from the evidence presented that Ordinances # 548, # 549 and # 552 were enacted by the City improperly and not in accordance with the requirements of the City Charter. Further, the evidence specifically indicates that the City Council was reacting to the [*242] demands of the residents of the near-by condominium building (the Amicus Curiae herein) and was attempting to satisfy the demands of these residents without consideration for the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes.

Finally, the Court finds from a review of all of the evidence that the preliminary site plans presented by the Plaintiff with reference to the proposed mini-warehouse/shopping center development contained 3 specific deficiencies. [**6] It is the further finding of the Court that these deficiencies were before the City Council, but the City Council did not provide the Plaintiff with an opportunity to correct the deficiencies in question. The evidence establishes that the City Council was required to give the Plaintiff the opportunity to correct the deficiencies; and when the corrections were made, the Ordinances of the City of Lauderdale Lakes would require the City Council to approve final site plans.

The final judgment determined that because appellee not only expended money but also made substantial physical changes in the land in reliance upon the city's undertaking in adopting the original zoning ordinances, it would be grossly unfair at this late date to permit the city to change the zoning. The trial court further declared ordinances numbered 548, 549 and 552 invalid and unenforceable for failure of the city to follow its own notice and procedure requirements and for lack of evidence to support a showing that these ordinances "were enacted as a result of compelling reasons or [of -- sic?] public health and safety."

The trial court held that the city was "estopped to deny Plaintiff's [appellee's] [**7] rights in [the original] zoning classification." The court then directed the city to approve the site plan when the designated deficiencies had been corrected and in due course to issue an appropriate building permit.

The city suggests four impediments to the

validity of the final judgment. We address the issues as presented by appellant city.

I

WAS RELIEF BY WAY OF MANDAMUS LEGALLY SUSTAINABLE UNDER THE FACTS AND LAW OF THIS CASE.

Relying on case law holding that mandamus will not lie to compel the doing of a discretionary act, the city points to language in appellee's petition for mandamus complaining that the City Council "failed to exercise good faith in the discharge of their judgment and limited discretion for the preliminary approval of site plans." Appellant cites *State ex rel. Zuckerman-Vernon Corp. v. City of Miramar,* 306 So.2d 173 (Fla. 4th DCA 1974) in support of its proposition that mandamus is not available under such circumstances.

In *Broward County v. Narco Realty Inc.,* 359 So.2d 509 (Fla. 4th DCA 1978) we receded from any suggestion which might be taken from the language in *Zuckerman-Vernon Corp.* that mandamus never lies to require approval [**8] of a plat. We specifically held in *Narco Realty Inc.* that ***HN1*** where all of the legal requirements for platting land have been met there is no residual discretion to refuse plat approval and mandamus will lie. The same reasoning applies to approval of site plans. Here disapproval was not based upon the three technical deficiencies but instead followed from a change in zoning. That change having been invalidated there is no impediment to requiring the formality of approval upon the correction of those deficiencies. No element of discretion remains once the legal requirements have been met. As we said in the *Narco Realty Inc.* case:

All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend upon the whim or caprice of the public body involved. Yokley, in his work, Law of Subdivisions, § 52, states:

> "Thus, while public policy requires municipal control of such development, nevertheless, the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, [*243] made to rest upon specific [**9] standards of a statute or implementing ordinances. Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act."

Likewise, in Section 53 of the same work, the author states:

> "When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board has been held to be ministerial, and such act may be enforced by a writ of mandamus."

4 Anderson, American Law of Zoning (Second Edition) § 26.04, (1976) states:

> "Mandamus to compel plat approval has been successful where the court, applying common-law principles, determined that when a subdivider has complied with all of the standards for plat approval, such approval is a ministerial act which the court may compel through a writ of mandamus...."

Id. at 510.

II

WAS THERE COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S CONCLUSION THAT THE APPELLEE HAD EXPENDED IN EXCESS OF $ 100,000.00 IN PREPARING THE PROPERTY IN QUESTION FOR DEVELOPMENT PURSUANT TO ORDINANCES 103 AND 105 AND THAT

SUCH EXPENDITURES WERE MADE IN RELIANCE UPON THE CITY'S ACTION WITH REFERENCE TO THE CLASSIFICATION OF THE PROPERTY IN QUESTION [**10] AND A 1969 LAWSUIT.

III

WAS IT ERROR FOR THE TRIAL COURT TO FIND THAT THE APPELLEE HAD A VESTED RIGHT TO THE ZONING CLASSIFICATION C-1A PERMITTING THE ERECTION OF MINI-WAREHOUSE/SHOPPING CENTER.

In essence appellant argues that there was not substantial competent evidence to support the application of an equitable estoppel against the city.

It is well established that ***HN2*** "[a]n owner of property acquires no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against the zoning authority have risen." *City of Gainesville v. Cone,* 365 So.2d 737, 739 (Fla. 1st DCA 1979). Thus a municipality "may be equitably estopped to enforce a change in zoning regulations against one who has substantially altered his position in reliance upon the original regulation,...." *City of Miami Beach v. 8701 Collins Ave.,* 77 So.2d 428, 429 (Fla.1954). The test for application of the doctrine is stated succinctly in *Town of Largo v. Imperial Homes Corporation,* 309 So.2d 571, 572 (Fla. 2d DCA 1975):

> ***HN3*** The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property [**11] owner
>
> (1) relying in good faith
>
> (2) upon some act or omission of the government
>
> (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired.

The final judgment determined that appellee relied in good faith upon zoning enacted by the city to induce him to request annexation of his property by the city and that he (1) expended considerable sums of money and (2) substantially changed the nature and contour of the land and its drainage system because of that reliance. Accordingly, the judgment concluded it would be grossly unfair to permit the city to change the zoning in mid-stream. The findings of fact are supported by substantial competent evidence and the conclusions of law follow logically from the findings. We are not permitted and we therefore have not attempted to reweigh the evidence or to consider the relative credibility of testimony.

[*244] We come, then, to appellant's final point on appeal.

IV

WAS IT ERROR FOR THE COURT TO DIRECT THE CITY TO APPROVE SITE PLANS AND ISSUE A PERMIT UPON THE CORRECTION OF CERTAIN DEFICIENCIES [**12] IN SAID PLAN AND IN EFFECT TAKE AWAY FROM THE APPELLANT THE DISCRETIONARY DUTIES OF THE LEGISLATIVE BODY.

To the extent that appellant's statement of this argument raises the issue of the discretionary power of the municipality to act or not to act where all legal requirements have been met, we refer back to our conclusions under Point I. The new ordinances were struck down for failure of the city to fulfill its own notice and procedural requirements. The implication that this is an interference with a legitimate exercise of the legislative prerogative is

unwarranted. To the extent, also, that the point suggests that approval of a plat or a site plan is a legislative function, we disagree and adhere to the view that such a function is administrative rather than legislative.

Of ultimate importance, however, is the fact that the city has been found to be equitably estopped from changing the zoning. To suggest that this usurps a legislative function or that the discretion remains nonetheless to thwart appellee's site approval would not only be counter-productive but indeed a contradiction in terms and a reversal of the legislative and judicial roles. Obviously ***HN4*** circumstances [**13] may be envisioned which would preclude an estoppel as where the public health or safety is placed in jeopardy. In the absence of evidence of some such factor, however, a municipality will be held to the same standards of fair dealing that are applied to other entities. That was done here and we find no error.

In light of our holding that the doctrine of equitable estoppel requires affirmance of the judgment under review we do not consider whether application of the doctrine of estoppel by judgment based upon the 1969 judgment would similarly support an affirmance.

Having determined that the final judgment is supported by substantial competent evidence, we affirm.

AFFIRMED.

ANSTEAD and BERANEK, JJ., concur.

End of Document

Appendix 31.

Hoerrmann v. Wabash R. Co.

Supreme Court of Illinois

October 20, 1923.

No. 15499.

Reporter
309 Ill. 524 *; 141 N.E. 289 **; 1923 Ill. LEXIS 997 ***

ANNA HOERRMANN, Appellant, *vs.* THE WABASH RAILWAY COMPANY *et al.* Appellees

Prior History: [***1] APPEAL from the Circuit Court of Will county; the Hon. FREDERICK A. HILL, Judge, presiding.

Disposition: *Decree affirmed.*

Core Terms

street, railway company, village, feet, right of way, amendments, Front, strip, railroad, highway, vacation, track, ordinance, plat, feet wide, west side, conveyed, feet west, structures, extending, built, deed, original right, south end, west line, coal-chute, cross-bill, depot

Case Summary

Procedural Posture
Appellant widow sought review of a judgment of the Circuit Court of Will County (Illinois), which dismissed the widow's bill and the cross-bill of appellees, a railroad company and a village, for want of equity. The widow had sought a decree that would have declared a village ordinance that vacated a street void and for the restraint of the company from obstruction or exclusive use of the portion of that street in front of the widow's property.

Overview
The village sought review of the dismissal of its cross-bill. A predecessor in title had conveyed to a railroad's predecessor a strip of land for its use. Two years later, a committee of a county board of supervisors laid out a public highway near the strip of land conveyed to the railroad's predecessor. The predecessor in title then conveyed a strip of land between the highway and the land conveyed to the railroad but reserved public access. The village was organized and the highway became a street within the village. The railroad acquired the track and right of way from its predecessor. The widow and her deceased husband purchased their property on the other side of the street. They complained about the railroad's encroachment of the street. In settlement of an ejectment action, the village adopted an ordinance that vacated part of the street to the railroad. The court held that: (1) the widow was entitled to a recovery of damages her property suffered as a result of the vacation of the street but she was not entitled to an injunction; and (2) the cross-bill was properly dismissed because the village never accepted the additional strip of land for use as part of the street.

Outcome
The court affirmed the circuit court's decree.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Trustees > Duties & Powers > General Overview

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Bridges & Roads

HN1 The village holds its streets in trust for the benefit of the public and the care and supervision of the streets are committed by law to the president and board of trustees. Their judgment as to the public necessity for a street and what the interest of the public requires, if fairly exercised, is not subject to the control of the courts. If fraud has intervened and the power of the trustees has been exercised with reference to private interests, without regard to the public interests, their action may be adjudged void. The motives of the trustees, however, cannot be called in question. They are presumed to act from honest motives, and it is only where it is apparent that no regard whatever has been given to the public interest that their action will be held void. However much the court may disagree with the

wisdom of their conclusion or the correctness of their judgment as to the public interests, it will not undertake to substitute its judgment for that of the trustees.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General Overview

Governments > Local Governments > Duties & Powers

Real Property Law > Subdivisions > General Overview

HN2 The act of approval by a village board when the statutes and ordinances are complied with in making a plat of a subdivision, is ministerial and may be enforced by mandamus.

Counsel: P. C. HALEY, and ROBERT E. HALEY, for appellant.

BARR & BARR, and DONOVAN, BRAY & GRAY, (J. V. BARTLEY, and JAMES A. BRAY, of counsel,) for appellees.

Opinion by: DUNN

Opinion

[*525] **[**289]** Mr. JUSTICE DUNN delivered the opinion of the court:

A bill was filed in the circuit court of Will county against the Wabash Railway Company and the village of Manhattan, praying for a decree declaring an ordinance of the village vacating a part of Front street void and restraining the Wabash Railway Company from obstructing Front street or continuing to occupy exclusively any part of it for its private use and restraining the village from permitting any such acts by the railway company. Gustav Hoerrmann and Anna Hoerrmann, his wife, were the original complainants. During the progress of the suit Hoerrmann died and the suit was revived in the name of Anna Hoerrmann, who by virtue of his will succeeded to all his rights. Answers were filed, as well as a cross-bill by the village of Manhattan, issues were joined, the cause was heard by Judge Dibell and was taken under **[***2]** advisement, but before it was decided he died. By a stipulation of the parties the evidence which had been heard was transcribed by the reporter, the cause was submitted for decision to Judge Frederick A. Hill upon the pleadings and transcript of the evidence with such argument as counsel should present, it being stipulated that no further evidence should be heard, and a **[*526]** decree was entered dismissing both the bill and the cross-bill for want of equity. The complainant in the original bill has appealed to this court, the judge having certified that the validity of a municipal ordinance was involved and that in his opinion the case should be passed upon by the Supreme Court, and the village of Manhattan has assigned cross-errors on the dismissal of its cross-bill.

It is unnecessary to set forth the pleadings **[**290]** in detail. The facts alleged and proved, so far as they are material, are as follows: On September 24, 1879, Elihu Trask, who was the owner of the west half of the northeast quarter of section 20, town 34, north, range 11, east of the third principal meridian, in Will county, conveyed to the Chicago and Strawn Railway Company a strip of land 66 feet **[***3]** wide, being 33 feet on each side of the center of the track of the railway company as it was then located across the tract of land above described. On October 21, 1881, a public highway was laid out by a committee of the board of supervisors of Will county on appeal from the decision of the highway commissioners of the town of Manhattan on a petition to lay out a road 60 feet wide. The road as laid out was described as commencing at the center of the west line of the northwest quarter of section 20; running thence east to the Wabash railway lands; thence north 19 1/2 degrees, east along the west bounds of said railway lands to the road leading from the Twelve-mile grove to Joliet, for a more particular description of which reference was made to the plat and survey annexed and made by J. M. Pierce, deputy county surveyor. The damages awarded by the committee were paid to Trask, the owner of the land, and the road became a duly established highway. A reference to the plat and survey annexed shows the highway thus laid out was 60 feet wide from the beginning of the road at the west side of the section "to the railway station ground, thence 50 feet wide to the State road." The plat **[***4]** shows the railroad and the Manhattan station grounds with a jog in **[*527]** the east line of the road at the south end of the plat of the station grounds and with the figures "50" between the lines indicating the road at this point and also near the State road, and the figures "60" at the place where the road turns north along the railroad right of way. It is clear that at this jog the width of the road was reduced to 50 feet. This left a strip along the west side of the right of way of the railway company 10 feet wide between the right of way and the highway. On November 4, 1881, Trask executed a deed to the Chicago and Strawn Railway Company conveying "a strip of land 17 feet wide on the westerly side of a strip of land 33 feet wide already conveyed to said railway company, said 17 feet to be left open for public travel

and use, running in a southwesterly direction and parallel thereto a distance of 656 feet, beginning at the center of the highway known as the Joliet and Twelve-mile Grove road." This deed conveyed the 10-foot strip between the original right of way and the highway but not as a right of way of the railway company. It was to be kept open for public travel and [***5] use, and the use of it for the exclusive purposes of the railway company was excluded by the terms of the conveyance. The deed also conveyed the fee in seven feet off the east side of the highway, subject to the easement of the public, but this did not convey any right of way to the railway company over this seven feet which was already a part of the highway. The railroad right of way still extended only 33 feet west of the center of the track. The Wabash Railway Company succeeded to the title of the Chicago and Strawn Railway Company, the railroad was constructed, and the original depot at Manhattan was built in 1880, with its west side on the west line of the 33-foot right of way west of the track. The village of Manhattan was organized in 1886, including the highway from its junction with the Twelve-mile Grove road southwest, parallel with the railroad track to the point where it turns west. This part of the highway thus became subject [*528] to the jurisdiction and control of the village and is now known as Front street. Through the village from the south the course of the railroad is north 19 degrees 22 minutes east, and that of State street, north 26 degrees 33 minutes [***6] west. In March, 1912, a part of the property west of the railroad was platted, as McDougal's subdivision, into lots numbered from 1 to 49, inclusive, lots from 21 to 31, inclusive, facing State street and from 32 to 49, inclusive, facing Front street, with a street on the south end of the subdivision. The part of the subdivision facing Front street extends about 600 feet south of its intersection with State street and is opposite the railroad depot and other structures. The appellant and her husband acquired title to these lots and the other land fronting upon the west side of Front street on April 1, 1912, and owned all this property until his death, when he devised it to her.

The original depot, which was a few feet south of the intersection of the railroad with State street, was burned in 1909 and a new one was built, which extended eight feet west of the original 33-foot right of way. At the same time a toilet was built south of the depot. Other structures which had been previously placed on the right of way, or the 10-foot strip conveyed by Trask, were a coal and oil house, a water-tank, a hand-car house, a motor-car house and a pump house. A large well near the pump [***7] house was dug in 1886, and extended 39 feet west of the center of the main track. South of these structures were a shed, a section house a story-and-a-half high, 16 by 36 feet in size, and a chicken house. All of these were on the 17-foot strip and extended to its west line. In 1912 a new steel water-tank was constructed, with an enlarged capacity, in place of the old wooden tank and located about 30 feet north of the old one, a toilet house was built south of the section house, and further south a box-car body without running gear was set on the ground for living purposes. In 1912, also, the railway company built entirely south of the 17-foot [*529] [**291] strip a coal-chute within the 33 feet of the right of way of the railway company. This chute was just north of the east and west highway at the south end of Front street, and there was a side-track about 365 feet long leading to it, which left the main track about at the south end of the 17-foot strip. There was also a coal-storage track just west of this side-track, which extended past the coal-chute and was wholly in the street. This siding is on an embankment which extends still farther into the street.

On [***8] the appellant's property on the south end of Front street, opposite the coal-chute and the coal-storage track, are three residences. On the north end, nearly opposite the water-tank, is a blacksmith shop, and further north, opposite the depot, are two buildings used as warehouses for the storage of implements. There are no residences on any of the lots facing Front street. State street is the main street of Manhattan, which is a village having a population of 525 according to the last census. Ten years before, its population was 443; ten years before that, 393. There are some business buildings on the north side of North street, an east and west street, which State street enters a few rods northwest of its intersection with Front street, and a number of residences in the northwest part of the village. The greater part of the business section of the village is on the east side of the railroad, where are several stores, two banks, the post-office, the school house and most of the churches.

Gustav Hoerrmann and his wife, after their purchase of the property on the west side of the railroad, made numerous complaints through one of their sons to the village board of encroachments [***9] by the railway company on the street, and the railway company entered into negotiations with them for the purchase of sufficient land on the west side of the street to widen it to the full 50 feet, but no agreement was reached. On December 18, 1916, the village brought an action of ejectment against the railway company in the circuit court for the possession of a portion of the [*530] street

18 feet wide immediately adjoining the west line of the right of way of the railway company, extending from State street south to the east and west road. This suit was settled by the railway company paying to the village $1000 for the payment of all damages which might arise from the vacation of a part of Front street by the passage of the ordinance in question, and by the entry of a judgment in favor of the railway company. The ordinance was passed on April 1, 1919, the judgment was entered on April 17, and the money was paid to the village on April 19.

While a great volume of evidence was introduced, much of it is immaterial to the determination of the case in accordance with our views. There was no substantial difference in the evidence as to matters which we regard as material to **[***10]** the questions to be determined. The material questions to be considered concern the description of the part of the street vacated, the power of the trustees of the village to vacate the street, the action of the court in refusing leave to the complainant to make certain amendments to her bill, and the alleged dedication and acceptance of seven feet on the west side of the street by the platting of McDougal's subdivision. The other questions which appear in the record and have been argued are dependent on these, and the disposition of these in accordance with our view will render a consideration of the others unnecessary.

The ordinance vacated "a part of Front street in said village described as a strip 18 feet wide immediately adjoining the westerly line of the right of way of the Wabash railroad in said village, and extending from the southwesterly line of State street to the north line of the highway extending east and west along the quarter section line in section 20," etc. It is contended by the appellant that it is doubtful whether by this language is meant the 18 feet west of the 17-foot strip deeded by Trask to the railway company, and that the ordinance is void for the **[***11]** doubtful description. The appellees contend that there can be no doubt **[*531]** of the intention of the village board, and the railway company by its answer expressly disclaims any right to an 18-foot strip west of the 17-foot strip deeded by Trask. Its counsel say in their brief that it expressly disclaims any right to any portion of Front street other than the 18 feet immediately adjoining its original right of way. The original right of way was 33 feet west of the center line of the track. Trask's deed conveyed 17 feet more to the railway company but not as right of way, for it was all required to be left open and was subject to public use and travel. The ordinance in vacating 18 feet immediately adjoining the westerly line of the right of way, referred to the line of the original right of way 33 feet west of the center of the track.

HN1 The village holds its streets in trust for the benefit of the public and the care and supervision of the streets are committed by law to the president and board of trustees. Their judgment as to the public necessity for a street and what the interest of the public requires, if fairly exercised, is not subject to the control of the courts. **[***12]** If fraud has intervened and the power of the trustees has been exercised with reference to private interests, without regard to the public interests, their action may be adjudged void. The motives of the trustees, however, cannot be called in question. They are presumed to act from honest motives, and it is only where it is apparent that no regard whatever has been given to the public interest that their action will be held void. However **[**292]** much the court may disagree with the wisdom of their conclusion or the correctness of their judgment as to the public interests, it will not undertake to substitute its judgment for that of the trustees. These principles have been announced by this court in many decisions, the latest of which are *Wolbach v. Rubens, 307 Ill. 186*, *People* v. *Elgin, Joliet and Eastern Railway Co.* 298 id. 574, *People* v. *Atkins,* 295 id. 165, *People* v. *Benson,* 294 id. 236, and *People* v. *Corn Products Co.* 286 id. 226. **[*532]** Whether a street 42 feet wide sufficiently meets the public interest is a question primarily for the board of trustees to determine. That question depends upon the character of the locality **[***13]** and its relation to other parts of the village, the manner of its present or probable future use, the nature and amount of the established business, and present and probable future requirements of the public. It is not a judicial question but a legislative question and one which is entirely committed to the discretion of the trustees. There are no stores on the appellant's land; no business is conducted there. If in the judgment of the trustees the present and future requirements of the public are sufficiently accommodated by the street as it exists or as it will remain after the vacation ordinance takes effect, we would not be justified in holding that their judgment is not based upon the interest of the public but of the railway company. The village frees itself from maintaining the street to an unnecessary width and the accommodation of the public in the use of the street is not materially diminished. The fact that the railway company benefits by the vacation does not affect the power of the village to make it. The appellant is entitled to recover whatever damage her property has suffered by the vacation of the street but she is not entitled to enjoin its vacation.

During [***14] the examination of a son of the complainant as a witness before Judge Dibell he was asked the question what effect the discharge of water from the railroad had on the complainant's land. The question was objected to, and the court inquired if there was anything about that in the bill. Counsel for the complainant stated that there was not; that he was going to ask leave to amend; that he did not know of that condition when the bill was filed and there were two or three amendments which he wanted to make. Counsel for the railway company objected that the amendments ought to be submitted before proceeding further with the case. The court stated that counsel had a [*533] right to amend the bill even after they got all the proof in. No motion for leave to amend was made. A stipulation of counsel, made after Judge Dibell's death, for submitting the cause to Judge Hill for decision, provided that it should be submitted upon the pleadings and the transcript of the evidence, with such arguments as counsel saw fit to present, and that no further evidence or proof should be heard or presented. Counsel for the complainant in the hearing before Judge Hill asked leave to file amendments [***15] to the bill of complaint, which were presented to the court, but the court denied the motion, and the appellant has assigned error on this action of the court. The original bill charged that the railway company had encroached on the street and occupied it with various structures which have been mentioned; that the ordinance vacating a portion of the street authorized the continuance of such structures and the occupation of the street by them, and by narrowing the street in this way appellant's property was injured and depreciated in value. No other cause of action was suggested in the bill. No complaint was made of the manner in which the structures were maintained or conducted, no damage to the appellant's property from such cause was alleged, and no relief was asked except for the occupation of the street and the vacation of it for the purpose of such occupation. The amendments alleged improper maintenance of the toilets, the chicken house, and the operation of the coal-chute in connection with the elevation of coal and the dropping of it into the chute with loud, grating noises, creating large volumes of coal dust and other dust, which rise up in the air and when the wind is [***16] blowing from the east are carried over and on the lots of the complainant. The amendments made a complete change in complainant's cause of action. The original cause of action was based upon the occupation of the street and had nothing to do with the manner in which the obstructions were maintained. However inoffensive they might be, they were still obstructions of the street, [*534] and for that reason, alone, were complained of in the bill. So far as the amendments are concerned, this cause of action is abandoned and appellant seeks relief because of the improper manner in which the structures complained of are used. No matter how good may be the right of the railway company to maintain them in the street, the amendments complain of the manner in which they are conducted. The operation of the coal-chute in such a manner as to be a nuisance to the property of the complainant, if it is actionable at all, is just as much so if located entirely on the right of way as if located in the street. In fact, it is located entirely on the right of way, and the only obstructions at that end of the street which are in the street are the coal-storage track and the embankment. The evidence [***17] which would support the original bill would not support the amendments, and the evidence which would support the amendments would not support the original bill.

The appellant introduced some evidence [**293] which tended to support the proposed amendments. It was not competent under the issues and the railway company objected. While it was admitted, the railway company was not required to introduce evidence to contradict that which was immaterial because not within the issues made by the pleadings. When the amendments were proposed to be made the evidence had been closed and it was agreed that no further evidence should be presented. The amendments raised entirely new issues of fact and questions of law, to meet which the defendants would be entitled to offer additional evidence. The allowance of an amendment to a bill after the issue has been formed is a matter largely within the discretion of the court, and new matter changing the character of the bill and making substantially a new case cannot generally be introduced after the cause is set down for hearing. A reviewing court will not reverse for a refusal to allow such an amendment unless a manifest abuse of discretion [***18] [*535] is shown. (*Walker v. Struthers, 273 Ill. 387*; *Foss* v. *People's Gas Light and Coke Co.* 241 id. 238.) The court did not err in refusing leave to file the amendments.

The plat of McDougal's subdivision shows the original right of way line of the railway company 33 feet west of the track. It shows the 17-foot strip, the west line of which is marked "right of way line." It then shows a 50-foot street extending south the full length of the 17-foot strip. The cross-bill relied upon this plat as a statutory dedication of the west seven feet of the street which was not included in Front street as laid out. There is a dispute in the evidence as to where the fence on the west side of Front street was built, -- whether west of

this seven feet or not; but whether the seven feet was fenced out as part of the street or not, the evidence does not show that it was ever accepted by the village as part of the street. At the foot of the plat is written, "Accepted and approved by the village board of the village of Manhattan this 21st day of March, A.D. 1912. -- Henry Eberhardt, President; Attest, Eugene Hoerrmann, Clerk." ***HN2*** The act of approval by a village board, however, **[***19]** when the statutes and ordinances have been complied with in making a plat of a subdivision, is ministerial and may be enforced by *mandamus*. (*Peopel v. Massieon, 279 Ill. 312*.) Such approval is evidence that the plat complies with the statutes and ordinances but is not an acceptance of the streets. (Ibid.) There is no evidence of any work done by the village on this seven-foot strip, or of any other act indicating an acceptance of it as a part of the street by the village. The cross-bill was therefore properly dismissed.

The decree will be affirmed.

End of Document

Appendix 32.

Wiggins v. Lykes Bros., Inc.

Supreme Court of Florida.

Oct. 4, 1957.

No Number in Original

Reporter
97 So. 2d 273 *; 1957 Fla. LEXIS 3002 **

J. J. WIGGINS, Appellant, v. LYKES BROS., Inc., a Florida Corporation, Appellee.

Core Terms

easement, reservation, grazing, deed, leases, sub-lessee, rights

Case Summary

Procedural Posture
Appellant property owner sought review of the decision of the trial court (Florida), granting appellee, a former sublessee of property, a final declaratory degree recognizing a pre-existing easement for grazing rights on property.

Overview
The original owners of property conveyed land with grazing rights to third parties. Appellee used the land for grazing, first without any legal right, and later as a sublessee of the third party owners. The land was eventually sold to appellant land owner without any reservation for grazing rights. Appellee brought an action to recognize its grazing rights on appellant's land. The trial court entered judgement in favor of appellee. The court affirmed the trial court's judgment. The court rejected appellant's argument that appellee waited too long to assert its easement where mere passage of time was not enough to invoke the doctrine of laches when there were no significant improvements to the land. The court also rejected appellant's argument that appellant abandoned its easement because appellee sought permission to continue using the property to graze.

Outcome
The court affirmed the judgment of the chancellor because appellee sublessee did not abandon its easement by seeking permission to continue its actions associated with the easement, and mere passage of time did not constitute laches to bar the suit.

LexisNexis® Headnotes

Real Property Law > Deeds > Validity Requirements > Enforceability

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN1 Reservations valid in the original deed, which are not in their nature temporary or personal, run with the land, absent some controlling provision to the contrary.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Real Property Law > ... > Easements > Easement Creation > Express Easements

HN2 Mere lapse of time does not in itself constitute laches. The applicability of the doctrine of laches depends upon the facts of the particular case.

Contracts Law > ... > Estoppel > Equitable Estoppel > General Overview

Real Property Law > Ownership & Transfer > Equitable Interests

HN3 An equitable estoppel, as affecting land titles, is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience.

Real Property Law > Adverse Possession > General Overview

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Easements > Easement Creation > Easement by Prescription

HN4 An easement may be lost by an occupation on the part of a person other than the owner of the easement adverse to the right claimed, in connection with nonuser by the owner of the easement.

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

Real Property Law > Encumbrances > Limited Use Rights > Licenses

HN5 An easement once established is not divested by the acts of the dominant owner in seeking and obtaining permission or license from the owner of the servient estate to make the same use of the latter's premises as could be made under the existing servitude.

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Easements > Easement Creation > Easement by Prescription

HN6 While nonuser may sometimes destroy an easement by prescription, the rule is general that it will not destroy an easement by grant.

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Easements > Easement Creation > Express Easements

HN7 No intention to convey an exclusive easement in the property can be imputed to the grantor of the easement in the absence of a clear indication of such intention.

Counsel: **[**1]** Henderson, Franklin, Starnes & Holt, Fort Myers, for appellant.

MacFarlane, Ferguson, Allison & Kelly, Thomas Alexander, Brooks P. Hoyt and Arthur Simpson, Tampa, for appellee.

Opinion by: HOBSON

Opinion

[*274] HOBSON, Justice.

This is an appeal by defendant from final declaratory decree favorable to plaintiff except in a certain particular which is sought to be raised on cross-appeal. The litigation had its inception when plaintiff, Lykes Bros., Inc., sued J. J. Wiggins, claiming certain grazing rights in lands owned by Wiggins.

The basic facts of the case are briefly as follows: In 1922 and 1923, Reynolds and Tennant, the original owners, conveyed the lands in suit to certain grantees, and the deeds contained reservations of which the following is a sample:

"Reserving however unto the said grantors, their heirs and assigns, the **[*275]** permanent right to use said lands for grazing purposes whenever and so long as said land is not under actual cultivation by grantee, his heirs or assigns. However said grantee, his heirs or assigns, may have the use of any part of said land at any time by fencing the same, for farming purposes."

In 1925, Randolph and Lerch acquired **[**2]** the lands by warranty deed without reservation. In 1950, Randolph and Lerch conveyed the lands to appellant Wiggins, also by warranty deed without reservation.

As for the reserved rights, in 1927 Reynolds and Tennant, the original grantors, executed a quitclaim deed, covering part of the lands, to Carlton. In 1937-1939, Reynolds, Tennant and Carlton executed quitclaim deeds, covering all of the lands, to plaintiff-appellee, Lykes Bros., Inc. It does not appear that the lands were ever used for farming purposes.

The reservation in the orignal deed appears to be valid, and no direct attack upon it is made. ***HN1*** Reservations of this type, which are not in their nature temporary or personal, have been held to run with the land, absent some controlling provision to the contrary. *McCoy v. Chicago, M. & St. P.R. Co., 176 Iowa 139, 155 N.W. 995*; *Barker v. Lashbrook, 128 Kan. 595, 279 P. 12*; *Benn v. Hatcher, 81 Va. 25*; 26 C.J.S., Deeds, § 140(9),

p. 1025; 16 Am. Jur., Deeds, Sec. 304, p. 611. Although appellant claims that he had no "actual notice" of the reservation, a title search should certainly have disclosed it. The case would thus be clear, were it not for the following circumstances: **[**3]**

In 1925, Randolph and Lerch, the fee owners, leased the lands to Joe Peoples for cattle grazing purposes, and this lease was continued until 1940, in which year Randolph and Lerch leased the lands to R. D. Lyons for one year for grazing. Thereafter, from year to year until the lands were sold to appellant, Randolph and Lerch, issued cattle grazing leases to members of the Peeples family. Appellee, Lykes Bros., Inc., without any claim of right, began grazing its cattle on the lands in 1929, and apparently continued to do so until 1941, when appellee became sublessee, under the Peeples' leases, of the grazing rights to the land. Appellee continued its status as such sub-lessee until 1950, when the fee was acquired by appellant.

Appellant first contends that the plaintiff, by waiting until 1953 (the year this suit was instituted) to assert its claim under the easement reserved in the original grant, was guilty of such laches as to bar the granting of relief. It is well established that ***HN2*** mere lapse of time does not in itself constitute laches, *Blocker v. Ferguson, Fla., 47 So.2d 694*; *Bethea v. Langford, Fla., 45 So.2d 496*. It is also clear that the applicability of the doctrine **[**4]** of laches depends upon the facts of the particular case. *DeHuy v. Osborne, 96 Fla. 435, 118 So. 161*; *Fort Pierce Bank & Trust Co. v. Sewall, 113 Fla. 811, 152 So. 617*.

Appellant relies on *Geter v. Simmons, 57 Fla. 423, 49 So. 131*, and *Norton v. Jones, 83 Fla. 81, 90 So. 854*, but both of those cases depend upon a change of circumstances, and in each case it would have been patently inequitable to enforce the claim which the plaintiff had permitted to smoulder for so long a time. In the Geter case, substantial improvements had been erected on the premises without protest by the true owner, while in the Norton case, the land had been divided into city lots and blocks, conveyances had been made, liens had attached to the land, and rights of third parties had come into existence. Appellant says that the land involved herein has increased in value over the years but we find in this factor, coupled with the passage of time, no such prejudice to appellant's rights as would justify us in reversing the chancellor's determination **[*276]** that appellee's claim was not barred by laches.

By the same token, we cannot accept appellant's contention that the chancellor erred in failing to **[**5]** hold that appellee was estopped to assert the validity of its easement. We agree with appellant that ***HN3*** an equitable estoppel, as affecting land titles, "is a doctrine by which a party is prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience." *Florida Land Investmen Co. v Williams, 98 Fla. 1258, 116 So. 642, 643*; *Hagan v. Ellis, 39 Fla. 463, 22 So. 727*. But the difficulty is that we can detect no way in which appellant has been led, by appellee, into a prejudicial position. No significant improvements have been made on the land as in *Mumaw v. Roberson, Fla., 60 So.2d 741*. The period of time relied upon by appellant is that between 1940 and 1950, during almost all of which time appellee was in actual possession of the land under the Peeples leases. Thus, appellant is asking us to hold that appellee defeated its own ends by its own possession, but that this possession was really appellant's possession which was open, notorious, hostile and adverse to the claim of appellee. This state of facts does not fit into any conceivable **[**6]** extension of the doctrine of adverse possession which we can now imagine.

"***HN4*** An easement may be lost by an occupation *on the part of a person other than the owner of the easement* adverse to the right claimed, in connection with nonuser by the owner of the easement." 28 C.J.S., Easements § 63, p. 729. Italics added.

Moreover, even if the possession with which we are here concerned is the possession of the appellant, it is elementary that adverse possession cannot be permissive, Stewart, Adverse Possession, Sec. 10, 1 Florida Law and Practice, p. 318. It is also apparent that appellee, as sublessee, permitted the "possession" of appellant and even paid money, as sub-lessee, to help maintain it. Although appellant's activity in permitting the sub-lease of grazing rights might have been adverse, in a sense, to the claim now made by Lykes Bros., Inc., we think it falls short in law of the requisites of adverse possession.

Appellant says that appellee has abandoned its easement, but for abandonment of an easement all of the elements of an equitable estoppel must exist, *Nichols v. Peck, 70 Conn. 439, 39 A. 803, 40 L.R.A. 81*; *Adams v. Hodgkins, 109 Me. 361, 84 A. 530, 42* L.R.A.,N.S., **[**7]** 741, and as we have already held, equitable estoppel does not operate in this case.

Moreover, it is said to be a "general rule that ***HN5*** an easement once established is not divested by the acts of the dominant owner in seeking and obtaining permission or license from the owner of the servient estate to make the same use of the latter's premises as could be made under the existing servitude." 17 Am. Jur., Easements, Sec. 140, pp. 1025, 1026. See also Annotation, Permission or License from Owner of Servient Estate as Extinguishing an Existing Easement, 50 A.L.R. 1296. See *Powers v. Coos Bay Lumber Co., 200 Or. 329, 263 P.2d 913*.

Since equitable estoppel is not present, and since the status of appellee as sub-lessee will not destroy the easement, there is nothing left but nonuser and, ***HN6*** while nonuser may sometimes destroy an easement by prescription, the rule is general that it will not destroy an easement by grant, such as this. 28 C.J.S., Easements § 60, pp. 724-727; 17 Am. Jur., Easements, Sec. 141, p. 1026.

This brings us to consideration of the contention made on cross appeal that it was error for the chancellor to fail to provide that the grazing rights of appellee under its **[**8]** reservation are exclusive. We agree with appellant that ***HN7*** no intention to **[*277]** convey an exclusive easement in the property can be imputed to the grantor of the easement in the absence of a clear indication of such intention, *City of Pasadena v. California-Michigan Land & Water Co., 17 Cal.2d 576, 110 P.2d 983, 133 A.L.R. 1186*; *Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527*, and that such intention in the present case is by no means clear. It follows that the judgment appealed from must be, and is hereby affirmed in its entirety.

It is so ordered.

TERRELL, C.J., and ROBERTS, DREW and O'CONNELL, JJ., concur.

End of Document

Appendix 33.

Cited
As of: January 11, 2017 5:20 PM EST

Gelfand v. Mortgage Investors of Washington

Court of Appeal of Florida, Fourth District

August 8, 1984

No. 82-2356

Reporter
453 So. 2d 897 *; 1984 Fla. App. LEXIS 14621 **; 9 Fla. L. Weekly 1742

HERBERT M. GELFAND, as Operating General Partner of DE ANZA PROPERTIES-X, a California Limited Partnership, Appellant/Cross Appellee, v. MORTGAGE INVESTORS OF WASHINGTON, a Maryland Business Trust, Appellee/Cross Appellant

Prior History: [**1] Appeal and cross appeal from the Circuit Court for Broward County; Gene Fischer, Judge.

Core Terms

easement, damages, roadway, servient, grantor, parties, right of way, pre judgment interest

Case Summary

Procedural Posture
Appellant limited partnership challenged the judgment of the Circuit Court for Broward County (Florida) which granted appellee investment trust's counterclaim by declaring that an easement for access into a mobile home park was nonexclusive and denied appellant's request for prejudgment interest on its breach of contract claim regarding the sale of the park. Appellee challenged the award of damages to appellant on its breach of contract claim.

Overview
Appellant limited partnership entered into a contract with appellee investment trust to purchase a mobile home park. Appellant brought a breach on contract action against appellee, and appellee counter-claimed, seeking a declaration that an easement it granted to appellant for access to the park was nonexclusive. The trial court awarded appellant damages for breach of contract, and held that the easement in question was nonexclusive. On appeal, the court affirmed the overall determination that the damages were unliquidated and that appellant was not entitled to prejudgment interest. However, appellant had alleged at trial that a portion of the damages were liquidated; therefore, prejudgment interest should have been awarded on that part. The court also affirmed the finding that the easement was non-exclusive because the language of the instrument granting the easement was ambiguous, and the trial court properly looked to extrinsic evidence to determine that the grantor, appellee, could not have reasonably intended to exclude itself from use of the property.

Outcome
The court affirmed the award of damages to appellant limited partnership on its breach of contract claim against appellee investment trust, but reversed in part the denial of prejudgment interest. The court affirmed the finding that an easement was nonexclusive because the trial court properly considered extrinsic evidence to determine that the grantor, appellee, did not intend to be excluded from using the easement.

LexisNexis® Headnotes

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Easements > Easement Creation > Express Easements

HN1 No intention to convey an exclusive easement can be imputed to the grantor of the easement in the absence of a clear indication of such intention.

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Interference With Easements

HN2 An exclusive easement is one for the sole benefit of the easement holder and excludes use thereof by the grantor servient owner. A non-exclusive easement permits use by the servient owner. Hence, if there is any doubt, the trial court will conclude that the grantor likewise may make use of the land subject to the easement so long as he does not interfere with the use thereof by his grantee.

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN3 In determining the scope of the easement, the trial court may, if it concludes the words of the instrument the least ambiguous, resort to extraneous matters to arrive at the probable intent of the parties. Thus, the purpose of the easement, the location of the realty, the situation of the parties, and all surrounding circumstances may be considered.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Real Property Law > ... > Easements > Easement Creation > Express Easements

HN4 An instrument which is reasonably subject to conflicting interpretation is ambiguous.

Counsel: James B. Tilghman, Jr., Herman J. Russomanno, and Bertha Claire Lee of Floyd Pearson, Stewart Richman, Greer & Weil, P.A., Miami, for Appellant/Cross Appellee.

Gregory G. Jones of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee/Cross Appellant.

Judges: Downey, Hersey and Barkett, JJ., concur.

Opinion by: PER CURIAM

Opinion

[*898] This controversy arose as the result of the sale of a mobile home park known as the Colonies of Margate (Colonies). The appellant, De Anza Corporation (De Anza), purchased the Colonies from the appellee, Mortgage Investors of Washington (MIW), for $5,750,000 in 1978. At the time of the sale, the Colonies consisted of three phases. Phases I and II were already built and occupied by tenants, while Phase III was still in the process of construction and was to be completed by MIW.

Subsequent to the closing of the transaction, De Anza filed a multi-count complaint against MIW alleging various breaches of the contract and breaches of certain warranties. MIW counterclaimed seeking declaratory relief concerning an easement agreement entered **[**2]** into by the parties. After a nonjury trial, De Anza was awarded $148,929.42 in damages. The court also held that the easement in question was nonexclusive.

De Anza appeals, raising several issues and MIW cross appeals. We reverse in part and affirm in part.

The Colonies is located near State Road 7 in western Broward County. The only means of ingress and egress to the Park is an entrance road that runs from State Road 7 across surrounding land owned by MIW. Two months after MIW sold the Colonies to De Anza, the parties entered into an agreement whereby, among other things, MIW conveyed to De Anza an easement over the roadway for ingress and egress to the mobile home park. De Anza maintains that this agreement created an exclusive easement so that MIW and all third parties have no right, title or interest in the roadway. MIW, on the other hand, contends that, while third parties may be prohibited from any use of the road, MIW may continue its use of the roadway as the grantor servient owner.

In *Wiggins v. Lykes Bros. Inc., 97 So.2d 273, 276-77 (Fla. 1957)*, the court stated that "***HN1*** no intention to convey an exclusive easement . . . can be imputed to the grantor of the **[**3]** easement in the absence of a clear indication of such intention . . . ." Professor Boyer reaches a similar conclusion:

> In determining the scope of easements as in construing deeds generally, the court is aided by various rules of construction. One of these rules is that the presumption is in favor of a non-exclusive easement. ***HN2*** An exclusive easement is one for the sole benefit of the easement holder and excludes use thereof by the grantor servient owner. A non-exclusive easement, on the other hand, permits use by the servient owner. Hence, if there is any doubt, the court will conclude that the grantor likewise may make use of the land subject to the easement so long as he doesn't interfere with the use thereof by his grantee.

HN3 In determining the scope of the easement, the

> court may, if it concludes the words of the instrument the least ambiguous, resort to extraneous matters to **[*899]** arrive at the probable intent of the parties. Thus, the purpose of the easement, the location of the realty, the situation of the parties, and all surrounding circumstances may be considered.

1 R. Boyer, Florida Real Estate Transactions, § 23.04 (footnotes omitted). The easement **[**4]** agreement provides:

> D. It is further the intentions of the parties by this Agreement to create an easement across Parcel One [MIW] as a roadway for ingress and egress to and from Parcel Two [DeAnza] . . . . . .
>
> 3. MIW hereby grants to DE ANZA an irrevocable, exclusive and perpetual easement for ingress and egress purposes for Parcel Two over, along and across said Roadway (Exhibit "D"). The obligation and right of maintenance of said Roadway shall be that of the Owner of Parcel Two.

In addition, the easement agreement provided that MIW could move the roadway in connection with the development of Parcel One if a substantially similar road is substituted. The issue thus framed is whether use in the granting instrument of the term "exclusive" forecloses further consideration of the nature, extent and exclusivity of the interest created.

One might suppose, despite the contrary presumption, that the term "exclusive" would be determinative of the issue at hand. In keeping with what we believe to be the better view we hold, as did the trial court, that it is not. Thus, in the case of *Weggeland v. Ujifusa, 14 Utah 2d 364, 384 P.2d 590 (1963)*, the court **[**5]** held that a grant of "an exclusive right of way for roadway purposes as a private driveway" did not allow the plaintiff to preclude the owner of the servient estate from utilizing the right of way.

> The difficulty with the plaintiff's contention is that if it were sound, the conveyance of the right of way would be tantamount to a conveyance of the land in fee simple. This would be inconsistent with the usual nature of a right of way. Ordinarily the purpose of granting a right of way over land, rather than making an outright conveyance of it, is to retain the ownership in the servient estate (defendants) and to allow a privilege of limited use to the dominant estate (plaintiff). The accepted rule is that the language of the grant is the measure and the extent of the right created; and that the easement conveyed should be so construed as to burden the servient estate only to the degree necessary to satisfy the purpose described in the grant.

Id. at 591 (footnote omitted). The rule is explained more fully and followed in a comprehensive majority opinion, which we approve, in *Latham v. Garner, 105 Idaho 854, 673 P.2d 1048 (1983)*. On the question of use of the **[**6]** term "exclusive," that court points out:

> ***HN4*** An instrument which is reasonably subject to conflicting interpretation is ambiguous. See *Rutter v. McLaughlin, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980)*. The phrase "exclusively for their use" lends itself, without contortion, to a number of interpretations. The instrument could be interpretated as (1) the grant of an easement right of way to the grantee, the defendants herein, to the exclusion of all others, except the grantor; or (2) the grant of an easement right of way excluding all others, including the grantor; or, (3) as the grant of a fee simple estate to the grantee. Thus, the instrument is reasonably subject to conflicting interpretations and as such is ambiguous.

Id. at 1052 (footnote omitted).

Here the trial court found the instrument ambiguous, considered extrinsic evidence and determined that use of the easement was not to exclude use by the grantor servient owner. Finding that holding supported by substantial competent evidence, we affirm as to it.

The second point, relating to prejudgment interest, requires reversal in part. On appeal, De Anza argues that it should have been awarded prejudgment **[**7]** interest on various liquidated damages. The **[*900]** trial court found that the damages were unliquidated and denied an award of prejudgment interest on all damages.

A review of the record indicates that, with the exception of the award of $15,000 for certain landscaping, De Anza's position at trial was that the damages were *unliquidated* and it is only on appeal that it is alleged that the other damages are *liquidated* as well. Therefore, we find no error in the court's over-all determination that the damages were unliquidated and that De Anza was not entitled to prejudgment interest. We do find, however, that the $15,000 awarded to De Anza for landscaping an area known as the Greenbelt

was liquidated since there was an exact amount due and owing at a particular time. *Bryan and Sons Corp. v. Klefstad, 265 So.2d 382 (Fla. 4th DCA 1972)*. At trial De Anza alleged that this portion of the damages was liquidated. Therefore, prejudgment interest should have been awarded on the $15,000.

We have reviewed the remaining issues and the cross appeal, and we find no additional errors. The matter is therefore remanded for further proceedings consistent herewith.

AFFIRMED [**8] IN PART; REVERSED IN PART; REMANDED.

DOWNEY, HERSEY and BARKETT, JJ., concur.

End of Document

Appendix 34.

Consolidated Gas Co. v. City Gas Co.

Court of Appeal of Florida, Third District

March 6, 1984

No. 82-2676

Reporter
447 So. 2d 351 *; 1984 Fla. App. LEXIS 12119 **

CONSOLIDATED GAS COMPANY OF FLORIDA, a Florida corporation, Appellant, v. CITY GAS COMPANY OF FLORIDA, a Florida corporation, Appellee

Subsequent History: [**1] Rehearing Denied April 11, 1984.

Prior History: An appeal from the Circuit Court for Dade County, John Gale, Judge.

Core Terms

easement, clear statement, right-of-way, install, rights

Counsel: Mershon, Sawyer, Johnston, Dunwody & Cole and William J. Dunaj and Philip A. Allen, III, for Appellant.

Steel, Hector & Davis and Arthur J. England, Jr. and Nancy E. Swerdlow, for Appellee.

Judges: Schwartz, C.J., and Nesbitt and Daniel S. Pearson, JJ.

Opinion by: PER CURIAM

Opinion

[*352] We affirm the judgment under review entered in favor of City Gas Company of Florida upon holdings that (1) the agreement between the developer and Consolidated Gas Company of Florida, which (a) gave to Consolidated "an exclusive franchise" to "install and maintain gas tanks, gas lines, appliances and appurtenances" in the developed subdivision did not create an easement or property right in the land enforceable by Consolidated against City Gas Company, *see* Colen v. Sunhaven Homes, Inc., 98 So.2d 501 (Fla. 1957); Leonard v. Baylen Street Wharf Co., 59 Fla. 547, 52 So. 718 (1910); St. Joe Natural Gas Co. v. City of Ward Ridge, 265 So.2d 714 (Fla. 1st DCA 1972); North Dade Water Co. v. Florida State Turnpike Authority, 114 So.2d 458 (Fla. 3d DCA 1959); G. W. Thompson, [**2] *Thompson on Real Property* § 295 at 644 (1980 replacement); *see generally* Loxahatchee Recreation, Inc. v. Harrison, 367 So.2d 237 (Fla. 4th DCA 1979), and (b) gave to Consolidated a "*perpetual* right-of-way easement" did not create an "*exclusive* right-of-way easement," *see* Holbrook v. Telesio, 225 Cal. App. 2d 152, 37 Cal.Rptr. 153 (1964) (the grant of an exclusive easement must be clearly stated); *see also* Jabour v. Toppino, 293 So.2d 123 (Fla. 3d DCA 1974); Claughton Hotels, Inc. v. City of Miami, 140 So.2d 608 (Fla. 3d DCA 1962); and (2) in the absence of an easement specifically and clearly stated to be exclusive, City Gas Company of Florida, a public utility granted statutory easement rights, is privileged to use the servient land in any manner not inconsistent with the limited use vested in the easement owner, *cf.* City of Pasadena v. California-Michigan Light & Water Co., 17 Cal.2d 576, 110 P.2d 983 (1941) (grant to city of non-exclusive easement for the installation of water pipes did not preclude grant to another water company of similar rights in easement).

Affirmed.

End of Document

Appendix 35.

Cited
As of: January 11, 2017 5:22 PM EST

Feather v. Donaldson

Court of Appeal of Florida, Fifth District

December 19, 1985

No. 84-1800

Reporter
481 So. 2d 937 *; 1985 Fla. App. LEXIS 16949 **; 11 Fla. L. Weekly 33

ROBERT G. FEATHER, etc., et al., Appellants, v. ANDREW CRAIG DONALDSON, et al., Appellees

Subsequent History: [**1] Rehearing Denied January 17, 1986.

Prior History: Appeal from the Circuit Court for Seminole County, Robert B. McGregor, Judge.

Core Terms

easement, conveyance, reconveyance, purposes, public road, municipality, conveyed, grantor, specific purpose, road purposes, conclusively, abandoned, permanent, sections, owning, strip, deed, adjoining land, quitclaim deed, right to use, fee title, circumstances, unimproved, construct, entity

Case Summary

Procedural Posture

Appellant county commissioners sought review of an order of the Circuit Court for Seminole County (Florida) that required them to reconvey a parcel of land to appellee individual based on *Fla. Stat. ch. 255.22* and 255.23 (1983).

Overview

A corporation granted appellant county commissioners a permanent easement to a piece of property to be used for road purposes. The corporation later subdivided the adjacent property for residential construction. Appellee individual purchased the property located at the corner easement. Appellant constructed and maintained a road on one side of the property, but did not make any improvements to the other strip. Appellee commenced an action against appellee to compel reconveyance of the unimproved strip based on *Fla. Stat. ch. 255.22* and 255.23 (1983). The trial court ordered appellant to reconvey the land. The court found that the action was improperly maintained under *Fla. Stat. ch. 255.22* and 255.23 (1983) because the original conveyance to appellant was a permanent easement for public road purposes. A conveyance by appellant to appellee would have created no additional right because an easement for use of land by the public was an exclusive easement, and a reconveyance would not vest the fee title in appellee. At most reconveyance would give appellee an easement for public roads. The original grantor of the easement held the fee interest in the property subject to the easement.

Outcome
Judgment of the lower court that ordered appellant county commissioners to reconvey a piece of property to appellee individual was reversed because appellant only had an easement for use of the land. The original conveyor held the fee interest in the property subject to the easement.

LexisNexis® Headnotes

Real Property Law > ....> Limited Use Rights > Easements > General Overview

HN1 See *Fla. Stat. ch. 255.22* (1983).

Real Property Law > ... > Limited Use Rights > Easements > General Overview

HN2 See Fla. Stat. ch. 255.23 (1983).

Real Property Law > Encumbrances > Limited Use Rights > General Overview

Real Property Law > ... > Limited Use Rights > Easements > General Overview

Real Property Law > ... > Limited Use Rights > Easements > Termination of Easements

HN3 Where an easement has been granted it becomes, in effect, an encumbrance upon the fee title and if the easement expires or is otherwise cancelled the fee is then unencumbered. The original grantor of the conveyance, absent its subsequent conveyance of the fee interest, remains the owner of the fee subject to the easement. If the purpose of the easement no longer is necessary, it may be extinguished.

Counsel: Nikki Clayton, County Attorney for Seminole County, and Robert A. McMillan, Deputy County Attorney for Seminole County, Sanford, for Appellants.

Marcia K. Lippincott of Marcia K. Lippincott, P.A., Orlando, for Appellees.

Judges: Upchurch, F., J. Cobb, C.J., and Cowart, J., concur.

Opinion by: UPCHURCH

Opinion

[*937] Appellants, the County Commissioners of Seminole County, appeal from a final judgment requiring them to reconvey a parcel of land to appellees, the Donaldsons. At trial, the Donaldsons successfully contended they were entitled, under *sections 255.22* and 255.23, Florida Statutes (1983), [1] to reconveyance **[*938]** of land which had been conveyed to the county by deed in August, 1963. We disagree.

[2]** This case originated on August 13, 1963, when Rana Park Corporation granted a permanent easement to Seminole County of an L-shaped piece of property to be used for road purposes. Rana Park Corporation later subdivided the adjacent property for residential construction. The property located at the corner of the "L" was eventually purchased by the Donaldsons. Since 1963, the county has constructed and maintained a road on one side of the "L", but has not made any improvements on the other strip. In 1983, the Donaldsons commenced an action against the county to compel the reconveyance of the unimproved strip. Relying on *sections 255.22* and 255.23, the court below concluded that the 1963 deed, while it was a single document, was divisible in regards to the two strips and the unimproved portion was conclusively presumed to have been abandoned.

We conclude that the action was improperly maintained under *sections 255.22* and 255.23. The conveyance to the county in 1963 consisted of a permanent easement for public road purposes. There was no conveyance of the fee. While an easement is a property interest subject to transfer by deed, *section 255.22* did not contemplate the conveyance **[**3]** of an easement for "public road purposes" because such a reconveyance would have no effect. When a city, county or other public entity (or, for that matter, a private individual or entity) owns or holds a permanent easement for "*public road purposes*", all members of the public have the right to use the land for road purposes. This would include the Donaldsons in this case. The conveyance from the county to them would create no additional right. If the court had been dealing with an "*exclusive*" easement, the effect would be different. For example, if the grantor had given the county an exclusive easement for private road purposes, then a reconveyance from the county to a private party would give them the exclusive right to use the land for road purposes. However, an easement

---

[1] *Section 255.22, Florida Statutes* (1983), states as follows:

> *HN1* Reconveyance of lands not used for purpose specified.—In event any party owning adjoining land shall convey real property, without receipt of valuable consideration, to any municipality or county for a specific purpose for use and if such county or municipality shall fail to use such property for such purpose for a period of 60 consecutive months, then in that event upon written demand of the grantor, or grantor's successors in title owning such adjoining land, the municipality or county may execute and deliver a quitclaim deed to the party making such demand provided such party is the owner of land adjoining such property on at least one side. No such quitclaim deed shall be delivered hereunder unless the specific purpose for use to be made of the property was disclosed to the grantee at the time of delivery of the conveyance or appeared in the conveyance or an official record of the county; provided however, that as to any such conveyance after July 1, 1967, the specific purpose of use must appear of record.

Section 255.23, Florida Statutes (1983), states:

> *HN2* Conclusive presumption of abandonment of purpose in certain circumstances.—In event the purpose for which the property was conveyed required physical improvement or construction on such property or the maintenance thereof, any such municipality or county, failing to construct, improve or maintain such property for the period above specified shall be conclusively deemed to have abandoned the property for the purpose for which it was conveyed.

for a use of land by the "*public*" is necessarily the antithesis of an "exclusive" easement. A reconveyance under *section 255.22* could not vest the fee title with the Donaldsons but, at most, would give them an easement for public road purposes.

HN3 Where an easement has been granted it becomes, in effect, an encumbrance upon the fee title and if the easement expires or is otherwise cancelled the **[**4]** fee is then unencumbered. The original grantor of the conveyance, Rana Park Corporation, absent its subsequent conveyance of the fee interest, remains the owner of the fee subject to the easement. If the purpose of the easement no longer is necessary, it may be extinguished. *Canal Authority of State v. Mainer, 440 So.2d 1304 (Fla. 4th DCA 1983)*. However, under the existing circumstances, title to the fee could not devolve to the Donaldsons by operation of law under *section 255.22*. Having resolved this case on these grounds, we decline to address the other issues raised on appeal.

REVERSED and REMANDED for entry of judgment for appellants.

COBB, CJ., and COWART, J., concur.

End of Document

Appendix 36.

Rollins v. Pizzarelli

Supreme Court of Florida

May 4, 2000, Decided

No. SC92080

Reporter
761 So. 2d 294 *; 2000 Fla. LEXIS 824 **; 25 Fla. L. Weekly S 331

JANE ROLLINS, et al., Petitioners, v. MICHAEL PIZZARELLI, et al., etc., Respondent.

Subsequent History: [**1] Rehearing Denied June 19, 2000. Released for Publication June 19, 2000.

Prior History: Application for Review of the Decision of the District Court of Appeal . . . Certified Great Public Importance Fourth District - Case No. 4D96-3628 (St. Lucie County).

This Opinion Substituted on Grant of Rehearing for Withdrawn Opinion of February 4, 1999, Previously Reported at: *1999 Fla. LEXIS 118*.

Disposition: Answered the certified question in the affirmative, approved the decision of the Fourth District, and disapproved Kokotis.

Core Terms

benefits, expenses, carrier, setoff, Statutes, damages, future medical expenses, personal injury, tort-feasors, supplied, insured, collateral source, no-fault, provides, legislative history, medical expenses, setoff, statutory construction, trial court, provisions, equitable distribution, statutory language, special damage, Dictionary

Case Summary

Procedural Posture

Petitioner tort-feasor filed an application for review of a decision of the District Court of Appeal (Florida), reversing the trial court's decision in respondent's personal injury action and holding that payable benefits under *Fla. Stat. Ann. § 768.79* did not include those for future medical expenses that had not yet been incurred.

Overview

Respondent brought a personal injury action for damages sustained in an accident with petitioner tort-feasor. The trial court ruled for respondent and held that under *Fla. Stat. Ann. § 627.736(3)* respondent's future medical expense award was offset by respondent's remaining personal injury protection (PIP) benefits. Respondent appealed, and the appellate court reversed the issue of PIP benefits and held that the definition of payable benefits under *Fla. Stat. Ann. § 627.736(3)* did not include those for future medical expenses that had not yet been incurred. Petitioner filed an application for review, claiming that the appellate court erred because *Fla. Stat. Ann. § 627.736(3)*'s definition of payable benefits included those for future medical expenses that had not yet been incurred. The court affirmed, holding that the appellate court did not err, because the proper interpretation of the term payable under *Fla. Stat. Ann. § 627.736(3)* was that only PIP benefits currently payable or owed by the PIP carrier as a result of expenses incurred by respondent should be set off from a verdict that includes an award of future medical expenses.

Outcome

Judgment affirmed because only personal injury protection (PIP) benefits currently payable or owed by the PIP carrier as a result of expenses incurred by respondent should be set off from a verdict that includes an award of future medical expenses.

LexisNexis® Headnotes

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > General Overview

Torts > ... > Damages > Collateral Source Rule > General Overview

Torts > Procedural Matters > Settlements > General

Overview

HN1 See *Fla. Stat. Ann. § 627.736(3)*.

Torts > ... > Damages > Collateral Source Rule > General Overview

HN2 See Fla. Stat. Ann. § 627.7372(1).

Torts > ... > Damages > Collateral Source Rule > General Overview

Torts > ... > Compensatory Damages > Types of Losses > Medical Expenses

HN3 *Fla. Stat. Ann. § 627.736(3)* provides that an injured party who is entitled to bring suit under the provisions of *Fla. Stat. Ann. § 627.730*-.7405, or his legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable.

Governments > Legislation > Interpretation

HN4 The legislature's intent must be determined primarily from the language of the statute. Accordingly, when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. Ambiguity suggests that reasonable persons can find different meanings in the same language.

Governments > Legislation > Interpretation

HN5 If a statutory term is susceptible to more than one reasonable interpretation, it is necessary to resort to principles of statutory construction to ascertain legislative intent.

Governments > Legislation > Interpretation

HN6 When a term is undefined by statute, one of the most fundamental tenets of statutory construction requires that we give a statutory term its plain and ordinary meaning. When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary. Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law.

Torts > Remedies > Damages > General Overview

HN7 The term payable has been defined as meaning capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable.

Torts > ... > Types of Damages > Compensatory Damages > General Overview

HN8 *Fla. Stat. Ann. § 627.736(4)* provides that personal injury protection benefits are due and payable as loss accrues, upon receipt of reasonable proof of such loss.

Governments > Legislation > Interpretation

HN9 The axioms of statutory construction provide that statutes must be read together to ascertain their meaning, and that the same meaning should be given to the same term within subsections of the same statute.

Insurance Law > Types of Insurance > Motor Vehicle Insurance > General Overview

Torts > Remedies > Damages > General Overview

HN10 See *Fla. Stat. Ann. § 627.736(4)*.

Governments > Legislation > General Overview

Governments > Legislation > Interpretation

HN11 When the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute. However, when the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent.

Insurance Law > Types of Insurance > Motor Vehicle Insurance > General Overview

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > General Overview

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

Torts > ... > Compensatory Damages > Types of Losses > Medical Expenses

HN12 The personal injury protection carrier (PIP) is not a party to the litigation and is not bound by the jury's determination of the amount of damages, including the amount awarded by the jury for the plaintiff's future expenses. Instead, the PIP carrier has a separate right to contest the reasonableness and necessity of the medical expenses at the time the expenses are incurred in the future. Additionally, the insurer might not even be in business when the plaintiff's medical expenses are incurred.

Governments > Legislation > Interpretation

Insurance Law > ....> No Fault Coverage > Personal Injury Protection > General Overview

Torts > ... > Damages > Collateral Source Rule > Insurance Payments

HN13 Statutory provisions altering common-law principles must be narrowly construed.

Counsel: James K. Clark of James K. Clark & Associates, Miami, Florida; and Garrison M. Dundas of Brennan, Hayskar, Jefferson, Walker & Schwerer, Ft. Pierce, Florida, for Petitioners.

Julie H. Littky-Rubin of Lytal, Reiter, Clark, Fountain & Williams, West Palm Beach, Florida, for Respondents.

Sharon Lee Stedman of Sharon Lee Stedman, P.A., Orlando, Florida, for Allstate Insurance Company, Amicus Curiae.

Dock A. Blanchard of Blanchard, Merriam, Adel & Kirkland, P.A., Ocala, Florida, for The Academy of Florida Trial Lawyers, Amicus Curiae.

Judges: ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur. HARDING, C.J., dissents with **[**2]** an opinion, in which WELLS, J., concurs. WELLS, J., dissents with an opinion. SHAW, J., dissents.

Opinion

[*295] PER CURIAM.

Upon consideration of the respondents' motion for rehearing, rehearing is granted. The opinion issued in this case on February 4, 1999, is withdrawn, and the following opinion is substituted in its place.

We have for review *Pizzarelli v. Rollins, 704 So. 2d 630 (Fla. 4th DCA 1997)*, in which the district court recognized conflict with the opinion in *Kokotis v. DeMarco, 679 So. 2d 296 (Fla. 5th DCA 1996)*, and certified the following question to this Court:

> WHETHER THE TERM "PAID OR PAYABLE" IN *SECTION 627.736(3), FLORIDA STATUTES* (SUPP. 1996), **[*296]** SHOULD BE DEFINED AS "THAT WHICH HAS BEEN PAID, OR PRESENTLY EARNED AND CURRENTLY OWING" SO THAT THE STATUTORY LANGUAGE OF *SECTION 627.736* WILL NOT BE INTERPRETED TO PERMIT ANY REMAINING PERSONAL INJURY PROTECTION BENEFITS TO BE USED FOR SET-OFFS FOR FUTURE COLLATERAL SOURCES.

704 So. 2d at 633. We have jurisdiction pursuant to *article V, section 3(b)(4) of the Florida Constitution.* For the reasons expressed below, we answer the certified question **[**3]** in the affirmative.

FACTS

The record in this case is silent regarding many of the relevant facts, as it fails to provide a complete transcript of the trial. Additionally, the district court opinion does not provide a factual background. Based on the parties' representations at oral argument and in their briefs, we are able to glean the following facts. Carlene Pizzarelli, the daughter of Michael and Michelle Pizzarelli, was injured in an accident when she was a passenger in a car that was hit by another car driven by Dasha Marie Cates and owned by Jane Rollins. The Pizzarellis sued Rollins and Cates. Medical bills incurred prior to trial by the Pizzarellis in the amount of $ 13,212.60 were admitted into evidence without objection. *Section 627.736(1)(a), Florida Statutes* (1991), provides that personal injury protection ("PIP") benefits will cover 80% of medical bills. The Pizzarellis had $ 10,000 in PIP coverage.

During the trial, the issue arose as to whether the jury should be advised that $ 524.78 in additional PIP benefits were available to the Pizzarellis to defray the cost of future medical expenses. The defendants, Rollins and Cates, argued that **[**4]** the plain language of *section 627.736(3), Florida Statutes* (1991), [1] **[**5]**

1

This statute provides:

> ***HN1*** (3) Insured's rights to recovery of special damages in tort claims. . . . No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405, or his legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable. The plaintiff may prove all of his special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all

required the court to instruct the jury not to compensate the Pizzarellis for PIP benefits that had been paid or were to be paid in the future. The Pizzarellis argued that section 627.7372, Florida Statutes (1991), [2] applied and entitled Rollins and Cates to a setoff only for those PIP benefits that had been paid up until the time of trial.

The trial judge ruled that because the PIP payments were made a part of the record of the case through the payout ledger, the future PIP benefits issue could be taken up post-trial. The jury awarded the Pizzarellis $ 5000 in future medical expenses and $ 48 in lost earnings. The jury also found that the victim suffered permanent **[*297]** injury and awarded the Pizzarellis $ 20,000 for past **[**6]** and future pain and suffering. After trial, both parties stipulated that there remained $ 524.78 in available PIP benefits.

HN3 *Section 627.736(3)* provides that "An injured party who is entitled to bring suit under the provisions of ss. 627.730-627.7405, or his legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable." The trial court concluded that the remaining $ 524.78 in PIP benefits fit the definition of "payable" and therefore set off the $ 524.78 from the $ 5000 future medical expense award.

On appeal, the Fourth District Court of Appeal agreed with the trial court that *section 627.736(3)* applied rather than section 627.7372. However, the Fourth District disagreed with the trial court as to the definition of "payable," reasoning that under the plain language of the statute, "payable" benefits do not include those for future medical expenses that have not yet been incurred. *See Pizzarelli, 704 So. 2d at 633*. The district court reversed and instructed the trial court on remand to reinstate the jury's verdict for the full amount of future damages and to award reasonable costs and attorney's **[**7]** fees under *section 768.79, Florida Statutes* (1991). [3] *See Pizzarelli, 704 So. 2d at 633*.

[8]** ANALYSIS

The question presented by this case is whether the Legislature, by using the term "payable" in section 627.727(3), intended to limit the setoff from damages only to expenses that had been incurred and were due and owing at the time of the judgment or whether the Legislature intended the setoff to be coextensive with the remaining amount of PIP benefits. The Fifth District concluded in *Kokotis* that "'payable' as used in this statute includes expenses which have not yet accrued but which will result from the covered injury." *679 So. 2d at 297*. In contrast, the Fourth District concluded that the term "payable" in section 627.727(3) means only those medical expenses that have been incurred prior to trial but not yet paid or processed by the PIP carrier. *See Pizzarelli, 704 So. 2d at 632*.

HN4 The Legislature's intent must be determined primarily from the language of the statute. *See Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank, 609 So. 2d 1315, 1317 (Fla. 1992)*. Accordingly, "when the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules **[**9]** of statutory

---

cases in which a jury is required to fix damages, the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits *paid or payable*.

§ 627.736(3), Fla. Stat. (1991) (emphasis supplied).

2

Specifically, ***HN2*** section 627.7372(1), Florida Statutes (1991), provides:

(1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources *paid to* the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits *received by* the claimant from any collateral source.

(Emphasis supplied.) This statute has since been repealed, *see* ch. 93-245, § 3 at 2439, Laws of Fla., and the general collateral source statute is now found in *section 768.76, Florida Statutes* (1999).

[3] Because the total verdict in the case was $ 25,048 ($ 5000 in future medical expenses, $ 20,000 in pain and suffering, and $ 48 in lost earnings), after the trial court set off the remaining $ 524.78 in available PIP benefits, the total judgment became $ 24,523.22. The Pizzarellis had made a demand for judgment in the case for $ 20,000. According to *section 768.79, Florida Statutes* (1991), if the plaintiff makes a demand which is not accepted by the defendant and the plaintiff recovers a judgment in an amount at least 25% greater than the demand, he or she shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. Thus, after setting off the available PIP benefits, the judgment was no longer 25% greater than the demand and the trial court found the Pizzarellis were no longer entitled to reasonable costs and attorney's fees under *section 768.79*.

interpretation and construction; the statute must be given its plain and obvious meaning." Modder v. American Nat'l Life Ins. Co., 688 So. 2d 330, 333 (Fla. 1997) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). "Ambiguity suggests that reasonable persons can find different meanings in the same language." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992). We find that because the term "payable," as used by the Legislature in section 627.736(3), **HN5** is susceptible to more than one reasonable interpretation, it is necessary to resort to principles of statutory construction to ascertain legislative intent. **[*298]** See Forsythe, 604 So. 2d at 455; Holly, 450 So. 2d at 219.

The term "payable" is not defined by statute. **HN6** When a term is undefined by statute, "[o]ne of the most fundamental tenets of statutory construction" requires that we give a statutory term "its plain and ordinary meaning." Green v. State, 604 So. 2d 471, 473 (Fla. 1992). When necessary, the plain and ordinary meaning "can be ascertained by reference to a dictionary." *Id.* **[**10]** Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law. See State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997); State v. Hagan, 387 So. 2d 943, 945 (Fla. 1980); Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602 (Fla. 2d DCA 1997).

HN7 The term "payable" has been defined in this Court's case law as "meaning 'capable of being paid; suitable to be paid; admitting or demanding payment; justly due; legally enforceable.'" In re Advisory Opinion to the Governor, 74 Fla. 250, 254, 77 So. 102, 103 (1917). *Black's Law Dictionary* provides this same definition, but with an important amplification that "when used without qualification, [the] term normally means that the debt is payable at once, as opposed to 'owing.'" *Black's Law Dictionary* 1128 (6th ed. 1990).

In accounting parlance, the term "payable," as in "accounts payable," has a similar usage. An "account payable" is defined in *Black's Law Dictionary*, in part, as a "liability representing an amount *owed* to a creditor, usually **[**11]** arising from purchase of merchandise or materials and supplies; not necessarily due or past due." *Id.* at 18 (emphasis supplied).

Thus, the most common usage of "payable" strongly suggests a limitation to incurred expenses that have not yet been paid at the time of trial, rather than potential future expenses that have not yet been incurred.

Because a plaintiff's future medical expenses have not yet been incurred, these expenses cannot be presented to the PIP carrier for payment and therefore do not represent a liability or a "payable" benefit of the PIP carrier.

This definition is also consistent with the usage given to the term "payable" in the very next subsection of the PIP statute to describe when PIP benefits are "due." **HN8** § 627.736(4). [4] That subsection provides that PIP benefits are "*due* and *payable* as loss accrues, upon receipt of reasonable proof of such loss." *Id.* (emphasis supplied). This use of the term "payable" in section 627.736(4) supports the construction of the term as referring to those medical expenses that have been already been incurred. This interpretation is thus consistent with **HN9** the axioms of statutory construction that statutes must be read **[**12]** together to ascertain their meaning, see Forsythe, 604 So. 2d at 455; City of Boca Raton v. Gidman, 440 So. 2d 1277, 1282 (Fla. 1983), and that the same meaning should be given to the same term within subsections of the same statute. See WFTV, Inc. v. Wilken, 675 So. 2d 674, 678 (Fla. 4th DCA 1996).

Further, as the Fourth District's opinion in *Rollins* points out, "[w]hen the Florida Legislature wishes **[**13]** to provide for set-offs for future benefits it well knows how to express itself." Pizzarelli, 704 So. 2d at 633. For example, section 440.39(3)(a), Florida Statutes (Supp. 1996), provides workers' compensation carriers with claims against responsible third-party tort-feasors **[*299]** for "future benefits to be paid" to the injured employee. In the context of arbitration of medical malpractice cases, the Legislature has provided that "[d]amages for future economic losses shall be . . . offset by future collateral source payments." § 766.207(7)(c), Fla. Stat. (1995). The clear intent of both these sections, expressed by the use of the terms "future benefits" and

---

[4] **HN10** Section 627.736(4), Florida Statutes (1991), provides in relevant part:

> (4) BENEFITS; WHEN DUE . . . Benefits due from an insurer under ss. 627.730-627.7405 shall be primary, except that benefits received under any workers' compensation law shall be credited against the benefits provided by subsection (1) and shall be *due and payable as loss accrues*, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730-627.7405.

(Emphasis supplied.)

"future collateral source payments," is to require setoff of future collateral benefits. Neither section uses the more limited term "payable." Just as the legislative use of different terms in different portions of the same statute is evidence that different meanings were intended, *see* State v. Mark Marks, P.A., 698 So. 2d 533, 541 (Fla. 1997), the use of the more limited term "payable" in section 627.736(3) is evidence that the Legislature did not intend **[**14]** to set off future benefits.

We recognize that ***HN11*** when the statutory language is clear, legislative history cannot be used to alter the plain meaning of the statute. *See* Aetna, 609 So. 2d at 1317. However, when the statutory language is susceptible to more than one meaning, legislative history may be helpful in ascertaining legislative intent. *See* Magaw v. State, 537 So. 2d 564, 566 (Fla. 1989); *cf.* Hawkins v. Ford Motor Co., 748 So. 2d 993 (Fla. 1999) (using legislative history to support an interpretation of the plain meaning of the statute).

The legislative history in this case is most persuasive. A legislative committee report on the 1976 amendments to the PIP statute states that the changes were intended to replace the "complicated system of equitable distribution of PIP benefits" with a system under which a plaintiff could "plead and prove all of his special damages" but would not be awarded PIP benefits that "have been paid or are *currently* payable." Summary of No-Fault Conference Comm. Rep. on Fla. CS for HB 2825 (June 8, 1976) (available at Fla. Dep't of State, Bureau of Archives & Records Management, Fla. State Archives, **[**15]** ser. 69, carton 319, Tallahassee, Fla.) (emphasis supplied) [hereinafter Summary of Report].

Under the former equitable distribution scheme, the tort-feasor received no offset for PIP benefits. Instead, the PIP carrier received a pro rata share of the plaintiff's recovery based on an equitable distribution formula, but only PIP "payments made" to the insured were subject to reimbursement based on equitable distribution. § 627.736(3)(b), Fla. Stat. (1975); *see* Williams v. Gateway Ins. Co., 331 So. 2d 301, 304-05 (Fla. 1976).

There is nothing in the legislative history of the 1976 amendments to indicate that, in replacing the complicated equitable distribution scheme and eliminating the PIP carrier's lien for payments made, the Legislature intended to grant tort-feasors a complete windfall by allowing a setoff against the verdict of all remaining PIP benefits. In fact, the committee report specifically used the modifier "currently" payable, which evidences its intent to limit the setoff to benefits that were owed by the PIP carrier because the expenses had been incurred. Summary of Report, *supra*. Thus, the legislative history supports **[**16]** the interpretation we give to the term "payable."

An interpretation of a statutory term cannot be based on this Court's own view of the best policy. *See* State v. Ashley, 701 So. 2d 338, 343 (Fla. 1997). However, even if we were to indulge in policy considerations, the competing policies favor an interpretation of the term "payable" that is limited to medical expenses that have been incurred but have not yet been paid by the PIP carrier. Generally, ***HN12*** the PIP carrier is not a party to the litigation and is not bound by the jury's determination of the amount of damages, including the amount awarded by the jury for the plaintiff's future expenses. [5] Instead, the **[*300]** PIP carrier has a separate right to contest the reasonableness and necessity of the medical expenses at the time the expenses are incurred in the future. Additionally, the insurer might not even be in business when the plaintiff's medical expenses are incurred.

[17]** If we interpreted the term "payable" as the defendants suggest, the injured victim would have no guarantee that the PIP carrier would in fact pay the remaining benefits when the expenses are actually incurred, yet the jury's verdict in the plaintiff's favor would be prematurely reduced by those remaining benefits. There would be no guarantee that the plaintiff would ever be made completely whole for her injuries. *See* Haugen v. Town of Waltham, 292 N.W.2d 737, 740 (Minn. 1980). [6] Under this interpretation, the entity

---

[5] Although this argument is less compelling where, as here, the defendant is the uninsured motorist carrier rather than the tort-feasor, in this case there is no indication that Allstate has agreed to be bound to pay its PIP benefits in the future or that it has agreed to pay plaintiff the balance of the PIP benefits in exchange for receiving the setoff.

[6] In Haugen v. Town of Waltham, 292 N.W.2d 737, 739 (Minn. 1980), the Minnesota Supreme Court examined Minnesota's no-fault statutes, which provided for a deduction from the plaintiff's recovery of "the value of . . . economic loss benefits *paid or payable or which will be payable in the future*." (Emphasis supplied.) The court concluded that there were "numerous problems" with the statutory requirement that benefits "payable in the future" must be deducted from the plaintiff's recovery, including the problem that because the no-fault carrier is not a party to the plaintiff's suit, the plaintiff had no certain remedy completely allowing him or her to obtain justice. *See* id. at 740. Mirroring our concerns if "payable" were interpreted as "payable in the future," the Minnesota

receiving the windfall is the tort-feasor, who obtains a setoff from the jury's verdict by the amount of the remaining benefits, but the insured has no concomitant immediate right to receive those remaining PIP benefits.

[18]** An additional and important canon of statutory construction applicable in this case is that ***HN13*** statutory provisions altering common-law principles must be narrowly construed. *See* Ady v. American Honda Fin. Corp., 675 So. 2d 577, 581 (Fla. 1996). Both PIP benefits and medpay benefits are collateral sources, that is, first-party benefits for which the insured has paid a separate premium. The common-law rule prohibited both the introduction of evidence of collateral insurance benefits received, and the setoff of any collateral source benefits from the damage award. *See* Gormley v. GTE Prods. Corp., 587 So. 2d 455, 457-59 (Fla. 1991). As an alteration of the common law, the statutory provisions that allow the introduction into evidence and setoff of collateral insurance benefits must be narrowly construed.

Lastly, we disagree with the dissents in this case that our prior case law construing section 627.737(3) mandates a contrary result. In Purdy v. Gulf Breeze Enterprises, Inc., 403 So. 2d 1325 (Fla. 1981), we upheld the constitutionality of section 627.737(3) because it simply reduced the amount of damages injured plaintiffs can recover **[**19]** by the amount of PIP benefits "they have received." Purdy, 403 So. 2d at 1327. In discussing the provisions of section 627.737(3) in effect at that time, we stated that "to prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they *have received* from their insurers will be set off from the amount they are entitled to recover from the tort-feasors." Purdy, 403 So. 2d at 1329 (emphasis supplied). Thus, in *Purdy* there was an implicit assumption that "payable" was limited to those expenses already incurred.

More recently, in Mansfield v. Rivero, 620 So. 2d 987 (Fla. 1993), we confronted the issue of whether a plaintiff, by failing to claim PIP benefits, could avoid the setoff provisions of section 627.736(3). The parties had stipulated to the amount of past medical expenses, and the jury found **[*301]** in a special verdict that the plaintiff "had incurred" expenses in that amount. *See* Mansfield, 620 So. 2d at 988. Thus, the only issue in *Mansfield* was whether there should be a setoff for 80% of the incurred expenses for which there was PIP coverage. We **[**20]** do not find that our construction of the term "payable," which is the precise issue we are asked to resolve in this case, is contrary to previous cases interpreting this subsection.

In summary, by examining the dictionary and case law definitions of the term "payable," applying well-recognized principles of statutory construction and examining legislative history, we conclude that the proper interpretation of the term "payable" is that only PIP benefits "currently payable" or owed by the PIP carrier as a result of expenses incurred by the plaintiff should be set off from a verdict that includes an award of future medical expenses. Accordingly, we answer the certified question in the affirmative, approve the decision of the Fourth District, and disapprove *Kokotis*.

It is so ordered.

ANSTEAD, PARIENTE, LEWIS and QUINCE, JJ., concur.

HARDING, C.J., dissents with an opinion, in which WELLS, J., concurs.

WELLS, J., dissents with an opinion.

SHAW, J., dissents.

Dissent by: HARDING; WELLS

Dissent

HARDING, C.J., dissenting.

I respectfully dissent. The issue presented in this case is whether an award of future medical damages should be set off by the amount of remaining **[**21]** personal injury protection (PIP) benefits, if such benefits remain at the time of judgment. The answer to this question depends on the definition of the term "payable" as found in section 627.736(3), Florida Statutes (Supp. 1996). In the decision below, the Fourth District Court of Appeal concluded that future medical expenses that have not been incurred at the time of trial are not included within the meaning of "payable," and therefore a verdict should not be reduced by the amount of remaining PIP benefits. Pizzarelli v. Rollins, 704 So. 2d 630, 632-33 (Fla. 4th DCA 1997). In contrast, the Fifth District Court of Appeal in Kokotis v. DeMarco, supra, held that "payable" includes "expenses which have not yet

---

court observed that in such a case, "the plaintiff has no assurance that his insurance carrier will accept the amount of damages awarded, let alone that it will accept responsibility for such damages." *Id.*

accrued but which will result from the covered injury." 679 So. 2d 296, 297 (Fla. 5th DCA 1996). This Court originally issued an opinion approving the definition of "payable" announced by the Fifth District in *Kokotis*. See Rollins v. Pizzarelli, 24 Fla. L. Weekly S69 (Fla. Feb. 4, 1999), 1999 Fla. LEXIS 118. However, on rehearing, the majority now adopts the definition of "payable" articulated by the district court below. I disagree with this **[**22]** "judicial U-turn."

The purpose behind the Florida no-fault statutory scheme is to allow each driver to collect certain statutorily required medical, disability, or death benefits regardless of fault. *See* Mansfield v. Rivero, 620 So. 2d 987, 988 (Fla. 1993) (citing Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974)). In essence, the no-fault scheme grants tort-feasors a limited exemption from liability to the extent of the PIP benefits. *See* Mansfield, 620 So. 2d at 988-89. I believe that the definition of "payable" adopted by the Fifth District in *Kokotis* is more in keeping with the spirit of the no-fault statutory scheme. *See also* State Farm Mut. Auto. Ins. Co. v. Klinglesmith, 717 So. 2d 569, 571-72 (Fla. 5th DCA 1998) (Harris, J., dissenting). If the no-fault scheme immunizes tort-feasors from liability for a victim's medical expenses to the extent of the victim's PIP benefits, then this immunity must extend to all of the victim's PIP benefits, even those that remain at the time of trial. The interpretation of "payable" articulated by the Fourth District and now adopted by the new majority will extinguish **[**23]** a portion of this immunity (the remaining PIP coverage) and potentially permit a victim to collect a double recovery for future medical expenses. This result is contrary to the no-fault statutory scheme. **[*302]** *See* Purdy v. Gulf Breeze Enters., 403 So. 2d 1325, 1329 (Fla. 1981) ("To prevent the injured persons from receiving double recovery, the legislature has provided that any PIP benefits they have received from their insurers will be set off from the amount they are entitled to recover from the tort-feasors."). Therefore, I would deny the motion for rehearing and adhere to this Court's previous holding in this case.

WELLS, J., concurs.

WELLS, J., dissenting.

I dissent because I believe the prior majority decision and the Fifth District's decision in Kokotis v. DeMarco, 679 So. 2d 296 (Fla. 5th DCA 1996), are correct and sound decisions.

I also dissent because I conclude that there is no proper basis upon which to grant a rehearing in this case.

End of Document

Appendix 37.

Therrien v. State

Supreme Court of Florida

October 27, 2005, Decided

No. SC03-2219

Reporter
914 So. 2d 942 *; 2005 Fla. LEXIS 2055 **; 30 Fla. L. Weekly S 725

JOHN RICHARD THERRIEN, Petitioner, v. STATE OF FLORIDA, Respondent.

Subsequent History: [**1] As Corrected November 15, 2005.

Prior History: Application for Review of the Decision of the District Court of Appeal--Certified Great Public Importance. (Escambia County).

Therrien v. State, 859 So. 2d 585, 2003 Fla. App. LEXIS 18005 (Fla. Dist. Ct. App. 1st Dist., 2003).

Core Terms

sexual predator, offender, designation, sentencing, Statutes, trial court, qualify, register, offenses, written findings, statutory construction, time of sentence, current offense, retroactive, sexual, convicted, probation, meets, certified question, state attorney, restrictions, provides

Case Summary

Procedural Posture
The First District Court of Appeal (Florida) affirmed the trial court's designation of defendant as a sexual predator. The issue was whether a person could be designated a sexual predator, which resulted in lifetime registration and public notification requirements as well as employment restrictions, when the offense triggering the designation became a qualifying offense for sexual predator status only after the person was sentenced.

Overview

Defendant, who was 16 at the time of the crime, pled nolo contendere to attempted sexual battery by a person under 18 on a person under 12 and to the lewd and lascivious assault count as charged. The trial court imposed probation for five years. Defendant's offenses did not qualify him as a sexual predator under the Florida Sexual Predators Act (FSPA) either when the offenses were committed or when defendant was sentenced. After defendant's plea and sentence, the Florida Legislature amended the FSPA to incorporate attempted sexual battery by a person under 18 on a person under 12 as an FSPA-qualifying offense. More than three years after his sentencing hearing, the State sought to have defendant designated a sexual predator under the amended FSPA. The supreme court held the Legislature in *Fla. Stat. ch. 775.21(5)(a)* expressly made the date of sentencing for crimes subject to the FSPA the point at which eligibility for sexual predator status was to be determined for offenders who did not otherwise qualify for the sexual predator designation. Thus, according to the plain language of the statute, defendant did not fit the statutory definition of a sexual predator.

Outcome
The decision of the lower appellate court which affirmed the trial court's order imposing sexual predator status was quashed.

LexisNexis® Headnotes

Constitutional Law > ... > Case or Controversy > Constitutional Questions > Necessity of Determination

HN1 The Florida Supreme Court refrains from deciding constitutional issues in case where the decision turns on matters of statutory construction.

Criminal Law & Procedure > Juvenile Offenders > Juvenile Proceedings > General Overview

Criminal Law & Procedure > Sentencing > Sentencing

Alternatives > Community Confinement

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

HN2 *Fla. Stat. ch. 948.01(2)* (2004) authorizes probation in lieu of imprisonment for commission of a crime if it appears to the court that the defendant is not likely again to engage in a criminal course of conduct. The Youthful Offender law provides that in lieu of other criminal penalties authorized by law the court may place a youthful offender under supervision on probation or in a community control program. *Fla. Stat. ch. 958.04(2)(a)* (1995).

Governments > Legislation > Interpretation

HN3 Statutory construction is a question of law. In construing a statute, the court's duty is to effectuate legislative intent, which is determined primarily from the language of the statute. Where the language of a statute is clear and unambiguous and conveys a definite meaning, the court construes it accordingly, and need not resort to additional rules of construction.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN4 *Fla. Stat. ch. 775.21(4)(a)* (2000) provides that for a current offense committed on or after October 1, 1993, upon conviction, an offender shall be designated as a sexual predator under *Fla. Stat. ch. 775.21(5)* if the felony is one of a number of specified crimes.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN5 See *Fla. Stat. ch. 775.21(5)(a)* (2000).

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN6 Under the 1996 amendment, and continuing up to the present, the duty to register is triggered solely by the trial court's finding that the offender is a sexual predator. *Fla. Stat. ch. 775.21(4)(c)(2)* (2004).

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN7 For offenders who have not been administratively designated as sexual predators under the previous version of the Florida Sexual Predators Act and who do not qualify for sexual predator status because of out-of-state convictions, *Fla. Stat. ch. 775.21(5)(a)(1)* (2000) makes the offender's sentencing proceeding the point at which sexual predator eligibility is determined. Given its plain and ordinary meaning, the language of this provision requires that an offender both meet the eligibility criteria and be before the court for sentencing on a current offense committed after October 1, 1993, in order to qualify for designation as a sexual predator. Thus, offenders whose crimes did not bring them within the sexual predator criteria in effect when they were sentenced cannot be declared sexual predators at sentencing.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN8 *Fla. Stat. ch. 775.21(5)(c)* (2004) contains a "second chance" clause applicable to persons who could have been but were not declared sexual predators at sentencing.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN9 See *Fla. Stat. ch. 775.21(c)* (2004).

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN10 By its plain language, *Fla. Stat. ch. 775.21(c)* (2004) applies to those offenders for whom the trial court was required to, but did not, impose the sexual predator designation at sentencing. The limitation of *Fla. Stat. ch. 775.21(5)(c)* to instances in which the court did not make a written finding that the offender is a sexual predator as required in *Fla. Stat. ch. 775.21(5)(a)* concerns situations in which the designation was overlooked at sentencing, or the State learns after sentencing that the offender qualified for the designation.

Criminal Law & Procedure > Postconviction Proceedings > Sex Offenders > General Overview

HN11 Read together, *Fla. Stat. ch. 775.21(5)(a)(1)* and *(5)(c)* apply only to offenders who could have been designated as sexual predators at the time of sentencing, and therefore excludes offenders who were not eligible when sentenced for an offense later brought within the sexual predator rubric. When a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. In addition, in providing that no offender shall be administratively designated a sexual

predator or required to register as a sexual predator without a written finding by the trial court, *Fla. Stat. ch. 775.21(5)(c)* clearly makes the determination that an offender is a sexual predator exclusively the province of the trial court. And where sexual predator designation depends solely upon conviction of an offense pending for sentencing after the July 1, 1996, effective date of the 1996 amendment eliminating a registration requirement independent of a trial court finding, the offender must meet the sexual predator criteria at the time of sentencing in order to be so designated.

Counsel: Charles V. Peppler, Pensacola, Fla., for petitioner.

Charles J. Crist, Jr., Atty. Gen., Robert R. Wheeler, Tallahassee Bureau Chief, Criminal Appeals, and Thomas H. Duffy, Asst. Atty. Gen., Tallahassee, Fla., for respondent.

Judges: PARIENTE, C.J., WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

Opinion by: PARIENTE

Opinion

[*943] CORRECTED OPINION

PARIENTE, C.J.

In this case we decide whether a person may be designated a sexual predator, which results in lifetime registration and public notification requirements as well as employment restrictions, when the offense triggering the designation became a qualifying offense for sexual predator status only after the person was sentenced. The First District Court of Appeal concluded that all the statutory consequences of sexual predator designation, including the lifetime employment restrictions in *section 775.21(10)(b), Florida Statutes (2000)*, could be imposed under these circumstances without a **[**2]** hearing on the defendant's future dangerousness. The First District further held that retroactive application did not violate the constitutional right to due process of law, but certified a question of great public importance regarding the statute's constitutionality. *See Therrien v. State, 859 So. 2d 585, 588 (Fla. 1st DCA 2003)*. [1]

We have jurisdiction pursuant to *article V, section (3)(b)(4) of the Florida Constitution*, which governs certified questions. **[*944]** [2] We also have jurisdiction pursuant to *article V, section (3)(b)(3) of the Florida Constitution* because the district **[**3]** court expressly declared *section 775.21(10)(b)* constitutional as applied. Although the First District addressed the constitutional issue, we decide this case on the narrower grounds of statutory construction. *See Metro. Dade County Transit Auth. v. State Dep't of Highway Safety & Motor Vehicles, 283 So. 2d 99, 101 (Fla. 1973)* (***HN1*** refraining from deciding constitutional issues in case where decision "turns on matters of statutory construction"). We conclude that *section 775.21, Florida Statutes (2000)*, does not authorize imposition of a sexual predator designation on a defendant based on a predicate offense that did not qualify the defendant for sexual predator status at the time of sentencing. Because this resolution makes it unnecessary to decide whether a procedural due process violation results from the retroactive imposition of the employment restriction without a hearing on future dangerousness, we decline to answer the certified question.

[4] FACTS AND PROCEDURAL HISTORY**

The State charged John Richard Therrien with sexual battery and lewd and lascivious assault based on acts allegedly committed upon a nine-year-old girl in

---

[1] The following question was certified:

> Whether the retroactive application of the permanent employment restrictions of *section 775.21(10)(b), Florida Statutes (2000)*, to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether such defendant constitutes a danger or threat to public safety, violates procedural due process.

859 So. 2d at 588.

[2] The First District addressed and ruled on the issue presented in the certified question when it held that the conditions of sexual predator status, including the lifetime employment restrictions, could be retroactively applied without a hearing on the defendant's future dangerousness. *See Therrien, 859 So. 2d at 587*. This satisfies the constitutional requirement that the certified question be one that the district court "passes upon," *see art. V, § 3(b)(3), Fla. Const.*, and distinguishes this case from other certified question cases in which we have dismissed review for lack of jurisdiction. *Cf. Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973, 974 (Fla. 2001)* (dismissing review because the district court had certified a question without ruling on the question certified); *Salgat v. State, 652 So. 2d 815, 815 (Fla. 1995)* ("This Court has no jurisdiction to answer a question certified by a district court when that court has not first *passed upon* the question certified.").

November 1996, when Therrien was sixteen. He was prosecuted as an adult. In August 1997, Therrien pled nolo contendere to the lesser included offense of attempted sexual battery by a person under eighteen on a person under twelve and to the lewd and lascivious assault count as charged. Both crimes were second-degree felonies. *See* §§ 777.04(4)(c), 794.011(2)(b), 800.04, Fla. Stat. (1995). The trial court withheld adjudication of guilt on both counts and imposed a sanction of probation for five years, conditioned on a county jail sentence of eleven months and fifteen days, which was suspended. [3]

The offenses to which Therrien pled nolo contendere did not qualify him as a sexual predator under the Florida Sexual Predators Act (FSPA) either when the offenses were committed or when Therrien was sentenced. *See* § 775.21(4)(c), Fla. Stat. (Supp. 1996). After Therrien's plea and sentence, the Legislature amended the **[**5]** FSPA to incorporate as qualifying offenses any attempt to commit a capital-, life-, or first-degree-felony violation of chapter 794, making attempted sexual battery by a person under eighteen on a person under **[*945]** twelve an FSPA-qualifying offense. *See* ch. 98-81, § 3, at 591, Laws of Fla., codified at § 775.21(4)(c)(1)(b), Fla. Stat. (Supp. 1998). Another amendment made any violation of section 800.04 a qualifying offense for the FSPA. *See* ch. 2000-207, § 1, at 2052-53, Laws of Fla., codified at § 775.21(4)(a), Fla. Stat. (2000).

HN2 In **[**6]** October 2000, more than three years after his sentencing hearing, the State sought to have Therrien designated a sexual predator under the amended FSPA. In a trial court pleading opposing the sexual predator designation, Therrien's counsel represented that Therrien had "completed probation in an exemplary manner and does not pose the threat for which the Florida Sexual Predator's Act was enacted." [4]

The trial court granted the State's request and issued an order designating Therrien a sexual predator. Pursuant to the requirements of section 775.21, the order required Therrien to register with the Department of Corrections, report to the Department of Highway Safety and Motor Vehicles to obtain a new photo identification, and notify the State within 48 hours of any change of address. The order specified that day care centers and schools within a one-mile radius of Therrien's residence shall be notified of his presence, and that an Internet record of his sexual predator status shall also be maintained and be available to the public. The order further specified criminal sanctions for failure to register or provide notification of change of residence, and for working "whether for **[**7]** compensation or as a volunteer, at any business, school, day care center, park, playground, or other place where children regularly congregate."

The First District rejected Therrien's constitutional claim that due process precluded retroactive application of the FSPA in this case and affirmed the sexual predator designation. *See* Therrien, 859 So. 2d at 587. Neither the trial court nor the First District addressed Therrien's argument that because he did not qualify for sexual predator designation when he was sentenced, the subsequent expansion in qualifying offenses did not apply to him. In dissent, Judge Benton, quoting from one of Therrien's briefs, stated that Therrien's "nolo contendere plea–which might, after all, have been a plea of convenience–to charges of misconduct alleged to **[**8]** have taken place six years ago should not deprive him of the opportunity 'to show that he is not a danger to society . . ., that he is married and a father, and that he is living a normal, productive life as a citizen of Florida.' " *Id.* at 592-93 (Benton, J., dissenting).

ANALYSIS

HN3 Statutory construction is a question of law. Bellsouth Telecomms., Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003). In construing a statute, our duty is to effectuate legislative intent, which is determined primarily from the language of the statute. *See* State v. Rife, 789 So. 2d 288, 292 (Fla. 2001). Where the language of a statute is clear and unambiguous and conveys a definite meaning, we construe it accordingly, and need not resort to additional rules of construction. *See* Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

Therrien was declared a sexual predator based on his convictions of crimes defined by Florida law. The provisions of the FSPA governing offenders such as

---

[3] Section 948.01(2), Florida Statutes (2004), which was in effect when these crimes were committed, authorizes probation in lieu of imprisonment for commission of a crime "[i]f it appears to the court . . . that the defendant is not likely again to engage in a criminal course of conduct." The Youthful Offender law under which Therrien appears to have been sentenced provides that "[i]n lieu of other criminal penalties authorized by law . . . [t]he court may place a youthful offender under supervision on probation or in a community control program." § 958.04(2)(a), Fla. Stat. (1995).

[4] Section 948.04(3), Florida Statutes (2004), authorizes early termination of probation if the offender has not violated any terms of probation and has met all financial sanctions.

Therrien concern sentencing for a "current offense." ***HN4*** *Section 775.21(4)(a), Florida Statutes (2000)*, provides that "[f]or a current offense **[**9]** committed on or after October 1, **[*946]** 1993, upon conviction, an offender shall be designated as a 'sexual predator' under *subsection (5)*" if the felony is one of a number of specified crimes. *Section 775.21(5)(a), Florida Statutes (2000)*, provides, in pertinent part:

> ***HN5*** (5) SEXUAL PREDATOR DESIGNATION.--An offender is designated as a sexual predator as follows:
>
> (a)1. An offender who meets the sexual predator criteria described in paragraph (4)(a) *who is before the court for sentencing for a current offense* committed on or after October 1, 1993, is a sexual predator, and the sentencing court must make a written finding *at the time of sentencing* that the offender is a sexual predator, and the clerk of the court shall transmit a copy of the order containing the written finding to the department within 48 hours after the entry of the order . . . .

(Emphasis supplied.) The quoted language from *subsections (4)* and *(5)* was first included in a revision to the FSPA that took effect July 1, 1996, before the commission of the offenses in this case. *See* ch. 96-388, §§ 61, 74, Laws of Fla. These provisions have remained materially unchanged throughout **[**10]** subsequent amendments to the FSPA, including those made in 1998 and 2000 that brought attempted sexual battery and lewd and lascivious assault within the ambit of the FSPA. [5]

The 1996 amendments expanded the role of the trial court in designating an offender as a sexual predator. Under the FSPA as enacted in 1993, the sexual predator registration requirement attached automatically in the event of a qualifying conviction, independent of trial court designation. *See* § 775.22(2), Fla. Stat. (1993) (providing **[**11]** that each offender convicted of, or found to have committed, a qualifying offense "is a sexual predator and must register or be registered in accordance with this section"). In addition, trial courts were required to designate those who qualified as sexual predators at the time of sentencing. *See* § 775.23(3), Fla. Stat. (1993). In revamping the FSPA in 1996, the Legislature repealed sections 775.22 and 775.23. *See* ch. 96-388, § 62, at 2375, Laws of Fla. In place of these statutes, the Legislature rewrote *section 775.21* to provide for trial court designation of those registered as sexual predators under the previous version of the law, those offenders who qualify via out-of-state convictions, and those Florida offenders who qualify for sexual predator designation at the time they are sentenced for a current offense. *See § 775.21(4)-(5), Fla. Stat. (Supp. 1996)*, as amended by ch. 96-388, § 61, at 2369, Laws of Fla. [6] The offender's duty to register regardless of any trial court designation, contained in former section 775.22(2), was eliminated.

[12]** ***HN6*** Under the 1996 amendment, and continuing up to the present, the duty to register is triggered solely by the trial court's finding that the offender is a sexual predator. *See § 775.21(4)(c)(2), Fla. Stat. (2004)* ("If the court makes a written finding that the offender is a sexual predator, the offender . . . must register or be registered **[*947]** as a sexual predator . . . ."); *§ 775.21(5)(c), Fla. Stat. (2004)* ("If the state attorney fails to establish that the offender meets the sexual predator criteria and the court does not make a finding that the offender is a sexual predator, the offender is not required to register with the department as a sexual predator.").

HN7 For offenders who had not been administratively designated as sexual predators under the previous version of the FSPA and who did not qualify for sexual predator status because of out-of-state convictions, *section 775.21(5)(a)(1), Florida Statutes (2000)*, made the offender's sentencing proceeding the point at which sexual predator eligibility is determined. Given its plain and ordinary meaning, the language of this provision requires that an offender **[**13]** both meet the eligibility criteria *and* be before the court for sentencing on a current offense committed after October 1, 1993, in order to qualify for designation as a sexual predator. Thus, offenders whose crimes did not bring them within the sexual predator criteria in effect when they were

---

[5] The provisions concerning sentencing for current offenses originally enacted in *section 775.21(4)(a), (b), and (c), Florida Statutes (Supp. 1996)*, which also contained the tiered system subsequently abandoned, are now combined in *section 775.21(4)(a), Florida Statutes (2004)*. The provision originally enacted in *section 775.21(5)(a)(1), Florida Statutes (Supp. 1996)*, is now codified at *section 775.21(5)(a)(2), Florida Statutes (2004)*.

[6] A 2004 amendment additionally provides for trial court designation as a sexual predator under *section 775.21* of anyone determined to be a "sexually violent predator" in a civil commitment proceeding. *See* ch. 2004-371, § 1, at 2784, Laws of Fla.

sentenced cannot be declared sexual predators at sentencing.

HN8 *Section 775.21(5)(c)* contains a "second chance" clause applicable to persons who could have been but were not declared sexual predators at sentencing:

> ***HN9*** If the [D]epartment of Corrections, the Department [of Law Enforcement], or any other law enforcement agency *obtains information which indicates that an offender meets the sexual predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a)*, the Department of Corrections, the department, or the law enforcement agency shall notify the state attorney who prosecuted the offense for offenders described in subparagraph (a)1., or the state attorney of the county where the offender establishes or maintains a residence upon first entering the state for offenders described in subparagraph (a)3. **[**14]** *The state attorney shall bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria.* If the state attorney fails to establish that an offender meets the sexual predator criteria and the court does not make a written finding that an offender is a sexual predator, the offender is not required to register with the department as a sexual predator. The Department of Corrections, the department, or any other law enforcement agency shall not administratively designate an offender as a sexual predator without a written finding from the court that the offender is a sexual predator.

§ 775.21(5)(c), Fla. Stat. (2004) (emphasis supplied). ***HN10*** By its plain language, this provision applies to those offenders for whom the trial court was required to, but did not, impose the sexual predator designation at sentencing. *Cf. State v. Curtin, 764 So. 2d 645, 647 (Fla. 1st DCA 2000)* (concluding, in case in which defendant met criteria for designation at sentencing, that "the statute provides for the state to petition the court to make such a finding" after sentencing). The limitation of *section 775.21(5)(c)* to instances **[**15]** in which "the court did not make a written finding that the offender is a sexual predator as required in paragraph (a)" concerns situations in which the designation was overlooked at sentencing, or the State learns after sentencing that the offender qualified for the designation.

HN11 Read together, *subsections (5)(a)(1)* and *(5)(c)* apply only to offenders who could have been designated as sexual predators at the time of sentencing, and therefore excludes offenders who were not eligible when sentenced for an offense later brought within the sexual predator rubric. **[*948]** *Cf. Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997)* ("[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded."). In addition, in providing that no offender shall be administratively designated a sexual predator or required to register as a sexual predator without a written finding by the trial court, *section 775.21(5)(c)* clearly makes the determination that an offender is a sexual predator exclusively the province of the trial court. And where sexual predator **[**16]** designation depends solely upon conviction of an offense pending for sentencing after the July 1, 1996, effective date of the 1996 amendment eliminating a registration requirement independent of a trial court finding, the offender must meet the sexual predator criteria at the time of sentencing in order to be so designated.

Adhering to principles of statutory construction, we conclude that the Legislature in *section 775.21(5)(a)* has expressly made the date of sentencing for crimes subject to the FSPA the point at which eligibility for sexual predator status is to be determined for offenders who do not otherwise qualify for the sexual predator designation.

THIS CASE

Therrien raised the statutory construction grounds discussed in the preceding section in challenging the sexual predator designation in both the trial and appellate courts. As stated above, the trial court did not directly address this aspect of his challenge to the sexual predator designation, concluding that the FSPA is procedural rather than substantive law and therefore that the designation may be applied retroactively. The First District also did not directly address the statutory construction argument, focusing **[**17]** instead on whether retroactive application violates procedural due process. *See Therrien, 859 So. 2d at 586-88.* Nonetheless, Therrien preserved the statutory construction argument for our review, and we resolve the case on this basis.

When Therrien appeared before the trial court for sentencing in August 1997 on offenses committed in November 1996, he did not meet the sexual predator criteria in *section 775.21(4)(c), Florida Statutes (Supp.*

1996). When he was declared a sexual predator in 2000 for these 1996 offenses, he had not been administratively designated a sexual predator under the previous version of the FSPA and did not qualify as a sexual predator for out-of-state offenses, alternative grounds on which the trial court may acquire jurisdiction to make a sexual predator designation. Nor has he been declared a sexually violent predator in this or any other jurisdiction, another potential basis for sexual predator designation under a 2004 amendment to the FSPA. *See* §§ 775.21(4)(d), 775.21(5)(a)(1), Fla. Stat. (2004), as amended by ch. 2004-371, § 1, at 2784, Laws of Fla.

The offenses **[**18]** for which Therrien was convicted were brought within the sexual predator criteria in legislation enacted in 1998 and 2000. Before, during, and after Therrien's sentencing proceeding, section 775.21(5)(a), Florida Statutes (Supp. 1996), defined a sexual predator as "[a]n offender who meets the sexual predator criteria in paragraph (4)(c) who is before the court for sentencing for a current offense committed on or after October 1, 1996." Thus, according to the plain language of the statute, Therrien does not fit the statutory definition of a sexual predator.

CONCLUSION

We hold that a trial court is without jurisdiction to impose the sexual predator **[*949]** designation, which includes notification and registration requirements in addition to the employment restrictions identified in the certified question, on an offender who, under the law in effect at the time of sentencing, did not qualify as a sexual predator. Because we have concluded that under section 775.21(5)(a)(1), Florida Statutes (2000), Therrien has been erroneously designated a sexual predator for offenses which, at the time of sentencing, did not meet the statutory criteria **[**19]** under section 775.21(4), Florida Statutes (Supp. 1996), we quash the First District decision affirming the trial court's order imposing sexual predator status, and remand for proceedings not inconsistent with this opinion.

It is so ordered.

WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

End of Document

Appendix 38.

T.J.R. Holding Co. v. Alachua County

Court of Appeal of Florida, First District

April 28, 1993, Filed

CASE NO. 92-1782

Reporter
617 So. 2d 798 *; 1993 Fla. App. LEXIS 4687 **; 18 Fla. L. Weekly D 1116

T.J.R. HOLDING CO., INC., a Florida corporation, d/b/a Cafe Risque, Appellant, v. ALACHUA COUNTY, a political subdivision of the State of Florida, Appellee.

Subsequent History: [**1] Released for Publication May 14, 1993.

Prior History: An appeal from the circuit court of Alachua County. Stephan Mickle, Judge.

Disposition: AFFIRMED.

Core Terms

ordinance, zoning, land use, zoning ordinance, Statutes, temporary injunction, alcoholic beverage, subsection, establishments, provisions

Case Summary

Procedural Posture

Appellant, the owner of a business that served alcohol and had nude dancers, sought review of the order from the Circuit Court of Alachua County (Florida) that denied its petition for a temporary injunction to stay Alachua County, Fla., Ordinance 91-5, which prohibited nudity in liquor establishments. Appellant claimed that the ordinance affected land, was a de facto zoning ordinance, and was subject to *Fla. Stat. ch. 125.66(5)* and *(6)* (1991).

Overview

Appellee, a county, enacted Alachua County, Fla., Ordinance 91-5 (ordinance) that prohibited nudity in liquor establishments. Appellant, the owner of a business that served alcohol and featured nude dancers, filed a petition for a temporary injunction to stay the application of the ordinance because of appellee's failure to follow the procedures of *Fla. Stat. ch. 125.66(6)* (1991). The trial court denied the petition. On appeal, the court held that because the ordinance regulated conduct, it was not an ordinance that affected land. Because the ordinance covered the entire county except those municipalities that opted out of the ordinance pursuant to appellee's charter, the ordinance was not a de facto zoning ordinance within the meaning of *Fla. Stat. ch. 125.66(5)* (1991). Thus, the ordinance was not subject to the enactment procedures of ch. 125.66(6) (1991), and the trial court did not abuse its discretion in denying the petition. Therefore, the court affirmed the order.

Outcome

The court affirmed the order denying the petition of appellant, an owner of a liquor business with nude dancers, for a temporary injunction to stay a county ordinance that prohibited nudity at liquor businesses, because the ordinance regulated conduct, not land use, for those areas of the county subject to appellee county's jurisdiction. Thus, the ordinance did not affect land, was not a de facto zoning ordinance, and was lawfully enacted.

LexisNexis® Headnotes

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN1 See *Fla. Stat. ch. 125.66(6)* (1991).

Governments > Legislation > Interpretation

HN2 The interpretation of a statute is a question of law to be determined solely by the court, not by expert witnesses.

Evidence > ... > Testimony > Expert Witnesses > General Overview

Evidence > Admissibility > Expert Witnesses > Helpfulness

Governments > Legislation > Interpretation

HN3 While expert testimony may be relevant and helpful to the court in understanding the meaning of statutory language involving words of art or scientific and technical terms, such expert testimony is not controlling on the court's construction of the statute; indeed, such expert testimony is not even appropriate when the statutory language in question consists of ordinary words susceptible to being given plain effect consistent with their ordinary meaning.

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN4 Alachua County, Fla. Ordinance 91-5 is intended to regulate, and does only regulate, specifically described conduct within establishments serving alcoholic beverages in the affected areas of Alachua County without regard to the owner's "use of land" on which the establishment was located. For this reason, the enactment of ordinance 91-5 does not implicate the provisions of *Fla. Stat. ch. 125.66(6)* (1991).

Governments > Local Governments > Charters

Governments > Local Governments > Ordinances & Regulations

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN5 The failure to include certain municipalities in the effective area of regulation by Alachua County, Fla. Ordinance 91-5 is predicated solely on those municipalities' exercise of the available option to be excluded from its regulatory effect. The exercise of this opt- out power by one or more municipalities in the county does not change the county's ordinance from one of general applicability to one intended to affect only land in certain areas of the county and thereby create de facto zoning districts.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN6 A trial court has wide discretion to grant or deny a temporary injunction, and an appellate court will not interfere with the exercise of such discretion unless the party challenging the grant or denial clearly shows an abuse of that discretion.

Counsel: Samuel Hankin of Hankin & Beverly, P.A., Gainesville, for Appellant.

Mary A. Marshall and Robert Ott, Office of the County Attorney, Gainesville, for Appellee.

Judges: ZEHMER, JOANOS, WEBSTER

Opinion by: ZEHMER

Opinion

[*799] ZEHMER, J.

T.J.R. Holding Co., Inc., a Florida corporation doing business as Cafe Risque, appeals an order denying its motion for a temporary injunction. Cafe Risque sought to enjoin the application of Alachua County Ordinance 91-5, which prohibits nudity and sexual conduct, or the simulation of sexual conduct, within an alcoholic beverage establishment, primarily on grounds that it had not been adopted in accordance with the statutory provisions governing ordinances affecting the use of land. Cafe Risque contends that the court erred in ruling that Ordinance 915 did not affect the use of land within the meaning of sub *section 125.66(6), Florida Statutes* (1991), did not create a de facto change in zoning within the meaning of sub *section 125.66(5), Florida Statutes* (1991), and was not void ab initio because Alachua County failed to comply **[**2]** with the procedural notice and hearing requirements of the cited statutory provisions. Finding no error, we affirm.

In April 1991, Alachua County enacted Ordinance 91-5 in compliance with the procedures described by subsections 125.66(1) and (2), Florida Statutes (1991). The ordinance prohibited specifically described conduct involving nudity and explicit or simulated sexual activity in establishments serving alcoholic beverages located within the county. The ordinance recited that it was

enacted in the exercise of the county's power to regulate conduct within such establishments. At that time, Cafe Risque operated a business in Alachua County serving alcoholic beverages and featuring live, nude dancers that was adversely affected by the prohibitions set forth in the ordinance. Cafe Risque filed a petition for a temporary injunction, permanent injunction, declaratory judgment, and supplemental relief, alleging that the ordinance was void, invalid, and unconstitutional. The court denied the petition for temporary injunction based on its finding that Alachua County had properly followed the statutory procedure set out in subsections 125.66(1) and (2) in enacting the ordinance. Cafe **[**3]** Risque moved for a rehearing and the court granted the motion, holding three evidentiary hearings. Finally, the court entered an order ruling that Ordinance 91-5 was not a land use or zoning ordinance that had to be enacted in compliance with subsections 125.66(5) or (6), and was properly enacted as a general ordinance in accordance with subsections 125.66(1) and (2). Based on these rulings, the court denied Cafe Risque's motion for rehearing. This appeal followed.

Cafe Risque first argues that the court erred in ruling that Ordinance 91-5 was not an ordinance that "affects the use of land" within the meaning of subsection 125.66(6), [1] thereby relieving the County of the requirement to comply with the notice and hearing requirements of that section. Recognizing there is no reported case law construing this operative language in subsection 125.66(6), Cafe Risque argues that several expert witnesses, including Alachua County's own expert witness, testified that the ordinance does affect the use of land within the meaning of subsection 125.66(6). According to Cafe Risque, the court should have accepted the uncontradicted **[*800]** opinions of these experts in the absence of specific statutory **[**4]** provisions or case law giving a contrary construction to the operative language of subsection 125.66(6).

We reject this argument because ***HN2*** the interpretation of a statute is a question of law to be determined solely by the court, not by expert witnesses. *Lindsay v. Allstate Ins. Co., 561 So. 2d 427 (Fla. 3d DCA 1990)*; *Devin v. City of Hollywood, 351 So. 2d 1022 (Fla. 4th DCA 1976)*. See also *Williams v. State Department of Transp., 579 So. 2d 226 (Fla. 1st DCA 1991)*; **[**5]** *Seibert v. Bayport Beach and Tennis Club Ass'n, Inc., 573 So. 2d 889 (Fla. 2d DCA 1990)*, rev. denied, *583 So. 2d 1034 (Fla. 1991)*. ***HN3*** While expert testimony may be relevant and helpful to the court in understanding the meaning of statutory language involving words of art or scientific and technical terms, such expert testimony is not controlling on the court's construction of the statute; indeed, such expert testimony is not even appropriate when the statutory language in question consists of ordinary words susceptible to being given plain effect consistent with their ordinary meaning. There is nothing so mysterious about the phrase "affects the use of land" as used in subsection 125.66(6) that the court could not construe and apply it in this case without the benefit of expert testimony. Indeed, it is patently clear to us that ***HN4*** the ordinance in question was intended to regulate, and did only regulate, specifically described conduct within establishments serving alcoholic beverages in the affected areas of Alachua County without regard to the owner's "use of land" on which the establishment was located. For this reason, the enactment **[**6]** of ordinance 91-5 did not implicate the provisions of subsection 125.66(6).

Cafe Risque next argues that the subject ordinance reflects the County's attempt to legislate as a zoning body without actually calling the process "zoning." As examples supporting this argument, Cafe Risque cites *Ellison v. City of Fort Lauderdale, 183 So. 2d 193 (Fla. 1966)*, and *Daytona Leisure Corp. v. City of Daytona Beach, 539 So. 2d 597 (Fla. 5th DCA 1989)*, and argues that, like *Ellison* and *Daytona Leisure Corp.*, the County in this case enacted a zoning ordinance and was therefore required to comply with the notice and hearing requirements of subsection 125.66(6).

Again, this argument is without merit as both of these cases are plainly inapposite. The ordinance at issue in *Ellison* completely prohibited the keeping of horses on land zoned R-O. The supreme court, in a concise discussion, understandably held that the ordinance was a zoning ordinance and had to be enacted in compliance with the procedural safeguards required for the enactment of such ordinances. The ordinance at issue in *Daytona Leisure Corp.* prohibited the

---

[1] Sub *section 125.66(6), Florida Statutes* (1991), provides in pertinent part:

> ***HN1*** Ordinances or resolutions initiated by the board of county commissioners or its designee which do not actually change the zoning designation applicable to a piece of property but do affect the use of land, including, but not limited to, land development regulations as defined in s. 163.3202, regardless of the percentage of the total land area of the county actually affected, shall be enacted or amended pursuant to the following procedure . . . .

service [**7] of alcoholic beverages "within 200 feet of any property that is zoned residential." The fifth district held the ordinance void ab initio because the city did not enact it in compliance with the statutory procedures governing zoning and rezoning; the fact that the ordinance in *Daytona Leisure Corp.* was an emergency *zoning* ordinance was not even in dispute. As both cases involved ordinances that showed on their face that a "zoning" regulation was involved, neither *Ellison* nor *Daytona Leisure Corp.* persuades us that the subject ordinance represents an attempt by Alachua County to enact a "zoning ordinance" without calling it such and complying with the statutes governing the enactment of zoning ordinances.

Cafe Risque's final argument is that the court erred in holding that the ordinance did not create a de facto change in zoning within the meaning of sub *section 125.66(5), Florida Statutes* (1991), and in not requiring the County to comply with the procedural formalities of that statutory provision. According to Cafe Risque, the subject ordinance is a de facto change in zoning because it applies only to discrete geographic locations in Alachua County rather than to all [**8] areas in the county generally.

Alachua County Ordinance 91-5 describes the area to which it applies in the following language:

> All territory within the legal boundaries of unincorporated Alachua County and [*801] the territory within the legal boundaries of the City of Archer, the City of Gainesville, the City of Hawthorne, the City of High Springs, the Town of Micanopy, and the City of Waldo shall be embraced by the provisions of this ordinance.

Alachua County is a charter county, and the charter gives the county the right to include all of the incorporated and unincorporated areas of the county within the regulatory effect of a county ordinance. The charter also allows municipalities in the county to opt out of the regulatory effect of a particular county ordinance, however. It is not disputed in this case that ***HN5*** the failure to include certain municipalities in the effective area of regulation by ordinance 91-5 is predicated solely on those municipalities' exercise of the available option to be excluded from its regulatory effect. The exercise of this opt- out power by one or more municipalities in the county does not change the County's ordinance from one of general applicability [**9] to one intended to affect only land in certain areas of the county and thereby create de facto zoning districts, as suggested by Cafe Risque.

HN6 A trial court has wide discretion to grant or deny a temporary injunction, and an appellate court will not interfere with the exercise of such discretion unless the party challenging the grant or denial clearly shows an abuse of that discretion. *Bailey v. Christo, 453 So. 2d 1134, 1136 (Fla. 1st DCA 1984)*, rev. denied, *461 So. 2d 113 (Fla. 1985)*. See also Groff *G.M.C. Trucks v. Driggers, 101 So. 2d 58 (Fla. 1st DCA 1958)*; *Gooding v. Gooding, 602 So. 2d 615 (Fla. 4th DCA 1992)*. Cafe Risque has not shown that the trial court abused its discretion in denying the petition for temporary injunction in this instance.

AFFIRMED.

JOANOS, C.J., and WEBSTER, J., CONCUR.

End of Document

Appendix 39.

Kernel Records Oy v. Mosley

United States Court of Appeals for the Eleventh Circuit

September 14, 2012, Decided

No. 11-12769

Reporter
694 F.3d 1294 *; 2012 U.S. App. LEXIS 19413 **; 104 U.S.P.Q.2D (BNA) 1987 ***; Copy. L. Rep. (CCH) P30,315; 23 Fla. L. Weekly Fed. C 1556; 2012 WL 4040695

KERNEL RECORDS OY, Plaintiff-Appellant, versus TIMOTHY MOSLEY, f.k.a. Timbaland, UMG RECORDINGS, INC., INTERSCOPE-GEFFEN-A&M, d.b.a. Interscope, d.b.a. Geffen, MOSLEY MUSIC GROUP, LLC, UNIVERSAL MUSIC DISTRIBUTION, et al., Defendants-Appellees.

Subsequent History: US Supreme Court certiorari denied by ***Kernel Records Oy*** *v. Mosley, 133 S. Ct. 1810, 185 L. Ed. 2d 812, 2013 U.S. LEXIS 2959 (U.S., Apr. 15, 2013)*

Prior History: [**1] Appeal from the United States District Court for the Southern District of Florida. D. C. Docket No. 1:09-cv-21597-EGT.

Kernal ***Records Oy*** *v. Mosley, 794 F. Supp. 2d 1355, 2011 U.S. Dist. LEXIS 60666 (S.D. Fla., 2011)*

Disposition: AFFIRMED.

Core Terms

Internet, district court, registration, website, disk, online, magazine, first publication, worldwide, summary judgment motion, deposition testimony, register, distribute, simultaneous, parties, material fact, network, granting summary judgment, e-mail, Music, registration requirement, copyright protection, probative evidence, peer-to-peer, declaration, pamphlet, summary judgment, infringement, fact-finder, Collection

Case Summary

Procedural Posture

Plaintiff copyright assignee's copyright infringement claim against defendant music company, asserted the musical work at issue was first published outside the U.S. and thus, under *17 U.S.C.S. §§ 101*, *411(a)*, copyright registration in the U.S. was not required before bringing suit. On cross-motions for summary judgment, the U.S. District Court for the Southern District of Florida granted defendants' motion. The assignee appealed.

Overview

By confounding "Internet" with "website," the district court erroneously assumed that all "Internet publication" occurred on the "World Wide Web" or a "website." It then erroneously assumed all "Internet publication" resulted in simultaneous, worldwide distribution, as the company claimed. A reasonable reading of the artist/assignor's deposition was that the work was first published in a disk magazine and not online. It was not shown it resulted in a simultaneous, worldwide publication that made the work a U.S. work requiring registration prior to suit. Granting the company's motion was error. But, while the assignor baldly attested that the disk magazine was published, he failed to attest to whether the disk was ever distributed, the breadth of distribution, the purpose of the distribution, and whether it included a transfer of any rights. No evidence described the disk magazine as a publicly accessible website or allowed an inference that it was uploaded to one. It could not be determined that the work was a foreign work exempt from registration. With no registration prior to filing suit, the infringement suit failed under *§ 411(a)*.

Outcome

While the district court erred by granting defendants' motion for summary judgment, because the assignee failed to produce substantially probative evidence that it complied with statutory prerequisites prior to filing the action, the judgment was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 An appellate court reviews a district court's grant of summary judgment de novo.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN2 See *Fed. R. Civ. P. 56(a)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN3 A genuine factual dispute exists for purposes of summary judgment only if a reasonable fact-finder could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. Once the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial. However, when the moving party fails to demonstrate the absence of a genuine issue of material fact, the motion should be denied.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN4 Although all justifiable inferences are to be drawn in favor of the nonmoving party on a motion for summary judgment, inferences based upon speculation are not reasonable. Evidence that is merely colorable, or is not significantly probative of a disputed fact cannot satisfy a party's burden, and a mere scintilla of evidence is likewise insufficient.

Constitutional Law > Congressional Duties & Powers > Copyright & Patent Clause

Copyright Law > Constitutional Copyright Protections > Copyright Clause

HN5 The United States Constitution authorizes federal regulation of copyright protection. *U.S. Const. art. I, § 8, cl. 8*.

Copyright Law > Scope of Copyright Protection > Formalities > General Overview

Copyright Law > ... > Statutory Copyright & Fixation > Fixation Requirement > General Overview

HN6 A copyright exists the moment an original idea leaves the mind and finds expression in a tangible medium, be it words on a page, images on a screen, or paint on a canvas.

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN7 See *17 U.S.C.S. § 408(a)*.

Copyright Law > ... > Deposit & Registration Requirements > Registration > Application Requirements

HN8 A copyright owner who wishes to register must: (1) complete an application, *17 U.S.C.S. § 409*; (2) deposit with the Copyright Office a copy of the work to be copyrighted, *17 U.S.C.S. § 408(b)*; and (3) pay a modest fee, *17 U.S.C.S. § 708*; *37 C.F.R. § 201.3(c)*. The Register of Copyrights examines the application and determines whether the deposited material is copyrightable, and if so, registers it. *17 U.S.C.S. § 410(a)*. Registration of a work may be obtained at any time during the subsistence of the work's copyright. *17 U.S.C.S. § 408(a)*.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN9 Registration is not a condition of copyright protection, and is completely voluntary. *17 U.S.C.S. § 408(a)*. However, Congress created a substantial incentive for copyright owners to register United States works. *17 U.S.C.S. § 411(a)*. Thus, although registration is not a condition of copyright protection, *§ 408(a)*, registration (or a refusal of registration) of a United

States work is a prerequisite for bringing an action for copyright infringement. The plaintiff bears the burden of proving compliance with statutory formalities.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN10 *17 U.S.C.S. § 411(a)*.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN11 If the Copyright Office has failed to receive the necessary elements to issue a registration certificate for a United States work prior to the time that the court is called upon to issue final judgment, the copyright infringement action must be dismissed.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN12 For purposes of *17 U.S.C.S. § 411*, the Copyright Act defines a "United States work" as a work that: (1) in the case of a published work, the work is first published -- (A) in the United States; (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States; (C) simultaneously in the United States and a foreign nation that is not a treaty party; or (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States; (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States. *17 U.S.C.S. § 101*. A "treaty party" is defined as a country or intergovernmental organization other than the United States that is a party to an international agreement. *17 U.S.C.S. § 101*.

Copyright Law > ... > Multilateral Treaties > Berne Convention > Formalities

Copyright Law > Foreign & International Protections > Protected Rights

Copyright Law > ... > Deposit & Registration Requirements > Registration > Registration Certificates

HN13 Although registration of "foreign works" (i.e., non-United States works) is not statutorily required, foreign works can also be registered. Owners of foreign works may choose to apply for registration because Congress has granted substantial litigation benefits to owners of registered works. A certificate of registration serves as prima facie evidence of copyright validity. *17 U.S.C.S. § 410(c)*. Further, only owners of registered works may collect statutory damages and attorney's fees. *17 U.S.C.S. §§ 412*, *504*, *505*. Because the fee for a basic registration is only $35, *37 C.F.R. § 201.3(c)(1)*, these benefits far outweigh the costs of registration.

Copyright Law > Scope of Copyright Protection > Publication > Acts Constituting Publication

HN14 Publication is a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term. The Copyright Act defines "publication" as the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. *17 U.S.C.S. § 101*. Publication also occurs when an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur. Further, when copies are "given away" to the general public, a sufficient transfer of ownership has occurred. Thus, proof of distribution or an offer of distribution is necessary to prove publication.

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1909

Copyright Law > Scope of Copyright Protection > Publication > Copyright Act of 1976

Governments > Courts > Judicial Precedent

Governments > Legislation > Interpretation

HN15 The statutory definition of publication constitutes a codification of the definition evolved by case law before the 1976 Copyright Act. Thus, precedent

examining publication under the 1909 Copyright Act is instructive.

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Governments > Legislation > Interpretation

HN16 The Copyright Act does not define "distribution." Therefore, the term should be given its plain and ordinary meaning.

Copyright Law > ... > Ownership Rights > Distribution > General Overview

Copyright Law > Scope of Copyright Protection > Publication > Acts Constituting Publication

HN17 Proof of distribution or an offer to distribute, alone, is insufficient to prove publication for purposes of a copyright. Central to the determination of publication is the method, extent, and purpose of distribution.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > Scope of Copyright Protection > Publication > Acts Constituting Publication

HN18 Because the statutory definition of "United States work" contains strict temporal and geographic requirements (e.g., "first," "simultaneously," "in the United States," "foreign nation," and "treaty party"), *17 U.S.C.S. § 101*, a determination that a work was first published abroad requires both: (1) an examination of the method, extent, and purpose of the alleged distribution to determine whether that distribution was sufficient for publication, and (2) an examination of both the timing and geographic extent of the first publication to determine whether the work was published abroad.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > Foreign & International Protections > General Overview

Copyright Law > Scope of Copyright Protection > Publication > Acts Constituting Publication

HN19 Without evidence of the exact timing and geographic extent of first publication, it would be impossible to determine whether a work met the statutory definition of a "United States work," or was instead a foreign work for purposes of a copyright. Of course, if a distribution is insufficient to establish publication, the timing and geographic extent of the deficient distribution is immaterial.

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > Foreign & International Protections > Protected Rights

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

Copyright Law > Scope of Copyright Protection > Publication > General Overview

HN20 To proceed with a copyright infringement action, a plaintiff that claims his published work is exempt from the registration requirement must prove that the first publication occurred abroad. *17 U.S.C.S. §§ 101, 411(a)*. This requires the plaintiff to first prove a publication: that the method, extent, and purpose of the distribution meets the Copyright Act's requirements for publication. Once the plaintiff has proven publication, he must then prove that the publication was, in fact, the first publication, and that the geographic extent of this first publication diverges from the statutory definition of a "United States work."

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > Scope of Copyright Protection > Publication > General Overview

HN21 Courts are only concerned with where "the work is first published" for purposes of *17 U.S.C.S. § 101*.

Civil Procedure > Appeals > Standards of Review > General Overview

HN22 An appellate court may affirm the judgment of the district court on any ground supported by the ***record***, regardless of whether that ground was relied upon or even considered by the district court.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN23 A genuine factual dispute exists only if a reasonable fact-finder could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. Thus, when the ***record*** viewed in the light most favorable to the nonmovant reveals insufficient evidence

to support a verdict for the nonmovant, summary judgment is appropriate.

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > Burdens of Proof

Copyright Law > ... > Civil Infringement Actions > Elements > Ownership

Copyright Law > ... > Deposit & Registration Requirements > Registration > General Overview

HN24 A plaintiff in a copyright infringement case bears the burden of proving compliance with statutory formalities, including the registration prerequisite.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN25 Conclusory allegations without specific supporting facts have no probative value sufficient to prevent a grant of summary judgment.

Counsel: For ***KERNEL RECORDS OY***, Plaintiff - Appellant: Richard Busch, Thomas J. Motzny, King & Ballow, NASHVILLE, TN; Bruce A. Christensen, Ethan J. Wall, Richman Greer, PA, MIAMI, FL.

For TIMOTHY MOSLEY, f.k.a. Timbaland, UMG REORDINGS, INC., INTERSCOPE-GEFFEN-A&M, d.b.a. Interscope, d.b.a. Geffen, MOSLEY MUSIC GROUP, LLC, UNIVERSAL MUSIC DISTRIBUTION, Defendants - Appellees: Jonathan L. Gaines, Karen L. Stetson, GrayRobinson, PA, MIAMI, FL; Jeffrey D. Goldman, Jeffer Mangels Butler & Mitchell LLP, LOS ANGELES, CA.

EMI MUSIC PUBLISHING, NELLY FURTADO, EMI APRIL MUSIC INC., NELSTAR PUBLISHING, INC., Defendants - Appellees: William Laurence Charron, Pryor Cashman, LLP, NEW YORK, NY.

Judges: Before MARCUS and BLACK, Circuit Judges, and HODGES,*

Opinion by: BLACK

Opinion

[*1988]** **[*1296]** BLACK, Circuit Judge:

Appellant ***Kernel Records Oy*** (***Kernel***) appeals the district court's[1] order granting Defendants' motion for summary judgment, and denying as moot ***Kernel***'s motion for summary judgment. **[**2]** We conclude the district court erred by granting Appellee Timothy Mosley's motion for summary judgment. However, because ***Kernel*** failed to produce substantially probative evidence that it complied with statutory prerequisites prior to filing this action, we affirm.

I. FACTS

In the summer of 2002, Glenn Rune Gallefoss created a Sound Interface Device (SID) file called *Acidjazzed Evening*.[2] Gallefoss based his musical work on a MOD file that had been previously created by Janne Suni. Suni's MOD file is playable on an Amiga computer or by using a newer computer running software that "emulates" the Amiga and its sounds. Gallefoss's SID file is playable on a Commodore 64 computer or with "emulator" software. The technical details of both the SID and MOD files are irrelevant to this opinion; all that is relevant is that during the summer of 2002, Suni's existing MOD file was modified by Gallefoss into a SID file called *Acidjazzed Evening*.

On August 10, 2002, with Gallefoss's permission, *Acidjazzed Evening* appeared in the Australian disk magazine *Vandalism News* Issue #39. The parties disagree as to how this "disk magazine" was published. ***Kernel*** contends the disk magazine was published in August 2002 on a physical computer disk in Australia. Defendants contend the disk magazine was published in August 2002 "on the Internet." However published in August 2002, the parties agree that in December 2002, a Swedish website called *High Voltage SID Collection* uploaded[3] *Acidjazzed Evening* to its own website, likely

* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

[1] The parties consented to proceeding before a magistrate judge in accordance with ***28 U.S.C. § 636(c)***. For simplicity, we refer to the magistrate judge's decisions as those of the district court.

[2] Gallefoss's amended complaint indicates that his work is referred **[**3]** to by multiple titles, including *Acidjazzed Evening*, *Acid Jazzed Evening*, and *Acid Jazz*. For consistency, we use *Acidjazzed Evening* throughout this opinion.

[3] "To download means to receive information, typically a file, from another computer to yours via your modem. The opposite term is upload, which means to send a file to another

after obtaining a copy from *Vandalism News* Issue #39.

On June 7, 2006, the allegedly infringing song *Do It* was released. On August 16, 2007, Gallefoss transferred his rights in **[**4]** *Acidjazzed Evening* to ***Kernel***. ***Kernel*** litigated a claim of copyright infringement in Finland against parties associated with the release of *Do It*. ***Kernel*** lost. ***Kernel*** then brought its copyright infringement claim to the United States.

[*1297] II. PROCEDURAL HISTORY

Kernel filed this action in the United States District Court for the Southern District of Florida. ***Kernel***'s amended complaint alleged that defendants Timothy Z. Mosley, Mosley Music, LLC (Mosley Music), Universal Music Distribution Corp. (Universal), Nelly Furtado, UMG Recordings, Inc. (UMG), Interscope-Geffen-A&M (Interscope), EMI Music Publishing (EMI Publishing), EMI April Music, Inc. (EMI April), Virginia Beach Music (Virginia), WB Music Corp. (WB), and Warner Chappell Music, Inc. (Warner) (collectively, Defendants)[4] infringed its copyright **[***1989]** of *Acidjazzed Evening*. In the amended complaint, ***Kernel*** claimed *Acidjazzed Evening* was "first published outside the United States" and that "[c]opyright registration in the United States [was] not required as a prerequisite to bringing an infringement action as the sound ***recording*** and musical arrangement at issue is not a 'United States Work,' as defined in 17 U.S.C. § 101." Am. Compl. at 1-2.

Defendants individually **[**6]** answered the complaint and pleaded affirmative defenses. Each defendant raised as an affirmative defense ***Kernel***'s failure to comply with the required statutory formalities prior to filing suit, including registration of the allegedly protected work with the Copyright Office.

On May 28, 2010, Mosley and Mosley Music (collectively Mosley) moved for summary judgment. Contemporaneously with the motion for summary judgment, Mosley filed a statement of material facts, which alleged the following was undisputed:

> 2. Gallefoss's work was first published on the Internet. "The first publication of Gallefoss's version of 'Acidjazzed Evening,' in any form, was in Australia as part of the disk magazine Vandalism News, issue 39, in August, 2002." (Amended Complaint, ¶ 25).
>
> 3. Gallefoss chose the Internet as the means to first publish his work (as is customary in the "demoscene" sub-culture of which he is a member). (Gallefoss Depo., 2/11/10, 20-21). Exhibit A.
>
> 4. The work at issue was not only "displayed" but was made available on more than one website for download, copying and for preparing derivative works by others. (Gallefoss Depo. 2/11/10, 73-80). Exhibit A.

In his motion, Mosley contended that ***Kernel*** **[**7]** lacked the statutorily required copyright registration for *Acidjazzed Evening*, and the copyright infringement action had to be dismissed. Mosley claimed it was undisputed that *Acidjazzed Evening* "was first published on the Internet" as part of the disk magazine *Vandalism News* Issue #39. Mosley contended that **[*1298]** by making *Acidjazzed Evening* available to download from an "Internet site," Gallefoss simultaneously published his work in every country in the world with Internet service. Mosley claimed such worldwide and simultaneous publication made *Acidjazzed Evening* a United States work subject to registration, and that ***Kernel***'s failure to register doomed its infringement claim.[5]

---

computer." *United States v. Mohrbacher, 182 F.3d 1041, 1048 (9th Cir. 1999)* (quotation and alteration omitted).

[4] ***Kernel*** also **[**5]** named Nelstar Publishing, Inc. (Nelstar) as a defendant in the action. Nelstar filed a motion to dismiss the complaint, claiming the court lacked personal jurisdiction over it, and that it was an indispensable party to the litigation. After a hearing, the district court granted in part Nelstar's motion, finding a lack of personal jurisdiction. However, the district court only dismissed ***Kernel***'s request for a permanent injunction, finding that Nelstar was not an indispensable party to the other counts of the amended complaint.

Kernel claims in its opening brief that the district court erred by finding Nelstar was an indispensable party for the purposes of granting a permanent injunction. However, "[d]ue to word limitations, ***Kernel*** . . . only briefly mention[ed] this point" in its brief, and incorporated its arguments to the district court by citation. Appellant's Br. at 55. Such a blatant attempt to "bypass the rules" only "makes a mockery of our rules governing page limitations and length." *See Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A., 377 F.3d 1164, 1167 n.4 (11th Cir. 2004)*. ***Kernel*** waived this argument by not properly presenting it for review. *Id.*

[5] Mosley also contended that Gallefoss failed to obtain permission from Suni to copyright his new version of *Acidjazzed Evening*, and that all defendants possessed an implied license to use Gallefoss's version of *Acidjazzed Evening*. In a separate motion for summary judgment, Interscope, UMG, Universal, WB, and Warner argued that

Mosley also attempted to preempt ***Kernel***'s response. Mosley predicted ***Kernel*** would contend that because the Internet site was "based" in Australia, *Acidjazzed Evening* was published in Australia, and registration therefore was not required. Mosley called this argument "unavailing, and at odds with the plain language of . . . the Copyright Act." Mosley, however, misconceived ***Kernel***'s argument.

On May 28, 2010, ***Kernel*** also filed its motion for summary judgment and statement of material facts. In its motion, ***Kernel*** simply stated it need not have registered its work because *Acidjazzed Evening* was first published outside the United States. ***Kernel*** did not contend, as Mosley had anticipated, **[**9]** that *Acidjazzed Evening* was first published on the Internet in Australia. Instead, ***Kernel*** claimed as an undisputed fact that *Acidjazzed Evening* was published in Australia on a physical computer disk, and uploaded to the Internet months later. ***Kernel***'s statement of material facts stated that:

> 19. Gallefoss authorized publication of his arrangement and sound ***recording*** of "Acidjazzed Evening" in a magazine published on a computer disk in Australia called *Vandalism* ***[***1990]*** *News*, issue [3]9, in August 2002. Gallefoss Decl. ¶ 23.
>
> 20. In December 2002, Gallefoss's arrangement and sound ***recording*** of "Acidjazzed Evening" was included in the High Voltage SID Collection and uploaded to the internet. Gallefoss Decl. ¶ 25.

The Gallefoss Declaration, dated May 28, 2010, was filed simultaneously with the statement of material facts.

Thus, on May 28, 2010, Mosley contended it was undisputed that *Acidjazzed Evening* was first published by making the SID file available for download from an "Internet site." On the same day, May 28, 2010, ***Kernel*** contended it was undisputed that *Acidjazzed Evening* was first published on a physical computer disk, and not uploaded to the Internet until months later.

Kernel subsequently **[**10]** responded in opposition to Mosley's motion for summary judgment. ***Kernel*** objected to Mosley's statement of undisputed facts, contending "[t]he factual citation made by defendants makes no reference to first publication on the internet." In its response, ***Kernel*** argued that *Acidjazzed Evening* was first published "on a disk magazine that was not online," and stated that Mosley's assertion **[*1299]** to the contrary was "[w]ithout any foundation." Pl.'s Resp. at 3. ***Kernel*** also made the alternative argument that "[e]ven if the first publication of [*Acidjazzed Evening*] were online, it [was] not a U.S. Work subject to registration requirements." Pl.'s Resp. at 5.

Defendants filed a collective response to ***Kernel***'s motion for summary judgment. Defendants reiterated Mosley's argument that the facts were undisputed that publication occurred on the Internet and stated that ***Kernel***'s "failure to address its non-compliance with [the registration] statutory condition precedent mandate[d] the denial of [***Kernel***]'s summary judgment motion (and the granting of Defendants' motions)." Defs.' Resp. at 4.

Mosley filed a reply in support of his motion for summary judgment. Mosley argued that:

> [T]here ha[d] been no showing **[**11]** made of any mode or manner of publication *other than* via the Internet, nothing to support Plaintiff's effort to come within an exception to the Copyright Act's registration requirement, and nothing to show Plaintiff's compliance with the condition precedent to suit . . . The burden [wa]s on the Plaintiff to plead and prove its work is of foreign . . . origin and that, therefore, it [wa]s exempt from registration requirements. . . . Not only has Plaintiff not met its burden, Plaintiff's sudden efforts to contradict that the work was first published via the Internet d[id] not alter the undisputed ***record*** of an online publication . . . .

Mosley's Reply at 1-2. Mosley then argued that ***Kernel*** failed to produce a physical copy of the claimed computer disk and that it had only produced a webpage printout. Mosley also argued that Gallefoss "agreed that the publication was via the online magazine" in his deposition. *Id.* at 3. Finally, Mosley argued that Gallefoss's declaration should be disregarded because it was offered for the sole purpose of opposing the summary judgment motion, and contradicted his prior sworn deposition testimony. *Id.* at 5.

Gallefoss's work failed to be sufficiently distinct from Suni's work to warrant derivative work protection, and that Gallefoss's work was not a sound ***recording***. In a motion to dismiss, Furtado **[**8]** argued ***Kernel*** failed to state a claim against her upon which relief could be granted. In granting summary judgment to Defendants, the district court did not address these arguments. In their briefs on appeal, Defendants argue that we should rely on one of these grounds as an alternative rationale to affirm the grant of summary judgment. We decline to exercise our discretion to consider these alternative grounds. *See* ***Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp., 604 F.3d 1291, 1306 n.15 (11th Cir. 2010)***.

On March 31, 2011, the district court issued an "abbreviated [**12] non-final Order" intended to be "supplemented with a plenary memorandum opinion and a final appealable Order." The non-final order indicated that the court would grant summary judgment to the defendants by relying on Mosley's Internet publication argument.

On April 1, 2011, ***Kernel*** filed a motion for reconsideration and a motion to stay the proceedings. ***Kernel*** claimed it had submitted credible evidence of non-Internet publication, but nevertheless voiced a willingness to register the work with the Copyright Office should the court hold the proceedings in abeyance. All defendants responded in opposition to ***Kernel***'s motions.

On May 5, 2011, ***Kernel*** filed a reply in support of its motion for reconsideration, indicating it had registered *Acidjazzed Evening*. ***Kernel*** also filed a motion for leave to amend its complaint to add the fact of its registration, attaching a certificate of registration from the Copyright Office effective April 29, 2011.

On June 7, 2011, the district court issued its final order. The district court found Gallefoss's deposition testimony was "clear enough" to affirmatively establish "Internet publication," and stated that if the testimony was "inaccurate or unclear, it [**13] was incumbent upon Plaintiff's counsel to clarify the witness' testimony on this important point." D. Ct. Final Order at 9. Relying on the sham affidavit doctrine, the district court disregarded Gallefoss's declaration, stating the "deposition testimony was clear" and a declaration cannot be used to create a factual dispute when "a party has given clear answers to [*1300] unambiguous questions." [***1991] *Id.* at 10-11.[6] The district court al 6 so concluded that "[t]here can be little dispute that posting material on the Internet makes it available at the same time — simultaneously — to anyone with access to the Internet." *Id.* at 19. With these two conclusions (i.e., *Acidjazzed Evening* was published on the Internet, and Internet publication is de facto simultaneous, worldwide publication), the district court proceeded to examine the ramifications under the Copyright Act's registration requirement. The district court determined that the unambiguous statutory language of the Copyright Act dictates that a work simultaneously published in every country of the world should be treated as a "United States work," and subject to the Copyright Act's registration requirement. Thus, because *Acidjazzed Evening* was [**14] published on the Internet, it was (1) published simultaneously worldwide; (2) a United States work; and (3) subject to the registration requirement. The district court concluded that ***Kernel***'s failure to register *Acidjazzed Evening* prior to filing suit doomed its infringement claim. The district court then rejected ***Kernel***'s motions for reconsideration and for leave to amend the complaint. The district court found that ***Kernel*** had made a "calculated decision" not to seek registration, and that its tardy efforts to "hedge its bet" prevented a finding of good cause under *Fed. R. Civ. P. 16* sufficient to allow an amendment of the complaint. ***Kernel*** filed a timely notice of appeal.[7]

III. SUMMARY JUDGMENT STANDARD

HN1 This Court reviews a district court's grant of summary judgment de novo. *Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1274 (11th Cir. 2012)*. ***HN2*** "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. ***HN3*** A genuine factual dispute exists only if a reasonable fact-finder "could find by [**16] a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. "Once the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a

[6] A district court may disregard an affidavit as a sham when a party to the suit files an affidavit that contradicts, without explanation, prior deposition testimony on a material fact. *Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736 F.2d 656, 657 (11th Cir. 1984)*. The sham affidavit rule should be applied sparingly, *Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1237 (11th Cir. 2010)*, and only when "[t]he earlier deposition testimony . . . consist[s] of clear answers to unambiguous questions which negate [**15] the existence of any genuine issue of material fact," *Lane v. Celotex Corp., 782 F.2d 1526, 1532 (11th Cir. 1986)* (quotations omitted). Because we affirm the grant of summary judgment while considering Gallefoss's alleged "sham" declaration, we need not determine whether the district court erred by relying on the sham affidavit doctrine.

[7] In addition to challenging the entry of summary judgment, ***Kernel*** claims on appeal that the district court abused its discretion by refusing to allow ***Kernel*** to amend its complaint. This claim lacks merit. *See Oravec v. Sunny Isles Luxury Ventures, L.C., 527 F.3d 1218, 1231-32 (11th Cir. 2008)* (affirming district court's denial of plaintiff's motion to amend complaint after belated copyright registration).

genuine issue for trial." Dietz v. Smithkline Beecham Corp., 598 F.3d 812, 815 (11th Cir. 2010). However, when the moving party fails to demonstrate the absence of a genuine issue of material fact, the motion should be denied. Adickes v. S. H. Kress & Co., 398 U.S. 144, 160, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Clark v. Coats & [*1301] Clark, Inc., 929 F.2d 604, 606-08 (11th Cir. 1991).

HN4 "Although all justifiable inferences are to be drawn in favor of the nonmoving party," Baldwin County v. Purcell Corp., 971 F.2d 1558, 1563-64 (11th Cir. 1992) (quotation omitted), "inferences based upon speculation are not reasonable," Marshall v. City of Cape Coral, 797 F.2d 1555, 1559 (11th Cir. 1986). Evidence that is "merely colorable, or is not significantly probative" of a disputed fact cannot satisfy a party's burden, see Anderson, 477 U.S. at 249-50 (citation omitted), and a mere scintilla of evidence is likewise insufficient, see Young v. City of Palm Bay, 358 F.3d 859, 860 (11th Cir. 2004).

IV. [**17] COPYRIGHT LAW

HN5 The Constitution authorizes federal regulation of copyright protection. U.S. Const. art. I, § 8, cl. 8. Congress overhauled federal copyright law by passing the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. § 101 et seq.). As part of that overhaul, Congress eliminated all statutory prerequisites to obtaining copyright protection. Instead, Congress provided "that HN6 a copyright exists the moment an original idea leaves the mind and finds expression in a tangible medium, be it words on a page, images on a screen, or paint on acanvas[]." La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1198 (10th Cir. 2005), abrogated in part by Reed [***1992] Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010).

A. Registration

Congress also created a new voluntary registration system. See 17 U.S.C. § 408(a) (HN7 "[R]egistration is not a condition of copyright protection."). Registration under the Copyright Act is relatively simple and inexpensive. HN8 A copyright owner who wishes to register must: (1) complete an application, id. § 409; (2) deposit with the Copyright Office a copy of the work to be copyrighted, id. § 408(b); and (3) pay a modest fee, id. § 708; [**18] 37 C.F.R. § 201.3(c) (listing fees ranging from $35 for a "basic claim" to $220 for a "claim in a vessel hull"). The Register of Copyrights examines the application and determines whether the deposited material is copyrightable, and if so, registers it. 17 U.S.C. § 410(a). Registration of a work may be obtained at any time during the subsistence of the work's copyright. Id. § 408(a).

HN9 "[R]egistration is not a condition of copyright protection," and is completely voluntary. Id. However, Congress created a substantial incentive for copyright owners to register United States works:

> HN10 [N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

Id. § 411(a). Thus, although "registration is not a condition of copyright [**19] protection," see id. § 408(a), registration (or a refusal of registration) of a United States work "is a prerequisite for bringing an action for copyright infringement," BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1142 (11th Cir. 2007). The plaintiff bears the burden of proving compliance with statutory formalities. Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1233 (11th Cir. 2010).

Courts have divided on whether the filing of an application for registration with [*1302] the Copyright Office is sufficient to comply with the statutory prerequisite, or whether a certificate of registration (or formal refusal) must be issued prior to suit. See Nimmer on Copyright § 7.16[B][3] (discussing "application" and "registration" approaches to registration timing problems).[8] However, "[a]s an absolute limit, HN11 if the

[8] We adopted the "registration" approach in M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1488-89 (11th Cir. 1990), viewing the failure to register as a jurisdictional defect. In Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 1246-49, 176 L. Ed. 2d 18 (2010), the Supreme Court held that the registration requirement is not jurisdictional, but rather a claims-processing rule similar to a statute of limitations or notice provision. We need not revisit M.G.B. Homes, Inc. today.

In Reed Elsevier, Inc., the Court reserved the question of

Copyright Office has failed to receive the necessary elements to issue a registration certificate [for a United States work] prior to the time that the court is called upon to issue final judgment, the action must be dismissed." *Nimmer on Copyright* § 7.16[B][3][c]. "Given the lax standards involved . . . that requirement will never thwart a determined plaintiff." *Id.* ***Kernel***, **[**20]** despite being a determined plaintiff, nevertheless failed to apply for registration prior to calling on the district court to issue final judgment. Thus, ***Kernel***'s infringement claim could survive only if *Acidjazzed Evening* is not a United States work, that is, if *Acidjazzed Evening* is a foreign work exempt from registration.

B. United States or Foreign Work

HN12 For purposes of *§ 411*, the Copyright Act defines a "United States work" as a work that:

> (1) in the case of a published work, the work is first **[**21]** published--
>
> (A) in the United States;
>
> (B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;
>
> (C) simultaneously in the United States and a foreign nation that is not a treaty party; or
>
> (D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual **[***1993]** work legal entities with headquarters in, the United States;
>
> (2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in the United States; or
>
> (3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

17 U.S.C. § 101. A "treaty party" is defined as "a country or intergovernmental organization other than the United States that is a party to an international agreement." *Id.*

HN13 Although registration of "foreign works" **[**22]** (i.e., non-United States works) is not statutorily required, foreign works can also be registered. *See Nimmer on Copyright* § 7.16[C][1][a][iv]. Owners of foreign works may choose to apply for registration because Congress has granted substantial litigation benefits to owners of registered works. *Id.* A certificate of registration serves as prima facie evidence of copyright validity. *17 U.S.C. § 410(c)*. Further, only owners of registered works may collect **[*1303]** statutory damages and attorney's fees. *Id. §§ 412, 504, 505*. Because the fee for a basic registration is only $35, *see 37 C.F.R. § 201.3(c)(1)*, these benefits far outweigh the costs of registration.

Here, the parties agree that *Acidjazzed Evening* was published, but dispute whether *Acidjazzed Evening* is a United States work for which registration was required prior to suit. Thus, their dispute and our analysis focuses on subsection 1 of the definition of a "United States work." Subsection 1's definition hinges on the timing and locations of first publication. To determine where and when *Acidjazzed Evening* was first published, we must examine the law of publication.

C. Publication

HN14 "[P]ublication is a legal word of art, denoting a process **[**23]** much more esoteric than is suggested by the lay definition of the term." *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214 n.3 (11th Cir. 1999)* (quotations omitted). The Copyright Act defines "publication" as:

> the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

17 U.S.C. § 101. Publication also occurs "when an authorized offer is made to dispose of the work in any such manner[,] even if a sale or other such disposition does not in fact occur." *Brown v. Tabb, 714 F.2d 1088, 1091 (11th Cir. 1983)* (quoting *Nimmer on Copyright* §

---

whether district courts may or should enforce the registration prerequisite sua sponte. *Id. at 1249*. We do the same, since Mosley raised the issue of registration by motion.

4.04).[9] Further, when copies are "given away" to the general public, a sufficient transfer of ownership has occurred. *Id.* Thus, proof of distribution or an offer of distribution is necessary to prove publication.[10]

However, ***HN17*** proof of distribution or an offer to distribute, alone, is insufficient to prove publication. Central to the determination of publication is the method, extent, and purpose of distribution. *See Estate of Martin Luther King, Jr., Inc., 194 F.3d at 1214-1216* **[**25]** (discussing general and limited publication); *cf. 17 U.S.C. § 101* (defining publication as distribution to the public). Most publication disputes concern whether distribution of the subject work was sufficiently broad, or whether the purpose of the distribution included a transfer of the right of diffusion, reproduction, distribution, or sale. *See Estate of Martin Luther King, Jr., Inc., 194 F.3d at 1215* (delivery of public speech via live broadcast to worldwide audience), 1216 (distribution to the press); *Aerospace Servs. Int'l v. LPA Grp., Inc., 57 F.3d 1002, 1003 & n.2 (11th Cir. 1995)* (distribution to a general contractor and government agencies); *Donald Frederick Evans & Assocs., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 901 n.7 (11th Cir. 1986)* **[*1304]** (public display of a model home).

D. Determining Whether First Publication Was Domestic or Foreign

Determining whether a work was first published domestically or abroad adds an additional level of complexity. ***HN18*** Because the statutory definition of "United States work" contains strict temporal and geographic requirements (e.g., "first," "simultaneously," "in the United States," "foreign nation," and "treaty party"), *see 17 U.S.C. § 101*, a determination **[**26]** that a work was first published abroad requires both: (1) an examination of the method, extent, and purpose of the alleged distribution to determine whether that distribution was sufficient for publication, and (2) an examination of both the timing and geographic extent of the first publication to determine whether the work was published abroad.

For example, a free pamphlet distributed by mail to every household on the continent of North America would undoubtedly meet the statutory definition of "publication." *See 17 U.S.C. § 101*. However, to determine whether the very same pamphlet was first published abroad, the exact timing and geographic extent of the first publication must be known. Was the pamphlet first mailed to every household in Mexico, followed a week later by a separate mailing to the rest of the continent? If so, the pamphlet is a foreign work, first published abroad, and is not subject to the registration requirement.[11] Or was the pamphlet first mailed to households in the United States and Mexico, followed a week later by a separate mailing to the rest of the continent? If so, the pamphlet was first published in the United States and a treaty party whose law grants a **[**27]** term of copyright protection longer than the United States,[12] making the work a United States work that is subject to the registration requirement. *See 17 U.S.C. §§ 101, 411(a)*. ***HN19*** Without evidence of the exact timing and geographic extent of first publication, it would be impossible to determine whether the pamphlet met the statutory definition of a "United States work," or was instead a foreign work.

---

[9] ***HN15*** The statutory definition of publication "constitutes a codification of the definition **[**24]** evolved by case law before the 1976 [Copyright] Act." *John G. Danielson, Inc. v. Winchester-Conant Props., Inc., 322 F.3d 26, 36 (1st Cir. 2003)* (quotation omitted). Thus, precedent examining publication under the 1909 Copyright Act is instructive. *See Aerospace Servs. Int'l v. LPA Grp., Inc., 57 F.3d 1002 [***1994]*, *1003 (11th Cir. 1995)* (applying 1909 Copyright Act precedent to a 1976 Copyright Act claim); *Nimmer on Copyright* § 4.13[B].

[10] ***HN16*** The Copyright Act does not define "distribution." Therefore, the term should be given its plain and ordinary meaning. *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235, 237 (11th Cir. 1995)*. Black's Law Dictionary defines "distribute" as "[t]o deliver" or "[t]o spread out; to disperse." Black's Law Dictionary 543 (9th ed. 2009); *see also* Oxford English Dictionary Online, *http://www.oed.com* (June 2012) (defining "distribute" as "[t]o deal out or bestow in portions" and "[t]o spread or disperse abroad").

[11] Mexico meets the statutory definition of a treaty party because Mexico is a party to multiple international agreements. *See* ***17 U.S.C. § 101***; United States Copyright Office, Circular 38A, *International Copyright Relations of the United States* 8 (2010), *available at http://www.copyright.gov/circs/circ38a.pdf*. Thus, ***17 U.S.C. § 101(1)(D)*** is inapplicable.

[12] Mexican law provides for a copyright protection term of the life of the author plus 100 years. Ley Federal de Derechos de Autor [LFDA] [Authors' Rights Law], *as amended*, Articulo 29, Diario Oficial de la Federación [DO], 27 de Enero de 2012 (Mex.), *available at http://www.diputados.gob.mx/LeyesBiblio/pdf/122.pdf*. The United States provides for a copyright protection term of the life of the author plus 70 years. *17 U.S.C. § 302(a)*.

Of course, **[**28]** if a distribution is insufficient to establish publication, the timing and geographic extent of the deficient distribution is immaterial. Assume in both of the hypotheticals above that an advance copy of the pamphlet had been mailed only to a small number of reporters in Canada in an effort to gain media attention. Such a mailing to the press would not be a distribution to the public, and is therefore not a publication. *See* Estate of Martin Luther King, Jr., Inc., 194 F.3d at 1216 (explaining that distribution to the news media, as opposed to the general public, for the purpose of enabling reporting is only a limited publication). Since the limited distribution to the press was not a publication, it could not be the first publication, and is immaterial to determining whether the pamphlet was a United States work or a foreign work.

Thus, ***HN20*** to proceed with a copyright infringement action, a plaintiff that claims **[*1305]** his published work is exempt from the registration requirement must prove that the first publication occurred abroad. *See* 17 U.S.C. §§ 101, 411(a); Latimer, 601 F.3d at 1233; BUC Int'l Corp., 489 F.3d at 1141-42. This requires the plaintiff to first prove a publication: that the **[**29]** method, extent, and purpose of the distribution meets the Copyright Act's requirements for publication. Once the plaintiff has proven publication, he must then prove that the publication was, in fact, the first publication, and that the geographic extent of this first publication diverges from the statutory definition of a "United States work."

V. TECHNOLOGY REVIEW

Because terminology is important to our holding, we must review relevant technological terms. The term "online" means "relating to a service, resource, etc., available on or performed using a computer network (esp[ecially] the Internet)." Oxford English Dictionary Online, http://www.oed.com (June 2012). "The Internet is an international network of interconnected computers . . . . [that] **[***1995]** enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." Reno v. ACLU, 521 U.S. 844, 849-50, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). "Any person . . . with a computer connected to the Internet can 'publish' information. . . . Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group . . . ." Id. at 853.

The Internet consists "of **[**30]** a wide variety of communication and information retrieval methods. . . . [including] electronic mail (e-mail) . . . and the 'World Wide Web.'" Id. at 851. "E-mail enables an individual to send an electronic message . . . to another individual or to a group of addressees." *Id.* The sender of an e-mail may "attach" files such as photographs to the message. *See* United States v. Williams, 553 U.S. 285, 305, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). "[T]he World Wide Web . . . allows users to search for and retrieve information stored in remote computers . . . ." Reno, 521 U.S. at 852. That information is typically presented to users as "web pages" or websites, most, but not all of which, are freely available to the public. *Id.* In addition to e-mail and websites, Internet users may choose to distribute electronic files by other methods, such as "peer-to-peer networks." Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005). Internet users who desire access to peer-to-peer networks must download a software product that allows them to distribute and receive files over the Internet directly from other users of the software. *Id.* "[P]eer-to-peer networks are employed to store and distribute electronic **[**31]** files by universities, government agencies, corporations, and libraries, among others." Id. at 920. Each of these very different "online" distribution methods occurs on the Internet.

Although "online" and "Internet" are largely synonymous terms, the Internet consists of distribution methods of significantly different types. Thus, an "online" activity may occur through public websites, restricted websites, peer-to-peer networks, e-mail, or other less common methods. Although it may be possible to presume simultaneous worldwide availability of a public website, *see* ACLU v. Reno, 929 F. Supp. 824, 831, 836-37 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997),[13] such a presumption **[*1306]** could not apply to restricted websites, peer-to-peer networks, and e-mail. A restricted website is only available to those willing to pay a fee or who meet specified criteria; a peer-to-peer network is only available to those who have downloaded the required software; and an e-mail only goes to the addresses input by the sender. Thus,

---

[13] As the **[**32]** Supreme Court observed in *Reno*, methods of communication on the Internet are "constantly evolving and difficult to categorize precisely." 521 U.S. at 851. The district court in *Reno* made extensive factual findings after holding extensive evidentiary hearings. Id. at 849; 929 F. Supp. at 828, 830-49. We therefore caution district courts against making presumptions such as this without careful consideration, especially without stipulations or supporting evidence.

unlike public websites on the World Wide Web, each of these other methods of online distribution would be inconsistent with a presumption of simultaneous worldwide availability.

To determine the countries to which these other online methods distribute material would require additional evidence, such as the country of residence of the users of a certain restricted website or peer-to-peer network, or the recipient of a certain e-mail. For example, if a restricted website has subscribers only in the United States, Germany, and Japan, placing a file on that website would not make the file simultaneously available to a worldwide audience. Similarly, if the software for a peer-to-peer network was downloaded only in Canada, Egypt, and the Netherlands, offering a file for download on the peer-to-peer network would not make the file simultaneously available to a worldwide audience. Finally, if the recipients **[**33]** of an e-mail are all located in Mexico, sending a file by e-mail attachment would not make the file simultaneously available to a worldwide audience. Each of these "online" distribution methods utilizes the Internet, but none of them can be presumed to result in simultaneous, worldwide distribution.

Throughout this case, the district court (as well as the parties) confounded "the Internet" and "online" with "World Wide Web" and "website." Because of the strict temporal and geographic requirements contained in the statutory definition of "United States work," conflating these terms had a profound impact on the district court's evidentiary analysis. By confounding "Internet" with "website," the district court erroneously assumed that all "Internet publication" must occur on the "World Wide Web" or a "website." The district court then erroneously assumed all "Internet publication" results in simultaneous, worldwide distribution. As outlined below, a proper separation of the terms yields a very different analysis. **[***1996]**

VI. MOSLEY'S MOTION

Before the district court, Mosley claimed the evidence affirmatively established that Gallefoss, through *Vandalism News*, first offered *Acidjazzed Evening* to **[**34]** the public by "posting" it to an "Internet site" in August 2002. Mosley claimed that such a posting on the Internet amounted to a simultaneous, worldwide publication of *Acidjazzed Evening*, making *Acidjazzed Evening* a United States work, and requiring registration prior to suit. Drawing all justifiable inferences in favor of ***Kernel*** as the nonmoving party, we conclude that Mosley failed to meet his burden as the movant under *Rule 56* to show that there was no genuine dispute as to whether *Acidjazzed Evening* is a United States work.

In his motion for summary judgment, Mosley relied solely on Gallefoss's February 2010 deposition testimony:

> Q: Now, you indicated that the first publication of your version of "Acid Jazz" was posted on this Australian —
>
> **[*1307]** A: Disk magazine.
>
> Q: — online magazine, correct?
>
> A: **Yeah**, that's the first — I gave it to the disk magazine, yes, so it was first used in that disk magazine.
>
> Q: And then after that you posted it on this High Voltage site [a few months later]; is that correct?
>
> A: I didn't post it. Someone else did.
>
> Q: Who did that?
>
> A: I don't know. Maybe the people who work for the High Voltage SID collection.
>
> Q: And they may have just gained access to it from the online **[**35]** magazine?
>
> A: **Yeah**.
>
> Q: And then posted it themselves?
>
> A: They took it from the disk magazines.

Gallefoss February 11, 2010 Deposition at 76:16-77:9 (emphasis added). Mosley's characterization of the first "agreement" by Gallefoss that the disk magazine was online is unavailing. The transcript clearly indicates that Gallefoss interrupted his questioner immediately prior to the word "online." This simultaneous questioning and answering, as indicated by the transcript, does not yield clear evidence. The second purported "agreement" by Gallefoss is similarly problematic. Although the question assumes the disk magazine is online, the question's purpose was not to confirm this fact. Instead, the questioner sought information about where "the people who work for the High Voltage SID collection" obtained their copy of *Acidjazzed Evening*. Gallefoss confirmed "[t]hey took it from the disk magazines;" nothing more. To infer from Gallefoss's answers that he acquiesced in the questioner's assumption of online publication

requires a strained reading of the exchange and unreasonable speculation.

However, even that unreasonable speculation (if assumed to be reasonable), would not definitively prove that **[**36]** *Acidjazzed Evening* was made available to the public on a website. As discussed, "online" is largely synonymous with the Internet, a term used to describe a wide variety of communication and information retrieval methods. Because the term "online" does not foreclose Internet distribution methods other than via a public website, Gallefoss's supposed agreement as to *Vandalism News* being an "online magazine" does not support a finding of simultaneous, worldwide publication on a website. Gallefoss's ambiguous testimony is insufficiently probative to demonstrate that there was no dispute of material fact concerning how *Acidjazzed Evening* was first published. *See Clark, 929 F.2d at 606-07; cf. Wolf v. Coca-Cola Co., 200 F.3d 1337, 1343 (11th Cir. 2000)*.

Further, Gallefoss's May 2010 deposition testimony directly contradicts Mosley's characterization of the February 2010 deposition testimony quoted above. When asked specifically about websites, Gallefoss testified as follows:

> Q: Are there a number of websites that you're aware of that your SID file of 'Acid Jazz Evening' has appeared on?
>
> . . .
>
> A: I only know one.
>
> Q: Which one is that?
>
> A: The High Voltage SID collection.

Gallefoss May 7, 2010 Deposition **[**37]** Testimony at 93:11-15. When asked a direct, concise question about websites, Gallefoss gave a direct response. And a reasonable inference from that response is that *Vandalism News* Issue **[***1997]** #39 did not appear on a website in August 2002.[14]

Mosley's motion rested solely on Gallefoss's deposition testimony. However, the **[*1308]** district court cited two additional pieces of evidence to support its finding that no genuine dispute of material fact existed as to how *Acidjazzed Evening* was first published. The district court first cited Suni's deposition testimony. At his deposition on May 26, 2010, Suni testified as follows:

> Q: Are you familiar with an Internet publication called Vandalism News?
>
> A: Yes.
>
> . **[**38]** . .
>
> Q: All right. Now, this online magazine, what is the focus of that magazine?
>
> . . .
>
> A: Well, it's the demoscene. It's history and publications and also displays interviews on people involved in the demoscene.

Suni May 26, 2010 Deposition at 3-4.

Suni's deposition testimony suffers from a lack of specificity in two ways. First, although Suni testified as to his general familiarity with *Vandalism News*, his testimony lacked temporal context. Suni's general familiarity with *Vandalism News* as an Internet publication on May 26, 2010, is too remote to be significantly probative as to whether *Vandalism News* Issue #39 was an Internet publication in August of 2002. *See Burton v. City of Belle Glade, 178 F.3d 1175, 1195 (11th Cir. 1999)* (finding ten-year-old evidence "too remote and attenuated" to be probative); 1 K. Broun, McCormick on Evidence § 185 at 732 (6th ed. 2006) ("[E]vidence lacking substantial probative value may be condemned as 'speculative' or 'remote.' . . . Remoteness relates not to the passage of time alone, but to the undermining of reasonable inferences due to the likelihood of supervening factors.").

Second, Suni, like Gallefoss, testified only that *Vandalism News* is an "Internet **[**39]** publication" and an "online magazine." Neither of these general characterizations provide any indication as to what method may have been used to distribute *Acidjazzed Evening* over the Internet in August 2002. Once again, the terms "Internet" and "online" include alternatives to the use of a public website, including a restricted

---

[14] It is important to remember that ***HN21*** we are only concerned with where "the work is first published." ***17 U.S.C. § 101***. Although the parties disagree as to how the first publication occurred, they agree that the first publication appeared in the August 2002 release of *Vandalism News* Issue #39. Although the parties also agree that Acidjazzed Evening was placed on the *High Voltage SID Collection* website in December 2002, that fact is irrelevant to determining whether *Acidjazzed Evening* is a United States work.

website, e-mail, or a peer-to-peer network. Such general and ambiguous deposition testimony, without the inclusion of specific facts, is insufficiently probative to demonstrate that there was no dispute of material fact. *See* Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1217 (11th Cir. 2000); Wolf, 200 F.3d at 1343.

The only other piece of evidence discussed by the district court related to publication is a document produced by ***Kernel*** during discovery. The document is a screen-shot from a third-party website called "Commodore 64 Scene Database," which seeks "to gather as much information and material about the scene around the commodore 64 computer . . . ." Visitors to the site "can find almost anything which was ever made for the commodore 64." The screen-shot was made on February 5, 2010, lists the publication as *Vandalism News #39*, lists the releasing party, **[**40]** lists a release date of "10 August 2002," and lists *Acid Jazz* as a SID included in the release. This document, created eight years after the alleged first publication, is of minuscule probative value. Although it may establish the existence of *Vandalism News* Issue #39 and the date of its first release (neither of which is disputed by either party), it provides no basis from which to reasonably infer how *Vandalism News* Issue #39 was first released, whether on a public website, through another Internet distribution method, or on a physical computer disk.

[*1309] Mosley failed to meet his burden as the movant under Rule 56 to show that there was no genuine dispute as to whether *Acidjazzed Evening* was published on a public website. Fed. R. Civ. P. 56(a). Mosley's failure to meet his burden precludes the presumption of simultaneous, worldwide publication relied upon by the district court. Because Mosley failed to meet his burden as the movant under Rule 56 to show a lack of genuine dispute as to whether *Acidjazzed Evening* is a United States work, the district court erred by granting Mosley's motion for summary judgment. *See* Adickes, 398 U.S. at 157; Clark, 929 F.2d at 606-07.

VII. ALTERNATIVE GROUND

Although **[**41]** Mosley's motion was improperly granted, ***HN22*** this Court may affirm the judgment of **[***1998]** the district court on any ground supported by the ***record***, regardless of whether that ground was relied upon or even considered by the district court. Krutzig v. Pulte Home Corp., 602 F.3d 1231, 1234 (11th Cir. 2010) ("This court may affirm a decision of the district court on any ground supported by the ***record***."); Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) ("We may affirm the district court's judgment on any ground that appears in the ***record***, whether or not that ground was relied upon or even considered by the court below.").[15]

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). **[**42]** ***HN23*** A genuine factual dispute exists only if a reasonable fact-finder "could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Anderson, 477 U.S. at 252. Thus, when the ***record*** viewed in the light most favorable to the nonmovant reveals insufficient evidence to support a verdict for the nonmovant, summary judgment is appropriate. *Id.*; Welding Servs., Inc. v. Forman, 509 F.3d 1351, 1356 (11th Cir. 2007); Thomas, 506 F.3d at 1363-64.

Here, a close review of the ***record*** dictates affirming the grant of summary judgment. ***HN24*** ***Kernel*** bears the burden of proving compliance with statutory formalities, including the registration prerequisite. *See* Latimer, 601 F.3d at 1233; BUC Int'l Corp, 489 F.3d at 1142. ***Kernel*** failed to register *Acidjazzed Evening* prior to filing suit. The ***record*** reveals a lack of sufficiently probative evidence to determine that *Acidjazzed Evening* is a foreign work. Without sufficiently probative evidence of *Acidjazzed Evening* being a foreign work exempt from registration, and without a certificate of registration, ***Kernel***'s infringement suit was over before it began. *See* 17 U.S.C. § 411(a); BUC Int'l Corp., 489 F.3d at 1142.[16]

---

[15] In *Thomas*, the district court had granted summary judgment on the grounds that a plaintiff failed to allege a sufficiently hostile work environment to support a Title VII claim. 506 F.3d at 1363. This Court decided that it need not examine that question, because the Title VII plaintiff "failed to produce evidence from which a reasonable jury could find a causal connection" between her complaints and her termination. *Id.* at 1364.

[16] ***Kernel*** cannot persuasively **[**43]** claim any prejudice from our affirming summary judgment on a ground not expressly considered by the district court. *See* Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228, 1232 n.3 (11th Cir. 2001). Mosley's summary judgment motion put ***Kernel*** on notice that it had to come forward with all of its evidence on the issue of whether *Acidjazzed Evening* was a foreign work. *See* Celotex Corp., 477 U.S. at 326; Thomas, 506 F.3d at 1364. ***Kernel*** had every opportunity to request

[*1310] ***Kernel*** denied publication **[**44]** occurred by any means of Internet distribution.[17] Instead, ***Kernel*** insisted "[t]he first publication [of *Acidjazzed Evening*] was on a disk magazine that was not online." In support of this theory, ***Kernel*** offered Gallefoss's declaration and deposition. Gallefoss's declaration stated:

> 23. I authorized publication of my version of "Acidjazzed Evening" in a magazine published on a computer disk in Australia called *Vandalism News*, issue [3]9, in August 2002.
>
> 24. *Vandalism News* is a magazine that appeals largely to people in the demoscene because the computer disk it is published. [sic]
>
> 25. In December 2002, without my permission or objection, my arrangement and sound ***recording*** of "Acidjazzed Evening" was included in the High Voltage SID Collection and uploaded to the internet.

Gallefoss Declaration at 3. Gallefoss's declaration, alone, is insufficient to establish that *Acidjazzed Evening* is a foreign work; he fails to address distribution, an essential element of publication. Although Gallefoss baldly attests that the disk magazine was published, "publication is a legal word of art, denoting a process much more esoteric than is suggested by the lay definition of the term." *Estate of Martin Luther King, Jr., Inc., 194 F.3d at 1214 n.3* **[**45]** (quotations omitted). Gallefoss attests to the **[***1999]** computer disk being "published . . . in Australia . . . in August 2002," but he fails to attest to whether the disk was ever distributed, the breadth of distribution, the purpose of the distribution, and whether the distribution included a transfer of the right of diffusion, reproduction, distribution, or sale. *See id. at 1216*. The unsupported, conclusory, and general attestation by Gallefoss that *Acidjazzed Evening* was "published" lacks probative value, and is insufficient to prevent a grant of summary judgment. *Leigh, 212 F.3d at 1217* ("This court has consistently held that ***HN25*** conclusory allegations without specific supporting facts have no probative value." (quotation omitted)).

Kernel also offered Gallefoss's February 2010 deposition testimony **[**46]** as proof of publication by distribution on a physical disk. That exchange (and every other piece of evidence cited by ***Kernel*** to support its theory of publication by physical computer disk) fails to provide any insight as to distribution. Because ***Kernel*** failed to offer significantly probative evidence of distribution, that is, whether the disk was ever distributed, the breadth of distribution, the purpose of the distribution, and whether the distribution included a transfer of the right of diffusion, reproduction, distribution, or sale, no reasonable fact-finder could find that *Acidjazzed Evening* was first published on a physical computer disk in August 2002. *See Latimer, 601 F.3d at 1233*; *Welding Servs., Inc., 509* ***[*1311]*** *F.3d at 1356*; *Estate of Martin Luther King, Jr., Inc., 194 F.3d at 1216*. Without a finding that publication occurred, no reasonable fact-finder could find the location of the August 2002 publication, whether in the United States or abroad. *See 17 U.S.C. § 101* (defining "United States work").

Although no reasonable fact-finder could find by a preponderance of the evidence that ***Kernel***'s specific theory of publication occurred, that alone is insufficient to dispose of the case. **[**47]** If a reasonable fact-finder, under any theory, could find by a preponderance of the evidence (1) that *Acidjazzed Evening* was published; (2) when that first publication occurred; and (3) in what countries that first publication occurred, we would be required to remand the case to the district court. However, on this ***record***, no reasonable fact-finder could possibly determine by a preponderance of the evidence those essential facts.

First, as previously discussed, Gallefoss's February deposition testimony and Suni's deposition testimony are too ambiguous and general to be sufficiently probative evidence of first publication. *Leigh, 212 F.3d at 1217*; *Wolf, 200 F.3d at 1343*. Second, the only inference (albeit an unreasonable and speculative one)

---

further discovery before filing a motion for summary judgment, *see Fed. R. Civ. P. 56(d)*, but chose instead to make its own motion for summary judgment using the evidence discussed below. The ***record*** evidence of publication and its adequacy was a central issue in the parties' summary judgment motion papers, in ***Kernel***'s motion for reconsideration, in each party's appellate brief, and at oral argument before this Court. Because ***Kernel*** had sufficient notice of the issue's import and had multiple opportunities to respond, we do not hesitate to affirm the entry of summary judgment on a ground supported by the ***record***, even one independent of Mosley's motion. *See Krutzig, 602 F.3d at 1234*.

[17] In its reply brief, ***Kernel*** contends that *Acidjazzed Evening* was published when Gallefoss offered to distribute *Acidjazzed Evening* to *Vandalism News* for further distribution to members of the public. Because ***Kernel*** raised this argument for the first time in its reply brief, we treat the argument as waived. ***Conn. State Dental Ass'n v. Anthem Health Plans, Inc., 591 F.3d 1337, 1351 n.11 (11th Cir. 2009)***.

to be drawn from Gallefoss's and Suni's ambiguous and general testimony is that *Acidjazzed Evening* was distributed "online" or on "the Internet." *See Marshall, 797 F.2d at 1559* ("[I]nferences based upon speculation are not reasonable."). Third, although the screen-shot corroborates that *Acidjazzed Evening* was first released in August 2002 as part of *Vandalism News* Issue #39, it provides no evidence of "Internet publication," and certainly not availability **[**48]** from a publicly accessible website.

We have exhaustively reviewed the ***record***; not a single piece of documentary or testimonial evidence describes *Vandalism News* as a publicly accessible website, or provides a basis to infer that *Vandalism News* Issue #39 was uploaded to a publicly accessible website in August 2002. To the contrary, Gallefoss testified clearly that the only website on which *Acidjazzed Evening* appeared was the *High Voltage SID Collection*, beginning in December of 2002. We are, at best, left with simple speculation that *Acidjazzed Evening* was published on the Internet in August 2002. A reasonable fact-finder could not find that a simultaneous, worldwide publication occurred in August 2002. Because the ***record*** lacks sufficiently probative evidence of simultaneous worldwide publication, we need not determine what effect simultaneous worldwide publication would have under *17 U.S.C. § 101*'s definition of a United States work.

Kernel has failed to produce sufficiently probative evidence of *Acidjazzed Evening* being a foreign work exempt from registration. Without proof of compliance with required statutory prerequisites, ***Kernel***'s case was not properly commenced. *See BUC Int'l Corp., 489 F.3d at 1142*. **[**49]** We need not remand the case for the simple purpose of allowing ***Kernel*** a second chance to muster the necessary proof. Instead, we affirm the grant of summary judgment.

VII. CONCLUSION

Mosley failed to demonstrate the absence of a genuine dispute of material fact. *See Fed. R. Civ. P. 56(a); Anderson, 477 U.S. at 252*. Because Mosley failed to meet his burden as the movant under *Rule 56*, the district court erred by granting Mosley's motion for summary judgment. *See Adickes, 398 U.S. at 157; Clark, 929 F.2d at 606-07*. **[***2000]**

However, ***Kernel*** has failed to produce sufficiently probative evidence that it complied with the statutory prerequisites required to bring this action. We have reviewed **[*1312]** all of the evidence cited by the parties and by the district court, and have independently reviewed the ***record***. When all inferences are drawn from the evidence in favor of ***Kernel***, the ***record*** lacks sufficiently probative evidence of whether *Acidjazzed Evening* is a United States work or a foreign work. ***Kernel*** bears the burden of proving compliance with statutory formalities. *Latimer, 601 F.3d at 1233*. Thus, because ***Kernel*** failed to apply for registration prior to the district court's grant of summary judgment, and **[**50]** ***Kernel*** cannot demonstrate that *Acidjazzed Evening* is a foreign work exempt from registration, ***Kernel***'s case is doomed. *See 17 U.S.C. § 411(a)*. We affirm the grant of summary judgment.

AFFIRMED.

End of Document

Appendix 40.

Glass v. Captain Katanna's, Inc.

United States District Court for the Middle District of Florida, Orlando Division

June 17, 2013, Decided; June 17, 2013, Filed

CASE NO. 6:13-cv-421-Orl-19GJK

Reporter
950 F. Supp. 2d 1235 *; 2013 U.S. Dist. LEXIS 87179 **; 120 Fair Empl. Prac. Cas. (BNA) 1540; 2013 WL 3017010

BRITTANY GLASS, Plaintiff, v. CAPTAIN KATANNA'S, INC., PINEDA INN BAR & GRILL, INC., Defendants.

Core Terms

pregnancy discrimination, sex, pregnancy, statutes, legislative intent, courts, cognizable, individual's, decisions, Hear, legislative history, appellate court, district court, Dictionary, Rights, federal district court, statutory construction, sex discrimination, discriminate, preemption, construe, female, unlawful employment practice, statutory language, motion to dismiss, national origin, state court, headquartered, reproductive, ambiguity

Counsel: [**1] For Brittany Glass, Plaintiff: Joseph C. Wood, Mauricio Arcadier, Stephen J. Biggie, LEAD ATTORNEYS, Arcadier & Associates, PA, West Melbourne, FL.

For Captain Katanna's, Inc., Pineda Inn Bar & Grill, Inc., Defendants: Chelsie Joy Flynn, LEAD ATTORNEY, Ford & Harrison, LLP, Orlando, FL.

Judges: PATRICIA C. FAWSETT, UNITED STATES DISTRICT JUDGE.

Opinion by: PATRICIA C. FAWSETT

Opinion

[*1236] **ORDER**

This case comes before the Court on the following:

1. The Motion to Dismiss Count I of Plaintiff's Complaint and Incorporated Memorandum of Law filed by Defendants Captain Katanna's, Inc. and Pineda Inn Bar & Grill, Inc. (Doc. No. 9, filed Apr. 17, 2013); and

2. The Response to Defendants' Motion to Dismiss filed by Plaintiff Brittany Glass (Doc. No. 11, filed May 1, 2013).

INTRODUCTION

On March 15, 2013, Plaintiff Brittany Glass ("Plaintiff") initiated this action against her former employers, Captain Katanna's, Inc. and Pineda Inn Bar & Grill, [*1237] Inc. ("Defendants"), alleging pregnancy discrimination claims pursuant to the Florida Civil Rights Act, *Florida Statutes, Chapter 760* (the "FCRA"), and Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§2000e, et seq.* ("Title VII"). (Doc. No. 1 at ¶¶14-23 ("Count One"); *id.* ¶¶24-27 ("Count [**2] Two")). Plaintiff alleges the following facts in support of her pregnancy discrimination claims:

(1) Defendants hired Plaintiff on May 11, 2011 to work as a bartender (*id.* ¶6);

(2) From May 11, 2011 through February 27, 2012, "Plaintiff maintained a discipline-free employment record" (*id.* at ¶8);

(3) On February 27, 2012, Plaintiff informed Defendants that she was pregnant (*id.* at ¶7);

(4) Defendants advised Plaintiff that she could not tend bar because she was pregnant, and they required her to provide a note from her doctor stating that she was "fit for duty" (*id.* at ¶¶16-17);

(5) On March 23, 2012, Plaintiff provided Defendants with a doctor's note which stated that Plaintiff could perform her work (*id.* at ¶17); and

(6) On or about the same day that Plaintiff provided the doctor's note to Defendants, the Defendants terminated Plaintiff's employment (*id.* at ¶¶9, 19-20).

On April 17, 2013, Defendant filed a Motion to Dismiss Count One (Doc. No. 9 (the "Motion")), and Plaintiff filed her Response in Opposition to Defendants' Motion on May 1, 2013 (Doc. No. 11 (the "Response")). [1] The Motion and Response address a discrete issue of law: whether pregnancy discrimination claims are cognizable **[**3]** under the FCRA. Citing to cases from this Court, the Federal District Court for the Southern District of Florida, and the First and Third District Courts of Appeal for the State of Florida, Defendants argue that pregnancy discrimination cases are not cognizable. (Doc. No. 9.) Taking the opposite position, Plaintiff points to cases from this Court, the Federal District Court for the Northern District of Florida, and the Second and Fourth District Courts of Appeal for the State of Florida. (Doc. No. 11.) After consideration of the conflicting law on the issue, [2] the Court determines that pregnancy discrimination claims are cognizable under the FCRA. Accordingly, the Court will deny the Motion.

THE LEGAL STANDARDS AND ANALYSIS

I. The Split of Authority in the Florida District Courts of Appeal

Like Title VII, the FCRA prohibits "certain employers from discriminating **[*1238]** against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *Hubbard v. Meritage Homes of Fla., Inc., No. 12-15172, 520 Fed. Appx. 859, 2013 U.S. App. LEXIS 10906, 2013 WL 2359065, *3 (11th Cir. May 30, 2013)*(quoting *42 U.S.C. § 2000e-2(a)(1)*); *§760.10(1)(a) Fla. Stat.* (2012). Pursuant to the Pregnancy Discrimination Act of 1978, **[**5]** *42 U.S.C. § 2000e(k)* (the "PDA"), Title VII was amended to define the phrase "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." *42 U.S.C. § 2000e(k)*.

After the PDA was enacted, the FCRA was not amended to include a definition of "because of sex" that explicitly includes "pregnancy, childbirth, or related medical conditions." As explained below, the absence of such an amendment is the primary basis courts have cited for the conclusion that the FCRA does not permit pregnancy discrimination claims. *Delva v. The Cont'l Group, 96 So. 3d 956 (Fla. 3d DCA 2012)*; *O'Loughlin v. Pinchback, 579 So. 2d 788 (Fla. 1st DCA 1991)*. In contrast, courts which have held that pregnancy discrimination claims are cognizable under the FCRA point to a plain reading of the statutory language "because of sex," the Florida legislature's directive to liberally construe the FCRA, the legislative history, as well as the long-standing and consistent construction of the FCRA by Florida's Commission on Human Relations (the "Commission"). *Carsillo v. City of Lake Worth, 995 So. 2d 1118 (Fla. 1st DCA 2008)*; *Carter v. Health Mgmt. Assocs., 989 So. 2d 1258 (Fla. 2d DCA 2008)*; **[**6]** *e.g., Wright v. Sandestin Invests., LLC, 3:11cv256, 914 F. Supp. 2d 1273, 2012 U.S. Dist. LEXIS 175837, 2012 WL 6194872, *6 (N.D. Fla. Dec. 12, 2012)*. As further explained below, this Court finds the latter courts' analyses to be more persuasive and consistent with how the Florida Supreme Court is likely to resolve the issue. [3]

---

[1] In determining the merits of a motion to dismiss, the Court must accept all factual allegations in the complaint as true and decide whether the plaintiff has stated a plausible claim to relief. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2009)*); *Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004)*. Here, there is no dispute that the factual allegations are sufficient to state a claim for pregnancy discrimination. Rather, **[**4]** the dispute between the parties concerns interpretation of Florida law.

[2] Recently, the Eleventh Circuit noted that the issue of whether the FCRA recognizes pregnancy discrimination claims "is an open question." *Hubbard v. Meritage Homes of Fla., Inc., No. 12-15172, 520 Fed. Appx. 859, 2013 U.S. App. LEXIS 10906, 2013 WL 2359065 (11th Cir. May 30, 2013)*; *DuChateau v. Camp, Dresser & McKee, Inc., 713 F.3d 1298, 1301 (11th Cir. 2013)* (declining to "decide" the "issue" of whether the FCRA "provides a cause of action for pregnancy discrimination"). *See generally*, Donna L. Eng., *The Unsettled State of Pregnancy Discrimination Claims Under the Florida Civil Rights Act of 1992*, 86 FLA. B.J. 54 (Oct. 2012).

[3] The Federal District Courts also are in disagreement concerning whether pregnancy discrimination claims are cognizable under Florida law. This Court will not focus on those decisions, however, because a federal court's disagreement with a state court decision is not a "persuasive indication that the Florida Supreme Court" would decide the issue differently than a state intermediate appellate court. *McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002)* (quoting *Tobin v. Mich. Mut. Ins. Co., 398 F.3d 1267, 1272 (11th Cir. 2005), certified question answered, 948 So. 2d 692 (Fla. 2006)*; *e.g. Horowitch v. Diamond Aircraft Indus., Inc., 645 F.3d 1254, 1261-62 (11th Cir. 2011)* (declining to follow Eleventh Circuit's prior interpretation of Florida law due to a contrary decision from a Florida intermediate appellate court).

A. Florida's First District Court of Appeal

Florida's First District Court of Appeal was the first **[**7]** court to discuss whether discrimination based on "sex" includes pregnancy discrimination under Florida law. [4] *O'Loughlin, 579 So. 2d at 791-92*. The matter came to the *O'Loughlin* Court on appeal from a determination by the Commission that a county sheriff was liable under the Florida Human Rights Act (the "FHRA") [5] and Title VII for discriminating against a female correctional officer due to her pregnancy. *Id. at 791* (summarizing the Commission's decision that "an unlawful employment practice was committed by the employer when [the officer] was discharged on the bases of her pregnancy"). The *O'Loughlin* Court upheld the Commission's liability determination; **[*1239]** however, it also engaged in a preemption analysis and concluded Title VII afforded greater protection for pregnancy discrimination than was provided under the FHRA. [6]

Without first identifying any ambiguity in the text of the FHRA, the *O'Loughlin* Court noted the "long-standing rule of statutory construction which recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation." *O'Loughlin, 579 So. 2d at 791*. Based on this "rule of statutory construction," the *O'Loughlin* Court reasoned that Title VII afforded more protection for female employees than was provided under the FHRA:

> It is undisputed that [the FCRA] is patterned after Title VII . . . . *School Bd. of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990)*. *Section 760.10(1)(a), Florida Statutes*, provides in part:
>
> > It is an unlawful employment practice for an employer to discharge . . . any individual . . . because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> In *General Elec. Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976)*, the Supreme **[**9]** Court held that discrimination on the basis of pregnancy was not sex discrimination under Title VII. However, in 1978, in response to the *Gilbert* decision, Congress amended Title VII by enacting the [PDA]. The PDA specifies that discrimination on the basis of pregnancy is sex discrimination, and therefore violative of Title VII. Florida has not similarly amended [the FCRA] to include a prohibition against pregnancy-based discrimination.
>
> * * *
>
> Under a [*California Federal Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987)*] preemption analysis, Florida's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ***by not recognizing that discrimination against pregnant employees is sex-based discrimination.*** . . . Thus, we conclude that the [FCRA], specifically *Section 760.10, Florida Statutes*, is preempted by Title VII . . . , *42 U.S.C. § 2000e-2* to the extent that Florida's law offers less protection to its citizens than does the corresponding federal law.

Id. at 791-92 (emphasis added) (citations omitted). [7] The *O'Loughlin* Court then analyzed the pregnancy discrimination claim in accordance with Title VII law, and

---

[4] The First District Court of Appeal is located in the panhandle of Florida, and it is headquartered in Tallahassee.

[5] The FHRA was a predecessor to the FCRA. *Carsillo v. City of Lake Worth, 995 So. 2d 1118, 1120-21 (Fla. 4th DCA 2008)* (examining the statutory history of the FCRA).

[6] The *O'Loughlin* Court did not indicate whether the preemption issue was first considered by **[**8]** the Commission, whether a party raised the issue, or whether it simply considered the issue *sua sponte*. *O'Loughlin, 579 So. 2d at 791*.

[7] The *O'Loughlin* Court's preemption analysis has been criticized and rejected by numerous courts. *Boone v. Total Renal Labs., Inc., 565 F. Supp. 2d 1323, 1326-27 (M.D. Fla. 2008)* (noting that preemption is not an issue to be determined by state courts, and reasoning that "Title VII is not undercut or diminished by the existence of the FCRA's lesser protections"); *e.g., Wynn v. Fla. Auto. Servs., LLC, No. 3:12cv133, 2012 U.S. Dist. LEXIS 145815, 2012 WL 4815688 (M.D. Fla. Oct. 10, 2012)* (rejecting *O'Loughlin* and following *Carsillo*); *Wright v. Sandestin Invests., LLC, 3:11cv256, 914 F. Supp. 2d 1273, 2012 U.S. Dist. LEXIS 175837, 2012 WL 6194872, *6 (N.D. Fla. Dec. 12, 2012)* (predicting that the Florida Supreme Court will agree with the *Carsillo* decision and reject *O'Loughlin*). Indeed, *Delva* is the only Florida District Court of Appeal to agree with *O'Loughlin* that the FCRA does not extend its protections to those who are discriminated against on the basis of pregnancy.

it affirmed the Commission's [**10] finding of liability but remanded for a determination of the appropriate relief. Id. at 796.

[*1240] B. Florida's Fourth District Courts of Appeal [8]

Florida's Fourth District Court of Appeal was presented [**11] with the question of whether pregnancy discrimination claims are cognizable under the FCRA in *Carsillo*. Carsillo 995 So. 2d at 1119-21. The trial court in *Carsillo* held that the FCRA "does not prohibit discrimination based on pregnancy," and it granted the defendant employer's motion for summary judgment on that ground. Id. at 1119. The appellate court in *Carsillo* reversed and held that the FCRA "bars such discrimination." *Id.* In so holding, the *Carsillo* appellate court noted that the *O'Loughlin* Court's preemption analysis has caused "conflict" in the federal district courts concerning whether the FCRA permits pregnancy discrimination claims. Id. at 1120. The *Carsillo* appellate court held that the federal district courts' interpretation of *O'Loughlin* and the FCRA was wrong:

> Although *O'Loughlin* involved a claim for pregnancy discrimination under the [FHRA], some federal district courts have interpreted *O'Loughlin* as not allowing relief under the [FCRA] for discrimination based on pregnancy, because the [FCRA] was not amended [after the PDA was enacted]. . . . This demonstrates, according to [defendant], that the Florida legislature did not intend to protect pregnancy discrimination as [**12] sex discrimination. We do not agree. We conclude that the fact that Congress made clear in 1978 that its intent in the original enactment of Title VII in 1964 was to prohibit discrimination based on pregnancy as sex discrimination, ***it was unnecessary for Florida to amend its law to prohibit pregnancy discrimination.***
>
> * * *
>
> The [FCRA] was originally enacted as the Florida Human Relations Act in 1969 and it prohibited discrimination based on "race, color, religion, or national origin." An amendment added a prohibition against "sex" discrimination in 1972. Other classifications were added in 1977, when the legislature renamed it the Human Rights Act of 1977. It was renamed the Florida Civil Rights Act in 1992. As we noted earlier, the [FCRA] has been patterned after the federal statute, and . . . this means that the [FCRA] will be given the same construction as the federal statute.
>
> [W]hen Congress passed the PDA in 1978, it explained that ***it had intended to prohibit discrimination based on pregnancy when it enacted Title VII in 1964.*** Because it was the intent of Congress in 1964 to prohibit this discrimination, and under Jackson we construe Florida statutes patterned after federal statutes [**13] in the same manner that the federal statutes are construed, it follows that ***the sex discrimination prohibited in Florida since 1972 included discrimination based on pregnancy.*** This conclusion is also consistent with the expressed intent of our legislature that our statute is to be liberally construed for victims of employment discrimination.

Id. at 1120-21 (emphasis added, citations omitted). [9]

[*1241] C. Florida's Third District Court of Appeal

The Third District Court of Appeal is the only other Florida appellate court to squarely address the issue of whether pregnancy discrimination claims are cognizable under the FCRA. [10] Delva, 96 So. 3d at 957-58. The trial court in *Delva* dismissed [**14] the plaintiff's FCRA claim on the ground that pregnancy discriminations claims are not cognizable under the FCRA. Id. at 957. The *Delva* Court affirmed the dismissal based on its adoption of *O'Loughlin* as a "better reasoned decision" than *Carsillo*. Id. at 958. The *Delva* Court also certified its decision as being in conflict with *Carsillo*. *Id.*

D. Florida's Second District Court of Appeal

The Second District Court of Appeal has not reached

---

[8] The Fourth District Court of Appeal is located in southeast Florida, and it is headquartered in West Palm Beach.

[9] The federal district courts which find that pregnancy discrimination is prohibited under the FCRA rely on the *Carsillo* decision. Constable v. Agilysis, Inc., No. 8:10cv1778, 2011 U.S. Dist. LEXIS 63518, 2011 WL 2446605, *6 (M.D. Fla. Jun. 15, 2011) (holding that the "FCRA does provide a cause of action for pregnancy discrimination"); *e.g.*, Terry v. Real Talent Inc., No. 8:09-cv-1756, 2009 U.S. Dist. LEXIS 99777, 2009 WL 3494476, * (M.D. Fla. Oct. 27, 2009) (denying motion to dismiss FCRA pregnancy discrimination claim and finding that *Carsillo* clarified Florida law).

[10] The Third District Court of Appeal is located in southern Florida, and it is headquartered in Miami.

the dispositive issue of whether pregnancy discrimination claims are cognizable under the FCRA. [11] However, in Carter, Florida's Second District Court of Appeal concluded that it would be objectively reasonable for a plaintiff to believe that pregnancy discrimination claims are cognizable under the FCRA. Carter, 989 So. 2d at 1261-62 (reversing order dismissing FCRA retaliation claim based on the plaintiff's initial charge of pregnancy discrimination). In so holding, the *Carter* Court emphasized that the Commission has long recognized pregnancy discrimination claims under the FCRA:

> [Plaintiff's] original belief that [defendant] had engaged in an unlawful **[**15]** employment practice was objectively reasonable when measured against the [Commission's] interpretation of the FCRA on the issue of pregnancy discrimination. . . . The [Commission] is authorized "[t]o receive, initiate, investigate, seek to conciliate, hold hearings on, and act upon complaints alleging any discriminatory practice, as defined by the [FCRA]." §760.06(5) Fla. Stat. In the exercise of its role under the FCRA, the [Commission] has taken the position that "[w]hile there is no specific prohibition against discrimination based on pregnancy in the [FCRA], pregnancy-based discrimination is prohibited by the [FCRA] within the context of 'sex' discrimination." Thus the [Commission's] interpretation of the FCRA provided ample support for an objectively reasonable belief by [Plaintiff] that pregnancy discrimination was covered under the FCRA.

Id. at 1264-66 (reasoning that the split of authority provided additional support for an objectively reasonable belief that the FCRA covers pregnancy discrimination).

II. Resolving Disputed Issues of of Florida Law

When faced with a question of Florida law, [12] this Court is bound to follow **[*1242]** the decisions of the Florida Supreme Court. C.I.R. v. Bosch's Estate, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); CSX Transp. Inc. v. Trism Specialized Carriers, Inc., 182 F.3d 788, 791 (11th Cir. 1999). Absent a clear decision from the Florida Supreme Court, this Court is bound to follow decisions of Florida's "'intermediate appellate courts unless there is some persuasive indication that the [Florida Supreme Court] would decide the issue differently.'" [13] Nunez v. Geico Gen. Ins. Co., 685 F.3d 1205, 1210 (11th Cir. 2012) (quoting McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002); *e.g.*, Stoner v. New York Life Ins. Co., 311 U.S. 464, 61 S. Ct. 336, 85 L. Ed. 284 (1940).

As noted *supra*, Florida's District Courts of Appeal are in disagreement concerning the issue at hand, and no overwhelming authority can be discerned among the few Florida District Court decisions on point. [14] (*Supra*, The Legal Standards and Analysis, Part I.) Under such circumstances, this Court must predict how the Florida Supreme Court would resolve the disagreement. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 61 S. Ct. 347, 85 L. Ed. 327 (1941); **[**18]** Trail Builders Supply Co. v. Reagan, 409 F.2d 1059, 1061 (5th Cir.1969); [15] Charles Alan Wright, LAW OF FEDERAL

---

[11] The Second District Court of Appeal is located in on the west coast of Florida, and it is headquartered in Lakeland. Like the Second District Court of Appeal, the Fifth District **[**16]** Court of Appeal, which is located in central Florida and is headquartered in Daytona Beach, also has not yet addressed the question of whether pregnancy discrimination claims may be asserted under the FCRA.

[12] This Court exercises supplemental jurisdiction over Plaintiff's FCRA claim. *See* 28 U.S.C. §1367. Accordingly, Florida law applies to any issue not governed by the Constitution or treaties of the United States or Acts of Congress. 28 U.S.C. § 1652 **[**17]** ("The laws of the several states . . . shall be regarded as rules of decision in civil action in the courts of the United States, in cases where they apply."); Erie R. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); Flava Works, Inc. v. City of Miami, Fla., 609 F.3d 1233, 1237 (11th Cir. 2010); Wiand v. Morgan, No. 8:10-CV-205-T-EAK, 919 F. Supp. 2d 1342, 2013 U.S. Dist. LEXIS 8995, 2013 WL 247072, *22 (M.D. Fla. Jan. 23, 2013); *see also* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 4520.

[13] "The Florida Supreme Court has specifically approved this rule by holding that '[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court].'" Nunez, 685 F.3d at 1210 (quoting Pardo v. State, 596 So.2d 665, 666 (Fla.1992)).

[14] Due to the differing interpretations of the FCRA and the *O'Loughlin* decision, the Court cannot find that an "overwhelming weight of authority" exists. Nunez, 685 F.3d at 1206 (finding Florida law "unclear" where law was subject **[**19]** to "varying interpretations" in the "lower Florida state courts"); *e.g.*, Liberty Mut. Ins. Co. v. Elec. Sys., Inc., 813 F. Supp. 802, 805 (S.D. Fla. 1993); *e.g.* Mitchell v. Young Refining Corp., 517 F.2d 1036 (5th Cir. 1975).

[15] The Eleventh Circuit Court of Appeals adopted as binding

COURTS 374 (4th ed. 1983). In making such a prediction, this Court may consider any authority that the Florida Supreme Court would consider. *Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1133 (11th Cir. 2010)* (noting that all "data may be considered to the extent they indicate how the Florida Supreme Court might rule on an issue"); *Hood v. Dun & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973)*; *Jackson v. Sam Finley, Inc., 366 F.2d 148 (5th Cir. 1966)* (describing obligation to carefully examine rules of construction and substantive approach of state court); *Putman v. Erie City Mfg. Co., 338 F.2d 911, 917 (5th Cir.1964)* (explaining that courts should consider "all data . . . keeping in mind that it must choose the rule which it believes the state court, from all that is known about its methods of reaching decisions[,] is likely in the future to adopt").

III. Statutory Interpretation

Under Florida law, "statutory analysis" is guided by "legislative intent." *Johnson v. Fla., 78 So. 3d 1305, 1310 (Fla. 2012)*; *Tasker v. Fla., 48 So. 3d 798, 804 (Fla. 2010)*; *Fla. Dep't of Children & Family Servs. v. P.E., 14 So. 3d 228, 234 (Fla. 2009)*. And, "'legislative intent is determined primarily from the text' of the statute." *Johnson, 78 So. 3d at 1310* (quoting *Continental Cas. Co. v. Ryan Inc. Eastern, 974 So. 2d 368, 374 (Fla. 2008)*). "Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent." [16] *Fla. Dep't of Children & Family Servs., 14 So. 3d at **[*1243]** 234*. Rather, a statute "must **[**20]** be given its plain and obvious meaning." *Bennett v. St. Vincent's Med. Center, Inc., 71 So.3d 828, 838-39 (Fla. 2011)* (analyzing "the statutory scheme," including definitional section, and legislative history, and rejecting the First District Court of Appeal's statutory interpretation); *Kephart v. Hadi, 932 So.2d 1086, 1091 (Fla.2006)* ("If the language of a statute is clear and unambiguous, the legislative intent must be derived from the words used without involving rules of construction or speculating as to what the legislature intended."). Thus, the Florida Supreme Court directs that any statutory analysis must begin "with careful consideration of the text of the statutes at issue." *Johnson, 78 So. 3d at 1310* (considering the statute's "plain language, the title of the statutes, and the legislative history" and rejecting the Fourth District Court of Appeal's statutory interpretation).

In discerning a statute's plain meaning, the Florida Supreme Court "looks first to the terms' ordinary **[**21]** definitions," which may be "derived from dictionaries." *Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209, 214 (Fla. 2009)* (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY to determine common meaning of statutory term); *L.B. v. State, 700 So.2d 370, 372 (Fla.1997)* ("[A] court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term."); *e.g., State v. Bodden, 877 So. 2d 680, 685 (Fla. 2004)* (noting that the courts presume that the legislature knows "the meaning of words and the rules of grammar," so effect is given to "generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated").

The Florida Supreme Court also examines the legislative history of a statute when determining the statute's meaning. *Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 10 (Fla. 2004)* ("[I]t is well settled that courts will consider the "history of a statute as an aid in determining the Legislature's intent.") While legislative history cannot alter the plain meaning of a statute, the Florida Supreme Court frequently "has relied on the plain meaning of statutes *and* legislative history **[**22]** in determining the legislature's intent." *Fla. Convalescent Ctrs. v. Somberg, 840 So. 2d 998, 1003 (Fla. 2003)* (citing cases). Further, the Florida Supreme Court has explained that "[s]ometimes it may be appropriate to consider a subsequent amendment to clarify original legislative intent of a statute if such amendment was enacted soon after a controversy regarding the statute's interpretation arose." *McKenzie Check Advance of Fla., LLC v. Betts, 928 So. 2d 1204, 1210 (Fla. 2006)*. However, if there is a substantial time lapse between statutory enactment and an amendment, then the amendment permits no "helpful inference concerning the original intent of a statutory enactment." *Id.* (determining that "seven years is too long to view the amendment as merely a clarification of legislative intent"); *Parole Comm'n v. Cooper, 701 So. 2d 543, 544-45 (Fla.1997)* (concluding that ten years is too long to be an affirmation of prior legislative intent).

If statutory language "is ambiguous and capable of

---

precedent all prior decisions of the former Fifth Circuit Court of Appeals issued prior to October 1, 1981. *Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc).

[16] "[C]ourts are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications." *Bennett, 71 So. 3d at 839*.

different meanings," the Florida Supreme Court applies "established principles of statutory construction to resolve the ambiguity." Bennett, 71 So. 3d at 843. Indeed, "Florida case law contains a **[**23]** plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). For instance, **[*1244]** "where a statute is remedial in nature, it should be liberally construed to 'preserve and promote access to the remedy intended by the Legislature.'" Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 7 (Fla. 2004) (quoting Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) (holding that chapter 760, Florida Statutes, relating to employment discrimination, is remedial and requires a liberal construction to preserve and promote access to the remedy intended by Legislature)). [17]

The Florida Supreme Court also "follows a deferential principle of statutory construction" when a statute "is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute." GTC, Inc. v. Edgar, 967 So. 2d 781, 785-90 (Fla. 2007) (deferring to agency's "reasonable" interpretation of ambiguous statute); Level 3 Commc'ns, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003) ("An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference."). Further, the Florida Supreme Court will presume that the legislature knew "the existing law when a statute is enacted, including 'judicial **[**25]** decisions on the subject concerning which it subsequently enacts a statute.'" Seagrave v. Fla., 802 So. 2d 281, 290 (Fla. 2001). Finally, a Florida law mirrored after a federal law generally will be construed in conformity with the federal law. Brand v. Fla. Power Corp., 633 So. 2d 504, 507-09 (Fla. 1st DCA 1994).

IV. The Meaning of "Sex" Under the FCRA

The pertinent provisions of the FCRA state:

> (1) It is an unlawful employment practice for an employer:
>
> (a) ***To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual*** with respect to compensation, terms, conditions, or privileges of employment, ***because of such individual's*** race, color, religion, ***sex***, national origin, age, handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, ***because of such individual's*** race, color, religion, ***sex***, national origin, age, handicap, or marital status.

§ 760.10, Fla. Stat. (2012) (emphasis added).

The FCRA does not define the word "sex." Accordingly, it is appropriate **[**26]** to consider the common definition of "sex" which the Florida Legislature is presumed to know. Metro. Cas. Ins. Co., 2 So. 3d at 214; L.B, 700 So.2d at 372. "Sex" is defined **[*1245]** as "[t]he property or quality by which many living things are classified *according to their reproductive functions*." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1068 (1994) (emphasis added). Alternatively, sex is defined as "[t]he sexual urge or instinct as manifested in behavior." (*Id.*) And, "the attraction of one sex for another." WEBSTER'S NEW WORLD DICTIONARY 438 (1979). "Sex" is defined in Black's Law Dictionary as (1) "[t]he sum of the peculiarities of structure and *function* that distinguish a male from a female organism;" and (2) "sexual intercourse." BLACK'S LAW DICTIONARY 1498 (9th ed. 2009) (emphasis added).

The focus on reproductive functions as a means of defining "sex" supports the notion that Florida legislators would have understood "sex" to include pregnancy as a function unique to the female sex. Accordingly, a plain reading of the phrase "to discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex"

[17] The Florida Supreme Court also instructs lower courts to avoid statutory "readings that would render part of a statute meaningless." Bennett, 71 So. 3d at 839 (instructing that courts "must give full effect to all statutory provisions"); Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209, 215 (Fla. 2009) ("[W]ords in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words."). And, "related statutory provisions should be read together to determine **[**24]** legislative intent, so that if from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail . . . ." Golf Channel v. Jenkins, 752 So. 2d 561, 564 (Fla. 2000) (internal quotation marks omitted); GTC, Inc. v. Edgar, 967 So. 2d 781, 787 (Fla. 2007) ("It is axiomatic that all parts of a statute must be read *together* in order to achieve a consistent whole.").

[27]** should be understood to ban discrimination against any individual "because of such individual's" reproductive functions (*e.g.*, pregnancy). To hold otherwise would be contrary to the Florida Legislature's directive to construe the FCRA "according to the fair import of its terms" and to "liberally" construe the FCRA "to further the general purposes stated in this section. . . ." [18] §760.01(3) Fla. Stat (2012); *e.g.*, Maggio v. Fla. Dep't of Labor & Employment Sec., 899 So. 2d 1074, 1076-77 (Fla. 2005); Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 894 (Fla. 2002). [19]

Because the legislative intent is discernable from a plain reading of the statutory language, the Court need not resort to canons of statutory construction to interpret the statute. Nonetheless, the Court notes that its reading of the FCRA is consistent with the legislative history and the practice of construing the FCRA consistently with Title VII. Carsillo 995 So. 2d at 1120-21. Further, the Court's reading of the FCRA is consistent with the interpretation and enforcement practices of the Commission. [20] Carter, 989 So. 2d at 1264-66; Mills v. Bay St. Joseph Care & Rehab. Ctr., F.C.H.R. Order No. 10-092, 2010 Fla. Div. Adm. Hear. LEXIS 356 (Fla. Comm'n on Human Relations Dec. 15, 2010); Bailey v. Centennial Employee Mgmt. Corp., F.C.H.R. Order No. 02-027, 2002 Fla. Div. Adm. Hear. LEXIS 1720 **[*1246]** (Fla. Comm'n on Human Relations May 31, 2002) **[**29]**; Pinchback v. St. Johns County Sheriff's Dep't, 7 F.A.L.R. 5369, 5371, 1984 Fla. Div. Adm. Hear. LEXIS 5354 (Fla. Comm'n on Human Relations 1985) ("'Termination of employment because of pregnancy is a recognized discriminatory practice based on sex contrary to the [FCRA's predecessor]'"). [21] Accordingly, this Court predicts that the Florida Supreme Court will reject the *O'Loughlin* and *Delva* decisions and will agree with the Commission and Florida's Fourth District Court of Appeal that discrimination based on pregnancy is an "unlawful employment practice" under the FCRA.

CONCLUSION

Based on the foregoing it is **ORDERED** and **ADJUDGED** that the Motion to Dismiss Count I of Plaintiff's Complaint and Incorporated Memorandum of Law filed by Defendants Captain Katanna's, Inc. And Pineda Inn Bar and Grill, Inc. (Doc. No. 9, filed Apr. 17, 2013) **is DENIED.**

Done and Ordered in Chambers in Orlando, Florida on June 17, 2013.

/s/ Patricia C. Fawsett

PATRICIA C. FAWSETT, JUDGE

UNITED STATES DISTRICT COURT

End of Document

---

[18] The FCRA identifies the following as the "general purposes" of the legislation: "to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby ***to protect their interest in personal dignity, to make available to the state their full productive capacities***, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." §760.01, Fla. Stat. (2012) (emphasis **[**28]** added). A woman's dignity and full productive capacity are fairly understood to include biological reproduction, especially under an admonition to interpret the statute liberally.

[19] A contrary ruling also would have the anomalous effect of permitting discrimination based on an employer's concerns or prejudices regarding a female employee's unique reproductive function, but outlawing discrimination based on an employer's improper prurient interests in a female employee.

[20] Again, the Florida Supreme Court has made clear that an administrative agency's "interpretation of a statute which it is charged with enforcing is entitled to great deference and will not be overturned unless it is clearly erroneous or contrary to legislative intent." Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001) (citing Donato v. Am. Tel. Tel. Co., 767 So. 2d 1146, 1153 (Fla. 2000)). The Commission is a Florida administrative agency taxed with enforcing the FCRA in Florida. §760.06 Fla. Stat. (2012).

[21] *E.g.*, McNight v. Sears Termite & Pest Control, No. 00-3845, 2001 Fla. Div. Adm. Hear. LEXIS 2605, 2001 WL 634584, *6 (Fla. Div. of Admin. Hearings Jun. 6, 2001) **[**30]** (holding that the plaintiff "is a member of a protected class based upon her gender and pregnancy); Fuller v. Progressive Am. Ins. Co., No. 89-0480, 1989 Fla. Div. Adm. Hear. LEXIS 7244, 1989 WL 644301 (Fla. Div. of Admin. Hearings Dec. 4, 1989) ("[I]t is difficult to see how discrimination on the account of pregnancy or child birth does not equate to discrimination on account of the discrimination victim's sex.").

Appendix 41.

Positive
As of: January 11, 2017 5:27 PM EST

United Auto. Ins. Co. v. Salgado

Court of Appeal of Florida, Third District

August 5, 2009, Opinion Filed

No. 3D07-461

Reporter
22 So. 3d 594 *; 2009 Fla. App. LEXIS 10733 **; 34 Fla. L. Weekly D 1578

United Automobile Insurance Company, Petitioner, vs. Oscar Salgado, Respondent.

Subsequent History: Released for Publication December 17, 2009

Rehearing, en banc, denied by *United Auto Ins. Co. v. Salgado, 2009 Fla. App. LEXIS 20620 (Fla. Dist. Ct. App. 3d Dist., Dec. 17, 2009)*

Review dismissed by *Salgado v. United Auto. Ins. Co., 2010 Fla. LEXIS 353 (Fla., Mar. 2, 2010)*

Prior History: [**1] A Writ of Certiorari to the Circuit Court for Miami-Dade County, Appellate Division, Lower Tribunal Nos. 06-82 AP, 06-631 AP, & 04-1454. Arthur L. Rothenberg, Celeste H. Muir, Thomas S. Wilson, Jr., Judges.

Core Terms

insurer, cancellation, coverage, material misrepresentation, rescission, Statutes, motor vehicle, No-Fault, circuit court, void, trial court, abrogated, insurance application, rescind, misrepresentation, affirmance, effective date, requirements, renewal, cancellation notice, per curiam, ab initio, appellate division, insurance contract, policies, days, statutory construction, Dictionary, forty-five, nonrenewal

Case Summary

Procedural Posture
Petitioner insurer filed a petition for a writ of certiorari to review an opinion by the Circuit Court for Miami-Dade County, Appellate Division, (Florida) that affirmed a final declaratory decree entered by the circuit court in favor of respondent insured.

Overview
After the insured was injured in a car accident, he submitted his medical expenses to the insurer for reimbursement. The insurer determined that the insured had failed to list his brother as a member of his household on his insurance application, and notified the insured that, as a result of a material misrepresentation, his policy was cancelled as of its effective date. The appellate court found, inter alia, that the insured's failure to list all residents of his household, as required by the insurance application, constituted a material misrepresentation pursuant to *§ 627.409, Fla. Stat.* (2003). Therefore, the insurer's failure to rescind a policy in accordance with *§ 627.728(3)(a), Fla. Stat.* (2003) did not preclude or abrogate its ability to void the policy ab initio pursuant to *§ 627.409*. Accordingly, the insurer was entitled to certiorari relief.

Outcome
The petition for certiorari was granted, and the circuit court appellate division's opinion was quashed; the case was remanded with directions to enter judgment in favor of the insurer.

LexisNexis® Headnotes

Insurance Law > ... > Coverage > No Fault Coverage > General Overview

HN1 The Florida Motor Vehicle No-Fault Law, *§§ 627.730-627.7405, Fla. Stat.* (2003), mandates certain types of no-fault insurance coverage for drivers.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN2 In a certiorari context, the standard of review for a decision rendered by a circuit court in its appellate

capacity is whether the circuit court's decision is either a departure from the essential requirements of the law or did not afford procedural due process.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN3 In a certiorari context, appellate courts are confined to determining whether a lower court provided due process and followed the correct law.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN4 Certiorari review should only be granted when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN5 Clearly established law may derive from legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN6 In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN7 *Sections 627.401-627.442, Fla. Stat.* (2003) is entitled "The Insurance Contract" and lays out the rules governing insurance contracts except those expressly excluded from its scope. The statutory right to rescission is set forth in 627.409, Fla. Stat.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN8 *Section 627.409, Fla. Stat.* (2003), provides that misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under a policy unless they are: (1) fraudulent; (2) material to the risk assumed by the insurer; or (3) the insurer in good faith would not have issued the policy or would have done so only on different terms if the insurer had known the true facts.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN9 See *§ 627.409, Fla. Stat.* (2003).

Business & Corporate Compliance > ... > Formation of Contracts > Mistake > Mutual Mistake

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN10 *§ 627.409, Fla. Stat.* (2003) is an unambiguous codification of the principle of law that a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle.

Governments > Legislation > Interpretation

HN11 A court cannot grant an exception to a statute, nor can it construe an unambiguous statute different from its plain meaning.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN12 Where a misstatement or omission materially affects an insurer's risk, or would have changed the insurer's decision whether to issue a policy and its terms, *§ 627.409(1)(a), Fla. Stat.* (2003) may preclude recovery.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN13 Florida law gives an insurer the unilateral right to rescind its insurance policy on the basis of misrepresentation in the application of insurance.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material

Misrepresentations

HN14 If such a material misrepresentation is established at trial, the subject insurance policy will be void ab initio.

Governments > Legislation > Interpretation

HN15 All parts of a statute must be read together in order to achieve a consistent whole.

Governments > Legislation > Interpretation

HN16 Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN17 In a rescission context, the only categories of insurance specifically excluded from Part II of Chapter 627 are: (1) Reinsurance; (2) Policies or contracts not issued for delivery in this state nor delivered in Florida, except as otherwise provided in the code; (3) Wet marine and transportation insurance, except *§§ 627.409*, *627.420*, and *627.428 Fla. Stat.* (2003); (4) Title insurance, except *§§ 627.406*, *627.415*, *627.416*, *627.419*, *627.427*, and *627.428, Fla. Stat.* (2003); (5) Credit life or credit disability insurance, except *§§ 627.419(5)* and *627.428, Fla. Stat.* (2003). *§ 627.401, Fla. Stat.* (2003).

Governments > Legislation > Interpretation

HN18 The mention of one thing implies the exclusion of another; expression unius est exclusion alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned.

Governments > Legislation > Interpretation

HN19 The starting point for the interpretation of a statute is always its language, so that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Evidence > Inferences & Presumptions > Presumptions

Governments > Legislation > Interpretation

HN20 A basic canon of statutory interpretation requires courts to presume that the legislature says in a statute what it means and means in a statute what it says there.

Governments > Legislation > Interpretation

HN21 Where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain and obvious meaning.

Governments > Legislation > Interpretation

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN22 Because Florida Motor Vehicle No-Fault Law policies are not expressly excluded from Part II of ch. 627, Fla. Stat. (2003), they are, therefore, governed by that part, including *§ 627.409, Fla. Stat.* (2003).

Insurance Law > Contract Formation > Applications

HN23 An insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to further investigate.

Insurance Law > Contract Formation > Applications

HN24 An insurer is entitled, as a matter of law, to rely upon the accuracy of the information contained in an application and has no duty to make additional inquiry.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Notice Requirements

HN25 See *§ 627.728(3)(a), Fla. Stat.* (2003).

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN26 An insurer's denial of coverage under *§ 627.409, Fla. Stat.* (2003), is a viable defense even in the absence of effective cancellation.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Notice Requirements

HN27 An insurer's failure to comply with *§ 627.728, Fla. Stat.* (2003)'s cancellation procedure does not waive the insurer's right to rescind the policy under *§ 627.409, Fla. Stat.* (2003).

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN28 A material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify any policy issued and is an absolute defense to enforcement of the policy. *§ 627.409, Fla. Stat.* (2003).

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Notice Requirements

HN29 There is nothing in § 627.0852, Fla. Stat., the predecessor to *§ 627.728, Fla. Stat.* (2003), that indicates the legislature intended to preclude an insurer from defending a suit upon a policy on the statutory grounds prescribed in § 627.01081, Fla. Stat., the predecessor to *§ 627.409, Fla. Stat.* (2003), which are applicable to all policies.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Notice Requirements

HN30 Because a material misrepresentation voids an insurance policy, any failure by the insurer in carrying out the requirements of the Claims Administration Statute is a nullity.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN31 A material misrepresentation renders an insurance policy null and void from the date of inception.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN32 See *§ 627.736(9)(a), Fla. Stat.* (2003).

Governments > Legislation > Interpretation

HN33 When a term is undefined by statute, one of the most fundamental tenets of statutory construction requires that courts give a statutory term its plain and ordinary meaning.

Governments > Legislation > Interpretation

HN34 When necessary, the plain and ordinary meaning of a statute can be ascertained by reference to a dictionary.

Governments > Legislation > Interpretation

HN35 In the absence of a statutory definition, courts can resort to definitions of the same term found in case law.

Insurance Law > Contract Formation > General Overview

HN36 See *§ 627.728(1)(b), Fla. Stat.* (2003).

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN37 The effect of rescission is to render an insurance contract abrogated and of no force and effect from the beginning.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN38 In an insurance context, the terms "cancellation" and "rescission" refer to two separate and distinct actions that operate to create different legal consequences. A rescission avoids the contract ab initio, whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective. In other words, cancellation of a policy operates prospectively, while rescission, in effect, operates retroactively to the very time that the policy came into existence; the distinction is similar to that between divorce and annulment.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > General Overview

HN39 Because the effect of a rescission is to render the contract abrogated and of no force and effect from the beginning, *§ 627.736(9)(a), Fla. Stat.* (2003) does not apply where the policy was rescinded as opposed to cancelled.

Insurance Law > Claim, Contract & Practice Issues > Policy Cancellation, Denial & Nonrenewal > Material Misrepresentations

HN40 If a misrepresentation by an insured was material to the acceptance of the risk by an insurer or, if the insurer in good faith would not have issued the policy under the same terms and premium, then rescission of

the policy by the insurer is proper.

Counsel: Michael J. Neimand, Office of the General Counsel, for petitioner.

Panter, Panter & Sampedro and Christian Carrazana, for respondent.

Judges: Before WELLS and LAGOA, JJ., and SCHWARTZ, Senior Judge.

Opinion by: LAGOA

Opinion

[*596] LAGOA, Judge.

Petitioner, United Automobile Insurance Company ("United"), seeks certiorari review of the circuit court appellate division's opinion affirming a final declaratory decree entered by the county court in favor of the Respondent, Oscar Salgado, Jr. ("Salgado"). Because we find that, absent an express exclusion by the legislature, the right of rescission contained in *section 627.409, Florida Statutes* (2003), applies to PIP insurance contracts issued pursuant to the Florida Motor Vehicle No-Fault Law, we conclude that the circuit court sitting in its appellate capacity departed from the essential requirements of the law. Accordingly, we grant the petition for certiorari and quash the opinion of the circuit court appellate division.

I. *FACTUAL AND PROCEDURAL HISTORY*

HN1 The Florida Motor Vehicle **[**2]** No-Fault Law, *sections 627.730-627.7405, Florida Statutes* (2003), mandates certain types of no-fault insurance coverage for drivers. Here, United issued to Salgado a no-fault **[*597]** motor vehicle policy to be in effect from December 18, 2003, until December 18, 2004. The insurance application contained two separate provisions that relate to a misrepresentation of material fact. In the section entitled "Driver and Resident Information," the application states:

> All persons 14 years or older, licensed or not, who reside with the applicant(s) must be listed below whether or not they are operators of the vehicles listed. *Failure to provide this information shall constitute a material misrepresentation, which shall result in all insurance coverages being void.*

(emphasis added).

Additionally, above the applicant's signature, the application provides:

> The undersigned by signature hereto, represents the statements and answers made herein to be true, complete and correct and agrees that any policy may be issued or renewed in reliance upon the truth, completeness and correctness of such statements and answers and understands that falsity, incompleteness, or incorrectness may jeopardize the coverage under **[**3]** such policy so issued or renewed *Fla. St. 627.409. It is also hereby agreed and understood that misrepresentation of a material fact on this application may cause this coverage to be declared null and void as of the effective date Fla. St. 627.409.*

(emphasis added).

During the policy's effective period, Salgado was injured in a car accident. After receiving treatment, Salgado submitted his medical expenses to United for reimbursement. After conducting an investigation, United determined that Salgado had failed to list his brother as a member of his household on his insurance application, and notified Salgado that, as a result of this material misrepresentation, his policy was cancelled as of its effective date.

Upon receipt of the cancellation notice, Salgado filed a complaint for declaratory relief to determine if coverage existed notwithstanding the misrepresentation made in his insurance application. In its answer and affirmative defenses, United asserted that Salgado's failure to list all residents of his household as required in his insurance application constituted a material misrepresentation pursuant to *section 627.409, Florida Statutes* (2003). [1]

Subsequently, Salgado filed a motion for summary judgment contending that United failed to cancel the policy in accordance with *section 627.728, Florida Statutes* (2003). At the summary judgment hearing, Salgado asserted that United could not deny coverage on the basis that the policy did not exist at the time of the loss because Florida's Motor Vehicle No-Fault Law provides that an insurer's remedy for a material

---

[1] In their respective depositions, **[**4]** United's Underwriting Supervisor and PIP Litigation Adjuster testified that Salgado's failure to list his brother as a member of his household on his insurance application constituted a material misrepresentation as the unknown risk would have resulted in a higher premium.

misrepresentation is to cancel the policy pursuant to section 627.728(3)(a), Florida Statutes (2003), which requires a forty-five day prospective cancellation notice, rather than to cancel the policy as void *ab initio*.

In granting Salgado's motion for summary judgment, the trial court found that "[s]ections 627.730-7405, Florida Statutes (2003), when viewed *in pari materia* with § 627.728, Florida Statutes (2003), are in derogation of Defendant's common law right to unilaterally rescind personal injury protection **[**5]** coverage for material misrepresentation; [and] as such, Defendant's common law right to rescind personal injury **[*598]** protection coverage is abrogated by the Florida Statutes." The trial court further reasoned that, because section 627.736(9)(a), Florida Statutes (2003), mandated United to report cancellation or nonrenewal of PIP coverage to the Department of Highway Safety Motor Vehicles within forty-five days from the effective date of cancellation or non-renewal, United did not comply with the statute when it cancelled Salgado's policy retroactively to the date of inception. The trial court further concluded that the notice of cancellation did not comply with section 627.728, which required that notice of cancellation be given to the insured forty-five days prior to the effective date of cancellation. The trial court, therefore, found that Salgado's policy was valid at the time of the accident on January 31, 2004. United appealed the decision to the circuit court sitting in its appellate capacity, and the circuit court affirmed without opinion. This petition followed.

II. *STANDARD OF REVIEW ON SECOND-TIER CERTIORARI*

HN2 Our standard of review for a decision rendered by the circuit court in **[**6]** its appellate capacity is whether the circuit court's decision is either a departure from the essential requirements of the law or did not afford procedural due process. *See* Williams v. Miami-Dade County, 969 So. 2d 389 (Fla. 3d DCA 2007) (***HN3*** "[W]e are confined to determining whether the lower court provided due process and followed the correct law."); Loguercio v. Dep't of Highway Safety & Motor Vehicles, 907 So. 2d 1267 (Fla. 3d DCA 2005). ***HN4*** Certiorari review should only be granted when "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003). ***HN5*** Clearly established law may derive from "legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review." Id. at 890.

Additionally, because the appellate division's ruling potentially affects a large number of PIP claims processed by insurers, exercise of certiorari jurisdiction is also **[**7]** appropriate. *See* Progressive Express Ins. Co. v. McGrath Cmty. Chiropractic, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005) (***HN6*** "In measuring the seriousness of an error to determine whether second-tier certiorari is available, one consideration is whether the error is isolated in its effect or whether it is pervasive or widespread in its application to numerous other proceedings."). We further note that the circuit court appellate division's per curiam decision in this case was followed by another trial court in another case involving the same issue. [2]

Accordingly, because we find that the there has been a violation of a clearly established principle of law resulting in a **[*599]** miscarriage of justice with the potential to impact a significant number of other cases, we conclude that the exercise of second-tier certiorari is appropriate.

III. *RESCISSION OF INSURANCE CONTRACTS UNDER CHAPTER 627*

We begin our analysis by discussing the general rule of rescission and its application to insurance contracts under Florida law. Chapter 627, Florida Statutes, governs insurance rates and contracts in the State of Florida. ***HN7*** Part II of Chapter 627, sections 627.401 -- 627.442, is entitled "The Insurance Contract" and lays out the rules governing insurance contracts except those expressly excluded from its scope. The statutory

---

[2] Salgado argues that certiorari review is inappropriate as the appellate court's decision was per curiam This Court, however, has previously granted relief from the circuit court appellate division's per curiam affirmances. *See* Auerbach v. City of Miami, 929 So. 2d 693, 694 (Fla. 3d DCA 2006) (granting relief from a per curiam affirmance of circuit court appellate division); State v. Bock, 659 So. 2d 1196 (Fla. 3d DCA 1995) (granting petition for writ of certiorari from circuit court appellate division per curiam affirmance); State v. Richard, 610 So. 2d 107, 107-08 (Fla. 3d DCA 1992) (holding the trial court applied the wrong version of Florida Rule of Criminal Procedure 3.191 **[**8]** and granting relief from a per curiam affirmance); Kneale v. Jay Ben Inc., 527 So. 2d 917 (Fla. 3d DCA 1988) (granting certiorari from per curiam affirmance of circuit court appellate division).

right to rescission is set forth in section 627.409.

HN8 Section 627.409, Florida Statutes (2003), provides that misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under a policy unless they [**9] are: (1) fraudulent; (2) material to the risk assumed by the insurer; or (3) the insurer in good faith would not have issued the policy or would have done so only on different terms if the insurer had known the true facts. [3]

As explained by the Supreme Court in Continental Assurance Co. v. Carroll, 485 So. 2d 406, 409 (Fla. 1986), HN10 this section is an unambiguous codification of the principle of law that "a contract issued on a mutual mistake of fact is subject to being voided and defines the circumstances for the application of this principle. HN11 This Court cannot grant an exception to a statute nor can we construe an unambiguous statute different from its plain meaning." Id. (footnote omitted). Accordingly, HN12 where a misstatement or omission materially affects the insurer's risk, or would have changed the insurer's decision whether to issue the policy and its terms, the statute may preclude recovery. See § 627.409(1)(a), Fla. Stat. (2003); Carroll, 485 So. 2d at 409; [**11] see also Gonzalez v. Eagle Ins. Co., 948 So. 2d 1, 2 (Fla. 3d DCA 2006) (HN13 "Florida law indeed gives an insurer the unilateral right to rescind its insurance policy on the basis of misrepresentation in the application of insurance."); Union Am. Ins. Co. v. Fernandez, 603 So. 2d 653, 653 (Fla. 3d DCA 1992) (reversing and remanding for trial on issue of material misrepresentation in insurance application; stating that HN14 "[i]f such a material misrepresentation is established at trial, the subject insurance policy would be void ab initio [*600] and, accordingly, there would be no liability insurance coverage for the subject accident").

IV. *DOES THE FLORIDA MOTOR VEHICLE NO-FAULT LAW ABROGATE THE RIGHT OF RESCISSION*

We now turn to the question of whether the Florida Motor Vehicle No-Fault Law abrogates United's statutory right of rescission. In considering this question, we are guided by the rule of statutory construction that HN15 "all parts of a statute must be read together in order to achieve a consistent whole. HN16 Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992).

Although [**12] both the Florida Motor Vehicle No-Fault Law and the statutory right of rescission are found in Chapter 627, Salgado argues that section 627.409 does not apply to the Florida Motor Vehicle No-Fault Law. We disagree. HN17 The only categories of insurance specifically excluded from Part II of Chapter 627 are:

> (1) Reinsurance.
>
> (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.
>
> (3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.
>
> (4) Title insurance, except ss. 627.406, 627.415, 627.416, 627.419, 627.427, and 627.428.
>
> (5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

§ 627.401, Fla. Stat. (2003).

---

[3] Specifically, section 627.409, Florida Statutes (2003), states:

> HN9 Representations in applications; warranties
>
> (1) Any statement or description made by or on behalf of an insured or annuitant in an application for an insurance policy or annuity contract, or in negotiations for a policy or contract, is a representation and is not a warranty. A misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the contract or policy only if any of the following apply:
>
> (a) The misrepresentation, omission, concealment, or statement is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer.
>
> (b) If the true facts had been known to the insurer pursuant to a policy requirement or other requirement, the insurer in good faith would not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not [**10] have provided coverage with respect to the hazard resulting in the loss.
>
> (2) A breach or violation by the insured of any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefor does not void the policy or contract, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured.

"It is, of course, a general principle of statutory construction that ***HN18*** the mention of one thing implies the exclusion of another; expression unius est exclusion alterius. Hence, where a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned." *Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976)*; *see also Young v. Progressive Se. Ins. Co., 753 So. 2d 80, 85 (Fla. 2000)* **[**13]** ("Under the principle of statutory construction, expression unius est exclusio alterius, the mention of one thing implies the exclusion of another.").

Following that principle, we must conclude that if the Legislature had intended to exclude no-fault insurance from Part II, Chapter 627, it would have included that type of insurance in the list enumerated in *section 627.401*. *See Vargas v. Enter. Leasing Co., 993 So. 2d 614, 618 (Fla. 4th DCA 2008)* (***HN19*** "'The starting point for [the] interpretation of a statute is always its language,' so that 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Garcia v. Vanguard Car Rental USA, Inc., 510 F. Supp. 2d 821, 829-30 (M.D. Fla. 2007)*, *aff'd*, *540 F.3d at 1242 (11th Cir. 2008)*)); *Haskins v. City of Ft. Lauderdale, 898 So. 2d 1120, 1123 (Fla. 4th DCA 2005)* (***HN20*** "A basic canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (quoting *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*)).

As such, ***HN21*** "[w]here, as here, the language of the statute is clear and unambiguous **[**14]** and conveys a clear and definite meaning, the statute should be given its plain and obvious meaning." *City of Miami v. Valdez, 847 So. 2d 1005, 1008 (Fla. 3d DCA 2003)*. In this case, the express language **[*601]** of *section 627.401* directly refutes Salgado's position that United's right of rescission under *627.409* is abrogated by the Florida Motor Vehicle No-Fault Law. For this Court to conclude otherwise would be a usurpation of the legislative function. ***HN22*** Because Florida Motor Vehicle No-Fault Law policies are not expressly excluded from Part II of Chapter 627, they are, therefore, governed by that part, including *section 627.409*.

V. *AN INSURER'S FAILURE TO COMPLY WITH SECTION 627.728 DOES NOT ABROGATE AN INSURER'S ABILITY TO VOID THE POLICY AB INITIO PURSUANT TO SECTION 627.409*

We now address the trial court's finding that because United's notice did not comply with *section 627.728*, [4] which required that notice of cancellation be given to the insured forty-five days prior to the effective date of cancellation, the policy was valid at the time of the accident. The trial court's finding in practice, would require that an insurer undertake a forty-five day investigation period after the effective **[**15]** date of such a policy in order to ascertain if the application contained any material misrepresentations. That finding, however, is contrary to well established law that ***HN23*** "an insurance company has the right to rely on an applicant's representations in an application for insurance and is under no duty to further investigate." *See N. Miami Gen. Hosp. v. Cent. Nat'l Life Ins. Co., 419 So. 2d 800, 802 (Fla. 3d DCA 1982)*; *see also Indep. Fire Ins. Co. v. Arvidson, 604 So. 2d 854, 856 (Fla. 4th DCA 1992)* (***HN24*** "An insurer is entitled, as a matter of law, to rely upon the accuracy of the information contained in the application and has no duty to make additional inquiry."). While it may be better public policy to require such a practice, it is not the province of this Court to effectuate such a policy change by way of case law.

Additionally, this Court, along with others, has stated that ***HN26*** an insurer's denial of coverage under *section 627.409* is "a viable defense even in the absence of effective cancellation." *Motors Ins. Corp. v. Woodcock, 394 So. 2d 485, 488 (Fla. 3d DCA 1981)*. In *Motors Insurance Corp. v. Marino, 623 So. 2d 814 (Fla. 3d DCA 1993)*, this Court held that ***HN27*** an insurer's failure to comply with *section 627.728*'s cancellation procedure did not waive the insurer's right to rescind the policy under *section 627.409*. This Court found that the summary judgment entered in the plaintiffs' favor was reversible error because the insurer had pled a "conclusively established affirmative defense of

---

[4] Specifically, *section 627.728(3)(a), Florida Statutes* (2003) states:

> ***HN25*** No notice of cancellation of a policy to which this section applies shall be effective unless mailed or delivered by the insurer to the named insured and to the named insured's insurance agent at least 45 days prior to the effective date of cancellation, except that, when cancellation is for nonpayment of **[**16]** premium, at least 10 days' notice of cancellation accompanied by the reason therefore shall be given. No notice of cancellation of a policy to which this section applies shall be effective unless the reason or reasons for cancellation accompany the notice of cancellation.

misrepresentation in the insurance application." Id. at 815. Specifically, this Court reasoned that **HN28** "[a] material misrepresentation in an application for insurance, whether or not made with knowledge of its correctness or untruth, will nullify *any* **[**17]** *policy* issued and is an absolute defense to enforcement of the policy. Fla. Stat., Section 627.409; Continental Insurance Company v. Carroll, 485 So.2d 406, 409 (Fla.1986)." Id. at 815 (emphasis added).

[*602] Similarly, in Sauvageot v. Hanover Insurance Co., 308 So. 2d 583 (Fla. 2d DCA 1975), the Second District concluded that section 627.409's predecessor applied to all policies and therefore could be raised by an insurer to deny PIP insurance even where the insurer had not cancelled the policy pursuant to section 627.728's predecessor. In affirming the trial court, the Second District reasoned, **HN29** "[t]here is nothing in s 627.0852 [the predecessor to section 627.728] . . . that indicates the legislature intended to preclude an insurer from defending a suit upon the policy on the statutory grounds prescribed in s 627.01081 [the predecessor to section 627.409], which are applicable to *all* policies." Id. at 585 (emphasis added).

Moreover, the Second District in Progressive American Insurance Co. v. Papasodero, 587 So. 2d 500 (Fla. 2d DCA 1991), addressed a similar situation in the context of the Claims Administration Statute. In that case, the insurer sought a declaration that the automobile policy **[**18]** issued to the insured was void *ab initio* because the insured had made a material misrepresentation as to who would operate her automobile and also failed to list a person who resided in her household. The insured argued that the insurer could not deny her coverage because it had failed to comply with the requirements of the Claims Administrative Statute, section 627.426, Florida Statutes (1989). The trial court agreed that the insured had made a material misrepresentation on the policy application but held that the insurer had to provide coverage for the claims made because it had failed to comply with the Claims Administration Statute. The Second District reversed, concluding that **HN30** because the material misrepresentation voided the policy, any failure by the insurer in carrying out the requirements of the Claims Administration Statute was a nullity. The Second District held that the finding by the trial court that there had been **HN31** a material misrepresentation rendered the "policy null and void from the date of inception." Papasodero, 587 So. 2d at 502. Therefore, adherence to the Claims Administration Statute was irrelevant. "The Claims Administration Statute was not intended to create **[**19]** coverage under a liability insurance policy that never provided coverage." Id. Although the effect of the Claims Administration Statute is to bar an insurance company from denying coverage, in this case, "there was no coverage in the first instance." Id. See also Independent Fire Ins. Co. v. Arvidson, 604 So. 2d 854 (Fla. 4th DCA 1992) (adherence to Claims Administration Statute was irrelevant as policy was null and void from date of inception due to material misrepresentation).

As such, we conclude that an insurer's failure to rescind a policy in accordance with statutory cancellation procedures does not preclude or abrogate an insurer's ability to void the policy *ab initio* pursuant to section 627.409.

VI. *APPLICATION OF SECTION 627.736(9)(a)*

We turn now to Salgado's argument that section 627.736(9)(a) abrogates an insurer's right to rescission. [5] This section states in pertinent part:

> **HN32** Each insurer which has issued a policy providing personal injury protection benefits shall report the renewal, cancellation, or nonrenewal thereof to the Department of Highway Safety and Motor Vehicles within 45 days from the effective date of the renewal, cancellation, or nonrenewal.

[*603] Based on the plain **[**20]** and unambiguous language of this section, we find Salgado's argument unpersuasive. First, we find that section 627.736(9)(a) applies only to "renewal[s], cancellation[s] or nonrenewal[s]." While section 627.728(1)(b) defines the term "renewal," [6] which is not applicable in this case, the

---

[5] Section 627.736(9) was amended in 2007 and moved to section 324.0221, Florida Statutes (2008). Chapter 324 is entitled "Financial Responsibility."

[6] Specifically, section 627.728(1)(b), Florida Statutes (2003) provides:

> **HN36** "Renewal" or "to renew" **[**21]** means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term. Any policy with a policy period or term less than 6 months or any policy with no fixed expiration date shall for the purpose of this section be considered as if written for successive policy periods or terms of 6 months.

term "cancellation" is undefined by chapter 627. ***HN33*** "When a term is undefined by statute, '[o]ne of the most fundamental tenets of statutory construction' requires that we give a statutory term 'its plain and ordinary meaning.' ***HN34*** When necessary, the plain and ordinary meaning 'can be ascertained by reference to a dictionary.' Further, it is well-settled rule of statutory construction that ***HN35*** in the absence of a statutory definition, courts can resort to definitions of the same term found in case law." *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954, 961 (Fla. 2005)* (quoting *Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000)* (citations omitted).

The term "cancellation" has been defined to mean "the termination by the insured or by the insurer or both of insurance in accordance with the specific terms of a policy." *Webster's Third New International Dictionary* 325 (1986); *see also Black's Law Dictionary* 259 (4th ed. 1968) (defining "cancellation" to mean "abandonment of contract"). The term "rescission," however, has been defined to mean "[a]nnulling or abrogation or unmaking of [a] contract and the placing of the parties to it in status quo." *Black's Law Dictionary* 1472 (4th ed. 1968); *see also Borck v. Holewinski, 459 So. 2d 405, 405 (Fla. 4th DCA 1984)* (***HN37*** "The effect of rescission is to render the contract abrogated and of no force **[**22]** and effect from the beginning."); *Webster's Third New International Dictionary* 1930 (1986) (term "rescind" defined to mean "to abrogate (a contract) by tendering back or restoring to the opposite party what one has received from him (as in cases of fraud, duress, mistake or minority")).

As such, ***HN38*** the terms "cancellation" and "rescission" refer to two separate and distinct actions that operate to create different legal consequences.

> A rescission avoids the contract ab initio whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective. In other words, cancellation of a policy operates prospectively, while rescission, in effect, operates retroactively to the very time that the policy came into existence; the distinction is similar to that between divorce and annulment.

2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 30:3 (3d ed. 1995).

HN39 Because "the effect of a rescission is to render the contract abrogated and of no force and effect from the beginning," we conclude that *section 627.736(9)(a)* does not apply where – as here -- the policy was rescinded as opposed to cancelled. When a contract is rescinded, it is as if the contract never **[**23]** existed in the first place. Accordingly, as the policy never came into existence, there was no contract for United to cancel.

[*604] VII. *CONCLUSION*

In concluding that United's only remedy was to cancel the policy prospectively under *section 627.728*, the trial court and the circuit court appellate division in its affirmance departed from the essential requirements of the law. First, rescission under *section 627.409* for a material misrepresentation has been previously applied to statutorily mandated PIP policies. *See Flores v. Allstate Ins. Co., 819 So. 2d 740 (Fla. 2002)*. Moreover, the "law is well settled that ***HN40*** if the misrepresentation of the insured were material to the acceptance of the risk by the insurer or, if the insurer in good faith would not have issued the policy under the same terms and premium, then rescission of the policy by the insurer is proper." *New York Life Ins. Co. v. Nespereira, 366 So. 2d 859, 861 (Fla. 1979)*. Here, the record establishes that Salgado provided United with grounds to rescind the policy.

Moreover, because the Florida legislature has chosen not to exempt the Florida Motor Vehicle No-Fault Law from *section 627.409*, we further conclude that the trial court applied **[**24]** the incorrect law when it determined that the Florida Motor Vehicle No-Fault Law is in derogation of United's right to unilaterally rescind the policy *ab initio* based on the undisputed material misrepresentations contained in Salgado's application.

Accordingly, we grant the writ, quash the opinion of the circuit court appellate division affirming the final declaratory decree entered in Salgado's favor, and remand with directions to enter judgment in favor of United.

Petition granted.

End of Document

Appendix 42.

Southern Owners Ins. Co. v. Cooperativa De Seguros Multiples

Court of Appeal of Florida, Fifth District

July 18, 2014, Opinion Filed

Case No. 5D12-3048

Reporter
143 So. 3d 439 *; 2014 Fla. App. LEXIS 11003 **; 39 Fla. L. Weekly D 1491; 2014 WL 3534357

SOUTHERN OWNERS INSURANCE COMPANY, Appellant, v. COOPERATIVA DE SEGUROS MULTIPLES, ETC., ET AL., Appellees.

Prior History: [**1] Appeal from the Circuit Court for Orange County, John Marshall Kest, Judge.

Core Terms

insured, premises, coverage, ownership, pool, endorsement, ownership interest, coverage provided, common area, insurance policy, homeowner's, operations, provisions, supervision, repair, wrongful death action, dangerous condition, summary judgment, trial court, declaratory judgment action, liability policy, drowned, parties, swimming pool, provides, commercial general, insurance contract, real property, allegations, declaring

Case Summary

Overview
HOLDINGS: [1]-It was error to grant an amended summary final judgment to an insured in an insurance coverage dispute, as it was unclear from the record whether the insured had an ownership interest in the community association's pool pursuant to § 720.301(2), Fla. Stat. (2009), and absent such ownership, she was not entitled to coverage from the insurer for underlying claims that arose from her allegedly negligent supervision of a minor who drowned.

Outcome
Judgment reversed.

LexisNexis® Headnotes

Insurance Law > Claim, Contract & Practice Issues > Policy Interpretation > General Overview

HN1 The phrase "arising out of," as used in insurance policies, is broader in meaning than the term "caused by" and means originating from, having its origin in, growing out of, flowing from, incident to, or having a connection with.

Real Property Law > Common Interest Communities > Homeowners Associations

HN2 See § 720.301(2), Fla. Stat. (2009).

Real Property Law > Common Interest Communities > Homeowners Associations

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN3 The Florida statutory scheme regarding ownership of common elements in a condominium is significantly different from the statutory scheme regulating the ownership of common areas in a homeowners' association. Section 718.103(11), Fla. Stat. (2009), expressly defines "condominium" to mean that form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements. By contrast, the statute regulating homeowners' associations, § 720.301(2), Fla. Stat. (2009), suggests that title to the common areas is often held by the association.

Real Property Law > Common Interest Communities > Homeowners Associations

Real Property Law > Ownership & Transfer > General Overview

HN4 Although the right to use property is an indicia of ownership, it does not equate to ownership. The primary elements of ownership, such as in a community association, are the rights of possession, use and

enjoyment, the right to change or improve the property, and the right to alienate the property.

Counsel: Manuel J. Alvarez, Kerry C. McGuinn, Jr., and Carla M. Sabbagh, of Rywant, Alvarez, Jones, Russo & Guyton, P.A., Tampa, for Appellant.

Daniel P. Mitchell and Debra M. Metzler, of Barr, Murman & Tonelli, P.A., Tampa, for Appellees Cooperativa De Seguros Multiples de Puerto Rico and Daisy Eastwood.

Peter G. Walsh, of David W. Singer & Associates, PA, Hollywood, for Appellee Margarita Fiallo.

Judges: EVANDER, J. ORFINGER, J., concurs. SAWAYA, J., concurs in part, dissents in part, with opinion.

Opinion by: EVANDER

Opinion

[*440] EVANDER, J.

Southern Owners Insurance Company ("Southern Owners") appeals an amended summary final judgment declaring that certain policies of insurance issued by Southern Owners provided coverage to Daisy Eastwood for the claims brought against her by Margarita Fiallo, as personal representative of the Estate of Damian Fiallo. Because the undisputed material facts of record do not support the trial court's determination of coverage, we reverse.

Ms. Fiallo brought a wrongful death action against Daisy[1] and Eastwood Community Association, Inc. after seven-year-old Damian drowned in the Eastwood Community swimming pool while in Daisy's **[**2]** care. Daisy owned a home in the Eastwood residential community and, thereby, was a member of the Eastwood Community Association. As a member of the Association, Daisy had a right to use the community swimming pool. The lawsuit filed by Ms. Fiallo alleged that Daisy negligently supervised Damian and, as a result, Damian drowned.

The complaint filed by Ms. Fiallo further alleged Eastwood Community Association was a homeowners' association that owned or operated the swimming pool and, as such, had a duty to operate the pool in a reasonably safe manner. Eastwood Community Association was alleged to have breached that duty in numerous ways, thereby causing Damian's death.

At the time of the loss, Daisy was insured under a homeowner's insurance policy issued by Appellee, Cooperativa de Seguros Multiples de Puerto Rico ("Cooperativa"). After Ms. Fiallo filed her wrongful death action in the underlying case, Cooperativa retained counsel to defend Daisy. At the time of the loss, Eastwood Community Association was insured under two policies issued by Southern **[**3]** Owners; a comprehensive general liability policy and an umbrella policy. The policies included an endorsement that extended coverage to each individual member of the Association, "**but only with respect to liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that member's exclusive use or occupancy.**" (Emphasis added).

After the commencement of the underlying action, Cooperativa and Daisy instituted a declaratory judgment action against Southern Owners seeking a determination that Southern Owners was required to defend and indemnify Daisy for the claim brought against her by Ms. Fiallo. Subsequently, Ms. Fiallo moved to intervene in the declaratory judgment action. When the motion to intervene was granted, Ms. Faillo filed her own declaratory judgment **[*441]** complaint against Southern Owners. Ultimately, the trial court entered summary judgment in favor of Cooperativa, Daisy, and Ms. Fiallo, finding that Daisy was entitled to a defense and to indemnity under both of the Southern Owners' insurance policies. This appeal followed.

The parties agree that any potential liability Daisy may have in the underlying wrongful death action **[**4]** would not arise from the "maintenance" or "repair" of the swimming pool. Thus, the only issue is whether Daisy has potential liability arising from the "ownership" of the pool.

In its detailed order, the trial court correctly concluded that ***HN1*** the phrase "arising out of" is broader in meaning than the term "caused by" and means "originating from, having its origin in, growing out of, flowing from, incident to, or having a connection with." *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So. 2d 528, 532-33 (Fla. 2005)*.

The trial court continued its analysis as follows:

[1] To avoid confusion, Daisy Eastwood will be referred to as "Daisy." It is pure coincidence that Daisy and the Association share the same name.

> DAISY was entitled to make use of the pool solely because of her membership in EASTWOOD which arose solely from her ownership of her unit. In other words, her right to use the pool, to invite the decedent to use the pool or to even enter the pool area was an incident of her ownership interest in the EASTWOOD common elements, including the pool. More simply stated, but for her ownership, neither DAISY nor Damian Fiallo, would have been in the pool area, in the pool itself or even subject to the provisions that guests must be supervised while at the pool.

If Daisy did, in fact, have an ownership interest in the Eastwood common areas, Appellees' argument would be stronger. However, as all parties acknowledged **[**5]** in their supplemental briefs, the record is extremely sparse on the issue of whether individual members of the Eastwood Community Association have any ownership interest in the community swimming pool.[2] *Section 720.301(2), Florida Statutes* (2009), suggests that Daisy may not have an ownership interest in the community pool:

> ***HN2*** "Common area" means all real property within a community which is owned or leased by an association or dedicated for use or maintenance by the association or its members, including, regardless of whether title has been conveyed to the association:
>
> (a) Real property the use of which is dedicated to the association or its members by a recorded plat; or
>
> **[*442]** (b) Real property committed by a declaration of covenants to be leased or conveyed to the association.

In the instant case, the record is devoid of deeds, association articles of incorporation and/or bylaws, plats, declarations of covenants, or any other documents or evidence[3] that would tend to reflect Daisy's specific ownership interest, if any, in Eastwood Community Association's common areas.

Absent an ownership interest in the pool, Daisy would not be entitled to coverage under Southern Owners' policies because her potential liability would arise, at most, out of her "use" of the pool. ***HN4*** Although the right to use property is an indicia of ownership, it does not equate to ownership. The primary elements of ownership are the rights of possession, use and enjoyment, the right to change or improve the property, and the right to alienate the property. *Ill. Dep't of Transp. v. Anderson, 384 Ill. App. 3d 309, 892 N.E.2d 116, 120, 322 Ill. Dec. 869 (Ill. App. Ct. 2008)*. Because it is unclear from the record whether Daisy had an ownership interest in the community pool, we conclude that it was error to enter **[**8]** summary judgment in favor of Appellees.

REVERSED and REMANDED.

ORFINGER, J., concurs.

SAWAYA, J., concurs in part, dissents in part, with opinion.

Concur by: SAWAYA (In Part)

---

[2] Throughout the proceedings, Southern Owners has maintained that because the underlying complaint alleged that Daisy was negligent in supervising Damian, any liability **[**6]** on the part of Daisy did not arise out of her "ownership" interest in the parcel on which the community pool was situated. Although Southern Owners denied that Daisy had an ownership interest in the community pool in its pleadings, at times it appeared to accept opposing counsels' assertion that Daisy, as a member of the Homeowner's Association, had an ownership interest in the common areas. Appellees' contention that Daisy had an ownership interest in the common areas appears to have been based on caselaw involving condominiums. However, ***HN3*** the Florida statutory scheme regarding ownership of common elements in a condominium is significantly different from the statutory scheme regulating the ownership of common areas in a homeowners' association. *Section 718.103(11), Florida Statutes* (2009), expressly defines "condominium" to mean "that form of ownership of real property created pursuant to this chapter, which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements." By contrast, as referenced above, the statute regulating homeowners' associations suggests that title to the common areas is often held by the association. **[**7]**

[3] Appellees cite to the deposition testimony of Cheryl Simmons, Eastwood Community Association's manager, for support of its contention that Daisy had an ownership interest in the community pool. However, a close review of Ms. Simmons' testimony reflects that she gave conflicting testimony on this issue. She testified at one point that the common areas were owned by the Association and at another point that they were owned by the members of the Association. Furthermore, it is unclear from her deposition whether Ms. Simmons had the knowledge necessary to be able to render an opinion on this issue.

Dissent by: SAWAYA (In Part)

Dissent

SAWAYA, J., concurring in part; dissenting in part.

I agree with the majority that the summary judgment rendered in favor of the Appellees in the declaratory judgment action should be reversed. But the majority remands the case to the trial court, apparently for the purpose of allowing the parties to establish whether Daisy Eastwood (the alleged tortfeasor and additional individual insured under the policy endorsement) has an ownership interest in the property. I do not believe that is the controlling issue in this case and, therefore, I respectfully dissent from that part of the opinion. I believe that the issue in this appeal is whether the personal act of Eastwood's alleged negligent supervision of the child who drowned in the pool is covered under the provisions of the policy endorsement, which will be discussed shortly. It clearly is not, and a remand to the trial court should only be for the purpose of entering summary judgment in favor of the Appellant.

Coverage does not exist under the policy endorsement **[**9]** because it only provides coverage for the individual members of the association, like Eastwood, for "liability arising out of the ownership, maintenance or repair" of the premises. This coverage is for premises liability, which insures against damage or injury arising out of a dangerous condition on the premises. Eastwood is accused of an act of personal negligence in failing to properly supervise the child who drowned, which has nothing to do with a dangerous condition on the premises, and the parties do not contend otherwise.

The endorsement was issued as a part of a Commercial General Liability (CGL) insurance policy that, like the typical commercial **[*443]** lines policy, insures against loss caused by business operations conducted on the premises. Eastwood was not conducting any business activity on the premises at the time the child drowned, and again, the parties do not contend otherwise.[4] But

[4] I do not believe that coverage exists under the other provisions of the CGL. In order to properly determine coverage, **[**10]** it is necessary to consider the type of policy involved. *See U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007)*; *Union Am. Ins. Co. v. Haitian Refugee Ctr./Sant Refijie Ayisyin, Inc., 858 So. 2d 1076, 1078 (Fla. 3d DCA 2003)*. "Commercial General Liability policies are designed to protect an insured against certain losses arising out of business operations." *J.S.U.B., Inc., 979 So. 2d at 877* (citation omitted). CGL policies are distinguished from personal liability policies, and the importance of the distinction between the two lies in what is and what is not covered under each. "Whereas personal liability insurance policies are intended to protect the insured against the risks which are associated with the 'personal' aspects of the insured's life, commercial general liability policies are designed to protect the insured from losses arising out of business operations." 9A Steven Plitt et al., *Couch on Insurance* § 129:1 (3d ed. 2013) (footnote omitted). The Florida courts have adopted this principle. *J.S.U.B., Inc.*; *Union Am.*. Therefore, unless the loss arises out of the insured's business operations, it is not covered.

These principles extend beyond the confines of Florida jurisprudence, as the authors in *Couch on Insurance* explain:

> Commercial general liability policies are designed to protect the insured against losses to third parties arising out of the operation of the insured's **[**11]** business. Consequently, a loss must arise out of the insured's business operations in order to be covered under the policy issued to the insured.

9A Steven Plitt et al., *Couch on Insurance* § 129:2 (3d ed. 2013) (footnote omitted). In *Stempel on Insurance Contracts*, the author similarly explains:

> Appreciating the nature and organizational structure of the CGL is of value in gauging coverage controversies. The CGL, like most insurance policies, has a relatively targeted objective for insuring risks. It is designed to protect commercial operators from litigation and liability arising out of their business operations.

2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.01[B] at 14-17 (3d ed. Supp. 2010); *see also Kennedy v. Lumbermans Mut. Cas. Co., 152 Misc. 2d 491, 577 N.Y.S.2d 353, 354 (N.Y. Sup. Ct. 1991)* ("Looking at the overall scheme of the policy and the exclusion in particular, the policy is a *homeowner's* policy and intends to cover only the home and domestic related activities. This is not a 'business' policy, and the carrier wishes to make sure that it is not forced to cover business activities. The policy holder has, of course, not paid for business coverage."), *affirmed as modified on other grounds, 190 A.D.2d 1053, 593 N.Y.S.2d 659 (N.Y. App. Div. 1993)*.

Considering the policy as a whole, it is clear that it provides coverage that is limited **[**12]** to business conducted on the premises. The definition of "insureds" in Section II of the policy specifically provides that if you are designated as an individual insured, "you and your spouse are insureds, **but only with respect to the conduct of a business of which you are the sole owner**." (Emphasis added). The definition of insureds goes on to discuss partnerships or joint ventures, but only

the issue in the declaratory judgment action is whether coverage is provided under the specific provisions of the endorsement, so I will confine the remainder of my argument to that issue.

This declaratory judgment action was filed against the issuer of the CGL and the endorsement, Southern Owners Insurance Company (Southern), and was considered in conjunction with a wrongful death action initiated by the personal representative of the deceased child (the Estate). The wrongful death action was filed against Eastwood, the individual insured, the Eastwood Community Association (the Association), which is also an insured under [*444] the policy (it is a mere coincidence that both defendants share the name [**13] Eastwood), and House of Management Enterprises for Community Associations, Inc. (House of Management). Eastwood owns a home in a residential community, and the Association owns and operates the common areas of the residential community, which include the pool and adjoining amenities. House of Management was hired by the Association to manage and operate the common areas, including the pool. Eastwood, as a member of the Association, is entitled to use the common areas, including the pool. Eastwood has a homeowner's policy issued by Cooperativa De Seguros Multiples de Puerto Rico (Cooperativa).

The deceased child is Damian. Eastwood invited him to the pool to play with her son. Tragically, Damian drowned. The sole allegation against Eastwood in the underlying wrongful death action is that she negligently supervised Damian. There is absolutely nothing in the record to suggest that the drowning was caused by a dangerous condition on the premises.

After the wrongful death action was filed, Eastwood and Cooperativa filed the declaratory judgment action seeking to declare that the CGL policy endorsement issued by Southern to the Association provides coverage to Eastwood individually and personally [**14] for the alleged wrongful death of the child. At the time, Cooperativa was providing the defense for Eastwood pursuant to the homeowners policy it had issued to her. The Estate intervened in the action, also seeking to have Southern placed on the hook for coverage and indemnity in the wrongful death action filed against Eastwood. Motions for summary judgment were filed by the parties on each side. The trial court granted the motion filed by Eastwood and Cooperativa and denied the motion filed by Southern. Southern appeals, arguing that the summary judgment should be reversed and this case remanded for entry of summary judgment in its favor.

The basis of the declaratory judgment action is an endorsement issued by Southern that includes the members of the Association as additional insureds under limited circumstances. That endorsement provides:

> **ADDITIONAL INSURED**
>
> **HOMEOWNERS ASSOCIATION MEMBERS**
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART.
>
> **A. SECTION II - WHO IS AN INSURED** is amended to include as an additional insured each individual member of the insured Homeowners Association, but only with respect to *liability arising out of [**15] the ownership, maintenance or repair* of that portion *of the premises* which is not reserved for that member's exclusive use or occupancy.

(Emphasis added). The provisions of the endorsement that are pertinent to the issue in this case are underscored.

The issue in this case is whether there is coverage under this endorsement for Eastwood's personal act of negligent supervision, and "coverage under an insurance contract is defined by the language and terms of the policy." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 169 (Fla. 2003)* (citing *Siegle v. Progressive Consumers Ins. Co., 788 So. 2d 355, 359 (Fla. 4th DCA 2001)*). "In interpreting an insurance contract, we are bound by the plain meaning of the contract's text." *State Farm Mut. Auto. Ins. Co. v. Menendez, 70 So. 3d 566, 569 (Fla. 2011)*; *see also* [*445] *Travelers Indem. Co. v. PCR Inc., 889 So. 2d 779, 785 (Fla. 2004)* ("If the language used in an insurance policy is plain and unambiguous, a court must interpret the policy in accordance with the plain meaning of the language used so as to give effect to the policy as it was written."). "In construing words in insurance policies, it is appropriate for courts to turn to legal and non-legal dictionaries for common meanings." *Siegle, 788 So. 2d at 360*.

"with respect to the conduct of your business." Therefore, the CGL policy does not provide coverage for personal acts of negligence, such as the negligent supervision of a child, committed by an individual Association member who uses the pool for personal and social reasons, as Eastwood did.

The endorsement specifically provides coverage for "liability arising out of ownership, maintenance, or repair . . . of the premises." The plain meaning of this provision clearly reveals that the endorsement provides premises liability coverage **[**16]** only for loss that results from a dangerous condition on the premises. The majority correctly states that "ownership" means the right to possess the property, to change or improve it, and to alienate it. Indeed, the courts have repeatedly held that ownership requires the owner to comply with the duty to properly maintain and repair the premises and warn invitees of known dangerous conditions on the premises. Friedrich v. Fetterman & Assocs., P.A., 137 So. 3d 362 (Fla. 2013); Dampier v. Morgan Tire & Auto, LLC, 82 So. 3d 204 (Fla. 5th DCA 2012); Aaron v. Palatka Mall, L.L.C., 908 So. 2d 574 (Fla. 5th DCA 2005). The term "maintenance" means "the work of keeping something in suitable condition." *Webster's II New Riverside University Dictionary* 717 (1984 ed.). The term "repair" means "to restore to sound condition after damage or injury." *Webster's II New Riverside University Dictionary* 996 (1984 ed.); *see also* Siegle, 788 So. 2d at 360 (stating that "repair" means "restore to a good condition" (quoting *The Merriam Webster Dictionary* 410 (1994 ed.))). I believe that the plain meaning of the terms and provisions of the endorsement is that it provides premises liability coverage for the owner regarding dangerous conditions on the premises that cause injury. *See* Union Am. Ins. Co. v. Haitian Refugee Ctr./Sant Refijie Ayisyin, Inc., 858 So. 2d 1076, 1078 (Fla. 3d DCA 2003); Hilton Hotels Corp. v. Emp'rs Ins. of Wausau, 629 So. 2d 1064, 1065 (Fla. 3d DCA 1994) (holding that one of the reasons a policy providing coverage for liability arising out of the ownership, maintenance, or repair of the premises did **[**17]** not provide coverage for the alleged loss is because "[t]he accident was not a result of any physical condition which emanated from the premises . . ."); Parliament Ins. Co. v. Bryant, 380 So. 2d 1088, 1089-90 (Fla. 3d DCA 1980) (analyzing a policy that provided coverage for injuries "'arising out of the ownership, maintenance, or use of the insured premises,'" and stating that "it is evident that that the policy we are examining is a premises liability policy, not a general liability policy . . ."). Therefore, it does not provide coverage for Eastwood's personal act of negligent supervision of the child.

In *Union American*, the court was confronted with a CGL policy that provided coverage for "'bodily injury . . . arising out of [t]he ownership, maintenance or use of the premises shown in the [s]chedule and operations necessary or incidental to those premises.'" Union Am. Ins. Co., 858 So. 2d at 1077. That policy differs from the endorsement in the instant case because it provided coverage for injury arising from the "use of the premises" and to "operations necessary or incidental to those premises," which are not included in the endorsement in the instant case. But both policies do provide for coverage for loss arising out of the ownership of the premises. The court in *Union American* held that the policy provision **[**18]** essentially made the policy a "designated premises policy," which meant that the injury must have occurred on the premises and resulted **[*446]** from a dangerous condition on the premises as opposed to the active negligence of the tortfeasor. Id. at 1078. The court explained:

> As was said in 11 Couch on Insurance 2d section 44:379 at 551-52 (1982):
>
> > A very common form of liability insurance is the one which insures the owner, occupier, or operator of real property against liability incident to his ownership or use of the premises. Such insurance, the purpose of which is simply to protect against liability arising from the condition or use of the building as a building must be distinguished from insurance against liability arising from the nature of the enterprise or activity conducted therein. More simply stated, a building liability policy does not cover a liability arising from the insured's activity in the building.
>
> *Id.*

Rather than consider all of the pertinent provisions of the endorsement, the trial court and the analysis in the majority opinion erroneously focus solely on the term "ownership" in isolation.[5] It is improper to consider

---

[5] Eastwood and Cooperativa argue that a duty to defend is established by the allegations in the underlying complaint that Eastwood's membership in the Association, which allows her the right to use the swimming pool owned by the Association, bestows upon Eastwood ownership of the pool and creates coverage and a duty to defend. I agree with the majority that a duty to defend cannot be based on such allegations. This is no more than clever and fanciful pleading designed to create coverage **[**20]** that does not exist. As the court explained in Pioneer National Title Insurance Co. v. Fourth Commerce Properties Corp., 487 So. 2d 1051 (Fla. 1986), to allow a party to improperly plead his way into coverage by asserting allegations that do not fairly bring the cause of action within the scope of coverage would force insurance companies "to

chosen phraseology of a policy in isolation to the rest of the provisions. § 627.419(1), Fla. Stat. (2013) **[**19]** ("Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any application therefor or any rider or endorsement thereto."); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 877 (Fla. 2007) ("'[I]n construing insurance policies, courts should read each policy as a whole, endeavoring to give every provision its full meaning and operative effect.'" (quoting Auto-Owners Ins. Co. v. Anderson, 756 So. 2d 29, 34 (Fla. 2000))); Swire Pac. Holdings, Inc., 845 So. 2d at 166 (same); Cont'l Ins. Co. v. Collinsworth, 898 So. 2d 1085, 1087 (Fla. 5th DCA 2005). Specifically, "'when construing an insurance policy to determine coverage the pertinent provisions should be read in *pari materia*.'" J.S.U.B., Inc., 979 So. 2d at 877 (quoting State Farm Fire & Cas. Co. v. CTC Dev. Corp., 720 So. 2d 1072, 1074-75 (Fla. 1998)). Proper application of these rules requires that "[a]n insurance policy . . . receive a reasonable, practical and sensible interpretation." Denman Rubber Mfg. Co. v. World Tire Corp., 396 So. 2d 728, 729 (Fla. 5th DCA 1981) (citations omitted).

When proper consideration is given to all of the pertinent provisions, it becomes clear that the endorsement does not provide coverage in this case. The complaint **[*447]** against Eastwood does not allege that the child was injured as a result of a dangerous condition on the premises. When deciding whether an insurer has a duty to defend, the allegations of the underlying complaint determine whether that duty exists. Essex Ins. Co. v. Big Top of Tampa, Inc., 53 So. 3d 1220, 1223 (Fla. 2d DCA 2011). A liability insurer has no duty to defend a suit where the complaint on its face **[**21]** alleges facts that fail to bring the case within the coverage of the policy. *Id.* If there is no duty to defend, there is no duty to indemnify. Id. at 1224. Because this endorsement and the coverage it provides do not apply to the alleged act of personal negligence in this case, there is no corresponding duty to defend or indemnify on the part of Southern. I would reverse the judgment under review and remand this case to the trial court to enter a summary judgment declaring that Southern has no duty to defend or indemnify for Eastwood's alleged act of negligence.

End of Document

underwrite risks not bargained for by either party." Id. at 1054; see also Great Am. Bank of Fla. Keys v. Aetna Cas. & Sur. Co., 662 F. Supp. 363, 365 (S.D. Fla. 1986) ("In *Pioneer*, the court reasoned that to hold an insurer liable for an action not covered under the policy would force insurers 'to underwrite risks not bargained for by either party.'" (quoting Pioneer, 487 So. 2d at 1054)). The complaint in the instant case does nothing more than attempt to create an inference of ownership, and no fair reading of it can lead to the conclusion that Eastwood was an owner of the premises.

Appendix 43.

Morgan v. Cornell

Court of Appeal of Florida, Second District

October 20, 2006, Opinion Filed

Case No. 2D05-5872

Reporter
939 So. 2d 344 *; 2006 Fla. App. LEXIS 17428 **; 31 Fla. L. Weekly D 2632

JULIA H. MORGAN, Appellant, v. ELIZABETH L. CORNELL, as Personal Representative of the Estate of TIMOTHY M. CORNELL, and TIMOTHY M. CORNELL, JR., and MARK H. CORNELL, Appellees.

Subsequent History: [**1] Released for Publication November 7, 2006.

Review denied by *Cornell v. Morgan, 2007 Fla. LEXIS 528 (Fla., Mar. 8, 2007)*

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

Disposition: Reversed and remanded for further proceedings consistent with this opinion.

Core Terms

devise, tenants in common, ownership, testator, undivided, trial court, the will, properties, one-half, parcel, owns

Case Summary

Procedural Posture
In an action between appellant companion of a decedent and appellee heirs of the decedent, the heirs challenged the devises made by the decedent of life estates in real estate to the companion. The Circuit Court for Collier County (Florida) granted summary judgment in favor of the heirs. The companion appealed.

Overview
The decedent and the companion owned two properties as tenants in common. In his will, the decedent attempted to leave a life estate in those real estate interests to the companion. The heirs argued, and the trial court found, that the language at issue, however, could be construed only to say that the devise was effective only if the decedent owned 100 percent of the property at the time of his death. The appellate court disagreed. The plain language of the devise did not contain a limitation on the kind of ownership required to trigger the condition. The decedent did not try to devise a particular portion of the real estate to a third party; instead, he devised his entire interest to the companion. As a tenant in common, the decedent owned a physically undivided part of each entire parcel. Without question, he did "own" the property at the time of his death; the ownership condition was fulfilled and each devise validly passed a life estate in his undivided half interest to the companion. This construction was further bolstered by the decedent's significant omission of any language limiting his ownership in the devise; he did not say "if I solely own the property."

Outcome
The judgment was reversed and the case was remanded for further proceedings.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Interpretation > Intent of Testator > General Overview

HN1 An appellate court, like the trial court, must examine the language of the will to ascertain the testator's intent. The intention of the testator as expressed in his or her will controls the legal effect of the testator's dispositions. *§ 732.6005(1), Fla. Stat.* (2005). Ascertaining intent is a court's paramount objective in construction of a will.

Real Property Law > General Overview

Real Property Law > Ownership & Transfer > General Overview

HN2 To "own" means to rightfully have or possess as

property or to have legal title to.

Real Property Law > General Overview

Real Property Law > Ownership & Transfer > General Overview

HN3 Land ownership, in particular, encompasses the dual concepts of actual physical control and the right to use and enjoy the land. While it is usual to speak of ownership of land, what one owns is properly not the land, but rather the rights of possession and approximately unlimited use, present or future. In other words, one owns not the land, but rather an estate in the land. This is, in some degree, true of any material thing. One owns not the thing, but the right of possession and enjoyment of the thing.

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN4 When two persons own property as tenants in common, it means that each owns separately one-half of the total ownership. Each is entitled to share with the other the possession of the whole parcel of land. Each may transfer his undivided one-half interest as he wishes so long as the transfer does not impair the possessory rights of the other tenant in common. Each may transfer his undivided one-half interest by will. The central characteristic of a tenancy in common is simply that each tenant is deemed to own by himself, with most of the attributes of independent ownership, a physically undivided part of the entire parcel.

Real Property Law > Estates > Concurrent Ownership > Tenancies in Common

HN5 The estate of a tenant in common is both inheritable and devisable.

Counsel: D. Keith Wickenden and William M. Pearson of Grant, Fridkin, Pearson, Athan & Crown, P.A., Naples, for Appellant.

Jon Scuderi of Goldman Felcoski & Stone, P.A., Naples, for Appellees Mark H. Cornell and Timothy M. Cornell, Jr.

No appearance for Appellee Elizabeth L. Cornell.

Judges: CASANUEVA, Judge. STRINGER and LaROSE, JJ., Concur.

Opinion by: CASANUEVA

Opinion

[*344] CASANUEVA, Judge.

Julia H. Morgan and Timothy M. Cornell Sr. were long-time companions who never married. When Mr. Cornell died on April 6, 2003, he and Ms. Morgan owned two properties as tenants in common, a summer home in New Hampshire and a winter home in Naples, Florida. In his will executed some eighteen months before his death, Mr. Cornell attempted to leave a life estate in his real estate interests to Ms. Morgan, but his heirs challenged the devises. On a motion for summary judgment filed by Mr. Cornell's sons, the trial court construed the language in favor of the heirs and **[**2]** against Ms. Morgan. We reverse.

The specific devises at issue state:

> (E) If I own the home [in] New Hampshire at my death, I leave said home and real estate together with the contents therein to Julia H. Morgan for the term of her life, subject to the obligation to pay all real estate taxes, upkeep, insurance and ordinary costs of ownership, with a remainder interest in **[*345]** fee simple as Tenants in Common to her children . . ., per stirpes.
>
> (F) If I own the home [in] Naples, Florida at my death, I leave said home and real estate together with the contents therein which were purchased by Julia and myself to Julia H. Morgan for the term of her life, subject to the obligation to pay all real estate taxes, upkeep, insurance and ordinary costs of ownership, with a remainder interest in fee simple to my children . . ., as Tenants in Common.

The personal representative of Mr. Cornell's estate, his daughter Elizabeth L. Cornell, filed a petition seeking construction of these conditional devises, alleging that the condition- "If I own the home" -is unclear in extent, nature, and meaning. On one hand, the word "own" could be read to mean "to the extent I own the home," so that **[**3]** the specific devises would be effective for whatever interest the testator possessed at his death. On the other hand, the word "own" could be interpreted more strictly, so that the condition would be fulfilled only if the testator were the sole owner of each home at the time of his death. If the second interpretation were operative, the condition would fail and the testator's interest in the homes would become part of the residuary estate and pass to his three children.

In their motion for summary judgment, Mr. Cornell's two

sons contended that the language was unambiguous and could be construed in only one way: the devise would be effective only if their father owned one hundred percent of the property at the time of his death. The trial court agreed with the sons and made the following ruling:

> There is no genuine issue of material fact. The language in the will regarding the specific devises of real property is not ambiguous. If Mr. Cornell is not the 100% owner of the specified properties, then the specific devises will fail and Mr. Cornell's interests in the properties will pass through the residuary clause.

HN1 An appellate court, like the trial court, must examine the **[**4]** language of the will to ascertain the testator's intent. "The intention of the testator as expressed in his or her will controls the legal effect of the testator's dispositions." *§ 732.6005(1), Fla. Stat.* (2005); *In re Estate of Budny, 815 So. 2d 781, 782 (Fla. 2d DCA 2002)*. Ascertaining intent is a court's paramount objective in construction of a will. *Wilson v. First Fla. Bank, 498 So. 2d 1289, 1291 (Fla. 2d DCA 1986)*.

In construing the key language of these devises- "If I own the home" -we must assume the testator meant what he said, see *Filkins v. Gurney, 108 So. 2d 57, 58 (Fla. 2d DCA 1959)*, and give the words their usual meaning, see *Estate of Martin, 110 So. 2d 421, 422 (Fla. 2d DCA 1959)*. We agree with the trial court that the language contains no ambiguity. However, the trial court erred when it read into the plain language of the devise a limitation on the kind of ownership required to trigger the condition.

The Cornell sons assert that *Elmore v. Elmore, 99 So. 2d 265 (Fla. 1957)*, is exactly on point and controls this case. In Elmore, the testatrix sought **[**5]** to devise one particular acre of a ten-acre parcel to a Mrs. Turner. The testatrix, however, owned an undivided one-half interest in the land as a tenant in common with her son. Because she did not have fee simple title to the parcel and had not partitioned the acreage before her death, as a tenant in common she could not convey a specific portion of the whole property to a third person, and the third person could not become the sole owner of the conveyed property.

The Elmore court noted that an "attempt to alienate a specific, located portion **[*346]** of the interest of a tenant in common is voidable at the election of the grantor's cotenants. . . . Obviously, the plaintiff [the testatrix's son] in this case has elected to avoid the devise of one acre to Mrs. Turner." *Id. at 266*. The court concluded that the testatrix had misconceived "the character and extent of her estate," *id. at 267*, and the devise to Ms. Turner failed.

In contrast, Mr. Cornell did not attempt to devise a particular portion of the real estate to a third party; instead, he devised his entire interest to Ms. Morgan, the co-owner. And there is no question that Mr. Cornell knew that **[**6]** he owned these properties as a tenant in common with Ms. Morgan.

As did the court in Elmore, we attribute to the word "own" its usual meaning in the context of the disposition of real property. ***HN2*** To "own" means to "rightfully have or possess as property; to have legal title to." Black's Law Dictionary 1137 (8th ed. 2004). ***HN3*** Land ownership, in particular, encompasses the dual concepts of actual physical control and the right to use and enjoy the land:

> While it is usual to speak of ownership of land, what one owns is properly not the land, but rather the rights of possession and approximately unlimited use, present or future. In other words, one owns not the land, but rather an estate in the land. This is, in some degree, true of any material thing. One owns not the thing, but the right of possession and enjoyment of the thing.

Bryan A. Garner, A Dictionary of Modern Legal Usage 633 (2d ed. 1995) (quoting 1 H.T. Tiffany, The Law of Real Property § 2, at 4 (B. Jones ed., 3d ed. 1939)).

The parties in this case agree that Mr. Cornell and Ms. Morgan owned the real properties as tenants in common. ***HN4*** When two persons own property as tenants in common,

> A **[**7]** and B *each* owns in his own name, and of his own right, one-half of Blackacre. . . . It means that each owns separately one-half of the total ownership. . . . Each is entitled to share with the other the possession of the whole parcel of land. Each may transfer his undivided one-half interest as he wishes so long as the transfer does not impair the possessory rights of the other tenant in common. Each may transfer his undivided one-half interest by will. . . . The central characteristic of a tenancy in common is simply that each tenant is deemed to own *by himself*, with most of the attributes of independent ownership, a physically

undivided part of the entire parcel.

Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land & Future Interests 58-59 (1966). ***HN5*** The estate of a tenant in common is both inheritable and devisable. *Tyler v. Johnson, 61 Fla. 730, 55 So. 870 (Fla. 1911)*.

As a tenant in common, Mr. Cornell owned a physically undivided part of each entire parcel in New Hampshire and in Naples. Without question, Mr. Cornell did "own" the property at the time of his death; the ownership condition was fulfilled; and each devise validly passed **[**8]** a life estate in his undivided half interest to Ms. Morgan-just as he intended.

Our construction of this unambiguous language is further bolstered by Mr. Cornell's significant omission of any language limiting his ownership in the devise; he did not say "if I solely own the property."

Reversed and remanded for further proceedings consistent with this opinion.

STRINGER and LaROSE, JJ., Concur.

End of Document

Appendix 44.

Pleus v. Crist

Supreme Court of Florida

July 2, 2009, Decided

No. SC09-565

Reporter
14 So. 3d 941 *; 2009 Fla. LEXIS 985 **; 34 Fla. L. Weekly S 389

ROBERT J. PLEUS, JR., Petitioner, vs. CHARLES J. CRIST, JR., GOVERNOR, Respondent.

Subsequent History: Released for Publication August 14, 2009.

Later proceeding at *Pleus v. Crist, 2009 Fla. LEXIS 1388 (Fla., Aug. 14, 2009)*

Core Terms

appointment, nominating, nominees, commissions, sixty days, mandamus, filling a vacancy, certified list, vacancy, applicants, constitutional provision, judicial appointment, resignation

Case Summary

Procedural Posture
Petitioner, a retired judge of the Fifth District Court of Appeal, filed an application for a writ of mandamus seeking an order compelling respondent governor to fill the vacancy his mandatory resignation created in the court of appeal. The issue was whether the Governor had to fill the vacancy with a judicial appointment from the list of nominees a judicial nominating commission (JNC) certified to him and do so within sixty days.

Overview

The judge tendered his resignation to the governor. The governor requested the JNC to provide him with a list of qualified applications. The JNC certified a list of nominees to the governor. He rejected the list. The supreme court held that the governor lacked authority under *Art. V, § 11(c), Fla. Const.* to seek a new list of nominees from the JNC and had a mandatory duty to fill the vacancy created by the judge's retirement with an appointment from the list certified to him. The Constitution mandated that the governor appoint a judicial nominee within sixty days of the certification of nominees by the JNC. The governor was not provided the authority to reject the certified list and request that a new list be certified. The judge, as a citizen and taxpayer, had a clear legal right to request that the governor carry out his duty of appointing judicial nominees within sixty days of receiving the certified list of nominees. The passage of almost six months since the judge's resignation became effective warranted the supreme court's decision in the mandamus proceeding in order to effectuate the intent of the framers to avoid or minimize further delay in filling the judicial vacancy.

Outcome
The supreme court granted the petition but withheld issuance of the writ because it believed the governor would fully comply with the dictates of its opinion.

LexisNexis® Headnotes

Constitutional Law > State Constitutional Operation

Governments > Courts > Judges

HN1 The Florida Constitution mandates that the Governor appoint a judicial nominee within sixty days of the certification of nominees by the Judicial Nominating Commission for the Fifth Appellate District. Within this process, the Governor is not provided the authority under the Constitution to reject a certified list of nominees and request that a new list be certified.

Governments > Courts > Judges

HN2 See *Art. V, § 8, Fla. Const.*

Governments > Courts > Judges

Governments > State & Territorial Governments > Employees & Officials

HN3 See *Art. V, § 11(c), Fla. Const.*

Governments > Courts > Judges

Governments > State & Territorial
Governments > Employees & Officials

HN4 Nominations made by the judicial nominating commissions are binding upon the Governor, as he is under a constitutional mandate to appoint one of not fewer than three persons nominated by the appropriate judicial nominating commission. The Governor must make the appointment within sixty days after the nominations have been certified to him. *Art. V, § 11(c), Fla. Const.* However, this same provision confers upon the Governor the express power to make the final and ultimate selection by appointment. The purpose of the judicial nominating commission is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge. When the commission has completed its investigation and reached a conclusion, the persons meeting the qualifications are nominated. In this respect the commissioners act in an advisory capacity to aid the Governor in the conscientious exercise of his executive appointive power. This appointive power is diluted by the Constitution to the extent that a nomination must be made by the appropriate commission, unrestrained by the influence of the Governor. To allow the Governor to guide the deliberations of the commissions by imposing rules of procedure could destroy its constitutional independence. This does not preclude him from making recommendations concerning rules.

Governments > Courts > Judges

HN5 While the function of the judicial nominating commissions is inherently executive in nature, the mandate for the commissions comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts.

Governments > Courts > Judges

HN6 The nominating commission process in *Art. V, § 11, Fla. Const.* is really a restraint upon the Governor, not a new process for removing from the people their traditional right to elect their judges as provided in the basic, preceding *Art. V, § 10 Fla. Const.* One of the principal purposes behind the provision for a nominating commission in the appointive process is not to replace the elective process but to place the restraint upon the "pork barrel" procedure of purely political appointments without an overriding consideration of qualification and ability. The purpose of a nominating commission is to eliminate that kind of selection which some people referred to as "picking a judge merely because he was a friend or political supporter of the Governor" thereby providing this desirable restraint upon such appointment and assuring a "merit selection" of judicial officers.

Constitutional Law > State Constitutional Operation

HN7 The interpretation of the Florida Constitution is a question of law for the court. In interpreting the constitution, the supreme court's analysis is straightforward. It begins with an examination of the explicit language of the article. If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written. The supreme court's goal in construing a constitutional provision is to ascertain and effectuate the intent of the framers and voters. The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied. In construing a constitutional provision, the supreme court is not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision.

Constitutional Law > State Constitutional Operation

Governments > Courts > Judges

Governments > State & Territorial
Governments > Employees & Officials

HN8 The plain language of *Art. V, § 11(c), Fla. Const.* mandates that the Governor, upon receipt of the certified list of nominees from a judicial nominating commission, make an appointment from that list within sixty days to fill the judicial vacancy. There is an absence of any language granting the Governor authority to reject the judicial nominating commission's certified list of nominees or to extend the time in which the appointment for judicial office must be made.

Civil Procedure > ... > Writs > Common Law
Writs > Mandamus

HN9 To be entitled to mandamus relief, the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must

have no other adequate remedy available.

Constitutional Law > State Constitutional Operation

Governments > Courts > Judges

Governments > State & Territorial
Governments > Employees & Officials

HN10 *Art. V, § 11(c), Fla. Const.* imposes a clear and indisputable legal duty upon the Governor in his exercise of appointing judicial nominees to act within sixty days of receiving the certified list of nominees.

Governments > Courts > Judges

HN11 Vacancies in judicial office are to be avoided whenever possible.

Counsel: **[**1]** Talbot C. D'Alemberte of D'Alemberte and Palmer, Tallahassee, Florida, for Petitioner.

Jason Gonzalez, Gerald B. Curington, Erik M. Figlio, and Carly A. Hermanson, Executive Office of the Governor, Tallahassee, Florida, for Respondent.

Siobhan Helene Shea, Chair, Appellate Practice Section, The Florida Bar, Tallahassee, Florida, on behalf of Appellate Practice Section, The Florida Bar; Keersten Heskin Martinez of Fisher, Rushmer, Werrenrath, Dickson, Talley and Dunlap, P.A., Orlando, Florida, and Joyce C. Fuller of J.C. Fuller, P.A., Winter Park, Florida, on behalf of The Central Florida Association of Women Lawyers; and Charles E. "Chuck" Hobbs, II, Tallahassee, Florida, on behalf of The Florida State Conference of Branches of the NAACP, as Amici Curiae.

Judges: LABARGA, J. QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and PERRY, JJ., concur.

Opinion by: LABARGA

Opinion

[*942] Original Proceeding -- Mandamus

LABARGA, J.

Petitioner Robert J. Pleus, Jr., a retired judge of the Fifth District Court of Appeal, filed a petition for writ of mandamus in this Court seeking an order compelling Governor Crist to fill the vacancy created in the Fifth District Court of Appeal by the Petitioner's mandatory resignation. [1] The issue **[**2]** raised by the petition concerns the extent of the Governor's authority in making judicial appointments under the Florida Constitution. [2] Specifically, we are called upon to decide whether the Governor must fill the vacancy created by Petitioner's resignation with a judicial appointment from the list of nominees certified to him on November 6, 2008, and do so within sixty days of receiving that list. [3] Having reviewed the parties' pleadings, as well as the briefs filed by Amici Curiae, [4] and in consideration of the oral arguments, we conclude that ***HN1*** the Florida Constitution mandates that the Governor appoint a judicial nominee within sixty days of the certification of nominees by the Judicial Nominating Commission for the Fifth Appellate District. We also conclude that, within this process, the Governor is not provided the authority under the constitution to reject the certified list and request that a new list be certified.

I. Background

The facts are not in dispute. Petitioner tendered his resignation as judge of the Fifth District Court of Appeal to the Governor on September 2, 2008, to become effective on January 5, 2009. Having accepted the Petitioner's letter of resignation, the Governor requested that the Judicial Nominating Commission for the Fifth **[*943]** Appellate District (hereinafter "JNC") provide him with a list of qualified applicants. A total of twenty-six applicants sought the appointment. The JNC reviewed the applications and conducted interviews. **[**4]** On November 6, 2008, the JNC certified to the Governor a list of six nominees for appointment to the Fifth District

---

[1] *Article V, section 8, of the Florida Constitution* provides, in pertinent part, that ***HN2*** "[n]o justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served." Petitioner has **[**3]** served on the Fifth District Court of Appeal as a senior judge since his retirement.

[2] This case does not involve any claim that the process for the selection of the nominees was tainted by impropriety or illegality. Our decision in this case should not be understood to suggest that no remedy would be available to address such a tainted process.

[3] We have jurisdiction. *See art. V, § 3(b)(8), Fla. Const.*

[4] Amicus briefs were filed, with leave of Court, by the Appellate Practice Section of The Florida Bar, the Central Florida Association for Women Lawyers, and the Florida State Conference of Branches of the National Association for the Advancement of Colored People.

Court of Appeal.

In a letter dated December 1, 2008, the Governor advised the JNC Chair that he was rejecting the certified list of nominees. In the interest of diversity in the courts, the Governor requested that the JNC reconvene to consider the applications of three African-Americans who had applied to fill the vacancy. The JNC met to consider the Governor's request, and resubmitted the original list of nominees to the Governor. The Governor has not filled the vacancy to date.

II. History and Intent of Article V, Section 11(c), Florida Constitution

Article V, section 11(c), governs the time periods applicable to judicial nominating commissions in nominating judicial applicants to fill vacancies and to the governor in making judicial appointments. That provision of the constitution expressly requires the following: ***HN3*** "The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified **[**5]** to the governor."

In the past, we have discussed at length the origin and purpose of article V, section 11, of the Florida Constitution, explaining the restraints the constitutional provision places on the Governor's appointment power:

> In the deliberations of the Florida Constitutional Revision Commission, it was proposed that judicial nominating commissions be created to screen applicants for judicial appointments within their respective jurisdictions and to nominate the three best qualified persons to the Governor for his appointment. *The commissions were to be an arm of the executive appointive power to supplant, at least in part, the Governor's so-called "patronage committee" composed of political supporters, to insure that politics would not be the only criteria in the selection of judges, and to increase generally the efficiency of the judicial appointive process.*
>
> . . . .
>
> . . . [T]he judicial nominating commissions [of the Revised Article V of the Florida Constitution, effective January 1, 1973] are elevated to constitutional stature and permanence. *The process of non-partisan selection has been strengthened even further because* ***HN4*** *nominations made by the judicial nominating commissions* ***[**6]*** *have now been made binding upon the Governor, as he is under a constitutional mandate to appoint "one of not fewer than three persons nominated by the appropriate judicial nominating commission." Moreover, the Governor must make the appointment within sixty days after the nominations have been certified to him.* Fla. Const., art. V (Rev.), § 11(a), F.S.A. However, this same provision confers upon the Governor the express power to make the final and ultimate selection by appointment.
>
> . . . .
>
> . . . *The purpose of the judicial nominating commission is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge.* When the commission has completed its investigation and **[*944]** reached a conclusion, the persons meeting the qualifications are nominated. In this respect the commissioners act in an advisory capacity to aid the Governor in the conscientious exercise of his executive appointive power.
>
> . . . .
>
> *This appointive power is diluted by the Constitution to the extent that a nomination must be made by the appropriate commission, unrestrained by the influence of the Governor.* To allow the Governor to guide the **[**7]** deliberations of the commissions by imposing rules of procedure could destroy its constitutional independence. This does not preclude him from making recommendations concerning rules.
>
> Seeking to remove some of the discretion of the Governor's office in the appointment of judicial officers is an apparent goal of the people which can best be attained by providing discretion to their commissions to promulgate rules of procedure for their hearings and findings, independent of any of the three standard recognized divisions of state government. ***HN5*** While the function of the commissions is inherently executive in nature, the mandate for the commissions comes from the people and the Constitution, not from the Legislature, the Governor, or the Courts.

In re Advisory Opinion to the Governor, 276 So. 2d 25, 28-30 (Fla. 1973) (emphasis added) (citation omitted).

Similarly, in Spector v. Glisson, 305 So. 2d 777 (Fla. 1974), we restated the objective that underlies displacing sole executive prerogative from the judicial appointment process:

> ***HN6*** *The nominating commission process in § 11 of Art. V is really a restraint upon the Governor*--not a new process for removing from the people their traditional right to **[**8]** elect their judges as provided in the basic, preceding *§ 10 of Art. V. One of the principal purposes behind the provision for a nominating commission in the appointive process was--not to replace the elective process--but to place the restraint upon the "pork barrel" procedure of purely political appointments without an overriding consideration of qualification and ability.* It was sometimes facetiously said in former years that the best qualification to become a judge was to be a friend of the Governor! The purpose of such nominating commission, then, was to eliminate that kind of selection which some people referred to as "picking a judge merely because he was a friend or political supporter of the Governor" thereby providing this desirable restraint upon such appointment and assuring a "merit selection" of judicial officers.

Id. at 783 (emphasis added).

III. Discussion

HN7 "The interpretation of the Florida Constitution is a question of law" for the Court. *Jackson-Shaw Co. v. Jacksonville Aviation Authority, 8 So. 3d 1076, 33 Fla. L. Weekly S972, S975 (Fla. Dec. 18, 2008)*. In interpreting the constitution, our analysis is straightforward. We begin with an examination of the explicit language of **[**9]** *article V, section 11(c)*. "If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written." *Lawnwood Med. Ctr., Inc. v. Seeger, 990 So. 2d 503, 511 (Fla. 2008)* (quoting *Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986)*). "Our goal in construing a constitutional provision is to ascertain and effectuate the intent of the framers and voters." *Id. at 510*. As we have previously explained:

> The fundamental object to be sought in construing a constitutional provision **[*945]** is to ascertain the intent of the framers and the provision must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied.

Ford v. Browning, 992 So. 2d 132, 136 (quoting *Crist v. Fla. Ass'n of Crim. Defense Lawyers, 978 So. 2d 134, 140 (Fla. 2008)*). We remain mindful that in construing a constitutional provision, we are not at liberty to add words that were not placed there originally or to ignore words that were expressly placed there at the time of adoption of the provision. **[**10]** *See Lawnwood, 990 So. 2d at 512*.

With these principles in mind, we turn to the language of *article V, section 11(c), of the Florida Constitution*:

> (c) The nominations [for judicial office] *shall* be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor *shall* make the appointment within sixty days after the nominations have been certified to the governor.

Art. V, § 11(c), Fla. Const. (emphasis added).***HN8*** The plain language of *article V, section 11(c)*, mandates that the Governor, upon receipt of the certified list of nominees from a judicial nominating commission, make an appointment from that list within sixty days to fill the judicial vacancy. Significantly, in addition to the mandatory language that is expressly stated in the provision, we note the absence of any language granting the Governor authority to reject the JNC's certified list of nominees or to extend the time in which the appointment for judicial office must be made. Cases such as *In re Advisory Opinion to the Governor* and *Spector* provide ample historical support for this interpretation.

Petitioner Pleus has sought mandamus relief **[**11]** in this Court. ***HN9*** To be entitled to mandamus relief, "the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Huffman v. State, 813 So. 2d 10, 11 (Fla. 2000)*. Based upon our foregoing analysis, we hold that ***HN10*** *article V, section 11(c)*, imposes a clear and indisputable legal duty upon the Governor in his exercise of appointing judicial nominees to act within sixty days of receiving the certified list of nominees. Petitioner, as a citizen and taxpayer, has a clear legal right to request that the Governor carry out that duty. *See Chiles v. Phelps, 714 So. 2d 453, 456 (Fla. 1998)*. In so holding, we reject the

proposition that the Governor's failure to act within the mandated time frame obviates that duty. To hold otherwise would render the constitutional provision nugatory.

We also reject the argument that mandamus does not lie because the appointment process is an executive function that is inherently discretionary. By allowing this mandamus proceeding, we do not direct the Governor's discretionary decision as to the actual appointment **[**12]** to fill the judicial vacancy. Rather, we simply recognize and enforce the mandate contained in *article V, section 11*, which requires the Governor to adhere to his duty to *make* an appointment within the mandated time frame from the certified list of nominees. We recognize that, in fulfilling this constitutional duty, the Governor has discretion in his selection of a nominee from the list.

Finally, we reject the argument that an action for declaratory judgment in the circuit court is an adequate legal remedy **[*946]** under the facts and circumstances of this case, thus requiring denial of mandamus in this Court. As the Court stated in *In re Advisory Opinion to the Governor (Judicial Vacancies), 600 So. 2d at 462, **HN11*** "[v]acancies in [judicial] office are to be avoided whenever possible. We are confident that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist." In this case, the passage of almost six months since the petitioner's resignation became effective warrants our decision, now, in this mandamus proceeding in order to effectuate the intent of the framers to avoid or minimize **[**13]** further delay in filling this judicial vacancy. Moreover, while we applaud the Governor's interest in achieving diversity in the judiciary–an interest we believe to be genuine and well-intentioned–the constitution does not grant the Governor the discretion to refuse or postpone making an appointment to fill the vacancy on the Fifth District Court of Appeal. [5]

CONCLUSION

We conclude that the Governor is bound by the Florida Constitution to appoint a nominee from the JNC's certified list, within sixty days of that certification. There is no exception to that mandate. Therefore, we hold that under the undisputed **[**14]** facts and specific circumstances present in this case, the Governor lacks authority under the constitution to seek a new list of nominees from the JNC and has a mandatory duty to fill the vacancy created by Petitioner's retirement with an appointment from the list certified to him on November 6, 2008. Because we believe the Governor will fully comply with the dictates of this opinion, we grant the petition but withhold issuance of the writ.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, POLSTON, and PERRY, JJ., concur.

End of Document

[5] It should be noted that the Legislature has also addressed the interest of diversity in the judicial nominating process in *section 43.291(4), Florida Statutes* (2008). That section provides that the Governor, in appointing members of each judicial nominating commission, "shall seek to ensure that, to the extent possible, the membership of the commission reflects the racial, ethnic, and gender diversity, as well as geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered." *§ 43.291(4), Fla. Stat.* (2008).

Appendix 45.

Eugster v. City of Spokane

Court of Appeals of Washington, Division Three

September 16, 2003, Filed

No. 21853-8-III

Reporter
118 Wn. App. 383 *; 76 P.3d 741 **; 2003 Wash. App. LEXIS 2058 ***

STEPHEN K. EUGSTER, ET AL., *Appellants*, v. THE CITY OF SPOKANE, ET AL., *Respondents*.

Subsequent History: Reconsideration denied by *Eugster v. City of Spokane, 2003 Wash. App. LEXIS 2623 (Wash. Ct. App., Nov. 7, 2003)*

Related proceeding at *Eugster v. City of Spokane, 121 Wn. App. 799, 91 P.3d 117, 2004 Wash. App. LEXIS 1106 (2004)*
Review denied by *Rodgers v. City of Spokane, 151 Wn.2d 1027, 94 P.3d 959, 2004 Wash. LEXIS 381 (2004)*

Prior History: *River Park Square, L.L.C. v. Miggins, 143 Wn.2d 68, 17 P.3d 1178, 2001 Wash. LEXIS 136 (2001)*

Core Terms

ordinance, garage, Developer, mandamus, parking meter, ground lease, bonds, operating expenses, trial court, pledge, debt service, parking, city council, lease, speedy, adequate remedy, contingent, obligations, ordinary course of law, writ of mandamus, revenue fund, ground rent, bond debt, shortfall, partly, parking garage, bondholders, municipal, remedies, Coopers

Case Summary

Procedural Posture
Appellants, two city counsel members, and respondent City of Spokane (city), sought review of the decision of the Superior Court of Spoke County (Washington), which ordered the city by peremptory writ of mandamus to forthwith loan money pursuant to the ordinance, from the city's parking meter revenue to respondent Spokane Public Development Authority (PDA).

Overview
This dispute involved a public parking garage of a shopping mall. The issue was whether the superior court erred by issuing a writ of mandamus directing the city to abide by an ordinance providing a contingent loan of parking meter revenue to cover garage expense shortfalls. The court affirmed the judgment of the superior court, stating that the city had a duty under the ordinance to offer the loan. No material fact issues remained requiring a mandamus trial. Further, the court rejected contentions seeking to nullify the ordinance centered on alleged violations of the Open Public Meetings Act, Wash. Rev. Code ch. 42.30. Relying on overly optimistic garage revenue projections, the city supported the garage financing plan with the expectation that the garage would consistently operate in the black even after payment of the bonds. When faced with the prospect of loaning millions of dollars of parking meter revenue, the city pursued damage control. Nevertheless, the trial court correctly interpreted the ordinance; the city had a duty to offer a loan to the PDA because garage revenues were insufficient to pay the ground lease and operating costs after debt servicing of the bonds.

Outcome
The judgment was affirmed.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN1 Mandamus is an extraordinary writ. A court may issue a writ of mandamus, to any inferior tribunal,

corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, Wash. Rev. Code § 7.16.160. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested, Wash. Rev. Code § 7.16.170. If disputed material fact issues exist, the trial court has discretion to hold a trial before it determines the appropriateness of mandamus, Wash. Rev. Code § 7.16.210. The above legal framework requires the applicant to satisfy three elements before a writ will issue: (1) the party subject to the writ is under a clear duty to act, Wash. Rev. Code § 7.16.160; (2) the applicant has no plain, speedy and adequate remedy in the ordinary course of law, Wash. Rev. Code § 7.16.170 ; and (3) the applicant is "beneficially interested," § 7.16.170. An applicant for writ has standing if the applicant is beneficially interested in the duty asserted.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Governments > Local Governments > Ordinances & Regulations

HN2 The determination of whether a statute specifies a duty that the person must perform is a question of law. Whether there is a plain, speedy, and adequate remedy in the ordinary course of the law is a question left to the discretion of the court in which the proceeding is instituted. Thus, the Court of Appeals of Washington will not disturb a decision regarding a plain, speedy, and adequate remedy on review unless the superior court's discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN3 Mandamus is appropriate to compel a government official or entity to comply with law when the claim is clear and there is a duty to act. Ordinarily, duty is a threshold element; if the claim is clear and the government entity has a duty to act, mandamus may be an appropriate remedy. If so, regarding duty, the question becomes whether the circumstances trigger the duty. Then, remedy is considered. Doubtful plaintiff rights do not justify a writ of mandamus. Mandamus writs should not be issued to direct a general course of conduct. Mandamus does not authorize a court to assume general control or direction of official acts. Instead, the remedy of mandamus contemplates the necessity of indicating the precise thing to be done. This does not mean that a writ cannot issue in regards to a continuing violation of a duty. Where there is a specific, existing duty which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance. Mandamus directs an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion. A mandamus applicant cannot exactly shape a mandatory discretionary act. Similarly, although mandamus will not lie to control exercise of discretion, it will lie to require that discretion be exercised. The act of mandamus compels performance of a duty, but cannot lie to control discretion.

Civil Procedure > Remedies > Writs > General Overview

HN4 In terms of duty, mandamus, if appropriate, tells a respondent what to do, but not how to do it.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > General Overview

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

HN5 The Court of Appeals of Washington reviews the interpretation of a city ordinance de novo under the error of law standard. The interpretation rules apply equally to municipal ordinances and statutes. Generally, the court interprets the ordinance "to best advance" the municipality's legislative purpose. The court begins its analysis with a plain meaning interpretation of the language on the face of the ordinance and closely related legislation in light of the municipality's underlying legislative purposes. Further, the court interprets the ordinance in its entirety, reviewing all provisions in relation to each other. The court does not judicially construct unambiguous ordinances. It will not add language to an unambiguous ordinance even if we believe the municipality intended something else but did not adequately express it. The court assumes the municipality meant exactly what it said when it enacted the ordinance. If the ordinance is ambiguous, the court resorts to tools of statutory construction, such as legislative history and relevant case law, to discern the

ordinance's meaning. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable.

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > ... > Traffic Regulation > Parking > Parking Meters

HN6 Generally, the use of the word "shall" in a legislative enactment is presumptively mandatory, thus creating a duty. Accordingly, the use of the word "shall" in a statute or ordinance imposes a mandatory requirement unless a contrary legislative intent is apparent.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Constitutional Law > Separation of Powers

Governments > Local Governments > Administrative Boards

HN7 Generally, a writ of mandamus or prohibition will not lie to interfere with a municipality's legislative functions, such judicial interference being a violation of separation of powers. When directing a writ to the Legislature or its officers, a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch..

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Governments > Local Governments > Ordinances & Regulations

HN8 An order or resolution is a ministerial act of a city council, as distinguished from the legislative act of enacting an ordinance. Mandamus will lie to compel a ministerial act.

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

Transportation Law > ... > Traffic Regulation > Parking > Parking Meters

HN9 Ordinance language should be construed to carry out, rather than defeat, the ordinance's purpose.

Civil Procedure > Remedies > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN10 A writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law, *Wash. Rev. Code § 7.16.170*. A statutory writ is an extraordinary remedy, and should issue only when there is no plain, speedy and adequate remedy in the ordinary course of law. A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ. Broadly, the remedy issue turns on whether the duty a plaintiff seeks to enforce cannot be directly enforced by any means other than mandamus. The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN11 The mandamus statute partly states the writ must be issued upon affidavit on the application of the party beneficially interested, *Wash. Rev. Code § 7.16.170*. Alternatively, the mandamus applicant can rely on a verified complaint. The affidavit or complaint must allege sufficient facts to establish that the appellants had no plain, speedy, or adequate remedy in the ordinary course of law.

Contracts Law > Remedies > Specific Performance

HN12 Specific performance ordinarily cannot lie to compel a promise to loan money.

Civil Procedure > Remedies > Writs > General Overview

HN13 A claim for damages may not be an adequate remedy in some situations where a court or other public official is under a clear duty to act.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract

Conditions & Provisions

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Contracts Implied in Fact

HN14 The party asserting the existence of an express or implied contract bears the burden of proving the essential elements of a contract, including mutual intent. The essential elements of a contract are subject matter, parties, promise, terms and conditions, and, depending on jurisdiction, price or consideration.

Governments > Legislation > Interpretation

Governments > Legislation > Statutory Remedies & Rights

HN15 Generally, a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create rights of a contractual nature enforceable against the State. Statutorily created contract rights, however are rare. If a statute is subject to full legislative control by future amendments and repeals, the statute declares policy to be pursued until the Legislature ordains otherwise, in contrast to creating contractual or vested rights.

Governments > Legislation > Interpretation

HN16 Even if a statute creates a right contractual in nature, it does not necessarily follow the statute in and of itself constitutes a complete contract. The contract analogy recognizes rights contractual in nature but also affords the legislative body flexibility to amend or improve the statute or ordinance as conditions change.

Civil Procedure > Remedies > Writs > General Overview

Governments > Local Governments > Claims By & Against

HN17 Mandamus ought not to be issued in cases of doubtful right. A plaintiff's claim against the government entity must be clear and not the result of the plaintiff's fault.

Civil Procedure > Pleading & Practice > Pleadings > Answers

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN18 The party served or subject to a mandamus writ may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action, *Wash. Rev. Code § 7.16.200*. After considering the application and answer, the trial court has discretion to determine whether factual questions remain essential to the determination of the motion, and affecting the substantial rights of the parties bearing on the truth of the allegation of which the application for the writ is based, *Wash. Rev. Code § 7.16.210*.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN19 Mandamus is inappropriate to command the performance of useless or vain acts. A court will not compel by mandamus the doing of an act that would serve no useful purpose, nor should a writ issue when by operation of law a compliance with the mandate could have no operative effect.

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Appeals > Summary Judgment Review > General Overview

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Cross Motions

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN20 The Court of Appeals of Washington conducts a de novo review of the trial court's legal conclusions when the parties submit cross motions for summary judgment, essentially conceding that there are no issues of material fact.

Administrative Law > Governmental Information > Public Information > General Overview

HN21 See *Wash. Rev. Code § 42.30.030*.

Administrative Law > Governmental Information > Public Information > General Overview

HN22 See *Wash. Rev. Code § 42.30.060(1)*.

Administrative Law > Governmental Information > Public Information > General Overview

HN23 See *Wash. Rev. Code § 42.30.020(3)*.

Administrative Law > Governmental Information > Public Information > General Overview

HN24 As a general rule, meetings held in violation of the

Open Public Meetings Act, Wash. Rev. Code ch. 42.30, will not invalidate a later final action taken in compliance with the statute. Moreover, to escape summary dismissal of an OPMA claim, the plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) where that body took action in violation of OPMA, and (4) the members of that body had knowledge that the meeting violated the statute. A "meeting" takes place when a majority of the governing body meets and takes "action."

Contracts Law > Remedies > Ratification

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

Public Contracts Law > Bids & Formation > Authority of Government Officers > Contracting Officers

Real Property Law > ... > Lease Agreements > Commercial Leases > Shopping Center Leases

Real Property Law > Purchase & Sale > Remedies > Duty to Disclose

HN25 In general, a municipal officer shall not benefit, directly or indirectly, through any contract with the municipality, *Wash. Rev. Code § 42.23.030*. And a municipal officer may not vote to authorize, approve, or ratify a contract if the officer has a beneficial interest in the contract. The municipal officer must disclose his or her beneficial interest on the record before formation of the contract.

Civil Procedure > Appeals > Appellate Briefs

HN26 The Court of Appeals of Washington will not consider an issue unsupported by citation to the record and reasoned argument, *Wash. R. App. P. 10.3(a)(5)*.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Civil Procedure > Appeals > Costs & Attorney Fees

HN27 Normally, the Court of Appeals of Washington will not grant a request for attorney fees absent an authorizing statute, contract, or recognized ground in equity.

Headnotes/Syllabus

Summary

Nature of Action: Action for a judgment declaring null and void a city ordinance pledging to loan parking meter revenue to a public development authority to cover parking garage expense shortfalls. The defendants interposed several counterclaims and sought affirmative relief, including specific performance or, alternatively, a writ of mandamus commanding the mayor and city council to loan parking meter revenue to the public development authority.

Superior Court: The Superior Court for Spokane County, No. 00-2-04265-0, James M. Murphy, J., on March 22, 2002, issued a writ of mandamus directing the city to abide by the provisions of an ordinance by offering a loan of parking meter revenue to cover garage expenses not covered by operational revenues.

Court of Appeals: Holding that the city had a duty under the ordinance to offer the loan, that the duty could be enforced by mandamus, that the trial court properly issued the writ, and that the ordinance was not invalid under the Open Public Meetings Act, the court *affirms* the judgment.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1] [1]

Mandamus > Elements > Burden of Proof

Under the mandamus procedure of *RCW 7.16.150-.210*, a writ of mandamus will issue if (1) the party subject to the writ is under a clear duty to act; (2) the applicant does not have a plain, speedy, and adequate remedy in the ordinary course of law; and (3) the applicant is beneficially interested. The burden of establishing all three elements is on the applicant.

WA[2] [2]

Mandamus > Elements > Beneficial Interest > What Constitutes

An applicant for a writ of mandamus is beneficially interested in the issuance of the writ if the applicant has an interest in the action beyond that shared in common with other citizens.

WA[3] [3]

Mandamus > Elements > Duty To Act > Question of Law or Fact

For purposes of a mandamus action, whether the party subject to the writ is under a clear duty to act is a question of law.

WA[4] [4]

Mandamus > Elements > Absence of Remedy at Law > Determination > Discretion of Court > Review > Standard of Review

Whether an applicant for a writ of mandamus lacks a "plain, speedy, and adequate remedy in the ordinary course of law" is a question addressed to the discretion of the court in which the application is made. The court's decision will not be disturbed by a reviewing court unless the decision is manifestly unreasonable, is based on untenable grounds, or was made for untenable reasons.

WA[5] [5]

Mandamus > Public Official or Body > Duty To Act > In General

Mandamus is appropriate to compel a government official or entity to comply with the law when the claim is clear and there is a duty to act. The initial question for a court in which an application for a writ of mandamus is made is whether the circumstances trigger the duty. If the duty is triggered, then the remedy of mandamus is considered. The remedy of mandamus contemplates the necessity of indicating the precise thing to be done.

WA[6] [6]

Mandamus > Public Official or Body > Duty To Act > Continuing Violation

Where there is a specific, existing duty that a government official has violated and continues to violate, mandamus is an appropriate remedy to compel performance.

WA[7] [7]

Mandamus > Public Official or Body > Discretionary Act > Manner of Discharge > Duty To Act

Mandamus can direct a public official to exercise a mandatory discretionary duty, but not the manner of exercising that discretion. Thus, a mandamus applicant cannot exactly shape a mandatory discretionary act. Similarly, although mandamus will not lie to control exercise of discretion, it will lie to require that discretion be exercised. Stated another way, the act of mandamus compels performance of a duty, but cannot lie to control discretion.

WA[8] [8]

Mandamus > Public Official or Body > Duty To Act > Nature of Act

Mandamus, if appropriate, tells the respondent what to do, but not how to do it.

WA[9] [9]

Municipal Corporations > Ordinances > Construction > Review > Standard of Review

A trial court's interpretation of a municipal ordinance is reviewed by an appellate court de novo under the error of law standard.

WA[10] [10]

Municipal Corporations > Ordinances > Construction > Applicable Rules

A municipal ordinance is interpreted by the use of the same rules as apply to the interpretation of a statute.

WA[11] [11]

Municipal Corporations > Ordinances > Construction > In General

In general, a court interprets a municipal ordinance to best advance the municipality's legislative purposes. A court begins its analysis with a plain meaning interpretation of the language on the face of the ordinance and closely related legislation in light of the municipality's underlying legislative purposes. The court interprets the ordinance in its entirety, reviewing all provisions in relation to each other. The court will not construe an unambiguous ordinance. Likewise, the court will not add language to an unambiguous ordinance, even if it believes the municipality intended something else but did not adequately express it. The court assumes the municipality meant exactly what it said when it enacted the ordinance. If the ordinance is ambiguous, the court will resort to tools of statutory construction, such as legislative history and relevant case law, to discern the meaning of the ordinance. An ordinance is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are

conceivable.

WA[12] [12]

Municipal Corporations > Ordinances > Construction > Meaning of Words > "Shall" > In General

The word "shall" in an ordinance imposes a mandatory requirement unless a contrary legislative intent is apparent.

WA[13] [13]

Mandamus > Public Official or Body > Ministerial Act

Mandamus will lie to compel a government official or entity to perform a ministerial act.

WA[14] [14]

Municipal Corporations > Appropriations > Special Fund > By Order > Ministerial Act > Mandamus > Validity

Under a municipal ordinance stating that appropriations "shall be by ordinance; save where there is a special fund created for particular purpose, payments from such fund shall be made on order of the city council," an order directing payment from a special fund is a ministerial act that may be compelled by mandamus. The writ of mandamus does not violate the separation of powers doctrine in such circumstances because an order directing payment from a special fund does not involve an act of legislative discretion.

WA[15] [15]

Municipal Corporations > Ordinances > Construction > Purpose > In General

The language of a municipal ordinance should be construed to carry out, rather than defeat, its purpose.

WA[16] [16]

Municipal Corporations > Parking > Off-Street Parking > Financing of Operational Costs > Pledge of Onstreet Parking Revenue > Loan From City > Duty > Ordinance

City of Spokane ordinance C31823 imposes a duty on the city to offer a loan of parking meter revenue to the Spokane Public Development Authority, a public corporation charged with operating a downtown parking garage developed by private parties with funds generated by the sale of bonds by a nonprofit corporation, if revenues from operation of the parking garage are insufficient to pay the ground rent and operating expenses of the garage after debt service on the bonds.

WA[17] [17]

Mandamus > Elements > Absence of Remedy at Law > Determination > What Constitutes

Mandamus is an extraordinary remedy that may be granted only if there does not exist a plain, speedy, and adequate remedy in the ordinary course of law. A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. To be inadequate, there must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ. In broad terms, the remedy issue turns on whether the duty the applicant for the writ seeks to enforce cannot be directly enforced by any means other than mandamus. The general principle is that, whatever can be done without the employment of the writ may not be done with it. It lies only when there is practically no other remedy.

WA[18] [18]

Mandamus > Elements > Absence of Remedy at Law > Proof > Supporting Materials > Verified Complaint

A mandamus applicant may rely on a verified complaint rather than the affidavit specified by *RCW 7.16.170* to establish the unavailability of a plain, speedy, and adequate remedy in the ordinary course of law.

WA[19] [19]

Mandamus > Elements > Absence of Remedy at Law > Proof > Supporting Materials > Sufficiency

A writ of mandamus may issue upon an affidavit or verified complaint alleging sufficient facts to establish that the applicant does not have a plain, speedy, or adequate remedy in the ordinary course of law. The sufficiency of the affidavit or verified complaint does not depend on a recitation of the language from *RCW 7.16.170* that "there is not a plain, speedy and adequate remedy in the ordinary course of law."

WA[20] [20]

Mandamus > Elements > Absence of Remedy at Law > Review > Standard of Review

A trial court's finding in a mandamus proceeding that the applicant for the writ did not have a plain, speedy, and adequate remedy in the ordinary course of law is reviewed for an abuse of discretion.

WA[21] [21]

Credit > Contracts > Specific Performance > Loan of Money

In general, specific performance will not lie to compel a promise to loan money.

WA[22] [22]

Mandamus > Elements > Absence of Remedy at Law > Alternative Contract Remedies > Inadequacy or Unavailability > Effect

A litigant who pleads both contract-based remedies and mandamus to compel the enforcement of a contractual obligation may be granted the writ of mandamus if an award of damages would be inadequate under the circumstances, specific performance is unavailable under the law, no other equitable remedy under contract law is sufficient to afford the litigant the relief sought, and the respondent has a clear duty to act.

WA[23] [23]

Contracts > Formation > Elements > Burden of Proof

A party asserting the existence of an express or implied contract has the burden of proving the essential elements of a contract, including mutual intent. The essential elements of a contract are subject matter, parties, promise, terms and conditions, and, depending on jurisdiction, price or consideration.

WA[24] [24]

Contracts > Statutes > Statutory Contracts > What Constitutes

A legislative contract right is created only when the language of legislation and the circumstances surrounding its passage demonstrate a legislative intent to create rights of a contractual nature enforceable against the government. Statutorily created contract rights are rare. Contractual rights are not created by legislation that is subject to full legislative control by future amendments and repeal.

WA[25] [25]

Contracts > Statutes > Statutory Contracts > Completeness

Even if a legislative act creates a right contractual in nature, it does not necessarily follow that the legislation in and of itself constitutes a complete contract. While the contract analogy recognizes rights contractual in nature, it also affords the legislative authority flexibility to amend or improve the legislation as conditions change. A policy commitment, similar to a letter of intent, is not a complete contract and is unenforceable by means of contract remedies.

WA[26] [26]

Mandamus > Elements > Clear Right > Equity

Mandamus may issue to compel an act so long as there are no legal or equitable impediments to issuance of the writ. Mandamus ought not to be issued in cases of doubtful right. The applicant's claim must be clear and not the result of the applicant's own fault.

WA[27] [27]

Mandamus > Issues of Fact > Necessity for Trial > Determination > Review > Standard of Review

A trial court's determination in a mandamus action that no material factual issues remain to be tried will not be disturbed by a reviewing court absent an abuse of discretion.

WA[28] [28]

Municipal Corporations > Ordinances > Validity > Wisdom of Legislation > In General

A court will not inquire into the wisdom of a municipal ordinance.

WA[29] [29]

Judgment > Summary Judgment > Issues of Fact > Cross Motions for Summary Judgment > Effect

Opposing parties who submit cross motions for summary judgment on a claim essentially concede that there are no genuine issues of material fact that need to be resolved before the court may decide the claim as a matter of law.

WA[30] [30]

Appeal > Conclusions of Law > Review > Standard of Review

A trial court's conclusions of law are reviewed de novo.

WA[31] [31]

Open Government > Public Meetings > Noncomplying Meetings > Final Action in Complying Meeting

In general, a meeting held in violation of the Open Public Meetings Act of 1971 (*chapter 42.30 RCW*) will not invalidate a later final action taken in compliance with the act.

WA[32] [32]

Municipal Corporations > Ordinances > Validity > Open Public Meetings Act > Noncomplying Prior Meetings > Effect

A municipal ordinance enacted at a public meeting that complies with the Open Public Meetings Act of 1971 (*chapter 42.30 RCW*) is not rendered invalid by the fact that precursor meetings did not comply with the act.

WA[33] [33]

Open Government > Public Meetings > Elements of Claim

A violation of the Open Public Meetings Act of 1971 (*chapter 42.30 RCW*) does not occur unless (1) members of a governing body (2) held a "meeting" of that body (3) where "action" was taken in violation of the act, and (4) the members had "knowledge" that the meeting violated the act. A "meeting" takes place when a majority of the body meets and takes "action."

WA[34] [34]

Appeal > Assignments of Error > Authority > Reference to Record > Necessity

An appellate court may decline to consider a claim on appeal if the grounds for the claim are unsupported by citation to the record and reasoned argument.

WA[35] [35]

Costs > Attorney Fees > On Appeal > In General

An appellate court generally will not grant a request for attorney fees absent an authorizing statute, contract, or recognized ground in equity.

Counsel: *Jerry L. Trunkenbolz* (of *Trunkenbolz & Rohr, P.L.L.C.); Laurel H. Siddoway, Michael L. Wolfe, David Groesbeck,* and *Jillian A. Grabicki* (of *Randall & Danskin, P.S.); John F. Bury* (of *Murphy, Bantz & Bury, P.S.); Stephen K. Eugster* (of *Eugster Law Offices, P.S.C.*); and *Christopher M. Grimes* (of *Ford & Grimes, P.S.) (Margery Bronster* of *Bronster, Crabtree & Hoshibata,* of counsel), for appellants.

William F. Etter and *Raymond F. Clary* (of *Etter, McMahon, Lamberson & Clary, P.C.); Leslie R. Weatherhead, Robert S. Magnuson,* and *Christopher G. Varallo* (of *Witherspoon, Kelley, Davenport & Toole, P.S.); James B. King* (of *Keefe, King & Bowman, P.S.); John D. Munding* (of *Crumb & Munding*); and *Michael F. Connelly, City Attorney,* and *Milton G. Rowland, Assistant (Alain M. Baudry* of *Masion, Edelman, Borman & Brand,* of counsel), for respondents.

Judges: Author: STEPHEN M. BROWN. Concurring: DENNIS J. SWEENEY & FRANK L. KURTZ.

Opinion by: STEPHEN M. BROWN

Opinion

[*389] [746]** BROWN, C.J. -- Today, we consider another dispute involving the public **[***2]** parking garage portion of Spokane's River Park Square shopping mall. The core issue is whether the superior court erred by issuing a writ of mandamus directing the city of Spokane (City) to abide by an ordinance providing a contingent loan of parking meter revenue to cover garage expense shortfalls. We hold the City has a duty under the ordinance to offer the loan. We agree no material fact issues remained requiring a mandamus trial. Further, we reject contentions seeking to nullify the ordinance centered on alleged violations of the *Open Public Meetings Act* (OPMA), *chapter 42.30 RCW,* and the *Ethics in Government Act*. Accordingly, we affirm.

FACTS

A. Parties

The parties in this continuing River Park Square controversy include the city of Spokane; Citizens Realty Company, Lincoln Investment Company, and River Park Square L.L.C., the mall owners and developers (Developer); the Spokane Downtown Foundation (Foundation), the non-profit corporation created by the developers specifically to issue bonds to finance purchase of the garage; the Spokane Parking Public

Development Authority (PDA), the public corporation charged with operating the garage; bond trustee U.S. Bank (USB); Stephen Eugster, a city [***3] council member and longtime critic of the project; and city council member Cheryl (Cheri) Rodgers.

B. Early Garage Financing Concepts

In June 1995, the Spokane City Council passed a resolution directing city officials to work on a proposal for acquisition and development of a public parking garage in connection with the private redevelopment of River Park Square. The proposal involved issuing revenue bonds "to be repaid over twenty-five years exclusively from parking [*390] garage revenues." Clerk's Papers (CP) at 2764. The resolution provided the City would lease the land under the parking garage from the land owner/private developer, [**747] and the lease would be "paid by revenues derived from the operation of the public parking garage." CP at 2765.

On October 17, 1996, the Spokane City Council considered a detailed proposal involving the City's issuance of bonds to purchase the garage. A representative of the bond underwriter explained that parking garage revenues would "flow down" first, to pay "all the operation and maintenance expenses of the facility." CP at 2765. "After the payment of operation and maintenance expenses, debt service requirements on this issue comes first. [***4] After that it's been structured to state that ground lease payments would be made to the developer." CP at 2765. [1] Later, the City abandoned its plan to issue bonds, and elected to issue them through the Foundation.

C. Origins of the Current Garage Financing Structure

On November 25, 1996, the Spokane City Council passed a resolution authorizing the city manager and city staff "to prepare the ordinances, agreements and documents jointly with" the PDA and Foundation "as are necessary to provide for the renovation, expansion and construction" of the garage. CP at 1196. The resolution additionally directed the city staff "to meet with the Foundation and its counsel and to do all things necessary and appropriate in [***5] order for it to recommend action to the Council in conjunction with" the redevelopment project, issuance of bonds, and the eventual transfer of the garage to the City. CP at 1196. The resolution also directed the city staff "to do all things necessary and appropriate" to procure a favorable bond rating for the proposed bonds. CP at 1196.

[*391] The resolution further directed the city staff "to prepare the resolution and/or ordinance necessary to accomplish" the City's contingent pledge of parking meter revenues to the PDA "for the sole purposes of supporting the Authority's activities including paying operating and maintenance expenses and ground rent payments in connection with the Facility." CP at 1197. During at least one November 1996 city council meeting, some discussion took place between unidentified speakers regarding separating out the parking meter revenues for the purpose of paying garage operating expenses but not for payments on the bonds.

D. Presentation of Draft Ordinance

The January 13, 1997 city council meeting addressed resolutions and a draft ordinance concerning the new garage financing plan. Regarding the City's contingent pledge of parking meter revenue, [***6] the City's bond counsel, Roy Koegen, stated:

> [T]he way the contingent pledge works is the studies that have been done by professional parking consultants have indicated that the revenues from the park [sic] garage itself will be more than sufficient to repay all expenses incident to the garage, debt service, lease payments and operating expenses.
>
> However, the capital markets look with some askance on stand-alone parking garages. So in order to obtain an investment grade rating, the City of Spokane has agreed to loan money, and it's a loan, not a grant, to the public development authority if the parking revenues that the authority would collect aren't sufficient to pay ground lease payments and operating expenses.
>
> The purpose was to give more security to the public development authority in its agreement to pay operating expenses and ground lease payments.

CP at 2647.

In response to a question from the council, Mr. Koegen clarified:

> [*392] [Parking meter revenue] will not leave the

[1] We note that small excerpts of three critical city council meetings are scattered throughout the more than 3,600 pages of clerk's papers. These excerpts are confusingly labeled. Accordingly, we have relied mainly on the context of each excerpt to determine the corresponding meeting date.

> City of Spokane at any time unless the revenues received by the public development authority from the garage and only at that time are insufficient to **[**748]** pay, again, only lease payments and operational **[***7]** costs.
>
> There's not an obligation on behalf of the city to make any deposits or to accumulate any money, it's only available if and only if the garage revenues are insufficient and, again, only insufficient to make rent or lease payments and operating costs, not debt service.

CP at 2648. City attorney Stanley Schwartz stated, regarding the parking meter fund, "I should note that if this fund is called upon or is utilized, monies will be repaid in more profitable years, and that is called for in the development documents." CP at 2649.

Betsy Cowles, the Developer's president, then explained to the city council that private investors would buy the bonds issued by the Foundation, and "it is garage revenue that will repay those bonds." CP at 2650. Regarding the use of parking meter revenue, Ms. Cowles stated:

> The city is contingently pledging parking meter revenue, not tax money, and they're pledging it to the PDA. That money will only be used if the garage revenue is insufficient to cover land rent, operation and maintenance, and that is highly unlikely to happen, as Mr. Koegen pointed out.

CP at 2650. Later, Ms. Cowles continued:

> The projections for this garage, and the **[***8]** city again acting responsibly, has discounted the projected revenues by almost 25 percent. Even under this scenario, even under that significant discount of what the Walker [Parking Consultants] study says this garage is going to bring in, there is going to be revenue to pay back the debt service, to pay the lease payments, to pay operation and maintenance.

CP at 2651.

The city council then passed Resolution 97-2, which partly approved the Foundation's plan to purchase the garage with bond proceeds.

[*393] E. Consideration of Ordinance

At the January 27, 1997 city council legislative meeting, financial consultant Coopers & Lybrand presented a written analysis of the garage project, partly stating:

> The operating income from the RPS [River Park Square] Garage will be allocated first to cover debt service on the bonds, then to obligations under the ground lease and then to pay operating expenses. To the extent revenues from the RPS Garage are insufficient to pay bond debt service, ground lease payments and operating expenses, the City has agreed to pledge parking meter revenues to meet ground rent and operating expenses of the RPS Garage. It is our understanding that **[***9]** this pledge will be in the form of a loan, to be repaid from the operations of the RPS Garage in subsequent years, if available. It is also our understanding that revenues from parking meters will not be used to guarantee debt service payments on the bonds. However, this credit enhancement with respect to covering ground lease and operating expenses, results in the ability to obtain an investment grade bond rating, according to the Developer.

CP at 1269.

The analysis later summarized that debt service on the bonds would have priority with respect to garage revenues. "Ground lease payments and operating and maintenance expenses of the RPS Garage are subordinate to the bond payments." CP at 1274. Regarding the loan of parking meter revenues, the analysis emphasized:

> It is important to note that the parking meter revenues pledged by the City are intended to cover ground lease payments and operating and maintenance expenses of the garage only, and will not be used to fund debt service obligations under the bonds. To the extent that the revenues from the RPS Garage are insufficient to meet the debt service requirements of the bonds and a default occurs, the bondholders could pursue **[***10]** foreclosure, taking title to the property.

CP at 1274.

Mr. Schwartz presented the proposed ordinance, explaining "[t]here is a contingent pledge of the parking meter **[*394]** revenues to the parking development authority for the parking garage operation, maintenance, and ground lease." CP at 2653. Answering a question from the mayor, Mr. Schwartz clarified the contingent pledge of parking meter **[**749]** revenue "is not going toward debt, as you have been told, it's only going toward the maintenance, operational and ground lease responsibilities." CP at 2653. The mayor asked, "that has to do with the potential bond buyers feeling much

more comfortable with how this thing works?" CP at 2653. Mr. Schwartz answered, "Correct." CP at 2653. Ordinance C31823 (ordinance) was then enacted.

F. The Ordinance

In the ordinance, the City acknowledged both that the Foundation would issue tax-exempt bonds to finance reconstruction of the River Park Square parking garage (garage or facility) and would acquire the garage from the Developer. The Developer would retain ownership of the ground under the garage, but would lease that ground to the Foundation (ground lease). The Foundation would [***11] then lease the garage (facility lease) and sublease the ground (ground sublease) to the PDA. The ordinance contemplates the City acquiring full legal title to the garage and a leasehold interest in the ground under the garage once the Foundation paid off the bonds.

The ordinance partly states: "[T]he Council is desirous of creating a parking meter revenue fund, into which parking meter revenue will be deposited and contingently pledged to pay Operating Expenses of the Facility and Ground Lease Payments in the event that Facility revenues are insufficient, thereby ensuring the Facility is maintained in a first-class condition." CP at 126-27. Per the ordinance:

> The City hereby pledges, as a first charge and lien, that, in the event Parking Revenues are insufficient to make Ground Lease Payments and pay Operating Expenses, the City shall loan money from the Parking Meter Revenue Fund (but only to the extent money or investments are then on deposit or [*395] allocable to the Parking Meter Revenue Fund) to the Authority's Ground Lease Account and Operating and Maintenance Account in an amount that is no more than is necessary, together with such other money as is on hand and available in the [***12] Ground Lease Account and the Operating and Maintenance Account, to permit the Authority to make Ground Lease Payments and to pay Operating Expenses. The City covenants to maintain parking meter rates at a level to produce an amount each year that, together with other legally available money loaned to the Parking Meter [Revenue] Fund, will equal Ground Lease Payments and Operating Expenses budgeted for that year. Notwithstanding the foregoing, the City specifically does not: (i) pledge to maintain money in the Parking Meter Revenue Fund; (ii) pledge revenue derived from the enforcement of City parking laws to the Parking Meter Revenue Fund or any transfer therefrom; (iii) pledge the City's full faith, credit and resources, or money in the City's General Fund to the payment of Ground Lease Payments or Operating Expenses; or (iv) pledge any assets of the City to the payment of principal of or interest on the Foundation's Bonds.

CP at 132.

The ordinance further states: "The public purposes of this Ordinance will be lost if assurances of City participation, including a contingent pledge of its Parking Meter Revenue to pay Operating Expenses and Ground Lease Payments, are not immediately [***13] made and effective upon passage of this Ordinance." CP at 133. An unsuccessful challenge to the constitutionality of the ordinance soon followed. *See CLEAN v. City of Spokane, 133 Wn.2d 455, 947 P.2d 1169 (1997)*.

G. Leases Executed

Apparently, on August 1, 1998, the Foundation executed the ground lease with the Developer. In the "Fixed Ground Rent" section, the lease partly states:

> Foundation agrees that the revenue from the Parking Facility shall be applied by the Foundation in the following order of priority: debt service on the Bonds issued by the Foundation for [*396] purchase of the Parking Facility, Fixed Ground Rent, operational and maintenance expenses of the Parking Facility, and Administrative Variable [**750] Ground Rent and reserve accounts described in Paragraph 4.2 herein.

CP at 137.

In paragraph 4.4, the lease provided that the PDA must apply parking facility revenue first to "Fixed Facility Rent," then, in descending priority, fixed ground rent, and operating expenses. CP at 138.

Apparently, also on August 1, 1998, the Foundation and the PDA entered an agreement for the lease of the garage structure to the PDA (facility lease). Regarding parking [***14] revenue, the purported facility lease in the record partly states:

> All Parking Revenues shall be deposited into the Revenue Account as collected and, together with amounts transferred to the Revenue Account from the Rate Stabilization Account and City loan proceeds and Parking Meter Revenues loaned to the Authority by the Authority by the City, shall be used only for the following purposes and in the

following order of priority:

First, to pay Fixed Facility Rent;

Second, to pay Fixed Ground Rent;

Third, to pay Operating Expenses;
CP at 1594.

H. Garage Problems

The Foundation issued approximately $ 31 million in bonds in September 1998. The Foundation then used approximately $ 26 million of the proceeds to buy the garage from the Developer. But an October 1998 City memorandum, citing clerical errors, alleged the "value for the parking garage should be reduced from $ 26,050,713.71 to $ 14,527,271.28." CP at 2607.

The projected parking charges posed another problem for the Developer. A major prospective tenant, AMC theaters, wanted free patron parking. A compromise resulted in a [*397] generous parking validation discount program for mall patrons generally.

[***15] In August 1999, the PDA sent a letter to the Foundation's law firm registering its concern that a recent analysis by Walker Parking Consultants projected an annual revenue shortfall of approximately $ 1,240,000. The projection proved generally correct; the garage has consistently lost money since it opened.

I. First Mandamus: *River Park Square, L.L.C. v. Miggins*

In spring 2000, after initially making start-up loans of approximately $ 280,000, the City refused to make further loans to make up for the growing shortfall in garage revenues. By then, John Talbott, an opponent of the City's involvement in the development project, had been elected mayor. And, Mr. Eugster, a critic of the project, had been elected to the city council. The loan refusals led to *River Park Square, L.L.C. v. Miggins, 143 Wn.2d 68, 72, 17 P.3d 1178 (2001)*.

The Developer, not the PDA, "applied for a writ of mandamus to compel the City Manager and the City Attorney to issue the loan." *Id.* The superior court granted the writ after a show cause hearing. "The trial court reasoned that Ordinance C31823 mandates that the City Manager and the City Attorney issue a loan when revenues to pay the ground lease [***16] payment and operating expenses are deficient, and there is no plain, speedy, and adequate remedy in the ordinary course of law." *Id.* The Supreme Court granted direct review. On February 15, 2001, the Supreme Court quashed the superior court's writ of mandamus, holding "the writ should not issue because Ordinance C31823 does not especially enjoin the City Manager and the City Attorney to act as a result of their office." *Id.at 76.* [2]

[*398] J. Current Litigation and Appeal

On July 24, 2000, Mr. Eugster and fellow city council member Ms. Rodgers [***17] filed a complaint for declaratory judgment against a number of parties including the City, the Developer, and USB. The complaint mainly sought to have the ordinance declared null and void for a number [**751] of reasons, including a generally worded allegation of violations of the OPMA. [3]

On June 15, 2001, the Developer filed an answer, counterclaim, cross-claim, third-party claim, and jury trial demand in response to the complaint. The Developer alleged 11 counterclaims against the City, Mayor Talbott, and individual city council members, including Mr. Eugster and Ms. Rodgers. One of the counterclaims [***18] alleges breach of contract and demands specific performance. The Developer claimed, "[t]he City's obligations under the contract are unique and specific: to make a loan to enable the PDA to meet specified obligations. Specific performance is necessary and appropriate to compel performance." CP at 112. The Developer also claimed promissory estoppel and detrimental reliance, alleging "RPS has been damaged in an amount exceeding $ 2 million by the City's failure to honor its pledge. Injustice can only be avoided through the Court's enforcement of the City's obligations under the Ordinance." CP at 113. Alternatively, the Developer requested a writ of mandamus to compel the mayor and city council to loan parking meter revenue to the PDA.

---

[2] The Developer tried to amend the *Miggins* writ application after the Supreme Court's ruling, but the superior court dismissed the action without prejudice. This court affirmed the dismissal order in an unpublished opinion. ***River Park Square, L.L.C. v. Miggins, noted at 116 Wn. App. 1020 (2003)***.

[3] According to the City's brief, it also filed a complaint in connection with the River Park Square controversy in July 2000. That complaint, *City of Spokane v. Walker,* No. 00-2-04173-4 (Spokane County Super. Ct.) was stayed pending the *Miggins* appeal. The City asserts it voluntarily dismissed its state claims and defenses and moved them to a federal court action described below.

In its prayer for relief, the Developer partly requested "[t]hat Defendant City be estopped from reneging on promises and obligations contained in the Ordinance and other representations," that "Defendant City be required to specifically [*399] perform its obligations under the Ordinance," and that, alternatively, the trial court issue a writ of mandamus commanding the mayor and city council to loan parking meter revenue to the PDA. CP at 122-23. The City [***19] moved to dismiss the Developer's claims.

On October 17, 2001, Mr. Eugster filed a motion for partial summary judgment seeking to have the ordinance and other City actions declared null and void because of alleged violations of the OPMA. On November 30, 2001, the Developer filed a cross-motion for summary judgment urging the trial court to dismiss the OPMA claims.

On December 21, 2001, the superior court denied the City's motion to dismiss the Developer's mandamus claim. The trial court's memorandum opinion reasoned the City's contingent promise to loan parking meter revenue to the PDA was a nondiscretionary, compulsory act under the ordinance. The court partly reasoned:

> It is premature to say that the Developers have other remedies available. The Supreme Court in *Miggins* stated there was no adequate remedy at law. Judge Donohue [the trial court judge in *Miggins*] articulated the issue as "'. . . [W]hether there is a plain, speedy, and adequate remedy in the ordinary course of law.'" Herein, the City did not assert that alternative remedies are speedy or plain. Lastly, until the Court addresses the alternative claims, remedies are theoretical at best.

CP at 843. In [***20] its memorandum opinion, the trial court concluded:

> The City further seeks to dismiss the Developers' mandamus claim due to the existence of other plain, speedy, and adequate remedies. The Developers have asserted 11 different claims, none of which compel the City to make the loan pursuant to City Ordinance C-31823. There being no other speedy, plain, and adequate remedy at law available to the Developers, it is appropriate to deny the City's Motion to Dismiss the Developers' Mandamus Claim.

CP at 845-46.

[*400] On January 31, 2002, the superior court dismissed without prejudice the Developer's counterclaims for tortious interference and due process violations against the City and individual city council members. The trial court did not dismiss the Developer's other counterclaims, including mandamus.

On February 14, 2002, the Developer filed a second amended answer, counterclaims, and cross-claims partly reinstating the previously [**752] dismissed claims. The renewed prayer for relief repeated the Developer's earlier requests for estoppel relief, specific performance, and the alternative remedy of mandamus. Concurrently, the Developer filed an application for writ of mandamus and motion [***21] for partial summary judgment. The Developer supported the application with the affidavit of Steven Rector, the Developer's secretary-treasurer. Mr. Rector's affidavit referenced attached exhibits documenting the amounts the PDA allegedly owed the Developer.

The trial court immediately issued the alternative writ of mandamus directing the City to loan "$ 3,344,856.60 from the City's parking meter revenue fund to the PDA, to enable it to make outstanding ground lease payments and pay operating expenses of the facility," or to show cause why it would not comply. CP at 932. The PDA joined the Developer's writ application on March 12, 2002.

On March 22, 2002, the trial court ordered the City by peremptory writ of mandamus "to forthwith loan money pursuant to the Ordinance, from the City's parking meter revenue fund to the PDA in the amount of $ 3,344,856.60, representing the amount of the outstanding ground lease payments and operation and maintenance costs relating to the facility." CP at 1324. Concurrently, the trial court issued a memorandum opinion, which incorporated the trial court's December 21, 2001 memorandum opinion as a declaratory judgment. The trial court denied Mr. [***22] Eugster's motion for partial summary judgment and granted the Developer's cross-motion for summary judgment dismissing Mr. Eugster's and Ms. Rodgers' claims.

[*401] Mr. Eugster, Ms. Rodgers, and the City sought direct review at the Supreme Court. Although the Developer and USB did not oppose direct review, the Supreme Court transferred the appeal to this court in March 2003.

K. Federal Litigation

In the meantime, related litigation has been ongoing before the United States District Court for the Eastern

District of Washington. [4] On April 24, 2001, several institutions representing bondholders filed suit against a number of defendants, including the Developer and the City. *Nuveen Quality Income Mun. Fund, Inc. v. Prudential Sec., Inc.*, No. CS-01-0127-JLQ. The bondholders asserted fraud claims under federal and state securities laws, common law fraud claims, and negligent misrepresentation claims. On November 19, 2001, the federal court denied the Developer's motion to dismiss the bondholders' action.

[*23]** In December 2002, the federal court granted in part a motion to dismiss a number of the City's cross-claims, including contract defenses, for lack of subject matter jurisdiction. The federal court partly reasoned that allowing the City to prevail on the basis of its asserted contract defenses would improperly require the federal court to hold the ordinance invalid and thus reverse the writ of mandamus. But the federal court would not dismiss the City's four other cross-claims for damages. At the June 2003 argument, we learned the federal bondholder action is slated to go to trial in April 2004.

ISSUES

The primary issue is whether the trial court erred in issuing a writ of mandamus directing the City to loan funds **[*402]** from the parking meter revenue fund to the PDA. [5] **[**753]** Next we decide whether the trial court erred in summarily dismissing the *OPMA* and *ethics in government act* claims. Lastly, we address Mr. Eugster's attorney fee claims.

[*24]** ANALYSIS

A. Mandamus

"We note at the outset that ***HN1*** mandamus is an extraordinary writ." *Walker v. Munro, 124 Wn.2d 402, 407, 879 P.2d 920 (1994)*. A court may issue a writ of mandamus "to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." *RCW 7.16.160*. "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested." *RCW 7.16.170*. If disputed material fact issues exist, the trial court has discretion to hold a trial before it determines the appropriateness of mandamus. *RCW 7.16.210*.

[1] [1] The above legal framework requires the applicant to satisfy three elements before a writ will issue: (1) the party subject to the writ is under a clear duty to act, *RCW 7.16.160*; (2) the applicant has no "plain, speedy and adequate remedy in the ordinary course of law," *RCW 7.16.170* **[***25]** ; and (3) the applicant is "beneficially interested." *RCW 7.16.170*. This dispute mainly involves the first two **[*403]** elements: the City's duty and the availability of other remedies.

[2] [2] First, Mr. Eugster strikes a blow at the "beneficially interested" element, which involves the concept of standing. *See Retired Pub. Employees Council v. Charles, 148 Wn.2d 602, 616, 62 P.3d 470 (2003)* (noting that applicant for writ has standing if the applicant is beneficially interested in the duty asserted). Here, the Developer owns the land under the garage and has a rental interest; USB, as the bondholders' representative looking to the loan as security for the bondholders, "has an interest in the action beyond that shared in common with other citizens." *Retired Pub. Employees Council, 148 Wn.2d at 616* (citing *State ex rel. Lay v. Simpson, 173 Wash. 512, 513, 23 P.2d 886 (1933)*). Thus, both the Developer and USB are beneficially interested and have standing. Our remaining focus is duty and remedy.

[3] [3] *[4]* [4] As noted, the applicant bears the "demanding" burden of proving all three elements

---

[4] Both the Developer and the City have filed requests for judicial notice focusing primarily on the federal matter. We take judicial notice of the bondholders' complaint and the federal court's rulings inasmuch as they implicate this appeal. But we decline to take judicial notice of briefs and memorandums submitted to that court; we rely solely on the briefs on appeal.

[5] We reject Mr. Eugster's contention the Developer's motion for partial summary judgment regarding mandamus was not properly before the trial court under *CR 56(a)*. The record shows Mr. Eugster initiated this action in July 2000. In response, the Developer filed its current mandamus claim in June 2001. Mr. Eugster filed his own motion for partial summary judgment in October 2001. In January 2002, the trial court dismissed some of the Developer's claims against Mr. Eugster without prejudice, but not the contract and mandamus claims. In February 2002, the Developer filed a second amended answer repeating its earlier contract and mandamus claims. Concurrently, the Developer filed a new and separate application for mandamus along with a cross-motion for partial summary judgment. Given the procedural record of this case, the trial court did not err in rejecting Mr. Eugster's argument.

justifying mandamus. Mallard v. U.S. Dist. Court, 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989). [***26] Different review standards apply to the duty and lack of remedy elements:

> HN2 The determination of whether a statute specifies a duty that the person must perform is a question of law. Whether there is a plain, speedy, and adequate remedy in the ordinary course of the law is a question left to the discretion of the court in which the proceeding is instituted.

River Park Square, L.L.C. v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001) (citing State ex rel. Hodde v. Superior Court, 40 Wn.2d 502, 517, 244 P.2d 668 (1952)). Thus, we "will not disturb a decision regarding a plain, speedy, and adequate remedy on review unless the superior court's discretion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Id. (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

1. Duty Element. The City contends it has no clear mandatory duty to issue the loan and, even if it has, the [*404] loan should issue solely where garage parking revenues are insufficient before servicing of the bond debt. The Developer argues the City's duty [***27] is mandatory and the ordinance allows garage revenue to flow first to debt service on the bonds for purposes of determining the shortfall contingency.

[5] [5] HN3 Mandamus is appropriate to compel a government official or entity "to comply [**754] with law when the claim is clear and there is a duty to act." In re Pers. Restraint of Dyer, 143 Wn.2d 384, 398, 20 P.3d 907 (2001) (citing Walker v. Munro, 124 Wn.2d 402, 408, 879 P.2d 920 (1994)). Ordinarily, duty is a threshold element; if the claim is clear and the government entity has a duty to act, mandamus may be an appropriate remedy. See Wash. State Labor Council v. Reed, 149 Wn.2d 48, 55-56, 65 P.3d 1203 (2003); State ex rel. Heavey v. Murphy, 138 Wn.2d 800, 804-05, 982 P.2d 611 (1999); Dep't of Ecology v. State Fin. Comm., 116 Wn.2d 246, 252, 804 P.2d 1241 (1991). If so, regarding duty, the question becomes whether the circumstances trigger the duty. See Murphy, 138 Wn.2d at 805; Dep't of Ecology, 116 Wn.2d at 252. Then, remedy is considered.

Doubtful plaintiff rights do not justify a writ of mandamus. United States ex rel. Arant v. Lane, 249 U.S. 367, 371, 39 S. Ct. 293, 63 L. Ed. 650 (1919); [***28] In re Life & Fire Ins. Co. v. Heirs of Wilson, 33 U.S. 291, 302-03, 8 L. Ed. 949 (1834). Mandamus writs should not be issued to direct a general course of conduct. Walker, 124 Wn.2d at 407. Mandamus does not authorize a court "to assume general control or direction of official acts." State ex rel. Taylor v. Lawler, 2 Wn.2d 488, 490, 98 P.2d 658 (1940); see also Walker, 124 Wn.2d at 407. "Instead, the remedy of mandamus contemplates the necessity of indicating the precise thing to be done." Walker, 124 Wn.2d at 407 (citing Clark County Sheriff v. Dep't of Soc. & Health Servs., 95 Wn.2d 445, 450, 626 P.2d 6 (1981); State ex rel. Hawes v. Brewer, 39 Wash. 65, 80 P. 1001 (1905)).

[6] [6] "This does not mean that a writ cannot issue in regards to a continuing violation of a duty." Walker, 124 Wn.2d at 408. "Where there is a specific, existing duty [*405] which a state officer has violated and continues to violate, mandamus is an appropriate remedy to compel performance." Id. (citing Clark County Sheriff, 95 Wn.2d at 450).

[7] [7] Mandamus can direct an officer to exercise a mandatory discretionary duty, [***29] but not the manner of exercising that discretion. Peterson v. Dep't of Ecology, 92 Wn.2d 306, 314, 596 P.2d 285 (1979). Thus, a mandamus applicant cannot exactly shape a mandatory discretionary act. Dyer, 143 Wn.2d at 398; State ex rel. Burlington N., Inc. v. Wash. Utils. & Transp. Comm'n, 93 Wn.2d 398, 410, 609 P.2d 1375 (1980); Washam v. Sonntag, 74 Wn. App. 504, 507, 874 P.2d 188 (1994). Similarly, "[a]lthough mandamus will not lie to control exercise of discretion, it will lie to require that discretion be exercised." Whitney v. Buckner, 107 Wn.2d 861, 865, 734 P.2d 485 (1987) (citing Bullock v. Superior Court, 84 Wn.2d 101, 103, 524 P.2d 385 (1974)). And, "[t]he act of mandamus compels performance of a duty, but cannot lie to control discretion." Dyer, 143 Wn.2d at 398 (citing Benedict v. Bd. of Police Pension Fund Comm'rs, 35 Wn.2d 465, 475, 214 P.2d 171 (1950)).

[8] [8] HN4 In terms of duty, mandamus, if appropriate, tells the respondent what to do, but not how to do it. Here, the specific duty the [***30] Developer asserts the City has failed to perform is to offer a loan to the PDA to cover arrearages in ground rent and operating expenses as provided under the ordinance. If the Developer's duty claim is clear, mandamus is an appropriate remedy provided the Developer satisfies the other elements. Dyer, 143 Wn.2d at 398; Walker, 124 Wn.2d at 408.

[9] [9] [10] [10] The City's duty to loan money to the

PDA turns on the meaning of the ordinance. ***HN5*** We review the interpretation of a city ordinance "de novo under the error of law standard." *Hatley v. City of Union Gap, 106 Wn. App. 302, 307, 24 P.3d 444 (2001)* (citing *Peter Schroeder Architects v. City of Bellevue, 83 Wn. App. 188, 191, 920 P.2d 1216 (1996)*). The interpretation rules apply equally to municipal ordinances and statutes. *World Wide Video, Inc. v. City of Tukwila, 117 Wn.2d 382, 392, 816 P.2d 18 (1991)*; *City of [*406] Spokane v. Fischer, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988)*; *City of Puyallup v. Pac. N.W. Bell Tel. Co., 98 Wn.2d 443, 448, 656 P.2d 1035 (1982)*.

[**755] ***[11]*** [11] ***[12]*** [12] ***[13]*** [13] ***[14]*** [14] ***[15]*** [15] ***[16]*** [16] Generally, we interpret the ordinance "to best advance" the municipality's [***31] legislative purpose. *State v. C.J., 148 Wn.2d 672, 685, 63 P.3d 765 (2003)* (citing *Morris v. Blaker, 118 Wn.2d 133, 143, 821 P.2d 482 (1992)*). We begin our analysis with a plain meaning interpretation of the language on the face of the ordinance and closely related legislation in light of the municipality's underlying legislative purposes. *See Wash. Public Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)*; *Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 11, 43 P.3d 4 (2002)*; *Wagg v. Estate of Dunham, 146 Wn.2d 63, 73, 42 P.3d 968 (2002)*. Further, we interpret the ordinance in its entirety, reviewing all provisions in relation to each other. *See In re Det. of Williams, 147 Wn.2d 476, 490, 55 P.3d 597 (2002)*.

We do not judicially construct unambiguous ordinances. *See, e.g., Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002)*, *cert. denied, 538 U.S. 1057, 155 L. Ed. 2d 1107, 123 S. Ct. 2221 (2003)*; *State v. Glas, 147 Wn.2d 410, 415, 54 P.3d 147 (2002)*. [***32] We will not add language to an unambiguous ordinance even if we believe the municipality "intended something else but did not adequately express it." *Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)* (citing *Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 904, 949 P.2d 1291 (1997)*; *Marquis v. City of Spokane, 130 Wn.2d 97, 107, 922 P.2d 43 (1996)*). We assume the municipality meant exactly what it said when it enacted the ordinance. *See In re Pers. Restraint of King, 146 Wn.2d 658, 663, 49 P.3d 854 (2002)*; *Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001)*.

If the ordinance is ambiguous, we resort to tools of statutory construction, such as legislative history and relevant case law, to discern the ordinance's meaning. *Kilian, 147 Wn.2d at 21*; *Campbell & Gwinn, 146 Wn.2d at 12*; [*407] *Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001)*. "A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations [***33] are conceivable." *Kilian, 147 Wn.2d at 20-21* (citing *State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001)*, *cert. denied, 534 U.S. 1130, 151 L. Ed. 2d 972, 122 S. Ct. 1070 (2002)*.

Initially, we address two subissues. First, whether the ordinance sets a mandatory duty to issue a loan in response to garage revenue shortfalls. Second, if so, whether the ordinance precludes consideration of bond debt service in determining the size of the revenue shortfall.

Here, the ordinance plainly states, "in the event Parking Revenues are insufficient to make Ground Lease Payments and pay Operating Expenses, the City shall loan money from the Parking Meter Revenue Fund" to the PDA. CP at 132. ***HN6*** Generally, the use of the word "shall" in a legislative enactment is presumptively mandatory, thus creating a duty. *See, e.g., State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)*; *Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993)*. Accordingly, the use of the word "shall" in a statute or ordinance "imposes a mandatory requirement unless a contrary legislative intent is apparent. [***34] " *Erection Co., 121 Wn.2d at 518* (citing *State v. Bryan, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980)*). The ordinance does not indicate a contrary legislative intent.

Studying the ordinance in its entirety, it is readily apparent that the City imposed upon itself a duty to offer a loan of parking meter revenue in the event parking garage revenues are inadequate. Some revenue shortfall is conceded. Therefore, the City is obligated to offer a loan to the PDA. But, as discussed below, the ordinance is silent as to terms.

The City asks whether the writ of mandamus violates the separation of powers doctrine by encroaching on the City's legislative function. ***HN7*** Generally, a writ of mandamus or prohibition will not lie to interfere with a municipality's legislative functions, such judicial interference being a [*408] violation of separation of powers. *See, e.g.,* [**756] *City Council v. Superior Court, 179 Cal. App. 2d 389, 394-95, 3 Cal. Rptr. 796, 799-800 (1960)*; *State ex rel. Torrance v. City of Shreveport, 231 La. 840, 93 So. 2d 187, 189-90 (1957)*;

see also Walker, 124 Wn.2d at 407 **[***35]** ("When directing a writ to the Legislature or its officers, a coordinate, equal branch of government, the judiciary should be especially careful not to infringe on the historical and constitutional rights of that branch.").

Section 12 of the Spokane City Charter provides that appropriations "shall be by ordinance; save where there is a special fund created for a particular purpose, payments from such fund shall be made on order of the city council." The parking meter revenue fund is "a special fund and because a special fund is involved, 'payments from such fund shall be made on order of the city council.'" Miggins, 143 Wn.2d at 77 (quoting SPOKANE CITY CHARTER § 12). "Because section 9 of the ordinance creates a special fund, pursuant to section 12 of the Spokane City Charter, a separate order must be made to make payments from the special fund." *Id.*

HN8 An order or resolution is a ministerial act of the city council, as distinguished from the legislative act of enacting an ordinance. *See, e.g.*, McGlothern v. City of Seattle, 116 Wash. 331, 334-35, 199 P. 457 (1921); Ehrhardt v. City of Seattle, 33 Wash. 664, 668-69, 74 P. 827 (1903). **[***36]** The *Miggins* court used the term "legislative order," but that dictum is likely descriptive of the issuing legislative body. Miggins, 143 Wn.2d at 77. Mandamus will lie to compel a ministerial act. *See, e.g.*, Smith v. Missoula County, 1999 MT 330, ¶ 28, 297 Mont. 368, 992 P.2d 834, 839 (1999); Hart v. City of Albuquerque, 1999 NMCA 43, ¶ P17, 126 N.M. 753, 975 P.2d 366, 371.

Accordingly, no separation of powers problem exists. Here, the writ of mandamus merely commands the City to carry out the ministerial act of putting the loan provision into operation by resolution or order when the revenue contingency arises. The specific terms of any such loan are discretionary matters left to the City and the PDA. This **[*409]** outcome is consistent with the duty rules summarized above that mandamus tells the respondent what to do, but not how to do it. In any event, the City cannot peremptorily refuse a loan in the face of the PDA's showing of existing revenue deficiency.

Because a revenue shortfall is conceded, whether the bond debt service is included in the shortfall bears mainly on when the duty to make the contingent loan **[***37]** was triggered and the size of the shortfall and corresponding loan. This issue also turns on the meaning of the ordinance. When the trial court issued the writ, it incorporated its December 21, 2001 interpretation of the ordinance as a declaratory judgment.

The ordinance's loan provision does not mention debt service. The City argues it need not loan parking meter revenue if the PDA can meet its obligations prior to debt servicing of the bonds. The Developer insists bond debt service comes first and then if garage revenues cannot cover the PDA's obligations, the City must issue loans to cover ground rent and operating expenses.

A major flaw in the City's interpretation is its singular focus on the loan provision. As noted, we must read the provision in relation to the entire ordinance. *See, e.g.*, Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). When reading the entire ordinance, its primary purpose was to facilitate the Foundation's bond issuance to enhance purchase of the garage. The eventual goal was for the City to take over garage ownership after garage revenues paid off the bonds. This plan allowed the City to limit **[***38]** its bond liability by relying on the Foundation.

Moreover, the ordinance states the contingent pledge of parking meter revenue was necessary as a means of assuring potential "tenants and lenders" that the City would lend a hand if the garage lost money and placed "the Project in jeopardy." CP at 128. The City recognized in the ordinance that "the Developer must receive assurances of City participation prior to pledging land and capital in order to obtain public and private financing to develop and construct **[*410]** the Project which will enable the Foundation to issue tax-exempt bonds and acquire the Facility." CP at 133.

[757]** Viewed in context with the entire ordinance, the parking meter revenue pledge served to dispel concerns of potential bondholders that garage revenues would be insufficient to pay off the bonds. The City's current interpretation is inconsistent with this earlier purpose, which does not preclude giving priority to debt service of the bonds.

The City's interpretation also impermissibly requires us to add language to the ordinance. Caritas Servs., Inc. v. Dep't of Soc. & Health Servs., 123 Wn.2d 391, 409, 869 P.2d 28 (1994); Vita Food Prods., Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). **[***39]** The City insists the term "insufficient" should be read to mean "less than" the sum of ground lease and payments and operating expenses "without any consideration of debt service." City's Br. at 29.

Moreover, bond debt service was to be paid mainly through "Fixed Facility Rent" under the terms of both the facility lease between the PDA and the Foundation and the ground lease rents between those two entities and the Developer. CP at 138. Both leases give priority to bond debt service. That arrangement is consistent with the express language of the ordinance and is in harmony with the general structure of the garage financing plan endorsed by the ordinance.

The City urges us to ignore the facility and ground leases because the City is not a direct party to those agreements. But, the ordinance expressly stated those leases were to be executed between the PDA, the Foundation, and the Developer, with the City assuming the ground lease after it takes ownership of the garage. And, the ordinance did not expressly prohibit those agreements giving priority to debt service on the bonds. Accordingly, the City's contention that the loan provision of the ordinance precludes any consideration **[***40]** of debt service fails.

[*411] Even if the loan provision was ambiguous, the legislative history supports the Developer's interpretation. [6] **[***41]** In 1995, the City contemplated a direct issue of bonds payable "exclusively from parking garage revenues." CP at 2764. As discussed at the October 17, 1996 city council meeting, this original plan contemplated that the garage parking revenues would flow first to operating expenses, then to bond debt servicing, and then to the ground lease. [7]

To limit its liability on the bonds, the City abandoned that original plan in favor of relying on the Foundation to issue the bonds and purchase the garage with the proceeds. The November 1996 city council presentation leading to the current garage financing structure optimistically anticipated garage revenue would "be more than sufficient to repay all expenses incident to the garage, debt service, lease payments and operating expenses." CP at 1834.

Before enacting the ordinance at the January 27, 1997 meeting, the city council considered both oral and written presentations of Coopers & Lybrand that indicated garage revenues would first go to debt service on the bonds. The Coopers & Lybrand **[***42]** report further noted "that the parking meter revenues pledged by the City are intended to **[**758]** cover **[*412]** ground lease payments and operating and maintenance expenses of the garage only, and will not be used to fund debt service obligations under the bonds." CP at 1274. The transcript of the city council meeting indicates the Council understood that such loans were intended to pay maintenance, operating expenses, and lease obligations, but not to pay off the bonds. But that understanding did not contradict the flow of garage parking revenues going first to debt service.

The City argues the Coopers & Lybrand representatives qualified their report by stating that they had not reviewed the draft ordinance in preparing their report. Nevertheless, the Coopers & Lybrand report and presentation informed the city council that garage revenue was expected to flow first to satisfaction of the bonds. That proposed flow was consistent with the purpose of the bond financing plan; garage revenues were to pay off the bonds so the City could eventually obtain the garage. [8]

---

[6] The City asks us not to consider a draft ground lease the Developer claims it submitted to the City prior to enactment of the ordinance that supports the Developer's contention that garage parking revenue was intended to flow first to debt service on the bonds. A filing stamp indicates the draft ground lease was filed with the City on January 13, 1997. Further, in *CLEAN v. City of Spokane, 133 Wn.2d 455, 947 P.2d 1169 (1997)*, the City and the Developer stipulated that the draft ground lease was part of the legislative record considered by the city council.

The City also objects to the post hoc affidavits of several city attorneys and staff involved directly in the development of the current garage financing plan. We agree with the City that the post hoc affidavits of various city staff and attorneys are not admissible evidence of legislative intent. *See, e.g., City of Yakima v. Int'l Ass'n of Fire Fighters, 117 Wn.2d 655, 677, 818 P.2d 1076 (1991)* (noting affidavits of legislators are not admissible evidence of legislative intent). In any event, the exhibits challenged in this footnote are unnecessary in determining the legislative intent underlying the ordinance.

[7] We deny the City's *RAP 9.11* additional evidence motion with respect to another portion of the October 17, 1996 city council meeting transcript. In that excerpt, Betsy Cowles relates garage revenues would flow first to operating expenses, then to bond debt service, and then to the ground lease. Ms. Cowles' statement is cumulative, merely conforming to a statement already in the record. *RAP 9.11(a)(1)*.

[8] We deny the City's *RAP 9.11* motion for additional evidence asking us to consider the affidavit and deposition testimony of a Coopers & Lybrand employee in determining the meaning of the ordinance. The proffered evidence is irrelevant to the intent of the city council and cumulative; it merely confirms Coopers & Lybrand's representation that it did not study the proposed ordinance and its parking meter revenue pledge.

[***43] Consistent with that historical background, the ordinance expressly states the Foundation would pay off the bonds with garage revenue alone. And, the ordinance states that the City would acquire full legal and unencumbered title to the Facility after the Foundation paid off the bonds.

We emphasize the parking meter loan pledge is not a bond guarantee. By the terms of the ordinance, parking meter revenue loan proceeds are limited to payment of lease, maintenance, and operating expenses. But the secondary effect of such a loan would be to make available garage parking revenue for debt servicing that would otherwise go to pay ground rent and operating expenses.

When the loan provision is read in relation to the entire ordinance, the Developer's interpretation is correct. That interpretation is in harmony with the ordinance's overall [*413] objectives. By contrast, the City's interpretation is strained, and conflicts with the legislative purpose. The ***HN9*** ordinance language "should be construed to carry out, rather than defeat," the ordinance's purpose. *State v. Votava, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003)* (citing *Miller v. Paul Revere Life Ins. Co., 81 Wn.2d 302, 310, 501 P.2d 1063 (1972)* [***44] (construing statute)). Accordingly, the trial court did not err in concluding a parking meter revenue loan must issue when garage revenue is insufficient to pay ground rent and operating expenses after debt service on the bonds. [9]

[***45] The Supreme Court recognized the triggering condition, garage revenue shortfall, has existed in some degree for some time. *Miggins, 143 Wn.2d at 72*. A City declaration on the issue indicates a loan would have to be made, albeit in a much smaller amount, even if this court were to adopt the City's interpretation of the ordinance. As Mr. Eugster commented at the April 26, 2000 city council meeting, "at the present time, revenue generated by the Parking Garage is not even sufficient to pay the fixed facility rent, much less operating expenses, much less ground lease payments." CP at 3462.

In sum, this dispute is more about the amount of the loan, than whether a loan was contemplated in the first place. Relying on overly optimistic garage revenue projections, the City supported the garage financing plan with the expectation that the garage would consistently operate in the black even after payment of the bonds. Now, when faced with the prospect of loaning millions of dollars [**759] of parking meter revenue, the City pursues damage control. Nevertheless, the trial court correctly interpreted the ordinance; the City has a duty to offer a loan to the PDA because garage [*414] revenues are insufficient to pay the ground lease and operating costs after debt servicing of the bonds.

[17] [17] 2. Remedy Element. Now, having decided the City has a duty, we turn to the remedy element. ***HN10*** "The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law." *RCW 7.16.170*. "A statutory writ is an extraordinary remedy, and should issue only when there is no plain, speedy and adequate remedy in the ordinary course of law." *City of Kirkland v. Ellis, 82 Wn. App. 819, 827, 920 P.2d 206 (1996)* [***46]).

> A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. There must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ.

Id. (citing *State ex rel. O'Brien v. Police Court, 14 Wn.2d 340, 347-48, 128 P.2d 332 (1942)*).

Broadly, the remedy issue turns on whether the duty the plaintiff seeks to enforce "cannot be directly enforced" by any means other than mandamus. *Bd. of Liquidation v. McComb, 92 U.S. 531, 536, 23 L. Ed. 623, 2 Otto 531 (1875)*. "The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. It only lies when there is practically no other remedy." *Ex parte Rowland, 104 U.S. 604, 617, 26 L. Ed. 861, 14 Otto 604 (1881)*.

[18] [18] ***[19]*** [19] Initially, we consider Mr. Eugster's contention that the Developer's affidavit was

---

RAP 9.11(a)(1).

[9] More than a month after oral argument, the Developer filed a *RAP 9.11* additional evidence motion regarding a statement made at the November 25, 1996 city council meeting. The statement seemingly supports the Developer's argument that bond debt service has priority under the current garage financing plan. We deny the motion because the proferred evidence does not change the result. *RAP 9.11(a)(2)*. We further deny the City's claim for attorney fees incurred in responding to the motion. The Developer's motion was not frivolous, and it would be inequitable to grant attorney fees in light of the City's failed *RAP 9.11* motion.

inadequate. ***HN11*** The mandamus statute partly states the writ "must be issued upon affidavit on the application of **[***47]** the party beneficially interested." *RCW 7.16.170*. Alternatively, the mandamus applicant can rely on a verified complaint. *State ex rel. Adams v. Irwin, 74 Wash. 589, 591-92, 134 P. 484, 135 P. 472, 74 Wash. 595 (1913)*. The affidavit or complaint must "allege sufficient facts to establish that the appellants had no plain, speedy, or adequate remedy in the ordinary course of law." *Edwards v. Tremper, 49 Wn.2d 677, 678, 305 P.2d 1062 (1957)*. Here, **[*415]** the Developer's affidavit and pleadings support the mandamus application.

Contrary to Mr. Eugster's argument, no authority requires the mandamus affidavit to recite, "there is not a plain, speedy and adequate remedy in the ordinary course of law." *RCW 7.16.170*. Mr. Eugster's hypertechnical argument fails. The two cases he relies upon for claiming the trial court lacked mandamus jurisdiction are inapposite; this is not a case where the applicant failed to file the required affidavit at all. *See Crosby v. City of Spokane, 137 Wn.2d 296, 301-02, 971 P.2d 32 (1999); Birch Bay Trailer Sales, Inc. v. Whatcom County, 65 Wn. App. 739, 744-45, 829 P.2d 1109 (1992)*. **[***48]** The relevant inquiry is whether the Developer's affidavit and other filings alleged sufficient facts for the trial court to determine whether there was no "plain, speedy and adequate" remedy. *RCW 7.16.170; Edwards, 49 Wn.2d at 678; Adams, 74 Wash. at 591*. The trial court, exercising its discretion, decided the Developer was without such a remedy.

[20] [20] Now, our focus returns to whether the trial court abused its discretion in deciding for the Developer regarding lack of remedies. [10] In *Miggins,* the Developer sought solely a writ of mandamus. Here, the Developer pleaded mandamus as an alternative to a significant number of simultaneously pleaded contract-based remedies. The Developer's two-prong strategy naturally complicates our analysis.

[*49]** **[**760]** Regarding potential contract-based remedies, the trial court reasoned the Developer was without a plain, speedy, and adequate remedy because none of its contract-based theories would compel the City to make the requested loan. Inconsistently with his other arguments, Mr. Eugster contends no contract exists. Here, the Developer contended in **[*416]** its briefing mandamus is appropriate notwithstanding its contract claims. However, the Developer clouded its position at oral argument when it argued a contract may or may not exist. At least we know a contract remedy was originally alleged.

[21] [21] ***[22]*** [22] Whether the ordinance constitutes a contract is crucial because our research has thus far failed to locate a case in any jurisdiction where a plaintiff simultaneously pleaded contract and mandamus theories. Moreover, numerous jurisdictions hold that a plaintiff may not enforce a contract or other agreement through mandamus where specific performance is an available alternative remedy. *Coach & Six Rest., Inc. v. Pub. Works Comm'n, 363 Mass. 643, 296 N.E.2d 501, 503 (1973); Bd. of County Rd. Comm'rs v. Mich. State Highway Comm'n, 79 Mich. App. 505, 261 N.W.2d 329, 332 (1977);* **[***50]** *State ex rel. Butte Youth Serv. Ctr. v. Murray, 170 Mont. 171, 174, 551 P.2d 1017, 1019 (1976); State ex rel. Wright v. Weyandt, 50 Ohio St. 2d 194, 363 N.E.2d 1387, 1389-91 (1977)*. "Traditional contract law suggests that where damages are not adequate, specific performance may be sought, both of which remedies are within the ordinary course of the law." *State ex rel. Curd v. Backhaus, 56 Ohio App. 2d 79, 381 N.E.2d 646, 648 (1977)* (citing *State ex rel. Bross v. Carpenter, 51 Ohio St. 83, 37 N.E. 261 (1894)*) . However, our Supreme Court reasoned more than 70 years ago that ***HN12*** specific performance ordinarily cannot lie to compel a promise to loan money. *Steward v. Bounds, 167 Wash. 554, 565, 9 P.2d 1112 (1932)*. Here, the Developer asserted specific performance of the alleged contract.

Similarly, several jurisdictions hold mandamus will not lie where the plaintiff is afforded adequate equitable remedies, such as injunctive relief. *George S. Chatfield Co. v. Reeves, 87 Conn. 63, 86 A. 750, 751 (1913); In re Air Terminal Servs., Inc., 47 Haw. 499, 393 P.2d 60, 78 (1964);* **[***51]** *City of Coral Gables v. State ex rel. Worley, 44 So. 2d 298, 300-01 (Fla. 1950); Craig v. Int'l Tri-D Corp., 338 So. 2d 952, 954 (La. 1976); Parrotta v. Hederson, 315 Mass. 416, 53 **[*417]** N.E.2d 97, 99 (1944); Garraway v. State ex rel. Dale, 184 Miss. 466, 184 So. 628, 185 So. 803, 805-06 (1939); Davidson v. Almeda Consol. Mines Co., 66 Or. 412, 134 P. 782, 783-84 (1913)*. Here too, the Developer relies on

[10] In passing, we note that the trial court stated incorrectly in its memorandum opinion that the City had failed to show the Developer lacked an adequate remedy. The burden of showing the lack of remedy rests upon the Developer. *Mallard v. Dist. Court, 490 U.S. 296, 309, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989)*. In any event, we review the trial court's decision under the abuse of discretion standard. *River Park Square, L.L.C. v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001)*.

equitable theories sounding in contract, such as detrimental reliance. USB also relies on equitable theories, thus undermining its own argument for mandamus.

Nevertheless, ***HN13*** a claim for damages may not be an adequate remedy in some situations where a court or other public official is under a clear duty to act. *See, e.g., Am. Bridge Co. v. Wheeler, 35 Wash. 40, 45-46, 76 P. 534 (1904)*. Still, the Developer's authorities do not involve plaintiffs simultaneously pleading contract damages, specific performance, and the "alternative" theory of mandamus. CP at 123. The Developer's simultaneous pursuit of multiple theories of recovery along with the "alternative" of mandamus is unique. The difficulties **[***52]** inherent in this approach were readily apparent at oral argument as the Developer struggled with this issue. In any event, we must now resolve whether the ordinance is a contract.

[23] [23] ***HN14*** The party asserting the existence of an express or implied contract bears the burden of proving the essential elements of a contract, including mutual intent. *Bogle & Gates, P.L.L.C. v. Holly Mountain Res., 108 Wn. App. 557, 560, 32 P.3d 1002 (2001)*. The essential elements of a contract are subject matter, parties, promise, terms and conditions, and, depending on jurisdiction, price or consideration. *Id. at 561*. Here, the Developer by pursuing its dual strategy has the heavy burden of showing the asserted contract-based claims do not also afford a plain, speedy, and adequate remedy.

[24] [24] ***HN15*** "Generally, a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create rights of a contractual nature enforceable against the State." **[**761]** *Wash. Fed'n of State Employees, AFL-CIO, Council 28, v. State, 101 Wn.2d 536, 539, 682 P.2d 869 (1984)* (citing *United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977))*. **[***53]** **[*418]** "Statutorily created contract rights, however, are rare." *Wash. Fed'n of State Employees v. State, 127 Wn.2d 544, 561, 901 P.2d 1028 (1995)*. "If a statute is subject to full legislative control by future amendments and repeals, the statute declares policy to be pursued until the Legislature ordains otherwise, in contrast to creating contractual or vested rights." *Noah v. State, 112 Wn.2d 841, 843-44, 774 P.2d 516 (1989)* (citing *Wash. Fed'n of State Employees, 101 Wn.2d at 539-40*).

Here, the ordinance may be susceptible to amendment, but given that the ordinance forms the basis for a number of agreements, including a Housing and Urban Development (HUD) loan, we doubt it can be repealed outright without raising significant constitutional issues. *See, e.g., Cuyahoga Metro. Hous. Auth. v. City of Cleveland, 342 F. Supp. 250, 259 (N.D. Ohio 1972)* (granting injunction against city ordinance canceling HUD low income housing cooperation agreement as impairment of a contract under article I, section 10 of the United States Constitution).

[25] [25] In any event, ***HN16*** even if a statute creates a right contractual in nature, it **[***54]** does not necessarily follow the statute "in and of itself constitutes a complete contract." *Noah, 112 Wn.2d at 844*. The contract analogy recognizes rights contractual in nature but also affords the legislative body flexibility to amend or improve the statute or ordinance as conditions change. *Id. at 844-45*.

Here, the ordinance shows the council's intent that the City participate in the River Park Square project by taking title to the garage after the bonds had been paid off. The ordinance authorizes the execution of various agreements between the PDA, the Foundation, and the Developer, with the City assuming the ground lease when it takes possession of the garage. At the center of this controversy, the City "pledges" to loan parking meter revenue to the PDA "in the event Parking Meter Revenues are insufficient to make Ground Lease Payments and pay Operating Expenses." CP at 132.

[*419] The ordinance resembles a contract with respect to the loan pledge, but leaves too much unsaid to be a complete contract. The ordinance is silent on the role of bond debt servicing in determining whether garage parking revenue is insufficient to pay the ground lease and **[***55]** operating expenses. The ordinance is silent also as to the terms of the anticipated facility and ground leases. Moreover, the ordinance is silent as to the terms of any parking meter revenue loan.

Further, while the ordinance anticipates the execution of the ground and facility leases, it did not and could not incorporate those then yet to be executed agreements; they came into being 18 months later. As discussed, the lease terms are critical because they control the flow of garage revenue.

The ordinance is properly viewed as the city council's policy commitment, similar to a letter of intent, to support the garage project and to direct its executive branch, the mayor and city staff, to execute a loan agreement with the PDA when the proper

circumstances arise. Accordingly, while the ordinance places a contingent duty on the City to enter a loan agreement with the PDA, it is not a complete contract readily enforceable by traditional contract remedies.

Given all, we decline to delve now into the intricacies of Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), the parol evidence rule, and other similar contract concepts to determine whether the ordinance is also [***56] an enforceable contract. See generally Bogle & Gates, 108 Wn. App. at 560 (noting role of parol evidence in determining whether contract is wholly written or partly oral). Moreover, the alternative contract remedy is not easily considered "plain" and it is unlikely very "speedy." RCW 7.16.170.

In sum, the trial court had a tenable basis for concluding that none of the Developer's asserted contract-based theories would provide the kind of remedy necessary to defeat the alternative mandamus relief. Accordingly, the trial court did not abuse its discretion [**762] in determining the Developer [*420] was without a plain, speedy, and adequate remedy in the ordinary course of law.

[26] [26] 3. Alleged Material Fact Issues. Even if the City has a duty under the ordinance to issue a loan, and the Developer is without a plain, speedy, and adequate remedy, legal and equitable concerns may yet preclude mandamus. As noted, HN17 mandamus "ought not to be issued in cases of doubtful right." Life & Fire Ins. Co. v. Heirs of Wilson, 33 U.S. 291, 302-03, 8 L. Ed. 949 (1834). Stated another way, the plaintiff's claim against the government entity must be [***57] clear and not the result of the plaintiff's fault. See Am. Bridge Co. v. Wheeler, 35 Wash. 40, 45, 76 P. 534 (1904) (noting the plaintiff "has been in no way at fault" for the county's obligation). In this connection, the City, Mr. Eugster, and Ms. Rodgers have consistently argued that trial is necessary to resolve material fact issues affecting the appropriateness of mandamus. The trial court disagreed, reasoning the relevant issues were entirely legal.

Impacting this part of our analysis is the ongoing federal litigation arising from the same facts. Essentially, the federal litigation involves the same factually intensive equitable issues that Mr. Eugster and Ms. Rodgers assert should have prevented issuance of the mandamus. Because the federal court has progressed this far relying on the trial court's decision to grant mandamus as part of its legal landscape, and the reality that the factual disputes are before the federal court, it serves little or no purpose to delve into them here or consider remand for duplicative fact finding by the trial court. Further, as discussed below, some of these issues have already been raised and resolved in other litigation. [***58] In any event, a brief discussion is warranted.

HN18 The party served or subject to a mandamus writ "may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action." RCW 7.16.200. After considering the application and answer, the trial court has discretion to determine whether factual questions remain "essential to the determination of the [*421] motion, and affecting the substantial rights of the parties" bearing on the "truth of the allegation of which the application for the writ is based." RCW 7.16.210; see also Trans-Can. Enters., Ltd. v. King County, 29 Wn. App. 267, 275, 628 P.2d 493 (1981) (noting bench trial held pursuant to RCW 7.16.210 to resolve factual disputes in mandamus action). Here, the trial court exercised its discretion to forgo additional fact finding before deciding to issue the mandamus.

[27] [27] Although some noncritical factual inquiries may remain, the trial court did not abuse its discretion. First, the City, Mr. Eugster, and Ms. Rodgers argue the requested loan would be an illegal gift or loan to a private entity under [***59] article VIII, section 7, of the Washington Constitution. However, the Supreme Court reviewed the constitutionality of the ordinance's contingent loan provision and held it not to constitute either a prohibited gift or loan. CLEAN v. City of Spokane, 133 Wn.2d 455, 469-70, 947 P.2d 1169 (1997).

[28] [28] Second, referring to the Developer's overevaluations of the garage, Ms. Rodgers asserts genuine fact issues remain as to whether the Developer has unclean hands. Mandamus "will not be granted in aid of those who do not come into court with clean hands." United States ex rel. Turner v. Fisher, 222 U.S. 204, 209, 32 S. Ct. 37, 56 L. Ed. 165 (1911). While mandamus is a legal remedy, it operates under equitable principles. Whitehouse v. Ill. Cent. R.R., 349 U.S. 366, 373, 75 S. Ct. 845, 99 L. Ed. 1155 (1955); see also Johnston v. Schlarb, 7 Wn.2d 528, 541-42, 110 P.2d 190 (1941). This factual dispute is likely to be resolved in the federal litigation, at least as to the bondholders. As the CLEAN court noted, "[a]lthough Appellants may view the transaction as an unwise use of public funds that unduly benefits the Developers, [***60] the wisdom of the plan is not for this

court to consider." CLEAN, 133 Wn.2d at 470.

Third, Mr. Eugster argues applying the terms of the facilities lease results in an illegal use of any loan. Mandamus cannot compel an act outside the governmental entity's lawful authority. State ex rel. Taro v. City of Everett, 101 Wash. 561, 565-66, [*422] 172 P. 752 (1918). Mr. Eugster's argument merely [**763] speculates regarding preliminary facts. An unsigned facility lease between the PDA and the Foundation appears to dump parking revenue loan proceeds into a common "Revenue Account," along with garage parking revenue and other loan proceeds. Payments from the "Revenue Account" are prioritized and require parking revenue to flow first to debt service on the bonds. But, the ordinance prohibits pledging City assets "to the payment of principal or interest on the Foundation's Bonds." CP at 132. Nevertheless, the mere potential for a violation exists. As such, the trial court did not abuse its discretion to proceed without fact finding.

Fourth, considering the federal litigation, the writ may well be futile. ***HN19*** Mandamus is inappropriate to command "the performance of useless [***61] or vain acts." Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 765, 903 P.2d 953 (1995) (citing Neilson v. Vashon Island Sch. Dist. 402, 87 Wn.2d 955, 960, 558 P.2d 167 (1976)). A court "will not compel by mandamus the doing of an act that would serve no useful purpose, nor should a writ issue when by operation of law a compliance with the mandate could have no operative effect." State ex rel. City of Tacoma v. Rogers, 32 Wn.2d 729, 733, 203 P.2d 325 (1949). Still, it would be an unwise use of scarce judicial resources and serve no useful purpose to remand for fact finding duplicating the federal litigation. Further, the *CLEAN* court aptly observed that although the plan may have "unduly benefited the Developers, the wisdom of the plan is not for this court to consider." CLEAN, 133 Wn.2d at 470. Considering all, we conclude the trial court did not abuse its discretion.

B. ***Open Public Meetings Act*** (OPMA)

The issue is whether the trial court erred in dismissing Mr. Eugster and Ms. Rodgers' OPMA claims in summary judgment. Mr. Eugster and Ms. Rodgers generally [***62] claim the [*423] City violated OPMA in connection with meetings held with representatives of Standard & Poor's and Coopers & Lybrand in December 1996 and January 1997, and such violations nullify the ordinance.

[29] [29] ***[30]*** [30] ***HN20*** "Here the parties submitted cross motions for summary judgment, essentially conceding that there were no issues of material fact." Shelton v. Strickland, 106 Wn. App. 45, 50, 21 P.3d 1179, review denied, 145 Wn.2d 1003, 35 P.3d 380 (2001). Accordingly, this court conducts a de novo review of the trial court's legal conclusions. Id.

HN21 "All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030. ***HN22*** "Any action taken at meetings failing to comply [with the OPMA] shall be null and void." RCW 42.30.060(1). ***HN23*** "'Action' means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final [***63] actions." RCW 42.30.020(3).

[31] [31] ***[32]*** [32] Even assuming an OPMA violation, Mr. Eugster's attempt to invalidate the ordinance on this ground fails because the enactment of the ordinance itself did not violate the statute. ***HN24*** As a general rule, meetings held in violation of OPMA will not invalidate a later final action taken in compliance with the statute. See Org. to Pres. Agric. Lands [OPAL] v. Adams County, 128 Wn.2d 869, 883, 913 P.2d 793 (1996); Clark v. City of Lakewood, 259 F.3d 996, 1014-15 (9th Cir. 2001); 1971 Op. Att'y Gen. No. 33. Here, unquestionably the city council adopted the ordinance in a public meeting after listening to a great deal of public comment, both for and against the project, much of the opposing comment coming from Mr. Eugster. Accordingly, even if the challenged meetings violated the OPMA, such violations will not nullify the properly enacted ordinance. OPAL, 128 Wn.2d at 883; Clark, 259 F.3d at 1014-15.

[*424] ***[33]*** [33] Moreover, to escape summary dismissal of an OPMA claim, the plaintiff must produce evidence showing (1) members of a governing body (2) held a meeting of that body (3) where [***64] that body took action in violation of the OPMA, and (4) the members of that body had knowledge that the meeting [**764] violated the statute. Eugster v. City of Spokane, 110 Wn. App. 212, 222, 39 P.3d 380, review denied, 147 Wn.2d 1021, 60 P.3d 92 (2002); Wood v. Battle Ground Sch. Dist., 107 Wn. App. 550, 558, 27 P.3d 1208 (2001). "A 'meeting' takes place when a majority of the governing body meets and takes 'action.'" Eugster, 110 Wn. App. at 222-23 (quoting RCW

42.30.020(4)); Wood, 107 Wn. App. at 564. Mr. Eugster's declarations and exhibits do not raise a reasonable inference that a majority of the city council held meetings and took action in knowing violation of OPMA at the alleged meetings.

C. ***Washington Ethics in Government Act***

The issue is whether the trial court erred in dismissing Mr. Eugster's claim that the River Park Square project is null and void because city council member Orville Barnes benefitted in violation of the Washington ethics in government act.

HN25 In general, a municipal officer shall not benefit, directly or indirectly, through any contract with the municipality. **[***65]** RCW 42.23.030. And a municipal officer may not vote to authorize, approve, or ratify a contract if the officer has a beneficial interest in the contract. *Id.* The municipal officer must disclose his or her beneficial interest on the record before formation of the contract. *Id.*

[34] [34] Without citation to the record, Mr. Eugster makes vague allegations regarding Mr. Barnes' alleged employer having a possible interest in land or a leasehold not part of the mall, but somehow benefiting by a skywalk connected to the mall. Ms. Rodgers' citations to the record are inapt. Proper citation is imperative considering the massive record. ***HN26*** We will not consider an issue unsupported by **[*425]** le;1.5qcitation to the record and reasoned argument. RAP 10.3(a)(5); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In passing, while Mr. Barnes' alleged employer may derive some economic benefit from the skywalk connection to River Park Square mall by improved customer access, and may have made some arrangement with River Park Square for skywalk maintenance, no evidence in the record suggests Mr. Barnes' alleged employer was a party to any relevant **[***66]** City contract or has any specific beneficial interest here.

D. Attorney Fees

[35] [35] Mr. Eugster alone demands attorney fees under RCW 42.30.120 for his OPMA claim and generally. ***HN27*** Normally, we will not grant a request for attorney fees absent an authorizing statute, contract, or recognized ground in equity. In re Improvement of Chevrolet Truck, 148 Wn.2d 145, 160, 60 P.3d 53 (2002). However, Mr. Eugster's OPMA claims have been rejected. The mandamus statute contains no attorney fee or cost provisions. Finally, we reject Mr. Eugster's invitation to fashion a common-law attorney fee remedy.

Affirmed.

SWEENEY and KURTZ, JJ., concur.

Reconsideration denied November 7, 2003.

Review denied at 151 Wn.2d 1027, 94 P.3d 959 (2004).

End of Document

Appendix 46.

DeSmedt v. North Miami Beach

Court of Appeal of Florida, Third District

December 31, 1991, Filed

CASE NO. 91-1959

Reporter
591 So. 2d 1077 *; 1991 Fla. App. LEXIS 13027 **; 17 Fla. L. Weekly D 143

JOHN DeSMEDT, Appellant, vs. THE CITY OF NORTH MIAMI BEACH, FLORIDA, et al., Appellee.

Subsequent History: [**1] Rehearing Denied February 4, 1992. Released for Publication February 4, 1992.

Prior History: An Appeal from the Circuit Court for Dade County, Amy Steele Donner, Judge.

Core Terms

city commission, lower tribunal, circuit court, proper remedy

Case Summary

Procedural Posture
Appellant sought review of the dismissal of his complaint, entered in the Circuit Court for Dade County (Florida), in which he sought a declaratory judgment that a resolution of appellee city commission finally approving a site plan was invalid.

Overview

Appellee city commission issued a resolution against appellant finally approving a site plan. Instead of filing an appeal of that decision, appellant filed a complaint seeking declaratory judgment that the resolution was invalid. However, the complaint was filed in the proper forum. The trial court dismissed the complaint, holding that it lacked jurisdiction. The reviewing court quashed the trial court's decision and granted certiorari, holding that the mistaken complaint should have been treated as an appropriate notice of appeal under *Fla. R. App. P. 9.040*.

Outcome
The court quashed the decision dismissing appellant's complaint for declaratory judgment and granted certiorari, holding that the trial court should have treated appellant's complaint as an appropriate notice of appeal where it was filed within the relevant time period in the proper forum.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN1 See *Fla. R. App. P. 9.040(c)*.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN2 See *Fla. R. App. P. 9.030(c)*.

Counsel: Bedzow Korn Kan & Glaser and Alan J. Kan, for appellant.

Howard B. Lenard and Miriam Bensinger; Jonas and Jonas and Daniel E. Jonas, for appellee.

Judges: Before SCHWARTZ, C.J., and BASKIN and GODERICH, JJ.

Opinion by: SCHWARTZ

Opinion

[*1077] SCHWARTZ, Chief Judge.

The judgment before us dismissed a complaint which sought a declaratory judgment that a resolution of the North Miami City Commission finally approving a site plan was invalid. The basis of the ruling below was that an original action for such relief was inappropriate. Pursuant to *Florida Rule of Appellate Procedure*

9.040(c), [1] we treat this appeal as an application for certiorari, see City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982); Save Brickell Avenue, Inc. v. City of Miami, 393 So 2d 1197, 1198 n.1 (Fla. 3d DCA 1981), and quash the decision below.

[2]** Under the appellate rule which we have already invoked, Fla.R.App.P. 9.040(c), the mistaken complaint below should have been treated as an appropriate notice of appeal, see Fla.R.App.P. 9.030(c)(1)(A); [2] City of **[*1078]** Deerfield Beach, 419 So. 2d at 624; Brickell, 393 So. 2d at 1197. Because the complaint was filed within thirty days of the city commission action sought to be reviewed, there is no jurisdictional impediment to this determination.

Certiorari granted.

End of Document

---

[1] RULE 9.040 GENERAL PROVISIONS

* * *

HN1 (c) Remedy. If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

[2] RULE 9.030 JURISDICTION OF COURTS

* * *

HN2 (c) Jurisdiction of Circuit Courts.

(1) Appeal Jurisdiction. The circuit courts shall review, by appeal:

(A) final orders of lower tribunals as provided by general law.

RULE 9.020 DEFINITIONS

* * *

(d) Lower Tribunal. the court, agency, officer, board, commission or body whose order is to be reviewed.

Appendix 47.

Haines City Cmty. Dev. v. Heggs

Supreme Court of Florida

July 6, 1995, Decided

No. 84,243

Reporter
658 So. 2d 523 *; 1995 Fla. LEXIS 1130 **; 20 Fla. L. Weekly S 318

HAINES CITY COMMUNITY DEVELOPMENT, d/b/a PARKVIEW VILLAGE, Petitioner, v. LEILA HEGGS, Respondent.

Subsequent History: [**1] As Corrected.

Prior History: Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance Second District - Case No. 94-00524 (Polk County).

Core Terms

circuit court, district court, essential requirement, common-law, standard of review, departure, cases, proceedings, writ of certiorari, lower court, county court, irregular, miscarriage of justice, procedural due process, appellate court, legal error, zoning, substantial competent evidence, principles of law, court of appeals, court's decision, scope of review, inferior court, second appeal, inferior, courts

Case Summary

Procedural Posture
The Second District Court of Appeal (Florida) denied petitioner housing community certiorari review of a circuit court order that reversed a county court order evicting respondent tenant for nonpayment of rent. The district court of appeal then certified for review a question regarding the standard a district court of appeal should use in reviewing the order of a circuit court acting in its review capacity.

Overview
Petitioner housing community attempted to evict respondent tenant for non-payment of rent and was granted judgment by a county court. Upon reversal, petitioner sought common-law certiorari review, which was denied by the district court of appeal. However, that court expressed concern regarding the appropriate standard of review for a circuit court appellate decision. On review, the court affirmed the decision below and held that the standards expressed in the two opinions about which the district court of appeal inquired were the same and were controlling. The court noted that under one standard, certiorari was not a second appeal and there should be a determination of whether there was a departure from the essential requirements of law. The court then noted that the standard in the second case was based on whether the circuit court afforded procedural due process and applied the correct law, which were expressions of ways in which the circuit court could "depart from the essential requirements of the law." The court then held that the appropriate standard was whether the circuit court afforded procedural due process and applied the correct law.

Outcome
The court affirmed the decision below and held that the appropriate standard of review for a district court of appeal when reviewing an appellate decision of a circuit court via a writ of common-law certiorari was a combination of the two standards on which the district court of appeal sought clarification. The combined standard asked whether the circuit court afforded procedural due process and applied the correct law.

LexisNexis® Headnotes

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN1 Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of an appeal, but to cause the entire record of the inferior court to be brought up in

order that it may be determined from the face thereof whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of law. Confined to its legitimate scope, the writ may issue within the court's discretion to correct the procedure of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice. Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void. The duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have had the remedy by due course of law, guaranteed by the Florida Constitution, if the judge fails or refuses to perform that duty.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN2 The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN3 In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of clearly established principle of law resulting in a miscarriage of justice. It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari. A district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law. The district courts should use this discretion cautiously so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal.

Civil Procedure > Appeals > Standards of Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN4 A district court, upon review of a circuit court's judgment, determines whether the circuit court afforded procedural due process and applied the correct law. "Applied the correct law" is synonymous with "observing the essential requirements of law."

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > Appeals > Standards of Review > General Overview

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN5 As a case travels up the judicial ladder, review should consistently become narrower, not broader. Circuit court review of an administrative agency decision, under *Fla. R. App. P. 9.030(c)(3)*, is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review

HN6 The standard of review for certiorari in the district court effectively eliminates the substantial competent evidence component of review. The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law.

Counsel: Jerri A. Blair of Blair & Cooney, P.A., Tavares, Florida, for Petitioner.

Nora Leto, Florida Rural Legal Services, Inc., Lakeland, Florida; and Cathy L. Lucrezi, Florida Rural Legal Services, Inc., Fort Myers, Florida, for Respondent.

Judges: ANSTEAD, J., GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.

Opinion by: ANSTEAD

Opinion

[*524] *CORRECTED OPINION*

ANSTEAD, J.

We have for review the following question certified to be of great public importance:

> AFTER *EDUCATIONAL DEVELOPMENT CENTER, INC. v. CITY OF WEST PALM BEACH, 541 So. 2d 106 (Fla. 1989)*, DOES THE STANDARD OF REVIEW IN *COMBS v. STATE, 436 So. 2d 93 (Fla. 1983)*, STILL GOVERN A DISTRICT COURT OF APPEAL WHEN IT REVIEWS, PURSUANT TO *FLORIDA RULE OF APPELLATE PROCEDURE 9.030(b)(2)(B)*, AN ORDER OF A CIRCUIT COURT ACTING IN ITS REVIEW CAPACITY OVER A COUNTY COURT?

See Haines City Community Dev. v. Heggs, 647 **[**2]** *So. 2d 855, 857 (Fla. 2d DCA 1994)*. We have jurisdiction, *article V, section 3(b)(4), Florida Constitution*, and answer the certified **[*525]** question in the affirmative by holding that the standards of review announced in *Combs* and *Educational Development Center* are the same. We approve the district court decision.

PROCEDURAL FACTS

This case originates from a final judgment entered in county court in favor of petitioner Haines City Community Development, d/b/a Parkview Village (Parkview), evicting the respondent Leila Heggs for non-payment of rent. Upon appeal, the circuit court reversed the county court's judgment. Parkview then sought common-law certiorari review of the circuit court's order in the Second District Court of Appeal, which denied the petition upon the authority of *Combs v. State, 436 So. 2d 93 (Fla. 1983)*. The district court expressed some concern, however, about the prevailing law defining the standard of review of a district court when reviewing an appellate decision of a circuit court. The court was particularly concerned that we may have recently adopted a different standard for review of administrative proceedings, and it was unclear if the standard was **[**3]** intended to supplant the *Combs* standard.

LAW & ANALYSIS

History of Common-Law Writ of Certiorari in Florida

Legal historians have told us that the English common-law writ of certiorari was an original writ issuing out of chancery or the King's Bench, directing that an inferior tribunal return the record of a pending cause so that the higher court could review the proceedings. George E. Harris, *A Treatise on the Law of Certiorari* § 1 (1893). The use of the writ was continued in the American courts, both state and federal. A more recent treatise defines certiorari as a discretionary writ issued by an appellate court to a lower court in cases where an appeal or writ of error was unavailable, directing that the record of the lower court be provided for review to determine whether the lower court has exceeded its jurisdiction or not proceeded according to law. 3 Fla. Jur. 2d *Appellate Review* § 456 (1978). [1]

[4]** This Court [2] first recognized its common-law certiorari jurisdiction in *Halliday v. Jacksonville & Alligator Plank Road Co., 6 Fla. 304 (1855)*, and defined its use in rather broad and general terms:

> [A] writ of certiorari will lie from this court to any of the inferior jurisdictions, whenever an appropriate case may be presented, or it shall become necessary for the attainment of justice.

Id. at 305. In 1882, in an opinion which retains its currency and whose clarity remains a hallmark, we defined the writ in more precise terms:

> The question which this *certiorari* brings here is . . . whether the Judge exceeded his jurisdiction in hearing the case at all, or adopted any method unknown to the law or essentially **[**5]** irregular in his proceeding under the statute. A decision made according to the form of law and the rules prescribed for rendering it, although it may be erroneous in its conclusion as to what the law is as

[1] Our discussion in this opinion will generally be limited to the use of certiorari to review circuit court decisions rendered by that court acting in its review capacity. We will not discuss other possible uses of certiorari such as its use to review interlocutory or non-final orders of a lower court.

[2] Interestingly, the present Florida Constitution does not grant the Florida Supreme Court any general power to issue common law writs of certiorari. *See Vetrick v. Hollander, 464 So. 2d 552, 553 (Fla. 1985)*; *Robinson v. State, 132 So. 2d 3, 5 (Fla. 1961)*.

> applied to facts, is not an illegal or irregular act or proceeding remediable by *certiorari*.

Basnet v. City of Jacksonville, 18 Fla. 523, 526-27 (1882); *see also Edgerton v. Mayor of Green Cove Springs*, 18 Fla. 528 (1882).

In *Basnet* and its progeny we refined the nature and scope of certiorari. We described certiorari as appellate in character in the sense that it involves a limited review of the proceedings of an inferior jurisdiction. *Basnet*, 18 Fla. at 527. "It is original in the sense that the subject-matter of the suit or proceeding which it brings before the court are not here reinvestigated, tried and determined upon the merits generally as upon **[*526]** appeal at law or writ of error." *Id.* This explanation, stated another way, importantly emphasizes that certiorari should not be used to grant a second appeal. [3] **[**6]** *Id.*; *Kennington v. Gillman*, 284 So. 2d 405, 406 (Fla. 1st DCA 1973). [4]

[7]** In *Jacksonville, T. & K.W. Railway Co. v. Boy*, 34 Fla. 389, 393, 16 So. 290, 291 (1894), we reviewed a circuit court decision affirming a county court judgment, and, while repeating certain language from *Basnet*, we also stated that we have the power to review and quash, on common-law certiorari, the proceedings of an inferior tribunal when it proceeds without jurisdiction or when its procedure is illegal, unknown to the law, or essentially irregular. *Id. at 392*. Further, in examining the scope of review in other states, we endorsed the practice in Illinois where the superior court determines "whether the inferior court had jurisdiction, or had exceeded its jurisdiction, or had *failed to proceed according to the essential requirements of the law*." *Id. at 393* (emphasis added). In conclusion, we found that "the judgment of affirmance in the record before the Circuit Court was such an essential irregularity and departure from prescribed rules of procedure in such cases as to require that it be quashed, and a judgment will therefore be entered accordingly." *Id. at 396*.

In *Mernaugh v. City of Orlando*, 41 Fla. 433, 27 So. 34 (1899), this Court explicitly incorporated **[**8]** the "essential requirements of law" language into our standard:

> The rule established here is that the Supreme Court has power to review and quash, on the common-law writ of *certiorari*, the proceedings of inferior tribunals when they proceed in a cause without jurisdiction, or when their procedure is essentially irregular and *not according to the essential requirements of law*, and no appeal or direct method of reviewing the proceeding exists.

Id. at 442 (emphasis added).

CONSISTENCY IN APPLICATION

It has been correctly noted that despite the announcement of a narrow standard of review, the scope of substantive review by certiorari actually applied was often, for all practical purposes, fully as broad as

---

[3] It has been noted that there are at least four distinguishing features between review by common-law certiorari and review by appeal which is provided by law. *G-W Dev. Corp. v. Village of N. Palm Bch. Zoning Bd. of Adjustment*, 317 So. 2d 828, 830 (Fla. 4th DCA 1975). First, common-law certiorari is available only "where no direct appellate proceedings are provided by law." *Id.* Second, common-law certiorari is entirely discretionary with the court, as opposed to an appeal which is taken as a matter of right. *Id.* Third, the scope of review by common-law certiorari is traditionally limited and much narrower than the scope of review on appeal. That is, on appeal, all errors below may be corrected: jurisdictional, procedural, and substantive; and judgments below may be modified, reversed, remanded with directions, or affirmed. Fourth, common-law certiorari will only lie to review judicial or quasi-judicial action, never purely legislative action, in contradistinction to review by appeal which is provided by law and by which the legislature can authorize review of a wider scope. *Id. at 831*.

[4] The policy behind this rule is simple. The circuit court is the court of final appellate jurisdiction in cases originating in county court. *See art. V, § 5, Fla. Const.* Prior to the establishment of the district courts, we noted that if the role of certiorari was expanded to review the correctness of the circuit court's decision, it would amount to a second appeal. If an appellate court gives what amounts to a second appeal, by means of certiorari, it is not complying with the Constitution, but is taking unto itself the circuit courts' final appellate jurisdiction and depriving litigants of final judgments obtained there. If, in cases originating in courts inferior to the circuit courts, another appeal from the circuit court is afforded in the guise of certiorari, then a litigant will have two appeals from the court of limited jurisdiction, while a litigant would be limited to only one appeal in cases originating in the trial court of general jurisdiction. *Flash Bonded Storage Co. v. Ades*, 152 Fla. 482, 483, 12 So. 2d 164, 165 (1943). There are societal interests in ending litigation within a reasonable length of time and eliminating the amount of judicial labors involved in multiple appeals. Further, while obviously important, circuit court opinions are not widely reported and used as precedent. William A. Haddad, *The Common Law Writ of Certiorari in Florida*, 29 U. Fla. L. Rev. 207, 227 (1977).

review by appeal. William H. Rogers & Lewis Rhea Baxter, Certiorari in Florida, 4 U. Fla. L. Rev. **[*527]** 477, 498, 500 n.90 (1951). [5] This tendency was so apparent that the discussion in Florida Jurisprudence noted that in many certiorari cases "it may appear that an error on which the reviewing court questions the lower court's judgment is no more fundamental or in violation of an essential requirement of the law than what otherwise would be reversible error **[**9]** on appeal." Haddad, *supra*, at 221 n.113. [6] Throughout the years, Florida courts have also used many terms interchangeably to describe a "departure from the essential requirements of law." [7] **[**10]** Beginning in the early 1960's, however, a more consistent practice seemed to emerge of "restricting the scope of review so that the reality of the extent of review on certiorari was to a large degree commensurate with the rhetoric of limited review." Haddad, *supra*, at 221 (footnote omitted). [8]

Despite this "all over the waterfront" picture, some opinions should be noted for their tight and lucid language in capturing the essence of the appropriate use of the writ. In *State v. Smith, 118 So. 2d 792 (Fla. 1st DCA 1960)*, Judge Wigginton explained:

> ***HN1*** Certiorari is a common-law writ which issues in the sound judicial discretion of the court to an inferior court, not to take the place of an appeal, but to cause the entire record of the inferior court to be brought up in order that **[**11]** it may be determined from the face thereof whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of law. Confined to its legitimate scope, the writ may issue within the court's discretion to correct the procedure of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice. . . . *Failure to observe the essential requirements of law means failure to accord due process of law within the contemplation of the Constitution, or the commission of an error so fundamental in character as to fatally infect the judgment and render it void. . . .*
>
> It seems to be the settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have had the remedy by due course of law [guaranteed by the Florida Constitution], if the judge fails or refuses to perform that duty.

Id. at 795 (footnote omitted) (emphasis added).

In 1985, Chief Justice Boyd also captured the essence of the standard: **[**12]**

> ***HN2***
>
> The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

[*528] *Jones v. State, 477 So. 2d 566, 569 (Fla. 1985)* (Boyd, C.J., concurring specially). *Combs*

In *Combs v. State, 436 So. 2d 93 (Fla. 1983)*, this Court

---

[5] For a more detailed discussion of this trend see Rogers & Baxter, *supra*, at 498-99.

[6] The treatise lists the types of errors held to be departures from the essential requirements of law. Haddad, *supra*, at 221 n.113; *see* 5 Fla. Jur. *Certiorari* § 31 (1955).

[7] For example, in determining whether there was a "departure from the essential requirements of law" reviewing courts have inquired: (1) whether the lower court proceeded "according to justice" or deprived the petitioner of fundamental rights, resulting in serious and material injury or gross injustice; (2) whether the judgment is authorized by law or is invalid, illegal, essentially irregular, or prejudicial; (3) whether the court rendering judgment lacked jurisdiction; (4) whether the circuit court's appellate judgment violates established principles of law; (5) whether the judgment results in a substantial injury to the legal rights of the petitioner; (6) whether the judgment constitutes a palpable miscarriage of justice; or (7) whether the lower court applied the wrong rule of law to the evidence. 5 Fla. Jur. *Certiorari* §§ 25, 30, 31 (1955).

[8] Mr. Haddad attributes this trend to the greater caseload in the appellate courts and further noted that typical of cases granting certiorari were those in which the reviewing court quashed affirmances of criminal convictions where virtually no evidence was found on a material element of the crime; those in which the circuit court reversed a lower court on the basis of a patently erroneous statement of law; and those in which the circuit court dismissed an appeal because the record was late and the fault was apparently that of the lower court clerk rather than of the appellant or his attorney. *Id.*

held that the district court had applied too narrow a certiorari standard of review. Melvin Combs was convicted in county court of driving while intoxicated. At trial, Combs claimed that certain statements he made at the accident scene were privileged. The county court rejected the claim, and, on appeal after conviction, the circuit court affirmed. In denying certiorari, the district court stated that its review was limited to: "violations which effectively deny appellate review such as a circuit judge rendering a decision without allowing briefs to be filed and considered, a circuit judge making a decision without **[**13]** a record to support the decision or the circuit court dismissing an appeal improperly." Combs v. State, 420 So. 2d 316, 317 (Fla. 5th DCA 1982) (citation omitted). In rejecting this scope of review as too narrow, we acknowledged that application of the phrase "departure from the essential requirements of law" had generated much confusion. Combs, 436 So. 2d at 95. We attributed the confusion mainly to the difficulty encountered by the courts in maintaining the distinction between certiorari review and the standard used in reviewing legal error on appeal. [9]

In an effort to clarify the certiorari standard, we elaborated on the meaning and boundaries of "departure from the essential **[**14]** requirements of law":

> The phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. ***HN3*** *In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error.* Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been *a violation of clearly established principle of law resulting in a miscarriage of justice.* It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari. A district court may refuse to grant a petition for common-law certiorari even though there may have been a departure from the essential requirements of law. The district courts should use this discretion cautiously **[**15]** so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal.

Combs, 436 So. 2d at 95-96 (emphasis added) (citations omitted).

We concluded in *Combs* that the district court reached a correct result, albeit for the wrong reason, in denying certiorari, despite its use of an erroneous standard of review. Id. at 96. [10]

[16]** [*529]** *Educational Development Center*

The case of Educational Development Center v. City of West Palm Beach, 541 So. 2d 106 (Fla. 1989), unlike *Combs*, began in an administrative agency--a zoning board of appeals. Further, in contrast to *Combs*, we held

---

[9] See, e.g., In re Camm, 294 So. 2d 318 (Fla.), cert. denied, ***419 U.S. 866, 95 S. Ct. 121, 42 L. Ed. 2d 103 (1974)***; Westerman v. Shell's City, Inc., 265 So. 2d 43 (Fla. 1972); Goodkind v. Wolkowsky, 151 Fla. 62, 9 So. 2d 553 (1942); Biscayne Beach Theatre, Inc. v. Hill, 151 Fla. 1, 9 So. 2d 109 (1942).

[10] We applied Combs in State v. Pettis, 520 So. 2d 250 (Fla. 1988), to further clarify the distinction between "essential illegality" and mere "legal error." The state made a pretrial motion to prevent Pettis from questioning a police officer at trial about five departmental reprimands the officer had received. Upon the denial of the motion in limine, the state filed a petition for writ of certiorari, which was granted by the Fourth District Court of Appeal. Accordingly, the Fourth District quashed the order denying the state's motion in limine. In its opinion, the district court held that Pettis could not use evidence of the officer's prior reprimands to impeach his character for truthfulness because the officer's character trait was not an essential element of the charge or defense. Id. at 251.

While we agreed that the trial judge erred in permitting the police officer to be questioned concerning unrelated reprimands, we did not believe it rose to the level of being a departure from the essential requirements of law:

> We cannot say that the ruling was a departure from the essential requirements of law. While some pretrial evidentiary rulings may qualify for certiorari, it must be remembered that the extraordinary writ is reserved for those situations where "there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Combs v. State, 436 So. 2d 93, 96 (Fla. 1983).

Id. at 254 (footnote omitted).

that the district court had applied too broad a standard of review.

In *Educational Development Center* [hereinafter EDC], the petitioner sought permission from the Zoning Board of Appeal (Board) to convert its residential property to a private preschool and kindergarten. The Board denied EDC's application and EDC appealed to the circuit court. The circuit court reversed, and concluded there was "substantially competent evidence" to support EDC's application as required by the zoning code. Subsequently, the district court granted the Board's petition for certiorari, and found that the circuit court had applied an incorrect standard of review. [11] *EDC, 541 So. 2d at 107*.

[17]** On remand and reconsideration, the circuit court again reversed the zoning board decision, this time finding that "there was no substantial competent evidence to support the City's denial of the petition." *Id. at 108*. Upon a second review in the district court, the circuit court's decision was again quashed, based upon the district court's disagreement with the trial court as to the existence of substantial competent evidence to support the Board's decision. [12] *City of W. Palm Beach v. Educational Dev. Ctr., 526 So. 2d 775, 777 (Fla. 4th DCA 1988)*.

---

[11] The district court explained:

> The circuit court departed from the essential requirements of law by applying an incorrect standard of review. The question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support a position *contrary* to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine whether there is substantial competent evidence to support the agency's conclusion.

City of West Palm Beach v. Educational Dev. Ctr., 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987).

[12] In contrast to the circuit court, the district court found:

> There was substantial evidence to support the denial of the application to permit the operation of a preschool in this residential area. To find to the contrary, we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed that evidence; in either event substituting its judgment for that of the zoning board, which it may not properly do.

City of W. Palm Beach v. Educational Dev. Ctr., 526 So. 2d 775, 777 (Fla. 4th DCA 1988).

[18]** In our review of *EDC*, we relied on *City of Deerfield Beach v. Vaillant, 419 So. 2d at 624, 626 (Fla. 1982)*, to define the district court's standard of review, and stated:

> The principles expressed by the Court in *Vaillant* clearly define the standards of review applicable here. There was no contention of a denial of due process and the district court of appeal did not find that the trial judge applied an incorrect principle of law. The district court of appeal simply disagreed with the circuit court's evaluation of the evidence. Accordingly, we reaffirm *Vaillant* and quash the decision of the district court.

541 So. 2d at 108-09.

Combs and EDC

To some extent Combs and *EDC* may be viewed as the bookends of appellate certiorari review, one pointing out an overly strict standard, while the other quashes the use of an overly broad standard. However, both decisions mandate a narrow standard of review and emphasize that certiorari should not be utilized to provide "a second appeal."

In *Combs* we held that a district court's review of an appellate circuit court decision should determine whether there was a "departure from the essential requirements **[**19]** of law." We emphasized that there must be "a violation of a clearly established principle of law resulting in a miscarriage of justice." On the other hand, *EDC* held that a district court's review of an appellate circuit court's decision which reviewed an administrative agency decision should consider whether the "circuit court afforded procedural due process and applied the correct law." Accordingly, the question becomes whether these **[*530]** two standards are different, and, if so, whether a difference is justified. [13]

[20]** *Vaillant* illustrates the relationship of these standards. In *Vaillant*, we agreed with the decision and

---

[13] Post-*EDC* and post-*Combs* cases have consistently applied the standards of review espoused in each case. *See, e.g.*, post-*EDC* cases: ***Branch v. Charlotte County, 627 So. 2d 577 (Fla. 2d DCA 1993)***; *Manatee County v. Kuehnel, 542 So. 2d 1356 (Fla. 2d DCA 1989), review denied,* ***548 So. 2d 663 (Fla. 1989)***; post-*Combs* cases: *State v. Frazee, 617 So. 2d 350 (Fla. 4th DCA 1993)*; *Horatio Enterprises, Inc. v. Rabin, 614 So. 2d 555 (Fla. 3d DCA 1993)*; *Slater v. State, 543 So. 2d 869 (Fla. 2d DCA 1989)*.

rationale of the Fourth District which reviewed the case before it came to us. 419 So. 2d at 626. The district court had determined that *procedural due process was afforded and that essential requirements of the law were observed. We actually held*, however, that ***HN4*** a district court, upon review of a circuit court's judgment, determines whether the circuit court "*afforded procedural due process and applied the correct law.*" *Id.* (emphasis added). When the above two standards are juxtaposed, we conclude that "applied the correct law" is synonymous with "observing the essential requirements of law." *See, e.g.*, Manatee County v. Kuehnel, 542 So. 2d 1356, 1358 (Fla. 2d DCA) (holding that when district court reviews decision of circuit appellate court standard of review is whether court afforded procedural due process and observed essential requirements of law), *review denied*, 548 So. 2d 663 (Fla. 1989). Therefore, when the *Combs* and *EDC* standards are reduced to their core, they appear to be the same. Moreover, we can see no justifiable reason for **[**21]** adopting different standards for district court review in such cases.

Common-law certiorari has been made available to review quasi-judicial orders of local agencies and boards not made subject to the Administrative Procedure Act when no other method of review is provided. *See* De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957). If the administrative action was initially reviewable by certiorari to the circuit court, the district court then has jurisdiction to review the circuit court's decision by a second petition for writ of certiorari. Phillip J. Padovano, *Florida Appellate Practice* § 3.7 (1988) (*citing* Tomeu v. Palm Beach County, 430 So. 2d 601 (Fla. 4th DCA 1983)). However, certiorari in circuit court to review local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3) is not truly discretionary common-law certiorari, because the review is of right. Vaillant, 419 So. 2d at 625-26; *see also* EDC, 541 So. 2d at 108. In other words, in such review the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *See* EDC, 541 So. 2d at **[**22]** 108.

HN5 As a case travels up the judicial ladder, review should consistently become narrower, not broader. We have held that circuit court review of an administrative agency decision, under Florida Rule of Appellate Procedure 9.030(c)(3), is governed by a three-part standard of review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. Vaillant, 419 So. 2d at 626. ***HN6*** The standard of review for certiorari in the district court effectively eliminates the substantial competent evidence component. The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law. As explained above, these two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law. In short, we have the same standard of review as a case which begins in the county court. *See* William A. Haddad, "Writ of Certiorari in Florida," *in* The Florida Bar, *Florida Appellate Practice* § 18.3 (3d ed. 1993). **[**23]** This standard, while narrow, also contains a degree of flexibility and discretion. [14] For **[*531]** example, a reviewing court is drawing new lines and setting judicial policy as it individually determines those errors sufficiently egregious or fundamental to merit the extra review and safeguard provided by certiorari. This may not always be easy since the errors in question must be viewed in the context of the individual case. It may also be true that review of administrative decisions may be more difficult, since care must be exercised to determine the nature of the administrative proceeding under review, and to distinguish between quasi-judicial proceedings and those legislative in nature. There is no complete catalog that the court can turn to in resolving a particular case.

CONCLUSION

[24]** The district court's opinion in this case is an excellent example of the correct application of the limited standard of review available to litigants after they have had the benefit of an appeal in the circuit court.

---

[14] One critic has noted:

> Some errors are so fundamental as to clearly fall within the term; others clearly do not fall within any reasonable interpretation. The vagueness of the phrase, however, means that there is a large grey area. Properly conceived, the discretion often mentioned in relation to common law certiorari should be exercised in this grey area. This should not be an unprincipled or arbitrary discretion but should depend on the court's assessment of the gravity of the error and the adequacy of other relief. A judicious assessment by the appellate court will not usurp the authority of the trial judge or the role of any other appellate remedy, but will preserve the function of this great writ of review as a "backstop" to correct grievous errors that, for a variety of reasons, are not otherwise effectively subject to review.

Haddad, *supra*, at 228.

The district court opinion noted:

> In this case, even if we were to conclude that the circuit court's order departed from the essential requirements of the law, we cannot say that such a departure was serious enough to result in a miscarriage of justice. The order did nothing more than reverse a county court's eviction judgment based on a peculiar set of facts. It did not deprive the petitioner of its day in court, nor has it foreclosed the petitioner from seeking eviction of the respondent because of future non-payment of rent. *See State v. Roess, 451 So. 2d 879 (Fla. 2d DCA 1984)*. Thus, we are unable to conclude that this is one of "those few extreme cases where the appellate court's decision is so erroneous that justice requires that it be corrected." *Combs, 436 So. 2d at 95*.

Heggs, 647 So. 2d at 856. This analysis captures the essence of our holdings in *Combs* and *EDC*.

We answer the certified question in the affirmative and hold that **[**25]** the standards of review announced in *Combs* and *Educational Development Center* are the same. We approve the decision below.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.

End of Document

Appendix 48.

Education Dev. Center, Inc. v. West Palm Beach Zoning Bd. of Appeals

Supreme Court of Florida

March 23, 1989

No. 72,755

Reporter
541 So. 2d 106 *; 1989 Fla. LEXIS 203 **; 14 Fla. L. Weekly 125

EDUCATION DEVELOPMENT CENTER, INC., Petitioner, v. CITY OF WEST PALM BEACH ZONING BOARD OF APPEALS, ET AL., Respondents

Prior History: [**1] Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions, Fourth District - Case No. 87-2889, Palm Beach County.

Core Terms

circuit court, district court, zoning board, trial judge, substantial competent evidence, court of appeals, zoning

Case Summary

Procedural Posture
Petitioner education center sought review of a judgment from the District Court of Appeal - Direct Conflict of Decisions, Fourth District (Florida) that reversed the circuit court's reversal of respondent zoning board's denial of petitioner's application to permit the operation of a preschool.

Overview

Respondent zoning board denied petitioner education center's application to permit the operation of a preschool. The circuit court reversed respondent's decision, concluding there was substantially competent evidence to support petitioner's application as required by the zoning code. The district court reversed and remanded the case. On remand, the circuit court again reversed respondent, finding that there was no substantial competent evidence to support the denial of the application. The district court disagreed. The court held, under *Fla. R. App. P. 9.030(b)(2)(B)*, the district court should have reviewed the circuit court's judgment to determine whether the circuit court afforded procedural due process and applied the correct law. Because there was no contention of a denial of due process, and the district court did not find that the trial judge applied an incorrect principle of law, the court held the reversal of the circuit court's decision was improper. Accordingly, the decision of the district court was quashed.

Outcome
The judgment that reversed the circuit court's reversal of respondent zoning board's denial of petitioner education center's application to permit the operation of a preschool was quashed because there was no contention of a denial of due process, and the district court did not find the trial judge applied an incorrect principle of law, such that the reversal of the circuit court's decision was improper.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN1 When the circuit court reviews the decision of an administrative agency under *Fla. R. App. P. 9.030(c)(3)*, there are three discrete components of its certiorari review. Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed,

and whether the administrative findings and judgment are supported by competent substantial evidence. In so doing, the circuit court is not permitted to reweigh the evidence nor to substitute its judgment for that of the agency.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN2 The standard of review to guide the district court when it reviews the circuit court's order under *Fla. R. App. P. 9.030(b)(2)(B)* is necessarily narrower. The standard for the district court has only two discrete components. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law.

Administrative Law > Judicial Review > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > General Overview

HN3 Common sense dictates that no one enjoys three full repetitive reviews to, 1. a civil service board, 2. a circuit court, 3. a district court of appeal.

Counsel: James K. Green of Green, Eisenberg & Cohen, West Palm Beach, Florida, for Petitioner.

Carl V. M. Coffin, West Palm Beach, Florida, for Respondents.

Judges: Barkett, J. Ehrlich, C.J., and Overton, Shaw, Grimes and Kogan, JJ., concur. McDonald, J., dissents with an opinion.

Opinion by: BARKETT

Opinion

[*107] We have for review *City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 526 So.2d 775 (Fla. 4th DCA 1988)*, in which the district court granted certiorari and quashed an order of the circuit court overturning a decision of an administrative agency. Because the district court's opinion conflicts with *City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982)*, we have jurisdiction. *

The issue here concerns the extent of the district court's certiorari review. We find that the district court exceeded the scope of review and quash the decision below.

The petitioner, Education Development Center, Inc. (Center), owns residential **[**2]** property. The Center appeared at a hearing before the respondent, City of West Palm Beach Zoning Board of Appeals (Board), seeking to convert its property to a private preschool and kindergarten.

The Board denied the Center's application and the Center appealed to the circuit court. The circuit court reversed the Board, concluding that there was "substantially competent evidence" to support the Center's application as required by the zoning code.

In *City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 504 So.2d 1385 (Fla. 4th DCA 1987)*, the district court granted the Board's petition for writ of certiorari, concluding that the circuit court had applied an incorrect standard of review. The district court remanded for a redetermination and explained:

> The circuit court departed from the essential requirements of law by applying an incorrect standard of review. The question is not whether, upon review of the evidence in the record, there exists substantial competent evidence to support **[*108]** a position contrary to that reached by the agency. Instead, the circuit court should review the factual determination made by the agency and determine **[**3]** whether there is substantial competent evidence to support the agency's conclusion.

Id. at 1386 (emphasis in original).

On remand, the circuit court again reversed, this time finding that "there was no substantial competent evidence to support the City's denial of the petition."

The Board returned a second time to the district court, which in the opinion now before us, *Education Development Center, 526 So.2d at 775*, granted the petition for writ of certiorari and remanded to the circuit

* *Art. V, § 3(b)(3), Fla. Const.*

court for further proceedings. The basis for the district court's reversal was its disagreement with the trial court's finding that there was no substantial competent evidence to support the Board's decision. In contrast to the circuit court, the district court found:

> There *was* substantial evidence to support the denial of the application to permit the operation of a preschool in this residential area. To find to the contrary, we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed the evidence; in either event substituting its judgment for that of the zoning board, which it may not properly do.

[4]** *Id. at 777* (emphasis supplied).

In *City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982)*, the Court clearly set forth the standards governing certiorari review. ***HN1*** When the circuit court reviews the decision of an administrative agency under *Florida Rule of Appellate Procedure 9.030(c)(3)*, there are *three* discrete components of its certiorari review.

> Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.

Vaillant, 419 So.2d at 626. In so doing, the circuit court is not permitted to reweigh the evidence nor to substitute its judgment for that of the agency. *Bell v. City of Sarasota, 371 So.2d 525 (Fla. 2d DCA 1979)*.

In turn, ***HN2*** the standard of review to guide the district court when it reviews the circuit court's order under *Florida Rule of Appellate Procedure 9.030(b)(2)(B)* is necessarily narrower. **[**5]** The standard for the district court has only *two* discrete components.

> The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law.

Vaillant, 419 So.2d at 626. In *Vaillant*, the Court adopted the rationale of the Fourth District Court of Appeal and quoted approvingly from its decision:

> "***HN3*** Common sense dictates that no one enjoys three full repetitive reviews to,
>
> 1. a civil service board
> 2. a circuit court
> 3. a district court of appeal. . . ."

Id. (quoting *City of Deerfield Beach v. Vaillant, 399 So.2d 1045, 1047 (Fla. 4th DCA 1981)*).

We find the Board's reliance on *Skaggs-Albertson's v. ABC Liquors, Inc., 363 So.2d 1082 (Fla. 1978)*, to be misplaced. There, the issue concerned the scope of review of the circuit court which had overturned the agency's decision, despite the existence of substantial competent evidence to support it. Here, we are concerned with the scope of review of the district court and find the definitive statements in *Vaillant* to be dispositive.

We hold that the principles **[**6]** expressed by the Court in *Vaillant* clearly define the standards of review applicable here. There was no contention of a denial of due process and the district court of appeal did not find that the trial judge applied an incorrect principle of law. The district court of appeal simply disagreed **[*109]** with the circuit court's evaluation of the evidence. Accordingly, we reaffirm *Vaillant* and quash the decision of the district court.

It is so ordered.

Ehrlich, C.J., and Overton, Shaw, Grimes and Kogan, JJ., concur. McDonald, J., dissents with an opinion.

Dissent by: McDONALD

Dissent

McDONALD, J., dissenting.

In reviewing the action of the trial judge reversing a decision of the West Palm Beach Zoning Board of Appeals, the district court of appeal stated "we conclude that the lower tribunal either reinterpreted the inferences which the evidence supported or reweighed that evidence; in either event substituting its judgment for that of the zoning board, which it may not properly do." *City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 526 So.2d 775, 777 (Fla. 4th DCA 1988)*. This, to me, is equivalent to the appellate court's determination that in assessing the facts the trial judge failed to apply the right law, and,

thus, the appellate court's review **[**7]** comported with *City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982)*.

I recognize that the trial judge, on remand, used the phrase, "that there was no substantial competent evidence to support the City's denial of respondent's application," in addition to his prior quashed order. I am not willing to accept the proposition that the inclusion of the magic words by the circuit judge, particularly when this resulted in a reversal of the zoning board, precluded the appellate court from reviewing his conclusion that no competent substantial evidence supported the zoning board's denial. It is the substance that counts, and not the form of the pronouncement. Here the dispute was whether or not the petitioner had proved by substantial competent evidence that the proposed occupancy of the property would be by a school offering a curriculum similar to that offered in a public school. The zoning board found that the petitioner had not carried its burden in this regard. The petitioner planned to use its property for a day care school for three-, four-, and five-year-old children. There was evidence that Palm Beach County had *no* schools for three or four year olds. **[**8]** [1]

There was an ample basis for the board to reach its conclusion. When the trial judge declared to the contrary, he was not following the appropriate law in assessing factual matters. It can also be said that the meaning of the ordinance could be interpreted differently. If so, the interpretation of the trial judge is subject to review when it differs from that of the zoning board.

I would suggest also, that, if we narrowly construe *Vaillant* [2] to prevent review of actions of a trial judge in *reversing* zoning board actions, we would clothe trial judges with powers of absolute czars in zoning matters. All that the trial judge would have to do to insulate his actions from review would be to couch his order mandating reversal in terms of "there is no competent evidence to deny the zoning application." Surely we do not want to tie the hands of the district courts of appeal in such situations. Rather, the appellate courts **[**9]** should be able to pass on the issue of whether there was, indeed, competent substantial evidence to support the conclusion of the zoning board.

I have one additional observation. The district court previously quashed the prior order of the trial judge and remanded with instructions. *City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 504 So.2d 1385 (Fla. 4th DCA 1987)*. Call it what you like, **[*110]** but, when the district court entertains a second review, it should have the authority to determine if its prior mandate had been complied with properly.

I would approve the district court's decision.

End of Document

[1] There was evidence that a curriculum for 3, 4, and 5 years had been approved by Ralph Turlington, acting in his capacity as Florida Commissioner of Education. The state participates in such programs with the federal government for migrant workers only.

[2] *Vaillant* was not a zoning case. It was a review of a Civil Service Board's action. The issue in *Vaillant* was whether such a review was by appeal or certiorari. The extent of review permitted by certiorari was a gratuitous comment by our Court.

Appendix 49.

Dep't of Children & Families v. Bronson

Court of Appeal of Florida, Fifth District

February 10, 2012, Opinion Filed

Case No. 5D11-3508

Reporter
79 So. 3d 199 *; 2012 Fla. App. LEXIS 1936 **; 37 Fla. L. Weekly D 378; 2012 WL 407151

DEPARTMENT OF CHILDREN AND FAMILIES, Petitioner, v. STEVEN H. BRONSON AND STATE OF FLORIDA, Respondents.

Subsequent History: Writ of habeas corpus granted, Without prejudice *Bronson v. State, 2012 Fla. App. LEXIS 9188 (Fla. Dist. Ct. App. 5th Dist., June 6, 2012)*

Prior History: [**1] Petition for Certiorari Review of Order from the Circuit Court for Osceola County, Scott Polodna, Judge.

Core Terms

incompetent, trial court, mental illness, involuntary, competency, custody, placement

Case Summary

Procedural Posture

Petitioner, the Florida Department of Children and Families (DCF) sought certiorari review of an order of the Circuit Court of Osceola County (Florida) that involuntarily committed a respondent, a criminal defendant, to the custody of DCF pursuant to *§ 394.467, Fla. Stat.* (2011).

Overview

Respondent had suffered a series of strokes that left him incompetent to proceed to trial regarding a 1979 murder. The quashed the commitment order because the circuit court failed to follow the procedures required under *§ 394.467*. In particular, there was no petition for involuntary inpatient placement, there was no showing that a psychiatrist examined respondent within the preceding 72 hours and found that the criteria for involuntary inpatient placement had been met, no evidentiary hearing had been ordered, and it was clear that the circuit court's order of involuntary commitment was not supported by clear and convincing evidence.

Outcome

Certiorari was granted and the circuit court's order was quashed.

Counsel: T. Shane DeBoard, Regional Counsel, DCF, Orlando, for Petitioner.

Robert Wesley, Public Defender, and Laura J. Kolssner, Assistant Public Defender, Kissimmee, for Respondent Steven H. Bronson.

Pamela Jo Bondi, Attorney General, Tallahassee, and Megan Saillant, Assistant Attorney General, Daytona Beach, for Respondent State of Florida.

Judges: EVANDER, J. LAWSON and JACOBUS, JJ., concur.

Opinion

[*199] EVANDER, J.

The Department of Children and Families (DCF) seeks certiorari review of an order involuntarily committing Steven Bronson, a criminal defendant, to the custody of DCF pursuant to *section 394.467, Florida Statutes* (2011). Because the trial court failed to comply with the procedural requirements set forth in that statute, we grant the petition.

[*200] On December 29, 2010, Bronson was arrested for, and charged with, the 1979 murder of Norma Page. After being appointed to represent Bronson, the Public Defender's Office retained Drs. Frumkin and Danziger to evaluate Bronson's psychiatric functioning for the purpose of determining whether he was competent to proceed in his criminal case. In his report, Dr. Frumkin [**2] concluded that "[i]t is questionable if Mr. Bronson

meets the criteria for competency to proceed with adjudication." Dr. Danziger was more definitive, opining that "this defendant is not competent to proceed."

When the issue of Bronson's competency was raised with the trial court, it appointed Drs. Tressler and Prichard to perform competency evaluations of the defendant. After performing his evaluation, Dr. Tressler found Bronson to be "a demented 63 year-old individual" with "severe brain damage" as a result of a series of strokes suffered in 2003. Dr. Tressler believed that Bronson was incompetent to proceed, and that his competency could not be restored. Dr. Prichard's opinion differed to some degree. He found that Bronson had a cognitive disorder related to his prior strokes and that he was "marginally incompetent to proceed." Dr. Prichard also opined that the prospect for competency restoration was "guarded." However, Dr. Prichard agreed that neurological issues associated with Bronson's 2003 strokes were "likely permanent and irreversible."

After considering the reports of the four above-referenced doctors, the trial court entered an order on June 24, 2011, adjudging Bronson incompetent **[**3]** to proceed and committing him to DCF's custody. In its order, the trial court found that Bronson "met the criteria for commitment to a treatment facility of the Department of Children and Families as provided in F.S. 916.13(1)." That subsection provides:

> (1) Every defendant who is charged with a felony and who is adjudicated incompetent to proceed may be involuntarily committed for treatment upon a finding by the court of clear and convincing evidence that:
>
> (a) The defendant has a *mental illness* and because of the mental illness:
>
> 1. The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; or
>
> 2. There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm;
>
> (b) All available, less restrictive treatment alternatives, **[**4]** including treatment in community residential facilities or community inpatient or outpatient settings, which would offer an opportunity for improvement of the defendant's condition have been judged to be inappropriate; and
>
> (c) *There is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future.*

(Emphasis added).

Shortly thereafter, DCF filed a motion to intervene and a motion to vacate the trial court's June 24, 2011 order. In its motion, DCF argued that the involuntary commitment of Bronson to DCF's custody was improper for two reasons. First, Bronson's incompetence to proceed was **[*201]** not restorable in the foreseeable future. *See, e.g.*, Dep't of Children & Families v. Wehrwein, 942 So. 2d 947 (Fla. 5th DCA 2006) (trial court's order committing defendant, who had previously been adjudicated incompetent to proceed to trial, to DCF's custody violated statute governing involuntary commitment of a defendant who had been adjudicated incompetent, where overwhelming evidence was that mental illness causing defendant's incompetency would not respond to treatment **[**5]** and that it was highly unlikely defendant would ever respond to treatment). Second, the reports of the expert evaluators demonstrated that Bronson's incompetence to proceed was the result of organic brain damage, not mental illness, and by its express language, section 916.13(1) was only applicable to defendants suffering from mental illness.

On July 13, 2011, the trial court entered an order granting DCF's motion to intervene and vacating its June 24, 2011 order.

On August 2, 2011, the trial court entered an order for involuntary examination pursuant to section 394.463.[1] In

---

[1] Section 394.463 authorizes a trial court to enter an ex parte order for the involuntary examination of an individual where there is reason to believe, based on sworn testimony, that the individual **[**6]** has a mental illness and because of his or her mental illness:

> (a)1. The person has refused voluntary examination after conscientious explanation and disclosure of the purpose

compliance with the court order, Dr. Speiser of Park Place Behavioral Health Care conducted a psychiatric evaluation of Bronson. Dr. Speiser then prepared a report in which he concluded that Bronson did not meet the criteria for inpatient psychiatric hospitalization and instead recommended that Bronson "continue in treatment in the Department of Corrections with eventual nursing home placement due to his medical problems."

On September 26, 2011, Bronson moved to dismiss his criminal charge (without prejudice) due to his incompetence. The State filed a written response arguing that dismissal would be improper and suggested that Bronson met the criteria for civil commitment under section 394.467(1).

On October 6, 2011, DCF filed a written response to the State's request **[**7]** to civilly commit Bronson in which it argued that Bronson did not meet the criteria for involuntary placement under section 394.467(1) because: (1) he was not "mentally ill"; and (2) there were less restrictive treatment alternatives to provide for his care, i.e., proper placement in a nursing home. More importantly, DCF observed the lack of compliance with the procedural requirements set forth in section 394.467.

Notwithstanding DCF's objection, on October 10, 2011, the trial court entered an order involuntarily committing Bronson to DCF's custody.

Certiorari jurisdiction lies to review DCF's claim that the trial court acted in excess of its jurisdiction by ordering DCF to undertake responsibility beyond what is required by statute. *See* Dep't of Children & Family Servs. v. Amaya, 10 So. 3d 152, 154 **[*202]** (Fla. 4th DCA 2009); *Wehrwein*. We conclude that the trial court's order constituted a departure from the essential requirements of law. As DCF contends, and as the State and Bronson concede, the trial court did not follow the multi-step process established in section 394.467. The procedural deficiencies included, but were not limited to:

1. The lack of a petition for involuntary inpatient **[**8]** placement;

2. The lack of any showing that a psychiatrist had examined Bronson within the preceding 72 hours and found that the criteria for involuntary inpatient placement had been met; and

3. The lack of an evidentiary hearing. Furthermore, given the lack of an evidentiary hearing, it is clear that the trial court's October 10, 2011 order involuntarily committing Bronson to DCF's custody was not supported by clear and convincing evidence.

PETITION FOR WRIT OF CERTIORARI GRANTED; ORDER QUASHED.

LAWSON and JACOBUS, JJ., concur.

End of Document

---

of the examination; or

2. The person is unable to determine for himself or herself whether examination is necessary; and

(b)1. Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; or

2. There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.

Appendix 50.

Peachtree Cas. Ins. Co. v. Prof'l Massage Servs.

Court of Appeal of Florida, First District

March 7, 2006, Opinion Filed

CASE NO. 1D05-2145

Reporter
923 So. 2d 548 *; 2006 Fla. App. LEXIS 3210 **; 31 Fla. L. Weekly D 708

PEACHTREE CASUALTY INSURANCE COMPANY, Petitioner, v. PROFESSIONAL MASSAGE SERVICES, INC., AS ASSIGNEE OF LISA CLIETT, Respondent.

Subsequent History: [1]** Released for Publication March 23, 2006.

Core Terms

billed, insurer, essential requirement, legislative intent, county court, provider, services, summary judgment, charges, days

Case Summary

Procedural Posture

Petitioner insurer brought a petition against respondent healthcare provider, seeking certiorari review of a circuit court ruling which affirmed a county court's summary judgment. The county court had ruled in favor of the healthcare provider in its claims seeking payment pursuant to former Fla. Stat. § 627.736(5)(b) (1998) for treatment rendered to the insurer's insured.

Overview

The insured patient was covered by a policy issued by the insurer. When the patient sought treatment, she incorrectly gave the name of a different insurance company to the healthcare provider. The healthcare provider timely billed that other insurance company, instead of the insurer, for the services. When the healthcare provider discovered the error, and billed the insurer, the insurer denied the claims as untimely. The lower courts found that allowing the healthcare provider to recover did not frustrate the legislature's purpose behind former Fla. Stat. § 627.736(5)(b) (1998), was consistent with a 2001 amendment to that statute, and was equitable. In ruling on the certiorari petition, the court found that § 627.736(5)(b) (1998) required claims to be billed to the insurer, and it was improper for the circuit court to apply the exception to the claims initially submitted to the wrong insurance company. The circuit court also departed from the essential requirements of law by affirming the county court's consideration of the 2001 amendment. Former Fla. Stat. § 627.736(5)(b) (1998) was unambiguous, so the lower courts were without power to diverge from its plain language.

Outcome

The petition for writ of certiorari was granted, the circuit court's order was quashed, and the case was remanded for further proceedings.

LexisNexis® Headnotes

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN1 See former Fla. Stat. § 627.736(5)(b) (1998).

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Standards of Review > General Overview

HN2 Second tier certiorari review is limited to situations where a lower court's decision is a (1) violation of procedural due process, or (2) departure from the essential requirements of law. A "departure from the essential requirements of law" occurs when a lower court fails to fulfill its constitutional duty to apply a correct principle of law to admitted facts.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN3 Former Fla. Stat. § 627.736(5)(b) (1998) provides

that an insurer is not responsible for paying bills submitted more than 30 days after a medical service was rendered except for past due amounts previously billed on a timely basis under that paragraph. Former Fla. Stat. § 627.736(5)(b) (1998) requires claims to be billed to "the insurer."

Governments > Legislation > Effect & Operation > Amendments

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN4 The 2001 amendment to former Fla. Stat. § 627.736(5)(b) (1998) is not applicable to claims for payment of services rendered before October 1, 2001. 2001 Fla. Laws 271, § 11(3).

Governments > Legislation > Interpretation

HN5 Where the wording of a law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the legislature as expressed in the plain language of the law.

Governments > Legislation > Effect & Operation > Amendments

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN6 See 2001 Fla. Laws 271, § 11(3).

Governments > Legislation > Interpretation

HN7 The legislature is presumed to be aware of prior existing laws and the construction placed upon them.

Counsel: R. Steven Ruta, Esquire, of Barrett, Chapman & Ruta, P.A., Orlando, for Petitioner.

Rebecca Bowen Creed, Esquire, and John S. Mills, Esquire, of Mills & Carlin, P.A., Jacksonville, for Respondent.

Judges: HAWKES, J. POLSTON, J., CONCURS; BENTON, J., DISSENTS WITH WRITTEN OPINION.

Opinion by: HAWKES

Opinion

[*549] Petition for Writ of Certiorari -- Original Jurisdiction.

HAWKES, J.

Peachtree petitions for second-tier certiorari review. As grounds, Peachtree contends the circuit court departed from the essential requirements of law by affirming the county court's summary judgment. We agree and grant the writ.

Facts and Procedural History

After sustaining injuries in an automobile accident, Lisa Cliett received treatment from Professional Massage. The parties stipulated that (1) her treatment was reasonable and related to the accident, and (2) the charges were reasonable. Cliett initially told Professional Massage she was insured by Dairyland (her former insurer), but she was actually insured by Peachtree. Based on this erroneous information, Professional Massage timely billed *Dairyland* **[**2]** - instead of *Peachtree* - for Cliett's services.

When Dairyland denied the claims, Professional Massage discovered Peachtree's identity and billed them for Cliett's services. However, Peachtree denied the claims, because they were not submitted within 30 days from the dates of the services as required by section 627.736(5)(b), Florida Statutes (1998). [1] In response, **[*550]** Professional Massage filed suit in county court arguing Peachtree was responsible for paying the claims under section 627.736(5)(b) (1998), because the claims were "previously billed [to *Dairyland*] on a timely basis."

[3]** Both parties subsequently filed motions for summary judgment on the issue of whether Peachtree properly denied Professional Massage's claims under section 627.736(5)(b)(1998). The county court ruled in favor of Professional Massage finding that allowing them to recover: (1) did not frustrate the Legislature's purpose behind the provision, (2) was consistent with the Legislature's 2001 amendment to the statute, [2] and

---

[1] This statute provided in pertinent part: ***HN1*** "With respect to any treatment or service, . . . the statement of charges must be furnished to the insurer by the provider and may not include, and the insurer is not required to pay, charges for treatments or services rendered more than 30 days before the postmark date of the statement, except for past due amounts previously billed on a timely basis under this paragraph."

[2] The 2001 amendment renumbered section 627.736(5)(b) (1998) to section 627.736(5)(c) and provided an exception to the 30-day billing requirement directly addressing the situation

(3) was equitable.

Peachtree appealed this ruling to the Fourth Circuit arguing the Legislature's intent should never have been examined because the statute was not ambiguous. The Fourth Circuit affirmed the county court's summary judgment, holding the exception **[**4]** for "past due amounts previously billed on a timely basis" was ambiguous as to whether it applied only to charges previously billed to the *same insurer* - or - whether it also applied to charges previously billed to the *wrong insurer*.

Certiorari Review

HN2 Second tier certiorari review is limited to situations where a lower court's decision is a (1) violation of procedural due process, or (2) departure from the essential requirements of law. *See* Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003). A "departure from the essential requirements of law" occurs when a lower court fails to fulfill its constitutional duty to apply a correct principle of law to admitted facts. *See* Kaklamanos v. Allstate Ins. Co., 796 So. 2d 555, 557 (Fla. 1st DCA 2001), *approved by* Allstate, 843 So. 2d 885.

***Section 627.736(5)(b)*(1998) is Unambiguous**

HN3 Section 627.736(5)(b)(1998) provides that an insurer is not responsible for paying bills submitted more than 30 days after a medical service was rendered "except for past due amounts previously billed on a timely basis *under this paragraph*." (emphasis added). "This **[**5]** paragraph" (i.e., subsection (5)(b)) requires claims to be billed to "the insurer." Here, it is undisputed that *Peachtree* was "the insurer" - not *Dairyland*. Thus, it was a departure from the essential requirements of law for the circuit court to apply the exception to the claims originally submitted to *Dairyland*.

The 2001 Amendment to Section 627.736(5)(b)(1998) is Irrelevant

It is not clear in the summary judgment whether the county court was actually applying the 2001 amendment to Professional Massage's claims, or merely referencing it to discern the Legislature's intent behind the 1998 version of the statute. Either way, the circuit court departed from the essential requirements of law by affirming the county court's consideration of the amendment.

If the county court was actually applying the amendment to Professional Massage's **[*551]** claims, this would be a failure to apply the correct law, because ***HN4*** the amendment is not applicable to claims for payment of services rendered before October 1, 2001. *See* Ch. 2001-271, § 11(3), Laws of Fla. [3] If, on the other hand, the county court was merely referencing the amendment to discern legislative intent, this would **[**6]** be a failure to apply the well-settled law requiring courts to refrain from looking to the legislative intent when a statute is clear and unambiguous. *See, e.g.,* ***HN5*** Warren v. State Farm Mutual Ins. Auto. Ins. Co., 899 So. 2d 1090, 1095 (Fla. 2005)("'Where the wording of the Law is clear and amenable to a logical and reasonable interpretation, a court is without power to diverge from the intent of the Legislature as expressed in the plain language of the Law.'")(quoting United Auto. Ins. Co. v. Rodriguez, 808 So. 2d 82, 85 (Fla. 2001)).

Even if it was proper to consider the legislative intent, the 2001 amendment actually supports *Petitioner's* position, because the Legislature would not **[**7]** have amended the statute in 2001 to incorporate a new exception for claims billed to the *wrong* insurer, if the 1998 exception already stood for that proposition. *See* ***HN7*** Dep't of Mgmt. Servs. v. Cason ex. rel. Columbia County, 909 So. 2d 378 (Fla. 1st DCA 2005)("The legislature is presumed to be aware of prior existing laws and the construction placed upon them....").

Conclusion

By erroneously affirming the county court's summary judgment in favor of Professional Massage, the circuit court departed from the essential requirements of law. We GRANT the petition for writ of certiorari, QUASH the circuit court's order, and REMAND for proceedings consistent with this opinion.

POLSTON, J., CONCURS; BENTON, J., DISSENTS WITH WRITTEN OPINION.

Dissent by: BENTON

---

at bar. The exception allows medical providers 35 additional days to submit a claim when they are furnished incorrect insurance information by a patient.

[3] This section of Florida's 2001 No-Fault Act provides in pertinent part that ***HN6*** "[p]aragraphs . . . (5)(b) and (c) . . . of section 627.736, Florida Statutes as amended by this act . . . shall apply to treatment and services occurring on or after October 1, 2001. . . ."

Dissent

BENTON, J., dissenting.

The petition for writ of certiorari should be denied because no legal error below, if indeed there was any, was "'sufficiently egregious or fundamental' to fall within the limited scope," *Kaklamanos, 843 So. 2d at 890* (quoting *Kaklamanos v. Allstate Ins. Co., 796 So. 2d 555, 557-58 (Fla. 1st DCA 2001)*), of our certiorari jurisdiction. The **[**8]** view (shared by both the circuit and the county court) that the Legislature did not intend (even before chapter 2001-271, § 11(3), Laws of Fla., removed all doubt) to extinguish the medical provider's rights on account of a patient's error cannot fairly be said to violate "a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 889 (Fla. 2003)*.

It has, indeed, been suggested that "if a medical provider alleged . . . noncompliance with the statute [failure to submit bills within 30 days] due to patient malfeasance or error, . . . the statute [before chapter 2001-271, § 11(3), Laws of Fla., amended it] would result in an unconstitutional denial of access to the courts as applied." *Warren v. State Farm Mut. Auto. Ins. Co., 899 So. 2d 1090, 1098 (Fla. 2005)*(Pariente, C.J., specially concurring).

The lower courts have proceeded here in keeping with the teaching that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of **[*552]** which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S. Ct. 527, 53 L. Ed. 836 (1909)*. **[**9]**

Denying the petition would obviate the need to decide substantial constitutional questions raised in the answer brief, questions which today's decision resolves against the respondent without any discussion. See *Dade County Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 644 (Fla. 1999)*(holding that "if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support the judgment in the record").

I respectfully dissent.

End of Document

Appendix 51.

Questioned
As of: January 11, 2017 5:42 PM EST

Bd. of County Comm'Rs v. Snyder

Supreme Court of Florida

October 7, 1993, Decided

No. 79,720

Reporter
627 So. 2d 469 *; 1993 Fla. LEXIS 1628 **; 18 Fla. L. Weekly S 522

BOARD OF COUNTY COMMISSIONERS OF BREVARD COUNTY, FLORIDA, Petitioner, v. JACK R. SNYDER, et ux., Respondents.

Subsequent History: [**1] As Revised December 23, 1993. Petition for Rehearing Denied December 23, 1993. Released for Publication January 18, 1994.

Prior History: Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Fifth District - Case No. 90-1214.

Orginial Opinion of March 20, 1992, Reported at: *1992 Fla. App. LEXIS 12297*.

Core Terms

zoning, rezoning, comprehensive plan, land use, quasi-judicial, local government, zoning classification, debatable, decisions, landowner, rezoning application, board's action, ordinance, county commissioners, judicial review, strict scrutiny, local plan, requirements, intensities, regulation, reasons, orders

Case Summary

Procedural Posture
Petitioner filed an application for review of a decision of the Fifth District Court of Appeal (Florida) which ruled, in apparent conflict with another appellate court, that petitioner's denial of respondents request for a zoning change, which was based on petitioner's comprehensive plan, was arbitrary and unreasonable.

Overview
The court granted review of an appellate court decision relating to a zoning matter because it conflicted with another appellate decision. Respondent landowners owned a one-half acre parcel of property that was zoned for general use. The zoning classification allowed for the construction of a single-family residence. Respondents filed an application to rezone their property, which was denied by petitioner county commission. The appellate court granted relief to respondents and held that petitioner's denial was arbitrary and capricious. The court quashed the decision of the appellate court and held that, because petitioner's action on respondents' application was quasi-judicial, the practical effect was to review the case by strict scrutiny in the sense of strict compliance with the comprehensive zoning plan. Applying that principle, the court opined that respondents were charged with the burden of proving that their proposal was consistent with the comprehensive plan. Then the burden shifted to petitioner to show that maintaining the existing zoning plan accomplished a legitimate public purpose. Because the appellate court did not follow this rationale, its judgment was quashed.

Outcome
The judgment of the appellate court, which found that petitioner's denial of respondents' request for a zoning change was arbitrarily and unreasonably denied, was quashed because the appellate court did not follow the appropriate burden-shifting rationale in place for challenges to a local government's comprehensive plan.

LexisNexis® Headnotes

Governments > Local Governments > Finance

Real Property Law > Water Rights > Nonconsumptive Uses > General Overview

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Growth Control

Transportation Law > Public Transportation

HN1 Pursuant to the Growth Management Act, Fla. Stat. ch. 85-55, each county and municipality is required to prepare a comprehensive plan for approval by the Department of Community Affairs. The adopted local plan must include principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the local government's jurisdictional area. At a minimum, the local plan must include elements covering future land use; capital improvements generally; sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer protection specifically; conservation; recreation and open space; housing; traffic circulation; intergovernmental coordination; coastal management (for local government in the coastal zone), and mass transit (for local jurisdictions with 50,000 or more people).

Real Property Law > Zoning > General Overview

HN2 See *Fla. Stat. ch. 163.3194(3)* (1991).

Real Property Law > Zoning > General Overview

HN3 See *Fla. Stat. ch. 163.3164* (1991).

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General Plans

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN4 Because an order granting or denying rezoning constitutes a development order, and development orders must be consistent with the comprehensive plan, it is clear that orders on rezoning applications must be consistent with the comprehensive plan.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Governments > Local Governments > Administrative Boards

HN5 A board's legislative action is subject to attack in circuit court. However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions are sustained as long as they are fairly debatable. On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari and are upheld only if they are supported by substantial competent evidence.

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN6 Enactments of original zoning ordinances are considered legislative.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN7 It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.

Administrative Law > Agency Adjudication > Hearings > General Overview

HN8 A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing, and consideration of evidence to be adduced as a basis for the making thereof.

Real Property Law > Zoning > Judicial Review

HN9 Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of quasi-judicial action.

Environmental Law > Land Use & Zoning > Constitutional Limits

Business & Corporate Compliance > ... > Real Property

Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Real Property Law > Zoning > Judicial Review

HN10 In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions. The term as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases.

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN11 A comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.

Business & Corporate Compliance > ... > Environmental Law > Land Use & Zoning > Comprehensive & General Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Real Property Law > Zoning > Judicial Review

HN12 Absent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The right of judicial review does not ipso facto ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed. Moreover, when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the status quo is no longer reasonable. It is not enough simply to be "consistent"; the proposed change cannot be inconsistent, and will be subject to "strict scrutiny" to insure this does not happen.

Counsel: Robert D. Guthrie, County Attorney and Eden Bentley, Assistant County Attorney, Melbourne, Florida, for Petitioner.

Frank J. Griffith, Jr. of Cianfrogna, Telfer, Reda & Faherty, P.A., Titusville, Florida, for Respondents.

Denis Dean and Jonathan A. Glogau, Assistant Attorneys General, Tallahassee, Florida, Amicus Curiae for The Attorney General, State of Florida.

Nancy Stuparich, Assistant General Counsel and Jane C. Hayman, Deputy General Counsel, Tallahassee, Florida, Amicus Curiae for Florida League of Cities, Inc..

Paul R. Gougelman, III and Maureen M.Matheson of Reinman, Harrell, Graham, Mitchell & Wattwood, P.A., Melbourne, Florida, Amicus Curiae for Space Coast League of Cities, Inc., City of Melbourne, and Town of Indialantic.

Richard E. Gentry, Florida Home Builders Association, Tallahassee, Florida; and Robert M. Rhodes and Cathy M. Sellers of Steel, Hector and Davis, Tallahassee, Florida, Amicus Curiae for Florida Home **[**2]** Builders Association.

David La Croix of Pennington, Wilkinson & Dunlap, P.A., Tallahassee, Florida; and William J. Roberts of Roberts and Eagan, P.A., Tallahassee, Florida, Amicus Curiae for Florida Association of Counties.

David J. Russ and Karen Brodeen, Assistant General Counsels, Tallahassee, Florida, Amicus Curiae for Florida Department of Community Affairs.

Richard Grosso, Legal Director, 1000 Friends of Florida, Tallahassee, Florida; and C. Allen Watts of Cobb, Cole and Bell, Daytona Beach, Florida, Amicus Curiae for 1000 Friends of Florida.

Neal D. Bowen, County Attorney, Kissimmee, Florida, Amicus Curiae for Osceola County.

M. Stephen Turner and David K. Miller of Broad and Cassel, Tallahassee, Florida, Amicus Curiae for Monticello Drug Company.

John J. Copelan, Jr., County Attorney and Barbara S. Monahan, Assistant County Attorney for Broward County, Fort Lauderdale, Florida; and Emeline Acton, County Attorney for Hillsborough County, Tampa, Florida, Amici Curiae for Broward County, Hillsborough County, and Florida Association of County Attorneys,

Inc..

Thomas G. Pelham of Holland & Knight, Tallahassee, Florida, Amicus Curiae for Thomas G. Pelham, pro se.

Judges: GRIMES, **[**3]** BARKETT, OVERTON, McDONALD, KOGAN, HARDING, SHAW

Opinion by: GRIMES

Opinion

[*470] The Motion for Rehearing filed by Petitioner, having been considered in light of the revised opinion, is hereby denied.

GRIMES, J.

We review *Snyder v. Board of County Commissioners, 595 So. 2d 65 (Fla. 5th DCA 1991)*, because of its conflict with *Schauer v. City of Miami Beach, 112 So. 2d 838 (Fla. 1959)*; *City of Jacksonville Beach v. Grubbs, 461 So. 2d 160 (Fla. 1st DCA 1984)*, *review denied*, *469 So. 2d 749 (Fla. 1985)*; and *Palm Beach County v. Tinnerman, 517 So. 2d 699 (Fla. 4th DCA 1987)*, *review denied*, **[*471]** *528 So. 2d 1183 (Fla. 1988)*. We have jurisdiction under *article V, section 3(b)(3) of the Florida Constitution.* Jack and Gail Snyder owned a one-half acre parcel of property on Merritt Island in the unincorporated area of Brevard County. The property is zoned GU (general use) which allows construction of a single-family residence. The Snyders filed an application to rezone their property to the RU-2-15 zoning classification which allows the **[**4]** construction of fifteen units per acre. The area is designated for residential use under the 1988 Brevard County Comprehensive Plan Future Land Use Map. Twenty-nine zoning classifications are considered potentially consistent with this land use designation, including both the GU and the RU-2-15 classifications.

After the application for rezoning was filed, the Brevard County Planning and Zoning staff reviewed the application and completed the county's standard "rezoning review worksheet." The worksheet indicated that the proposed multifamily use of the Snyders' property was consistent with all aspects of the comprehensive plan except for the fact that it was located in the one-hundred-year flood plain in which a maximum of only two units per acre was permitted. For this reason, the staff recommended that the request be denied.

At the planning and zoning board meeting, the county planning and zoning director indicated that when the property was developed the land elevation would be raised to the point where the one-hundred-year-flood plain restriction would no longer be applicable. Thus, the director stated that the staff no longer opposed the application. The planning and zoning board **[**5]** voted to approve the Snyders' rezoning request.

When the matter came before the board of county commissioners, Snyder stated that he intended to build only five or six units on the property. However, a number of citizens spoke in opposition to the rezoning request. Their primary concern was the increase in traffic which would be caused by the development. Ultimately, the commission voted to deny the rezoning request without stating a reason for the denial.

The Snyders filed a petition for certiorari in the circuit court. Three circuit judges, sitting en banc, reviewed the petition and denied it by a two-to-one decision. The Snyders then filed a petition for certiorari in the Fifth District Court of Appeal.

The district court of appeal acknowledged that zoning decisions have traditionally been considered legislative in nature. Therefore, courts were required to uphold them if they could be justified as being "fairly debatable." Drawing heavily on *Fasano v. Board of County Commissioners, 264 Ore. 574, 507 P.2d 23 (Or. 1973)*, however, the court concluded that, unlike initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the **[**6]** public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial in nature. Under the latter circumstances, the court reasoned that a stricter standard of judicial review of the rezoning decision was required. The court went on to hold:

> (4) Since a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to close judicial scrutiny. Effective judicial review, constitutional due process and other essential requirements of law, all necessitate that the governmental agency (by whatever name it may be characterized) applying legislated land use restrictions to particular parcels of privately owned lands, must state reasons for action that denies the owner the use of his land and must make findings of fact and a record of its proceedings, sufficient for judicial review of: the legal sufficiency of the

evidence to support the findings of fact made, the legal sufficiency of the findings of fact supporting the reasons given and the legal adequacy, under applicable law (*i.e.*, under general comprehensive **[**7]** zoning ordinances, applicable state and case law and state and federal constitutional provisions) of the reasons given for the result of the action taken.

(5) The initial burden is upon the landowner to demonstrate that his petition or application for use of privately owned **[*472]** lands, (rezoning, special exception, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the ordinance and that the use sought is consistent with the applicable comprehensive zoning plan. Upon such a showing the landowner is presumptively entitled to use his property in the manner he seeks unless the opposing governmental agency asserts and proves by clear and convincing evidence that a specifically stated public necessity requires a specified, more restrictive, use. After such a showing the burden shifts to the landowner to assert and prove that such specified more restrictive land use constitutes a taking of his property for public use for which he is entitled to compensation under the taking provisions of the state or federal constitutions.

Snyder v. Board of County Commissioners, 595 So. 2d at 81 (footnotes omitted).

[8]** Applying these principles to the facts of the case, the court found (1) that the Snyders' petition for rezoning was consistent with the comprehensive plan; (2) that there was no assertion or evidence that a more restrictive zoning classification was necessary to protect the health, safety, morals, or welfare of the general public; and (3) that the denial of the requested zoning classification without reasons supported by facts was, as a matter of law, arbitrary and unreasonable. The court granted the petition for certiorari.

Before this Court, the county contends that the standard of review for the county's denial of the Snyders' rezoning application is whether or not the decision was fairly debatable. The county further argues that the opinion below eliminates a local government's ability to operate in a legislative context and impairs its ability to respond to public comment. The county refers to *Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), review denied, 598 So. 2d 75 (Fla. 1992)*, for the proposition that if its rezoning decision is quasi-judicial, the commissioners will be prohibited from obtaining community **[**9]** input by way of ex parte communications from its citizens. In addition, the county suggests that the requirement to make findings in support of its rezoning decision will place an insurmountable burden on the zoning authorities. The county also asserts that the salutary purpose of the comprehensive plan to provide controlled growth will be thwarted by the court's ruling that the maximum use permitted by the plan must be approved once the rezoning application is determined to be consistent with it.

The Snyders respond that the decision below should be upheld in all of its major premises. They argue that the rationale for the early decisions that rezonings are legislative in nature has been changed by the enactment of the Growth Management Act. Thus, in order to ensure that local governments follow the principles enunciated in their comprehensive plans, it is necessary for the courts to exercise stricter scrutiny than would be provided under the fairly debatable rule. The Snyders contend that their rezoning application was consistent with the comprehensive plan. Because there are no findings of fact or reasons given for the denial by the board of county commissioners, there is no basis **[**10]** upon which the denial could be upheld. Various amici curiae have also submitted briefs in support of their several positions.

Historically, local governments have exercised the zoning power pursuant to a broad delegation of state legislative power subject only to constitutional limitations. Both federal and state courts adopted a highly deferential standard of judicial review early in the history of local zoning. In *Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926)*, the United States Supreme Court held that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *272 U.S. at 388*. This Court expressly adopted the fairly debatable principle in *City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364 (1941)*.

Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner. Many land use experts and practitioners **[**11]** have been critical of the local zoning system. Richard Babcock deplored the effect of "neighborhoodism" and **[*473]** rank political influence on the local decision-making process. Richard F. Babcock, *The Zoning Game* (1966).

Mandelker and Tarlock recently stated that "zoning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits." Daniel R. Mandelker and A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law. 1, 2 (1992).

Professor Charles Harr, a leading proponent of zoning reform, was an early advocate of requiring that local land use regulation be consistent with a legally binding comprehensive plan which would serve long range goals, counteract local pressures for preferential treatment, and provide courts with a meaningful standard of review. Charles M. Harr, "*In Accordance With A Comprehensive Plan*," 68 Harv. L. Rev. 1154 (1955). In 1975, the American Law Institute adopted the Model Land Development Code, which provided for procedural and planning reforms at the local level and increased state participation **[**12]** in land use decision-making for developments of regional impact and areas of critical state concern.

Reacting to the increasing calls for reform, numerous states have adopted legislation to change the local land use decision-making process. As one of the leaders of this national reform, Florida adopted the Local Government Comprehensive Planning Act of 1975. Ch. 75-257, Laws of Fla. This law was substantially strengthened in 1985 by the Growth Management Act. Ch. 85-55, Laws of Fla.

HN1 Pursuant to the Growth Management Act, each county and municipality is required to prepare a comprehensive plan for approval by the Department of Community Affairs. The adopted local plan must include "principles, guidelines, and standards for the orderly and balanced future economic, social, physical, environmental, and fiscal development" of the local government's jurisdictional area. *§ 163.3177(1), Fla. Stat.* (1991). At the minimum, the local plan must include elements covering future land use; capital improvements generally; sanitary sewer, solid waste, drainage, potable water, and natural ground water aquifer protection specifically; conservation; recreation and open space; housing; traffic circulation; **[**13]** intergovernmental coordination; coastal management (for local government in the coastal zone); and mass transit (for local jurisdictions with 50,000 or more people). *Id. § 163.3177(6).*

Of special relevance to local rezoning actions, the future land use plan element of the local plan must contain both a future land use map and goals, policies, and measurable objectives to guide future land use decisions. This plan element must designate the "proposed future general distribution, location, and extent of the uses of land" for various purposes. *Id. § 163.3177(6)(a).* It must include standards to be utilized in the control and distribution of densities and intensities of development. In addition, the future land use plan must be based on adequate data and analysis concerning the local jurisdiction, including the projected population, the amount of land needed to accommodate the estimated population, the availability of public services and facilities, and the character of undeveloped land. *Id. § 163.3177(6)(a).*

The local plan must be implemented through the adoption of land development regulations that are consistent with the plan. *Id.* § 163.3202. In addition, all development, **[**14]** both public and private, and all development orders approved by local governments must be consistent with the adopted local plan. *Id. § 163.3194(1)(a).* ***HN2*** *Section 163.3194(3), Florida Statutes* (1991), explains consistency as follows:

> (a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

HN3 *Section 163.3164, Florida Statutes* (1991), reads in pertinent part:

> (6) "Development order" means any order granting, denying, or granting with conditions an application for a development permit.
>
> **[*474]** (7) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.

HN4 Because an order granting or denying rezoning constitutes a development order and development **[**15]** orders must be consistent with the comprehensive plan, it is clear that orders on rezoning applications must be consistent with the comprehensive plan.

The first issue we must decide is whether the Board's action on Snyder's rezoning application was legislative or quasi-judicial. ***HN5*** A board's legislative action is subject to attack in circuit court. *Hirt v. Polk County Bd. of County Comm'rs, 578 So. 2d 415 (Fla. 2d DCA 1991)*. However, in deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. *Nance v. Town of Indialantic, 419 So. 2d 1041 (Fla. 1982)*. On the other hand, the rulings of a board acting in its quasi-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence. *De Groot v. Sheffield, 95 So. 2d 912 (Fla. 1957)*.

HN6 Enactments of original zoning ordinances have always been considered legislative. *Gulf & Eastern Dev. Corp. v. City of Fort Lauderdale, 354 So. 2d 57 (Fla. 1978)*; *County of Pasco v. J. Dico, Inc., 343 So. 2d 83 (Fla. 2d DCA 1977)*. **[**16]** In *Schauer v. City of Miami Beach*, this Court held that the passage of an amending zoning ordinance was the exercise of a legislative function. *112 So. 2d at 839*. However, the amendment in that case was comprehensive in nature in that it effected a change in the zoning of a large area so as to permit it to be used as locations for multiple family buildings and hotels. *Id.* In *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman*, the district courts of appeal went further and held that board action on specific rezoning applications of individual property owners was also legislative. *Grubbs, 461 So. 2d at 163*; *Tinnerman, 517 So. 2d at 700*.

HN7 It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. *Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648 (Fla. 3d DCA 1982)*. Generally speaking, legislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy. Carl J. Peckingpaugh, Jr., Comment, **[**17]** *Burden of Proof in Land Use Regulations: A Unified Approach and Application to Florida*, 8 Fla. St. U. L. Rev. 499, 504 (1980). In *West Flagler Amusement Co. v. State Racing Commission, 122 Fla. 222, 225, 165 So. 64, 65 (1935)*, we explained: ***HN8***

> A judicial or quasi-judicial act determines the rules of law applicable, and the rights affected by them, in relation to past transactions. On the other hand, a quasi-legislative or administrative order prescribes what the rule or requirement of administratively determined duty shall be with respect to transactions to be executed in the future, in order that same shall be considered lawful. But even so, quasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof.

Applying this criterion, it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature. **[**18]** However, we agree with the court below when it said:

> ***HN9*** Rezoning actions which have an impact on a limited number of persons or property owners, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting, are in the nature of . . . quasi-judicial action . . . .

Snyder, 595 So. 2d at 78. Therefore, the board's action on Snyder's application was in the nature of a quasi-judicial proceeding and **[*475]** properly reviewable by petition for certiorari. [1]

[19]** We also agree with the court below that the review is subject to strict scrutiny. ***HN10*** In practical effect, the review by strict scrutiny in zoning cases appears to be the same as that given in the review of other quasi-judicial decisions. *See Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996 (Fla. 2d DCA 1993)* (The term "strict scrutiny" arises from the necessity of strict compliance with comprehensive plan.). This term as used in the review of land use decisions must be distinguished from the type of strict scrutiny review afforded in some constitutional cases. *Compare Snyder v. Board of County Comm'rs, 595 So. 2d 65, 75-76 (Fla. 5th DCA 1991)* (land use), *and Machado v. Musgrove, 519 So. 2d 629, 632 (Fla. 3d DCA 1987), review denied, 529 So. 2d 693 (Fla. 1988)*, and *review denied, 529 So. 2d 694*

---

[1] One or more of the amicus briefs suggests that Snyder's remedy was to bring a de novo action in circuit court pursuant to *section 163.3215, Florida Statutes* (1991). However, in *Parker v. Leon County*, Nos. 80,230 and 80,288, *627 So.2d 476* (Fla. Oct. 7, 1993), we explained that this statute only provides a remedy for third parties to challenge the consistency of development orders.

(Fla. 1988) (land use), with In re Estate of Greenberg, 390 So. 2d 40, 42-43 (Fla. 1980) (general discussion of strict scrutiny review in context of fundamental rights), appeal dismissed, [**20] 450 U.S. 961, 101 S. Ct. 1475, 67 L. Ed. 2d 610 (1981), Florida High Sch. Activities Ass'n v. Thomas, 434 So. 2d 306 (Fla. 1983) (equal protection), and Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459 (Fla. 1992) (First Amendment).

At this point, we depart from the rationale of the court below. In the first place, the opinion overlooks the premise that the comprehensive plan is intended to provide for the *future* use of land, which contemplates a gradual and ordered growth. See City of Jacksonville Beach, 461 So. 2d at 163, in which the following statement from Marracci v. City of Scappoose, 26 Ore. App. 131, 552 P.2d 552, 553 (Or. Ct. App. 1976), was approved:

> **HN11** [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the [**21] comprehensive plan.

Even where a denial of a zoning application would be inconsistent with the plan, the local government should have the discretion to decide that the maximum development density should not be allowed provided the governmental body approves some development that is consistent with the plan and the government's decision is supported by substantial, competent evidence.

Further, we cannot accept the proposition that once the landowner demonstrates that the proposed use is consistent with the comprehensive plan, he is presumptively entitled to this use unless the opposing governmental agency proves by clear and convincing evidence that specifically stated public necessity requires a more restricted use. We do not believe that a property owner is necessarily entitled to relief by proving consistency when the board action is also consistent with the plan. As noted in *Lee County v. Sunbelt Equities II, Limited Partnership*:

> **HN12** Absent the assertion of some enforceable property right, an application for rezoning appeals at least in part to local officials' discretion to accept or reject the applicant's argument that change is desirable. The *right* of judicial review [**22] does not *ipso facto* ease the burden on a party seeking to overturn a decision made by a local government, and certainly does not confer any property-based right upon the owner where none previously existed.
>
> . . . .
>
> Moreover, when it is the zoning classification that is challenged, the comprehensive plan is relevant only when the suggested use is inconsistent with that plan. Where any of several zoning classifications is consistent with the plan, the applicant seeking a change from one to the other is not entitled to judicial relief absent proof the *status quo* is no longer reasonable. It is not enough simply to be "consistent"; the proposed change cannot be *inconsistent*, and will be subject to the "strict [*476] scrutiny" of *Machado* to insure this does not happen.

619 So. 2d at 1005-06.

This raises a question of whether the Growth Management Act provides any comfort to the landowner when the denial of the rezoning request is consistent with the comprehensive plan. It could be argued that the only recourse is to pursue the traditional remedy of attempting to prove that the denial of the application was arbitrary, discriminatory, or [**23] unreasonable. Burritt v. Harris, 172 So. 2d 820 (Fla. 1965); City of Naples v. Central Plaza of Naples, Inc., 303 So. 2d 423 (Fla. 2d DCA 1974). Yet, the fact that a proposed use is consistent with the plan means that the planners contemplated that that use would be acceptable at some point in the future. We do not believe the Growth Management Act was intended to preclude development but only to insure that it proceed in an orderly manner.

Upon consideration, we hold that a landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. At this point, the burden shifts to the governmental board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose. In effect, the landowners' traditional remedies will be subsumed within this rule, and the board will now have the burden of showing that the refusal to rezone the property is not arbitrary, discriminatory, or unreasonable. If the board carries its burden, the application [**24] should be denied.

While they may be useful, the board will not be required to make findings of fact. However, in order to sustain the board's action, upon review by certiorari in the circuit court it must be shown that there was competent substantial evidence presented to the board to support its ruling. Further review in the district court of appeal will continue to be governed by the principles of *City of Deerfield Beach v. Vaillant, 419 So. 2d 624 (Fla. 1982)*.

Based on the foregoing, we quash the decision below and disapprove *City of Jacksonville Beach v. Grubbs* and *Palm Beach County v. Tinnerman*, to the extent they are inconsistent with this opinion. However, in the posture of this case, we are reluctant to preclude the Snyders from any avenue of relief. Because of the possibility that conditions have changed during the extended lapse of time since their original application was filed, we believe that justice would be best served by permitting them to file a new application for rezoning of the property. The application will be without prejudice of the result reached by this decision and will allow the process to begin anew according to the **[**25]** procedure outlined in our opinion.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, KOGAN and HARDING, JJ., concur.

SHAW, J., dissents.

End of Document

Appendix 52.

Pollard v. Palm Beach County

Court of Appeal of Florida, Fourth District

May 9, 1990, Filed

Case No. 88-1827

Reporter
560 So. 2d 1358 *; 1990 Fla. App. LEXIS 3179 **; 15 Fla. L. Weekly D 1272

PATRICIA POLLARD, Petitioner, v. PALM BEACH COUNTY, a political subdivision of the State of Florida, Respondent

Notice: [**1] Released for Publication March 25, 1990.

Prior History: Petitioner for writ of certiorari to the Circuit Court for Palm Beach County; William C. Williams, III, Judge.

Core Terms

zoning, special exception, public interest, adversely affect

Case Summary

Procedural Posture
Petitioner sought review, by way of certiorari, of an order the Circuit Court for Palm Beach County (Florida) that declined petitioner's request for review of an order that denied his application for a special zoning exception.

Overview
Petitioner applied for a special exception to place an elderly adult living facility in a residential area. After making his application, petitioner obtained approval of respondent county's zoning department and, subsequently, the approval of respondent's planning commission. In subsequent hearings before respondent's commission, residents of the affected area expressed concern with petitioner's plans. Respondent's commission then denied the application, and the circuit court denied certiorari to review the commission's denial. As a result, petitioner sought review with the court. The court granted certiorari, quashed the order that declined review, and remanded with instructions to grant the special exception, because there was no substantial competent evidence underlying the conclusion that the public interest was affected adversely by granting petitioner the special exception he had requested.

Outcome
The court granted the request for review, quashed the order that declined review, and remanded with instructions, because there was no competent substantial evidence to support the conclusion that the special exception sought by petitioner was adverse to the public interest.

LexisNexis® Headnotes

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN1 In rezoning, the burden is upon the applicant to clearly establish such right. In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the zoning authority to demonstrate by competent substantial evidence that the special exception is adverse to the public interest. A special exception is a permitted use to which the applicant is entitled, unless the zoning authority determines according to the standards of the zoning ordinance that such use would affect the public interest adversely.

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN2 Substantial evidence is evidence that establishes a substantial basis of fact from which the fact at issue can be reasonably inferred. The evidence relied upon to sustain the ultimate finding must be sufficiently relevant and material so that a reasonable mind accepts it as adequate to support the conclusion reached. To this

extent the "substantial" evidence should also be "competent."

Counsel: Bruce G. Kaleita, West Palm Beach, for petitioner.

Richard W. Carlson, Jr. and Thomas P. Callan, Assistant County Attorneys, West Palm Beach, for respondent.

Judges: Hersey, C.J., and Anstead, J., concur. Stone, J., dissents with opinion.

Opinion by: PER CURIAM

Opinion

[*1359] This is a petition to review denial of an application for a special exception. The real property in question is located in an area zoned residential. The use for which a special exception was requested is an adult congregate living facility for the elderly, a use permitted by special exception in a residential area.

Certain procedural shortcomings having been remedied, we now treat only the merits, being satisfied that this court has jurisdiction.

After making appropriate application, petitioner obtained approval of the County Zoning Department and, subsequently, the approval of the County Planning Commission. Approval was based upon documentary evidence and expert opinion.

In public hearings before the County Commission, various neighbors expressed their opinion that the proposed **[**2]** use would cause traffic problems, light and noise pollution and generally would impact unfavorably on the area. The County Commission denied the application and the circuit court denied certiorari to review that denial. We grant the writ and quash the order under review.

We explained the respective burdens of an applicant for a special exception and the zoning authority in *Rural New Town, Inc. v. Palm Beach County, 315 So.2d 478, 480 (Fla. 4th DCA 1975)*, as follows:

HN1 In rezoning, the burden is upon the *applicant* to clearly establish such right (as hereinabove indicated). In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the *zoning authority* to demonstrate by competent substantial evidence that the special exception *is adverse to the public interest.* Yokley on Zoning, vol. 2, p. 124. A special exception is a permitted use to which the applicant is entitled *unless* the zoning authority determines according to the standards of the zoning ordinance that such use would adversely affect the public interest.

(Emphasis in original; some citations omitted.)

[3]** The supreme court, in *De Groot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)*, explained in the following language what is meant by the term "competent substantial evidence" in the context of certiorari review:

HN2 Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill, 155 Fla. 379, 20 So.2d 912*; *Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748*. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521*. We are of the view, however, that the evidence relied upon to **[*1360]** sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it **[**4]** as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

(Some citations omitted.)

In *City of Apopka v. Orange County, 299 So.2d 657, 660 (Fla. 4th DCA 1974)*, the "evidence" in opposition to petitioner's application for special exception consisted, as in the present case, of the opinions of neighbors, and in that case we explained:

The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts. Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated

as a conclusion that the exception would adversely affect the public interest. Accordingly we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that **[**5]** the public interest would be adversely affected by granting the appellants the special exception they had applied for.

Earlier in that opinion we also noted:

As pointed out by Professor Anderson in Volume 3 of his work, American Law Of Zoning, § 15.27, pp. 155-56:

"It does not follow, . . . that either the legislative or the quasi-judicial functions of zoning should be controlled or unduly influenced by opinions and desires expressed by interested persons at public hearings. Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:

'Public notice of the hearing of an application for exception . . . is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of . . . public health . . . . The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting **[**6]** of the application.'
The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect."

299 So.2d at 659.

Our review of the record leads us to conclude that there is literally no competent substantial evidence to support the conclusion reached below. The circuit court overlooked the law which says that a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards of the zoning ordinance that the use would adversely affect the public interest. *Rural New Town, 315 So.2d at 480*. It also overlooked the law which says that opinions of residents are not factual evidence and not a sound basis for denial of a zoning change application. *See City of Apopka, 299 So.2d at 660*.

For these reasons we grant certiorari, quash the order and remand with instructions that the special exception be granted.

Dissent by: STONE

Dissent

[7]** **[*1361]** STONE, J., dissenting.

I would deny certiorari. In my judgment, the record supports the decision of the circuit court upholding the action of the county. I also do not conclude that the trial court overlooked the law.

End of Document

Appendix 53.

De Groot v. Sheffield

Supreme Court of Florida

May 29, 1957; As Amended on Denial of Rehearing June 26, 1957.

No Number in Original

Reporter
95 So. 2d 912 *; 1957 Fla. LEXIS 3506 **

Peter DE GROOT, Appellant, v. L. S. SHEFFIELD et al., Appellees.

Core Terms

abolished, quasi-judicial, mandamus, cases, administrative agency, mandamus proceeding, judicial review, collateral, assault, boards.

Case Summary

Procedural Posture
Relator employee appealed and sought reversal of an order of the Circuit Court (Florida), which dismissed his petition for a writ of mandamus to compel respondent employer to reinstate his employment.

Overview
Relator employee was dismissed from his position with respondent employer. Pursuant to Fla. Stat. ch. 22263, § 7 (1943), respondent submitted a resolution to eliminate relator's position to the county civil service board, which held a hearing and declined to approve the resolution. Despite the action of the civil service board, respondent dismissed relator. The circuit judge dismissed relator's petition for writ of mandamus to compel his reinstatement. On appeal, relator contended that the decision of the civil service board was not subject to collateral attack. The court held that review of an order of an administrative agency depended on whether the agency's function was judicial, quasi-judicial, or executive. The court noted that in relator's case, the civil service board was exercising a quasi-judicial function because it reviewed evidence and held a hearing. Thus, its decision was subject to judicial review for substantial evidence. The court held that respondents should have sought a review of the order of the civil service board by certiorari before dismissing relator. Relator's position was not legally abolished, and his dismissal was without justification.

Outcome
The court held that relator employee was entitled to the issuance of a peremptory writ and that the circuit court erred in dismissing his petition for a writ of mandamus to compel respondent employer to reinstate relator's employment.

LexisNexis® Headnotes

Administrative Law > Agency Adjudication > Informal Agency Action

HN1 See Fla. Stat. ch. 22263, § 7 (1943).

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN2 The reviewability of an administrative order depends on whether the function of the agency involved is judicial or quasi-judicial in which event its orders are reviewable or on the contrary whether the function of the agency is executive in which event its decisions are not reviewable by the courts except on the sole ground of lack of jurisdiction. In the latter event the order is, of course, subject to direct or collateral attack.

Administrative Law > Judicial Review > Reviewability > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN3 Where one holds office at the pleasure of the appointing power and the power of appointment is coupled with the power of removal contingent only on the exercise of personal judgment by the appointing authority, then the decision to remove or dismiss is

purely executive and not subject to judicial review. If removal or suspension of a public employee is contingent upon approval by an official or a board after notice and hearing, then the ultimate judgment of such official or board based on the showing made at the hearing is subject to appropriate judicial review. The reason for the difference is that when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Federal Government > Employees & Officials

HN4 Where an officer or employee is removed pursuant to purely executive authority, the courts will do no more than examine into the existence of jurisdictional facts to determine only the question of the existence of executive jurisdiction.

Administrative Law > Judicial Review > Reviewability > General Overview

Governments > Federal Government > Employees & Officials

HN5 In deciding upon the advisability of abolishing a position in the classified service, the Civil Service Board is exercising a quasi-judicial function. This is so for the reason that it arrives at its decision after a full hearing pursuant to notice based on evidence submitted in accordance with the statute involved. This being so, its ultimate decision is subject to judicial review in an appropriate proceeding.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Criminal Law & Procedure > ... > Crimes Against Persons > Assault & Battery > General Overview

Criminal Law & Procedure > ... > Assault & Battery > Simple Offenses > General Overview

HN6 Certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi-judicial proceeding. The writ is available to obtain review in such situations when no other method of appeal is available. In certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment that also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN7 Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. It is such relevant evidence, as a reasonable mind would accept as adequate to support a conclusion.

Administrative Law > ... > Hearings > Evidence > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN8 In administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. However, the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN9 As contrasted to certiorari, mandamus is an original proceeding to enforce a clear legal right to the performance of a clear legal duty. It is not an appellate writ. As in any original proceeding the record and evidence are made and offered in that proceeding. While it is by nature discretionary it is not an appropriate process to obtain a review of an order entered by a judicial or quasi-judicial agency acting within its jurisdiction. When thus analyzed it is obvious that

certiorari and mandamus serve two entirely different functions.

Counsel: **[**1]** Coffee & Coffee, Jacksonville, for appellant.

Elliott Adams and McCarthy, Lane & Adams, Jacksonville, for appellees.

Opinion by: THORNAL

Opinion

EN BANC

[*913] THORNAL, Justice.

Appellant DeGroot, who was relator below, seeks reversal of an order of the Circuit Judge dismissing his petition for a writ of mandamus which was sought to compel the appellees to reinstate the relator as an employee of the Duval County School Board.

The determining question is whether the action of the County Civil Service Board, which supervises the county merit system, can be reviewed and collaterally assaulted as a defense to a mandamus proceeding.

Relator Peter DeGroot had been an employee of the Duval County School Board for about eighteen years prior to February 9, 1955. For the last ten years he held the position of "Supervisor of Construction." Since 1943 he was in the classified service under the Duval County Civil Service Act. See Chapter 22263, Laws of Florida, Acts of 1943. On August 4, 1954, the School Board, with the approval of the Civil Service Board, created the position of "Supervising Architect" and filled the job by appointment of a registered architect named Broadfoot. On February **[**2]** 9, 1955, the School Board adopted a resolution delineating the functions of the Supervising Architect, many of which had theretofore been performed by DeGroot, as Supervisor of Construction. By the same resolution the School Board proposed that the position of Supervisor of Construction be abolished.

HN1 Section 7, Chapter 22263, Laws of Florida, Acts of 1943, provides in part as follows:

"* * * No position in the classified [service] shall be abolished without the approval of the Civil Service Board. Positions may be abolished only in good faith."

Pursuant to this requirement, the School Board resolution was submitted to the County Civil Service Board which, after an extended hearing, declined to approve the resolution defining the duties of the Architect and abolishing the position of Supervisor of Construction.

Despite the action of the Civil Service Board, the School Board proceeded to dismiss DeGroot from his employment. He thereupon instituted this action in mandamus to compel reinstatement. In the mandamus proceeding the parties stipulated that the transcript of the testimony offered **[*914]** before the Civil Service Board could be filed in evidence. A motion **[**3]** to quash the alternative writ was likewise filed. Upon consideration of the record thereby presented, the trial judge concluded that regardless of the judgment of the Civil Service Board, the action of the School Board in resolving to abolish the position of Supervisor of Construction was taken in good faith and that therefore DeGroot was subject to dismissal. He thereupon granted the respondents-appellees' motion to dismiss the petition in mandamus and entered final judgment in their favor. Reversal of this judgment is here sought.

It is contended by the appellant-relator that the decision of the Civil Service Board was not subject to collateral attack by the respondents in the mandamus proceeding. He further contends that if review of that order were desired by the respondents, they should have proceeded by way of certiorari and that in all events the trial judge could not re-weigh the evidence presented to the Civil Service Board.

It is the position of the appellees that the order of the Civil Service Board should not be enforced in the absence of supporting substantial evidence and that the decision of the Board could be reviewed by the Circuit Judge regardless of the **[**4]** nature of the proceeding to determine whether there was substantial evidence in support thereof.

We are here squarely confronted with the problem of determining the appropriate procedure for obtaining review of an order of an administrative agency. Although administrative agencies have been known to the law for many years, it has only been within fairly recent years that a substantial body of jurisprudence has developed with reference to so-called "administrative law." Because of the expansion of the number of boards, commissions, bureaus and officials having authority to make orders or determinations which directly affect both public and private rights, there has been an increasing number of cases involving the extent of the authority of these agencies as well as the validity

or correctness of their conclusions in particular instances. We are told that in our state government there are over one hundred boards, bureaus and officials engaged in administrative activities affecting the rights and property of individuals as well as the public. See French's Research in Florida Law, p. 54; 1 Florida Law and Practice, Administrative Law, Sec. 30. In addition there are innumerable county **[**5]** and city boards and agencies such as Civil Service Boards and other boards that perform similar functions.

Although over the years many cases in one form or another have come to this court involving the correctness of orders of administrative agencies, we are unaware of any that has squarely and directly raised the problems presented by the instant appeal. Despite the local nature of the particular problem at hand, it appears to us that it is appropriate to undertake to reconcile many of our previous apparently divergent opinions in an effort to establish for the future some orderly procedure in disposing of problems of this nature. We do this also in fairness to the trial judge who undoubtedly was confronted with some of these conflicting viewpoints but who did not have available the opportunity for detailed research that accompanies appellate review. Nonetheless, as pointed out by Kenneth Culp Davis in 44 Illinois Law Review p. 565, "No branch of administrative law is more seriously in need of reform than the law concerning methods of judicial review." This author then observes, "No other branch is so easy to reform." ***HN2*** The reviewability of an administrative order depends on **[**6]** whether the function of the agency involved is judicial or quasi-judicial in which event its orders are reviewable or on the contrary whether the function of the agency is executive in which event its decisions are not reviewable by the courts except on the sole ground of lack of jurisdiction. In the latter event the order is, of course, subject to direct or collateral attack.

It is in some measure insisted in the case before us that the decision of the **[*915]** Civil Service Board is beyond the scope of judicial review. The contention to this end is that the ultimate decision of the Board is executive in nature and beyond the reach of the courts. In *Bryan v. Landis, 106 Fla. 19, 142 So. 650*, it was pointed out that ***HN3*** where one holds office at the pleasure of the appointing power and the power of appointment is coupled with the power of removal contingent only on the exercise of personal judgment by the appointing authority, then the decision to remove or dismiss is purely executive and not subject to judicial review. In the same opinion, however, we pointed out that if removal or suspension of a public employee is contingent upon approval by an official or a board after notice **[**7]** and hearing, then the ultimate judgment of such official or board based on the showing made at the hearing is subject to appropriate judicial review. The reason for the difference is that when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive. See also, *Owen v. Bond, 83 Fla. 495, 91 So. 686*; *Sirmans v. Owen, 87 Fla. 485, 100 So. 734*; *State ex rel. Tullidge v. Hollingsworth, 103 Fla. 801, 138 So. 372*; *State ex rel. Hatton v. Joughin, 103 Fla. 877, 138 So. 392*; *State ex rel. Pinellas Kennel Club v. State Racing Commission, 116 Fla. 143, 156 So. 317*. In the same cases and similar ones it was held that ***HN4*** where an officer or employee is removed pursuant to purely executive authority, the courts will do no more than examine into the existence of jurisdictional facts to determine only the question of the existence of executive jurisdiction.

Applying the rule of these cases to the situation before us it is perfectly obvious that ***HN5*** in deciding upon the advisability of abolishing a position in the classified service, the Civil Service **[**8]** Board was exercising a quasi-judicial function. This is so for the reason that it arrived at its decision after a full hearing pursuant to notice based on evidence submitted in accordance with the statute here involved. This being so its ultimate decision was subject to judicial review in an appropriate proceeding. *State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136*, supplemental op. *156 So. 705, 95 A.L.R. 1416*; *West Flagler Amusement Co. v. State Racing Commission, 122 Fla. 222, 165 So. 64*; *State ex rel. Hathaway v. Williams, 149 Fla. 48, 5 So.2d 269*; *Hammond v. Curry, 153 Fla. 245, 14 So.2d 390*.

Having determined the nature of the order under consideration we next proceed to ascertain the appropriate method of obtaining review as well as the scope of review available. It must be conceded that over the years orders of administrative agencies have been placed under scrutiny in Florida in both mandamus and certiorari cases. Admittedly, little attention has been given to the propriety of the procedure in particular cases. Hence the resultant confusion. We interpolate that we pretermit in this instance any discussion of the proper use of the equity injunction and the **[**9]** writ of prohibition. Injunction has been many times employed to assault legislative action at the state and local level where such action allegedly impinged on some constitutional right. Attacks on municipal zoning

ordinances are typical. Prohibition has at times been employed as against quasi-judicial action of administrative agencies where the agency proposed to exceed its jurisdiction or exercise jurisdiction which it did not have. We further mention that we are discussing herewith appellate review in situations where applicable statutes fail to provide specific methods of review as was the case here. When the statute provides the appellate procedure, that course should be followed. Curry v. Shields, Fla.1952, 61 So.2d 326, 327; State ex rel. Coleman v. Simmons, Fla.1957, 92 So.2d 257.

Recurring to the problem at hand we are reminded that ***HN6*** certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasijudicial **[*916]** proceeding. The writ is available to obtain review in such situations when no other method of appeal is available. Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421. In certiorari **[**10]** the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault.

We have used the term "competent substantial evidence" advisedly. ***HN7*** Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. Becker v. Merrill, 155 Fla. 379, 20 So.2d 912; Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that ***HN8*** in administrative proceedings the formalities in the introduction of testimony common **[**11]** to the courts of justice are not strictly employed. Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." Schwartz, American Administrative Law, p. 88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p. 481; United States Casualty Company v. Maryland Casualty Company, Fla. 1951, 55 So.2d 741; Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S. Ct. 206, 83 L. Ed. 126.

HN9 As contrasted to certiorari, mandamus is an original proceeding to enforce a clear legal right to the performance of a clear legal duty. It is not an appellate writ. As in any original proceeding the record and evidence are made and offered in that proceeding. While it is by nature discretionary it is not an appropriate process to obtain a review of an order entered by a judicial or quasi-judicial agency acting within its jurisdiction. When thus analyzed it is **[**12]** obvious that certiorari and mandamus serve two entirely different functions.

In delineating the distinctions between certiorari and mandamus we disclaim any allegiance to the formalities and technicalities of the past. Procedural formalities are not necessarily sacrosanct merely because they are time-honored. Nonetheless, in situations such as the one before us, the distinctions have a present and vital importance in determining the issues presented by the litigants and considered by the trial court. We think the lines of demarcation are justifiable in a field such as administrative law which is still in its formative stages of development.

Applying the foregoing general rules to the situation presented by this record it becomes apparent that the assault made by the respondents-appellees on the order of the Civil Service Board as a defense to the mandamus proceeding was entirely collateral to the quasi-judicial proceeding had before the Civil Service Board itself. No direct review of the order of the Civil Service Board was sought by the appellees. The Civil Service Act specifically required the approval of the Civil Service Board as a condition precedent to the abolition **[**13]** of the job in the classified service. Prior to dismissing the appellant-relator the School Board had failed in its effort to obtain such approval. If it had been dissatisfied with the order of the Civil Service **[*917]** Board such order was subject to appropriate review by certiorari. When the mandamus proceeding was filed by the relator, the order of the Civil Service Board declining to abolish the job held by the relator was in full force and effect. There is no assault on the jurisdiction of that board. The job therefore had not been legally abolished. This being so, the relator under the Civil Service Act was entitled to continue to fill the job and his dismissal was without justification. Freeman on

Judgments (5th ed.) Vol. 3, Sec. 1258; 42 Am.Jur., Public Administrative Law, Sec. 159, 160; *State ex rel. Spurck v. Civil Service Board, 226 Minn. 240, 32 N.W.2d 574*.

We mention in passing that there were no charges before the Civil Service Board that relator had failed in any measure to perform his job well. The sole issue revolved around abolishing the job that he held.

In view of the foregoing, from the showing made by this record, the relator was entitled to the **[**14]** issuance of a peremptory writ.

It was error to dismiss his petition therefor. The judgment under review is therefore -

Reversed.

TERRELL, C.J., and THOMAS, HOBSON, ROBERTS, DREW and O'CONNELL, JJ., concur.

On Rehearing

PER CURIAM.

The last sentence of our opinion of May 29, 1957, is amended to read as follows:

"The judgment under review is therefore reversed without prejudice to any rights which the appellees may have under the rules announced in *State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So.2d 707*".

When addressed to the opinion as amended, the petition for rehearing is denied.

TERRELL, C.J., and THOMAS, ROBERTS and THORNAL, JJ., concur.

End of Document

Appendix 54.

Katherine's Bay, LLC v. Fagan

Court of Appeal of Florida, First District

December 14, 2010, Opinion Filed

CASE NO. 1D10-939

Reporter
52 So. 3d 19 *; 2010 Fla. App. LEXIS 19009 **; 35 Fla. L. Weekly D 2759

KATHERINE'S BAY, LLC, INTERVENOR, Appellant, v. RONALD J. FAGAN and CITRUS COUNTY, Appellees.

Subsequent History: Released for Publication December 30, 2010.

Prior History: [**1] An appeal from an order of the Department of Administration.

Core Terms

land use, environmental, limitations, subject property, wetlands, compatible, designation, intensity, policies, site, incompatible, recommended, traffic, karst, future development, impacts, comprehensive plan, residential, provisions, argues, severe, land use designation, substantial evidence, requirements, regulations, property's, services, maximum, vested, space

Case Summary

Procedural Posture

Appellee neighbor brought a challenge under § *163.3187(3)(a), Fla. Stat.* to a small-scale development amendment (Amendment) to the Citrus County, Fla., Comprehensive Plan (Plan) which changed the future land use designation of a parcel of land belonging to appellant owner. The Department of Administration (Florida) adopted the decision of an administrative law judge (ALJ) which held that the Amendment was invalid. The owner appealed.

Overview

The Amendment changed the subject property's future land use category from low intensity coastal and lakes to recreational vehicle park/campground (RVP). The appellate court found that there was insufficient evidence to support the ALJ's finding that the Amendment was incompatible with the surrounding uses. The development of new RVPs in coastal areas was specifically anticipated by Citrus County, Fla., Comprehensive Plan Future Land Use Element (FLUE) Policy 17.6.12. Two provisions of the Plan showed that the entire coastal area was considered environmentally sensitive, and yet future development of this area was expected. Thus, when all the pertinent provisions of the Plan were considered in pari materia, the mere fact that an area had environmental limitations was not a basis to prohibit development as long as the development is carried out in accordance with the limitations provided by the Plan and the Land Development Code. Therefore, the ALJ's finding of "severe environmental limitations" was insufficient to justify overriding the county's determination that the Amendment was proper, particularly in light of the presumption required by § *163.3187(3)(a)*.

Outcome

The decision was reversed and the case was remanded for reinstatement of the ordinance approving the Amendment.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN1 See Citrus County, Fla., Comprehensive Plan.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN2 See Citrus County, Fla., Comprehensive Plan.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN3 See Citrus County, Fla., Comprehensive Plan

Future Land Use Element Policy 17.2.7.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN4 See Citrus County, Fla., Comprehensive Plan Future Land Use Element Policy 7.2.8.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN5 See Citrus County, Fla., Comprehensive Plan Future Land Use Element Policy 3.18.11.

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN6 See *Fla. Admin. Code Ann. R. 9J-5.003(23)*.

Real Property Law > Zoning > Judicial Review

HN7 *Section 163.3187(3)(a), Fla. Stat.* provides for review of amendments adopted under *§ 163.3187(1)(c)*.

Real Property Law > Zoning > Judicial Review

HN8 See *§ 163.3187(3)(a), Fla. Stat.*

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

HN9 Where an appellant is challenging a final agency action in an appeal, the appellate court's standard of review is governed by *§ 120.68(7), Fla. Stat.* (2010).

Administrative Law > Judicial Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN10 See *§ 120.68(7), Fla. Stat.* (2010).

Administrative Law > Judicial Review > Reviewability > Preservation for Review

HN11 The preservation rule is recognized in administrative proceedings.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN12 It is not the role of the appellate court to reweigh evidence anew.

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN13 Rules of statutory construction are applicable to the interpretation of comprehensive plans.

Governments > Legislation > Interpretation

HN14 Specific provisions control over general ones and one provision should not be read in such a way that it renders another provision meaningless.

Governments > Legislation > Interpretation

HN15 All provisions on related subjects be read in pari materia and harmonized so that each is given effect.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN16 See Citrus County, Fla., Comprehensive Plan Future Land Use Element Policy 17.2.7.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN17 See Citrus County, Fla., Comprehensive Plan Future Land Use Element Policy 17.6.5.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN18 See Citrus County, Fla., Comprehensive Plan Future Land Use Element Policy 17.6.12.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN19 See Citrus County, Fla., Comprehensive Plan.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN20 See Citrus County, Fla., Comprehensive Plan.

Evidence > ... > Testimony > Lay Witnesses > General Overview

Evidence > ... > Lay Witnesses > Opinion Testimony > General Overview

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

HN21 Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise. Lay witness's speculation about potential traffic problems, light and noise pollution, and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. Similarly, lay witness's opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. There must be evidence other than the lay witness's opinions to support such claims.

Real Property Law > Zoning > General Overview

HN22 The mere fact that property is in close proximity to another property with a less restrictive classification does not require reclassification.

Counsel: Clark A. Stillwell, Inverness, for Appellant.

Shaw P. Stiller, General Counsel, Department of Community Affairs, Tallahassee, and Denise A. Lyn, Inverness, for Appellees.

Judges: LEWIS, J. WEBSTER and MARSTILLER, JJ., CONCUR.

Opinion by: LEWIS

Opinion

[*21] LEWIS, J.

Katherine's Bay, LLC, Appellant, seeks review of a final order issued by the Administration Commission ("the Commission"), which adopted an administrative law judge's ("ALJ") holding that a small-scale development amendment ("the Amendment") to Citrus County's Comprehensive Plan ("the Plan") was invalid because it rendered the Plan internally inconsistent. The ALJ and the Commission recognized two grounds for finding the Amendment inconsistent with the Plan: first, that it violated a policy in the Plan's Future Land Use Element ("FLUE") requiring compatibility of land uses; and second, that it violated a policy in the Plan's FLUE requiring the County to guide future development to areas with minimal environmental limitations. Appellant challenges both grounds. As to the first ground, Appellant argues that there was a lack of competent, substantial evidence to support the ALJ's finding that the Amendment **[**2]** approved a future land use designation that was incompatible with the surrounding uses. We agree. As to the second ground, Appellant argues both that there was a lack of competent, substantial evidence to support the ALJ's factual findings and that the ALJ's ultimate conclusion resulted from an erroneous construction of the Plan. While we do find competent, substantial evidence of the findings the ALJ made in relation to the second ground, we hold that the findings did not support the conclusion that the Amendment rendered the Plan internally inconsistent. Because the ALJ's conclusion that the Amendment rendered the Plan internally inconsistent is not supported by either of the FLUE policies at issue, we reverse and remand to the Commission for reinstatement of the ordinance.

[*22] I. Facts and Procedural History

On May 26, 2009, the Citrus County Board of County Commissioners adopted an ordinance that amended the Plan's Generalized Future Land Use Map ("GFLUM"), which is a part of the FLUE. The Amendment changed the future land use designation of a 9.9-acre parcel of land owned by Appellant, based on Appellant's application for such a change.

The subject property is located in a geographic **[**3]** region defined by Citrus County as the "Coastal Area." According to the Plan, "[t]he Coastal Area parallels the Gulf of Mexico, and the boundary may be described as following the west side of US-19 north from the Hernando County line to the Withlacoochee River." The Plan notes that "[t]his boundary is the basis for an environmentally sensitive overlay zone to be used for land use regulatory purposes."

Before the Amendment, the subject property was designated Low Intensity Coastal and Lakes ("CL"), which the Plan defines in pertinent part as follows:

HN1 **Low Intensity Coastal and Lakes (CL)**

> This land use category designates those areas having environmental characteristics that are sensitive to development and therefore should be protected. Residential development in this district is limited to a maximum of one dwelling unit per 20 acres . . . .
>
> . . . .
>
> In addition to single family residential development, the following land uses may be allowed provided the permitted use is compatible with the surrounding area, and standards for development are met as specified in the Citrus County Land Development Code (LDC)[:]
>
> > . Multifamily residences (in existing platted areas only or in lieu of clustering **[**4]** single family units at a density of one unit per lot of record and requiring the recombination of said lots. For example, a duplex requires two lots to be recombined into a single parcel, a quadruplex four lots, etc.)
> >
> > . Recreational uses
> >
> > . Agricultural and Silviculture uses
> >
> > . Public/Semi-Public, Institutional facilities
> >
> > . Home occupations
> >
> > . New railroad right-of-way, storage facilities, or related structures
> >
> > . Communication towers
> >
> > . Utilities
> >
> > . Commercial fishing and marina related uses
> >
> > . Commercial uses that are water related, water dependent, or necessary for the support of the immediate population[.]

The Amendment changed the subject property's future land use category from CL to Recreational Vehicle Park/Campground ("RVP"), which the Plan defines in pertinent part as follows:

HN2 **Recreational Vehicle Park/Campground (RVP)**

> This category is intended to recognize existing Recreational Vehicle (RV) Parks and Campgrounds, as well as to provide for the location and development of new parks for recreational vehicles. Such parks are intended specifically to allow temporary living accommodation for recreation, camping, or travel use.
>
> . . . .
>
> New RV parks shall be required to preserve thirty percent (30%) **[**5]** of the gross site area as permanent open space, consistent with Policy 17.15.11 of this Plan.
>
> **[*23]** In addition to RV/campsite development, the following land uses as detailed in the Land Development Code, shall be allowed provided the permitted use is compatible with the surrounding area, and standards for development are met as specified in the County Land Development Code:
>
> > . Recreational Uses
> >
> > . Agricultural and Silvicultural Uses
> >
> > . Public/Semi-Public, Institutional Facilities
> >
> > . Convenience retail and personal services to serve park visitors and guests up to one percent of the gross site area, not to exceed 5,000 square feet, located within the development and not accessible from any external road[.]

After the Amendment changing the subject property's future land use category from CL to RVP was adopted, Appellee, the owner of neighboring property, challenged the Amendment under the procedure set forth in *section 163.3187(3)(a), Florida Statutes* (2008). Appellee argued that the Amendment was not "in compliance" with the Local Government Comprehensive Planning and Land Development Regulation Act ("the Act") because it rendered the Plan internally inconsistent. Appellee identified two policies **[**6]** in the FLUE, among others, that he claimed were inconsistent with the Amendment. Those policies are 17.2.7 and 17.2.8, and they provide as follows:

> ***HN3*** Policy 17.2.7 The County shall guide future development to the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations and the availability of necessary services.

> ***HN4*** Policy 17.2.8 The County shall utilize land use techniques and development standards to achieve a functional and compatible land use framework which reduces incompatible land uses.

Appellant intervened in the proceedings, and the matter proceeded to a *section 120.57* hearing.

The parties stipulated that the subject property is located across the road from Appellee's property, which is on the Homosassa River, and that the subject property is bordered in all directions by property designated as either CL or Coastal and Lakes Residential ("CLR"). They also stipulated that there exists on Appellant's property a parcel designated Coastal/Lakes-Commercial ("CLC") [1] and that this property is being used as an RV park because this use of the property is vested. Further, they stipulated that Appellee's property was in the Coastal High Hazard **[**7]** Area ("CHHA").

At the hearing, Appellee supported his argument that the Amendment rendered the subject property incompatible with the surrounding uses primarily by presenting his own testimony and that of his neighbor. Appellee described the beauty and peacefulness of the area and opined that the introduction of another RV park into the area would lead to increased traffic, litter, noise, and light pollution. He testified that the vested RV park currently existing on Appellant's property is an "eyesore" that "looks like a bunch of junk stored on the front lawn." Appellee also testified that, in 1993, there was a major flood in the area around his home, which was so severe that he had to tie boats to his mailbox to keep them from floating down **[*24]** the road. He was concerned that the RV park Appellant planned to develop on the subject property would require **[**8]** him to manage even more debris in the event of a natural disaster. Appellee also expressed concern that the RV park would decrease his property value. A neighbor expressed the same concerns about the potential for increased traffic and decreased property values in the area.

The evidence concerning the subject property's environmental limitations came in the form of the County Staff's report and the testimony of Dr. Timothy Pitts and Sue Farnsworth, both of whom were employed by the County as planners. The report was prepared by Dr. Pitts, who was the County's Senior Planner of Community Development at the time. According to the County Staff's report, the subject property was studied by officials in the fire prevention, engineering, utilities, and environmental divisions. The fire prevention and engineering representatives recommended approval of the application with conditions, and the utilities representative recommended approval. The environmental planner did not recommend approval or denial but noted that the subject property was within a "Karst Sensitive Area." [2] Additionally, the report indicated that a "traffic analysis" had revealed that "adequate capacity exists on Halls River **[**9]** Road for anticipated traffic at the maximum development potential of the site." The report also noted that the subject property was within the CHHA and that it contained "significant wetland areas." According to the report, if the application was granted, Appellant would still need to "design a Master Plan of Development that minimizes wetland alterations."

One of the policies of the Plan that the report indicated may be cause for concern was Policy 3.18.11, which provides as follows:

> ***HN5*** The County shall protect springs by prohibiting increases in allowed land use intensity at the Generalized Future Land Use level within a Karst Sensitive Area without a hydrogeological analysis that addresses impacts to groundwater resources. The analysis shall be performed by a professional geologist or professional engineer licensed in Florida. Karst Sensitive Area shall be defined as an area in which limestone lies within five (5) feet of depth from natural grade.

In relation to this policy, the report stated that Appellant had "provided a letter **[**10]** from a professional engineer that adequately meets the intent of this policy" and that Appellant intended "to develop the site using methods that will meet the intent of the Comprehensive Plan." The report also contained the following observations:

> This site has some severe environmental restrictions--extensive wetlands, proximity to an Outstanding Florida Waterbody, Karst sensitive

---

[1] As provided in the Plan, the CLC category allows commercial uses that are "water related, water dependent, or necessary for the support of the immediate population," i.e. "neighborhood commercial uses, personal services, or professional services." This category is intended "for a single business entity on a single parcel of property."

[2] According to Dr. Pitts, karst is a "limestone underground sort of rock structure that is very porous" and through which "pollutants can very easily travel."

> landscape--and it will be difficult to design a site that meets the standards of the Comprehensive Plan and the Land Development Code. The following policy would potentially restrict development if this application were to be approved:
>
> **Policy 3.16.3** Development shall not be allowed at the maximum densities and intensities of the underlying land use district if those densities would be harmful to natural resources.
>
> So, the applicant should be cautioned that given the environmental sensitivity of the property, development may be limited on this site to less than the allowable maximum intensity. If this **[*25]** application is approved, an appropriately designed master plan of development will be required which meets all standards of the Comprehensive Plan and the Land Development Code and is approved by the Board of **[**11]** County Commissioners.

Ultimately, despite the environmental limitations, the County Staff concluded that the site was "appropriate for some type of RV Park development subject to an appropriately designed master plan." In making this recommendation, the County Staff emphasized that, "based on the environmental limitations of the area, the applicant is cautioned that the site may not be able to be designed at the maximum intensity for this land use district."

Dr. Pitts testified consistently with the County Staff's report. He noted that neither the Plan nor the Land Development Code ("LDC") prohibits RV parks in either karst sensitive areas or the CHHA. He explained, however, that the County has regulations limiting the density or intensity of RV parks in such areas and indicated that the professional studies he had received on the subject property represented that the site could be developed to meet those standards. Dr. Pitts testified that, in his opinion, "just about anything west of [U.S. Highway 19] is . . . karst sensitive." Dr. Pitts acknowledged that the subject property had 1.64 acres of wetlands and that there were wetlands in the surrounding areas. He explained that the Plan **[**12]** requires "setbacks" to mitigate wetland impacts and that the LDC required one-hundred percent protection of the wetlands. Additionally, he explained that the regulations required fifty percent open space in the Coastal Area. Based on these regulations, Dr. Pitts testified that it was highly unlikely that Appellant would be permitted to develop the space at the maximum build-out potential theoretically allowed under the new designation, which would be five units per acre. He emphasized that, no matter what the number of approved units proved to be, complete protection of the wetlands would be required. Finally, Dr. Pitts testified that there were several vested uses in the surrounding area, including a 300- to 400- unit RV park, that did not conform to the land use designations identified for those properties in the Plan.

Farnsworth, an environmental planner for the County, testified that the wetlands were located around the perimeter of the property and that they extended into the part of the property beyond the perimeter. She explained, however, that permitting standards for an RV park prohibited the filling of wetlands and that the subject property could be developed as an RV park **[**13]** without the need to fill in the wetlands.

After the hearing, the ALJ issued a Recommended Order concluding that the Amendment was inconsistent with FLUE Policy 17.2.7's requirement that future development be directed to "the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations." In support of this conclusion, the ALJ noted the County Staff's finding that the land had "severe environmental limitations." In particular, the ALJ noted that the area in which the subject property was located had extensive wetlands, a karst sensitive landscape, and a CHHA designation. The ALJ acknowledged that the Plan did not expressly prohibit RV parks in CHHA areas and that there were regulations in the Plan and the LDC that would limit the intensity of development on this land even under the RVP designation. The ALJ concluded, however, that "[n]otwithstanding the other provisions within the Plan and LDRs that place limitations on RV park development **[*26]** in an effort to satisfy environmental constraints, . . . the subject property is clearly not 'the most appropriate area, as depicted on the GFLUM' for new development, nor is it an area with 'minimal environmental **[**14]** limitations.'"

The ALJ also concluded that the Amendment was inconsistent with FLUE Policy 17.2.8's requirement that development be accomplished in a "functional and compatible land use framework which reduces incompatible land uses." Because "compatible" is not defined in the Plan, the ALJ relied on the definition of "compatibility" in *Florida Administrative Code Rule 9J-5.003(23)*. That definition is as follows:

> ***HN6*** "Compatibility" means a condition in which land uses or conditions can coexist in relative

> proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

In support of the conclusion that the new designation approved a land use incompatible with the surrounding uses, the ALJ noted Appellee's testimony concerning the characteristics of the area. He also noted Appellee's concerns about noise, lighting, litter, traffic, and property value. The ALJ further noted that there were only six nonconforming land uses and that each was permitted to exist due to vested rights. The ALJ then stated, "It is fair to infer that the insertion of an RV park in the middle of a large tract of vacant **[**15]** CL land would logically lead to further requests for reclassifying CL land to expand the new RV park or to allow other non-residential uses." The ALJ further found the following:

> The commercial RV park, with a yet-to-be determined number of spaces for temporary RVs, tenants, and associated commercial development, will be in close proximity to a predominately [sic] residential neighborhood. A reasonable inference from the evidence is that these commercial uses will have a direct or indirect negative impact on the nearby residential properties and should not coexist in close proximity to one another.

Based on these findings and the determination that the Amendment was inconsistent with FLUE Policy 17.2.7, the ALJ recommended that the Commission conclude that the Amendment was not in compliance with the Act.

The Commission adopted the ALJ's findings and conclusions, except that it modified the finding that the Amendment would "logically lead to further requests for reclassifying CL land to expand the new RV park or to allow other non-residential uses." The Commission concluded that this finding was mere conjecture, unsupported by competent, substantial evidence. It modified the finding to **[**16]** read, "Unlike the presence of . . . pre-existing, non-conforming uses, permitting the addition of an RV park in the middle of a large tract of vacant CL land now would set a precedent that an RV park, a Commercial Land Use, is compatible with the Low Intensity Coastal and Lakes Land Use designation in this vicinity." Based on the adoption of the ALJ's findings and conclusions, as modified, the Commission held that the Amendment had no legal effect.

II. Analysis

A. Standard of Review

The amendment at issue in this case was adopted under the authority of *section 163.3187(1)(c), Florida Statutes* (2008). ***HN7*** *Section 163.3187(3)(a)* provides for review of amendments adopted under *section 163.3187(1)(c)* under the following terms:

> ***HN8*** The state land planning agency shall not review or issue a notice of intent for small scale development amendments which satisfy the requirements of paragraph **[*27]** (1)(c). Any affected person may file a petition with the Division of Administrative Hearings pursuant to *ss. 120.569* and *120.57* to request a hearing to challenge the compliance of a small scale development amendment with this act within 30 days following the local government's adoption of the amendment, shall serve **[**17]** a copy of the petition on the local government, and shall furnish a copy to the state land planning agency. An administrative law judge shall hold a hearing in the affected jurisdiction not less than 30 days nor more than 60 days following the filing of a petition and the assignment of an administrative law judge. The parties to a hearing held pursuant to this subsection shall be the petitioner, the local government, and any intervenor. In the proceeding, the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act. In any proceeding initiated pursuant to this subsection, the state land planning agency may intervene.

§ 163.3187(3)(a).

HN9 Because Appellant is challenging the Administration Commission's final agency action in this appeal, *see id.*, this Court's standard of review is governed by *section 120.68(7), Florida Statutes* (2010). That section provides in pertinent part as follows:

> ***HN10*** The court shall remand a case to the agency for further proceedings **[**18]** consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> . . . .
>
> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial

> evidence in the record of a hearing conducted pursuant to *ss. 120.569* and *120.57*; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact; [or]
>
> . . . .
>
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action . . . .

§ 120.68(7).

In this Court, Appellant challenges the sufficiency of the evidence supporting the findings of inconsistency with both policies. [3] In addition, Appellant challenges the ALJ's interpretation of the policy requiring that future development be directed toward areas of the County with minimal environmental limitations. The separate arguments concerning each policy will be addressed in turn.

B. FLUE Policy 17.2.7

With regard to FLUE Policy 17.2.7, Appellant raises two arguments: first, that **[*28]** the ALJ erred in relying on the County Staff's finding of "severe environmental limitations" because the County Staff recommended approval of the application; and second, that the ALJ erred in failing to apply the FLUE policies that are more specific to RV parks in the Coastal Area in lieu of FLUE Policy 17.2.7, which is a general planning policy applicable to all land use decisions countywide. We agree with the second point.

i. The County Staff's Report

Appellant insists **[**20]** that the ALJ was required to give the County Staff's recommendation great weight. Even assuming that the County Staff's report was entitled to great weight in this case, there is no basis in the record for believing that the ALJ did not give it due consideration. To the contrary, the ALJ recited it heavily and relied on the concrete findings within it that showed the environmental limitations of the subject property, even though the ALJ disagreed with the ultimate conclusion. If an ALJ were not entitled to disagree, then the ALJ's review would serve no purpose. To the extent Appellant argues that the recommendation of the County Staff was not given sufficient weight, this assertion is unreviewable because ***HN12*** "[i]t is not the role of the appellate court to reweigh evidence anew." *Young v. Dep't of Educ., Div. of Vocational Rehab., 943 So. 2d 901, 902 (Fla. 1st DCA 2006)*. The ALJ's finding that the subject property had severe environmental limitations was thoroughly supported by the County Staff's report. Whether those limitations required a finding that the Amendment was inconsistent with FLUE Policy 17.2.7 is, however, a separate matter.

ii. Interpretation of the Plan

Appellant's argument **[**21]** that the ALJ erred in relying on a general policy in the Plan where more specific policies existed is an issue of law to be reviewed de novo. *See Nassau County v. Willis, 41 So. 3d 270, 278 (Fla. 1st DCA 2010)*. In reviewing this issue de novo, however, we bear in mind that the ALJ was required under *section 163.3187(3)(a)* to presume that the County's determination that the Amendment complied with the Act (and, thus, was consistent with the Plan) was correct.

HN13 Rules of statutory construction are applicable to the interpretation of comprehensive plans. *See Great Outdoors Trading, Inc. v. City of High Springs, 550 So. 2d 483, 485 (Fla. 1st DCA 1989)* (noting that the rules of statutory construction apply to municipal ordinances and city charters); *Willis, 41 So. 3d at 279* (noting that a comprehensive plan is like a "constitution for all future development within the governmental boundary") (citation omitted). Appellant argues that this case implicates the rules of construction that ***HN14*** specific provisions control over general ones and that one provision should not be read in such a way that it renders another provision meaningless. Both rules are well-established. *See Murray v. Mariner Health, 994 So. 2d 1051, 1061 (Fla. 2008)*. **[**22]** Another rule of construction relevant to this issue is that ***HN15*** all provisions on related subjects be read in pari materia

---

[3] In challenging the sufficiency of the evidence, Appellant argues that the ALJ did not view the evidence with an eye toward the proper standard. He contends the ALJ should have considered whether the County's determination that **[**19]** the Amendment was proper was "fairly debatable," based on the standard recognized in *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001)*. The argument that the ALJ applied the wrong standard is not properly before us because Appellant stood silent when Appellee argued to the ALJ that the "fairly debatable" standard did not apply and when the ALJ invited Appellant to provide contrary authority. *See Dep't of Bus. & Prof'l. Regulation, Constr. Indus. Licensing Bd. v. Harden, 10 So. 3d 647, 649 (Fla. 1st DCA 2009)* (recognizing ***HN11*** the preservation rule in administrative proceedings).

and harmonized so that each is given effect. *Cone v. State, Dep't of Health, 886 So. 2d 1007, 1010 (Fla. 1st DCA 2004)*.

Here, the ALJ concluded that the Amendment conflicted with FLUE Policy 17.2.7, which provides, ***HN16*** "The County shall guide future development to the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations and the availability of necessary services." (CP 10-155). Appellant contends that FLUE Policies 17.6.5 and 17.6.12, which are more specific to RV parks in the Coastal Area, indicate **[*29]** that the Amendment was consistent with the Plan. Those policies provide as follows:

> ***HN17*** Policy 17.6.5 Specialized commercial needs, such as water-dependent and water-related uses, temporary accommodations for tourists and campers, as well as neighborhood commercial uses and services serving residential communities within the general Coastal, Lakes, and Rivers Areas shall be provided for within the Future Land Use Plan and standards for development provided within the County LDC.
>
> ***HN18*** Policy 17.6.12 Recreational vehicle (RV) parks and **[**23]** campgrounds shall be designed according to a detailed master plan, shall preserve a minimum of 30 percent of the property in open space, shall provide a minimum of an additional 10 percent of the property as recreation areas, and generally shall conform to the commercial development standards in the Land Development Code. . . . In order to minimize the adverse impact of development on the resources and natural features of the Coastal, Lakes, and Rivers Region, the LDC shall be amended to include additional review criteria for all new RVP projects located in this region. Such criteria may include:
>
> . Restrictions on density
>
> . Enhanced open space requirements
>
> . Wetland protection
>
> . Upland preservation
>
> . Clustering
>
> . Connection to regional central water and sewer service

Appellant is correct in noting that the development of new RV parks in Coastal Areas was specifically anticipated by FLUE Policy 17.6.12. This observation does not, however, mandate approval of an RVP designation for the particular parcel at issue. Thus, it was appropriate for the ALJ to resort to other portions of the Plan to determine whether approval of the RVP designation for the subject property was proper. The policy that **[**24]** most directly relates to this inquiry is FLUE Policy 17.2.7, which articulates the County's general preference for guiding future development to the "most appropriate areas," which are areas "with minimal environmental limitations."

Two additional provisions of the Plan provide more context for the policies at issue. First, the Plan describes the "Coastal Area" as follows:

> ***HN19*** The Coastal Area parallels the Gulf of Mexico, and the boundary may be described as following the west side of US-19 north from the Hernando County line to the Withlacoochee River. This boundary is the basis for an environmentally sensitive overlay zone to be used for land use regulatory purposes. . . .

Second, under the heading "Development in Wetland and Coastal Areas," the Plan notes the following:

> ***HN20*** Future development in the Coastal, Lake, and River Areas will require careful management in order to reduce potential problems and impacts on the environment. Development within these areas will be limited to low, [sic] intensity uses. In addition, all development will be required to meet standards for development and obtain necessary permits from appropriate regulatory agencies.

These two provisions show that, under the **[**25]** Plan, the entire Coastal Area is considered environmentally sensitive, and yet "[f]uture development" of this environmentally sensitive area is expected. Thus, when all the pertinent provisions of the Plan are considered in pari materia, the mere fact **[*30]** that an area has environmental limitations is not a basis to prohibit development as long as the development is carried out in accordance with the limitations provided by the Plan and the LDC. Therefore, the ALJ's finding of "severe environmental limitations" was insufficient to justify overriding the County's determination that the Amendment was proper, particularly in light of the presumption required by *section 163.3187(3)(a)*. The ALJ properly found the existence of wetlands and karst sensitivity in the area, but there was no competent,

substantial evidence that these limitations were so severe as to require a prohibition on the development of an RV park under the restrictions that would be imposed by the LDC. In sum, when FLUE Policy 17.2.7 and the evidence related to that policy are viewed in the context of all relevant provisions of the Plan, the conclusion that the Amendment is inconsistent with that policy is unsupported.

C. FLUE [26] Policy 17.2.8**

With regard to FLUE Policy 17.2.8, Appellant argues that the ALJ erred in relying on the testimony of Appellee and his neighbor as a basis for finding incompatibility of the subject property's new future land use designation with the surrounding uses. In particular, he argues that this testimony was "unacceptable lay testimony" and that no competent, substantial evidence showed a lack of compatibility, as that term is defined by *Florida Administrative Code Rule 9J-5.003(23)*. We agree.

Initially, we note that the reliance on the definitions provided in *Florida Administrative Code Rule 9J-5.003* was proper because the Plan does not define the term "compatible," and because *section 163.3184(1)(b)* defines "in compliance" in pertinent part as "consistent with the requirements of ss. *163.3177*, *163.3178*, *163.3180*, *163.3191*, and *163.3245*, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code." Therefore, to show that the Amendment provided for an incompatible land use, Appellee was required to prove that, because of the new future land use category assigned to Appellant's property, the land uses **[**27]** or conditions in the area could not "coexist . . . in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." *See Fla. R. Admin. Code 9J-5.003(23)*.

HN21 Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. *Metro. Dade County v. Blumenthal, 675 So. 2d 598, 601 (Fla. 3d DCA 1995)*. For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise. *Blumenthal, 675 So. 2d at 601*. Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. *Pollard v. Palm Beach County, 560 So. 2d 1358, 1359-60 (Fla. 4th DCA 1990)*. Similarly, lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. *See City of Apopka v. Orange County, 299 So. 2d 657, 659-60 (Fla. 4th DCA 1974)* (citation omitted). There must be evidence other than the lay witnesses' opinions to support such claims. *See BML Invs. v. City of Casselberry, 476 So. 2d 713, 715 (Fla. 5th DCA 1985)*; **[**28]** *City of Apopka, 299 So. 2d at 660*.

Based on these standards, it was error for the ALJ to rely on Appellee's testimony concerning potential light pollution, increased traffic, and negative impacts on **[*31]** the value of the homes in the area. There were no facts to support his concerns, and in fact, the County Staff's report indicates that the traffic issue was studied by an expert and determined that increased traffic would not unduly burden the area.

Although it was proper for the ALJ to consider Appellee's observations that, with the exception of the vested non-conforming uses, the area is predominantly residential and that it is peaceful, Appellee presented no competent, substantial evidence to support his claim that the new RV park would unduly interfere with those characteristics of the area. The mere fact that Appellee's property has a different future land use designation than Appellant's re-classified property is insufficient. *See Hillsborough County v. Westshore Realty, Inc., 444 So. 2d 25, 27 (Fla. 2d DCA 1983)* (holding that ***HN22*** the mere fact that property is in close proximity to another property with a less restrictive classification does not require reclassification). Additionally, **[**29]** while it may have been noteworthy that Appellant presently fails to maintain its vested one-acre RV park in an attractive manner, the concern that the yet-to-be-developed RV park would be maintained in the same way is speculative and does not establish long-term negative impacts stemming from the reclassification of the subject property.

In sum, based on the applicable definition of "compatibility," Appellant's argument that there was insufficient evidence to support a finding that the RV park was incompatible is well-taken. It appears that, in finding the proposed use incompatible with the surrounding uses, the ALJ gave undue emphasis to Appellee's preference not to have an RV park as a neighbor. However, this preference in itself is insufficient to override Appellant's desire to build an RV park on its land. *See Conetta v. City of Sarasota, 400 So. 2d 1051, 1053 (Fla. 2d DCA 1981)* (suggesting that a land-use decision should not be "based primarily on the

sentiments of other residents"). As a result, we hold that the ALJ erred in concluding that the Amendment was inconsistent with FLUE Policy 17.2.8.

III. Conclusion

For the reasons explained above, both of the ALJ's ultimate conclusions **[**30]** as to inconsistency of the Amendment with the remaining portions of the Plan were erroneous. As a result, we reverse and remand to the Commission for reinstatement of the ordinance approving the Amendment.

REVERSED and REMANDED.

WEBSTER and MARSTILLER, JJ., CONCUR.

End of Document

Appendix 55.

BML Inv. v. Casselberry

Court of Appeal of Florida, Fifth District

September 12, 1985

No. 85-243

Reporter
476 So. 2d 713 *; 1985 Fla. App. LEXIS 15781 **; 10 Fla. L. Weekly 2124

BML INVESTMENTS, a Florida general partnership, Petitioner, v. CITY OF CASSELBERRY, FLORIDA, a municipal corporation, Respondent

Subsequent History: [**1] Rehearing Denied October 8, 1985.

Prior History: Petition for Writ of Certiorari, A Case of Original Jurisdiction.

Core Terms

zoning, condominium, zoning code, development plan, circuit court, planned unit development, dwellings, density, zoning classification, apartment, developer, ownership, revised

Case Summary

Procedural Posture
Appellant investment company filed a petition for a writ of certiorari to review a final order entered by a Florida circuit court denying appellant's petition for writ of certiorari filed in that court. The petition in circuit court sought relief from appellee city council's decision denying approval of appellant's revised preliminary development plan pursuant to Casselberry, Fla. Zoning Code § 157.188.

Overview
Appellant investment company acquired property that was located within appellee city council's jurisdiction. The previous owner had the property rezoned to planned unit development zoning classification. At that time, the previous owner was granted a preliminary development plan in accordance with appellee's zoning code. Because of the unavailability of sewer and water facilities, the previous project did not proceed. Appellee denied appellant's revised preliminary development plan, and litigation ensued. Appellant filed a petition for writ of certiorari seeking review of appellee's decision. The circuit court denied the motion, and appellee then filed a writ of certiorari in the appellate court. The court granted the writ, quashed the lower court's decision, and remanded. The court reasoned that, although appellee contended that rezoning was conditioned upon the building of condominiums, the rezoning ordinances made no reference to any such limitation. The court held that the record was insufficient to determine whether the finding was based on substantial competent evidence as dictated by Casselberry, Fla. Zoning Code § 157.188.

Outcome
Appellant investment company's writ of certiorari was granted, and the lower court's order, denying appellant's writ of certiorari to review appellee city council's denial of appellant's preliminary development plan, was quashed. The cause was remanded to the lower court with directions to require an adequate record of the proceedings in order to determine whether appellee's decision was supported by competent substantial evidence.

LexisNexis® Headnotes

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN1 The Casselberry Zoning Code permits both condominium and apartment complexes to be built on planned unit development zoned property. Casselberry, Fla., Zoning Code § 157.176.

Real Property Law > Subdivisions > Local Regulations

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Planned Unit Developments

HN2 A planned unit development is defined in the Casselberry, Fla., Zoning Code as: an area of land developed as a single entity or in approved stages in conformity with a final development plan by a developer or a group of developers acting jointly and under single ownership, which is totally planned to provide for a variety of compatible uses and common open space and which does not necessarily comply with the subdivision and zoning regulations of the city with respect to lot size, lot coverage, setback, off-street parking, bulk, type of dwelling, density, and other regulations.

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Planned Unit Developments

HN3 Permitted uses in planned unit development zoned property include inter alia: (A) The uses permitted within the Planned Unit Development District shall include the following. (1) Residential units, including single-family attached and detached dwellings, two-family dwellings, and multiple-family dwellings. Casselberry, Fla. Zoning Code § 157.176.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Land Use & Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Judicial Review

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Real Property Law > Zoning > Judicial Review

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN4 A circuit court's review of a city's zoning actions is limited to: (1) whether procedural due process is accorded, (2) whether the essential requirements of law are observed, and (3) whether the administrative findings and judgments are supported by competent substantial evidence. The appellate court, upon review of the circuit court's decision, is limited to a determination of whether the circuit court affords procedural due process and applies the correct law. Further, it is well settled that courts will not interfere with administrative decisions of zoning authorities unless such decisions are arbitrary, discriminatory, or unreasonable.

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

HN5 Objections of residents in surrounding neighborhoods to proposed developments are not a sound basis for denying a permit to build.

Governments > Public Improvements > Sanitation & Water

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Planned Unit Developments

HN6 The Casselberry Zoning Code does not specifically set forth criteria to be utilized in determining whether the City Council should grant or deny a preliminary development plan but the code does require the Planning and Zoning Commission to consider the following criteria in determining whether it should recommend approval or denial of the proposed development to the City Council. These factors include: (A) degree of departure of the proposed planned unit development from surrounding residential areas; (B) compatibility within the planned unit development and relationships with surrounding neighborhoods; (C) prevention of erosion and degrading of surrounding areas; and (D) provision for future education and recreation facilities, transportation, water supply, sewage disposal, surface drainage, flood control, and soil conservation as shown in the preliminary development plan. These matters shall be handled by building official staff members who are responsible for

permits and code enforcement. Casselberry, Fla. Zoning Code § 157.188.

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN7 Additional factors to be considered by the Planning and Zoning Commission in determining whether it should recommend approval or denial of a proposed development to the City Council include: (E) the nature, intent, and compatibility of common open space, including provisions for the maintenance and conservation of the common open space; (F) feasibility and compatibility of specified stages of the preliminary development plan; and (G) the planning and zoning commission shall not review code requirements germane to building or building interior. These matters shall be handled by building official staff members who are responsible for permits and code enforcement. Casselberry, Fla. Zoning Code § 157.188.

Counsel: Albert R. Cook of Robinson, Rooks & Owen P.A., Casselberry, for Petitioner.

Clayton D. Simmons and Ned N. Julian, Jr., of Stenstrom, McIntosh, Julian, Colbert & Whigham, P.A., Sanford, for Respondent.

Judges: Dauksch, J. Orfinger and Upchurch, F., JJ., concur.

Opinion by: DAUKSCH

Opinion

[*713] BML Investments petitions this court for a writ of certiorari to review a final order entered by the circuit court denying BML's petition for writ of certiorari filed in that court. The petition in circuit court sought relief from a decision of the City Council of the City of Casselberry, Florida which denied approval of BML's revised preliminary development plan which sought construction of an apartment complex on 18.37 acres of land within the city limits.

BML acquired the property in January, 1984. The previous owner had the property rezoned from R-3 to planned unit development (PUD) zoning classification. [1] At **[*714]** that time the previous owner was granted a preliminary development plan in accordance with the City's zoning code. That project contemplated building condominiums **[**2]** on the property. Due to the unavailability of sewer and water facilities the project did not proceed. The City contends that rezoning was conditioned upon the building of condominiums but the rezoning ordinances make no reference to any such limitation. ***HN1*** The Casselberry Zoning Code permits both condominium and apartment complexes to be built on PUD zoned property. [2] *See* § 157.176, Casselberry Zoning Code.

[3]** On January 4, 1984, BML bought the property. BML wanted to change the design of the previous owner's proposal so it contacted the city attorney who indicated that the project should go through the preliminary development planning process again. After several amendments, a revised preliminary development plan was unanimously approved by the City's Planning and Zoning Commission and this recommendation was sent to the City Council. At a workshop session before the City Council, the revised plan was presented and additional changes were made and accepted by BML. On March 2, 1984, a public hearing was held before the City Council. Petitions against the project were submitted and testimony from several surrounding homeowners reflected that they

---

[1] ***HN2*** A planned unit development is defined in the City's zoning code as:

> PLANNED UNIT DEVELOPMENT. An area of land developed as a single entity or in approved stages in conformity with a final development plan by a developer or a group of developers acting jointly and under single ownership, which is totally planned to provide for a variety of compatible uses and common open space and which does not necessarily comply with the subdivision and zoning regulations of the city with respect to lot size, lot coverage, setback, off-street parking, bulk, type of dwelling, density, and other regulations.

[2] ***HN3*** Permitted uses in PUD zoned property include inter alia:

> (A) The uses permitted within the Planned Unit Development District shall include the following.
>
> (1) Residential units, including single-family attached and detached dwellings, two-family dwellings, and multiple-family dwellings.
>
> * * *
>
> § 157.176, Casselberry Zoning Code.

were against the change from condominium to apartment development. A letter from the original owner, dated July 25, 1980, was considered by the City Council. The letter indicated that the original design called for condominium ownership of multi-family units. The City Council voted unanimously to deny the revised plan. The reasons given by the City Council for the denial were:

1. The Council originally approved the plan for condominium ownership **[**4]** and not for apartment rental.

2. The majority of the people affected opposed the change from condominiums to apartments.

3. High density requested by the developer.

4. New owner should be morally obligated to original owner's commitments.

5. Condominiums generally are better maintained and have lower crime risk.

BML sought review in the circuit court by a petition for writ of certiorari. In denying the petition, the court found that there is a distinction in the Casselberry Zoning Code (§ 157.176) between the permissible uses authorized in a PUD zoning classification in that condominiums are single-family attached dwellings rather than apartments which are multi-family dwellings. Further, the court found that the original approval of PUD zoning classification for the property was influenced by the representations of the prior owner that the project would be 100% condominium ownership. The court noted that the section of the Casselberry Zoning Code relating to the PUD zoning classification provides for conditions fo be agreed upon between the zoning authority and applicant for a particular zoning classification. The court also found that the record was inadequate **[**5]** to determine whether the decision of the City Council to deny the request was supported by substantial competent evidence but the court stated the record did show that the City considered density, traffic, the opinions of the surrounding property owners and comparisons between apartment living and condominium ownership, all of which were deemed by the court to be appropriate factors for consideration. Finally, the court found that the specific controlling **[*715]** provisions of the Casselberry Code were not unconstitutional.

HN4 The circuit court's review of the City's actions was limited to: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed, and (3) whether the administrative findings and judgments were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla. 1982)*; *Cherokee Crushed Stone v. City of Miramar, 421 So.2d 684 (Fla. 4th DCA 1982)*. This court, upon review of the circuit court's decision, is limited to a determination of whether the circuit court afforded procedural due process and applied the correct law. *Vaillant*. Further, it is well settled that courts **[**6]** will not interfere with administrative decisions of zoning authorities unless such decisions are arbitrary, discriminatory, or unreasonable. *Conetta v. City of Sarasota, 400 So.2d 1051 (Fla. 2d DCA 1981)*; *City of Naples v. Central Plaza of Naples, Inc., 303 So.2d 423 (Fla. 2d DCA 1974)*.

In *Conetta* the second district reversed a denial of a special exception to a zoning ordinance and granted petitioner's request for writ of certiorari. The special exception sought by petitioner was to build a guest house on her residential property. The denial of the special exception in that case was based solely on the proposal's unpopularity with surrounding residents and the conjecture that a subsequent owner of the property would not comply with the City's proscription against renting guesthouses. Neither factor was found to be relevant to the controlling city ordinance setting forth criteria to be utilized in determining whether a special exception should be granted. Courts have held that ***HN5*** objections of residents in surrounding neighborhoods to proposed developments are not a sound basis for denying a permit to build. *Conetta*; *City of Apopka v. Orange County, 299 So.2d 657 (Fla. [**7] 4th DCA 1974)*; *see also* 3 Anderson, *American Law of Zoning*, § 15.27.

In the instant case, like *Conetta*, the major consideration in denying BML's proposed development was that the majority of the persons affected opposed the change. [3]

---

[3] ***HN6*** The Casselberry Zoning Code does not specifically set forth criteria to be utilized in determining whether the City Council should grant or deny a preliminary development plan, but the code does require the Planning and Zoning Commission to consider the following criteria in determining whether it should recommend approval or denial of the proposed development to the City Council. These factors include:

A. Degree of departure of the proposed planned unit development from surrounding residential areas.

B. Compatibility within the planned unit development and

Although one property owner voiced opposition to the proposal citing traffic problems and increases in crime, no evidence was submitted in support of his claim. The opinions of surrounding landowners arguably falls within the criterion in the Casselberry Zoning Code that the Planning and Zoning Commission consider the relationship of the planned development surrounding the neighborhood and, to a lesser extent, the criterion considering the degree of departure of the proposed development from the surrounding residential areas, but such opinions, by themselves, are insufficient to support the denial. *Conetta.*

[8]** What causes us concern, however, is reason Number 3, "High density requested by the developer." Under the zoning ordinance, to secure approval of PUD zoning, the developer must submit its preliminary **[*716]** plan, showing, among other things, the proposed density of the development. We gather from reason Number 3 that the revised preliminary plan submitted by petitioner increased the proposed density, and if this is so, it is of legitimate concern to the city in determining whether or not to approve the plan. Nevertheless, the record before us is insufficient, as it was before the circuit court, to determine whether this finding is based on substantial competent evidence.

We therefore grant the petition for writ of certiorari, quash the order of the circuit court, and remand the cause to the circuit court with directions to require an adequate record of the proceedings which were held in order to determine whether reason Number 3 as expressed by the city is supported by competent substantial evidence. If the record does not support this reason by competent substantial evidence, then the trial court shall grant relief to the petitioner.

WRIT GRANTED: ORDER QUASHED AND REMANDED **[**9]** WITH DIRECTIONS.

ORFINGER and UPCHURCH, F., JJ., concur.

End of Document

---

relationships with surrounding neighborhoods.

C. Prevention of erosion and degrading of surrounding areas.

D. Provision for future education and recreation facilities, transportation, water supply, sewage disposal, surface drainage, flood control, and soil conservation as shown in the preliminary development plan. ***HN7***

E. The nature, intent, and compatibility of common open space, including provisions for the maintenance and conservation of the common open space.

F. Feasibility and compatibility of specified stages of the preliminary development plan.

G. The planning and zoning commission shall not review code requirements germane to building or building interior. These matters shall be handled by building official staff members who are responsible for permits and code enforcement.

§ 157.188, Casselberry Zoning Code.

Appendix 56.

Apopka v. Orange County

Court of Appeal of Florida, Fourth District

February 22, 1974

No. 73-273

Reporter
299 So. 2d 657 *; 1974 Fla. App. LEXIS 8851 **

The CITY OF APOPKA, Florida, et al., Appellants, v. ORANGE COUNTY, a political subdivision of the State of Florida, and Clarcona Improvement Association, Appellees

Core Terms

airport, Zoning, special exception, county commissioners, circuit court

Case Summary

Procedural Posture
Appellants, cities and their airport authority, sought review of a final judgment of the Circuit Court of Orange County (Florida), which denied their petition for certiorari that sought review of an order of the zoning board, which denied appellants' application for a special exception.

Overview
Appellants, cities and their airport authority, filed a request for a special exception with the zoning board to build an airport. Without entering any findings of fact, the zoning board denied the application on the ground that granting it would be adverse to the general public interest. On appeal to the board of county commissioners, a de novo hearing was held and that board upheld the denial. Appellants filed a petition for a writ of certiorari in the circuit court, pursuant to Fla. Laws ch. 63-1716, to obtain review of the decision. While the petition was pending, appellants filed another action in the circuit court seeking a declaration that implementation of Fla. Stat. ch. 332 (1971) by appellants constituted a governmental function, thereby exempting them from the zoning regulations. The court reversed the board of county commissioners' decision and found that the decision was based upon lay testimony in opposition to the exception and was unsubstantiated by any competent facts.

Outcome
The court reversed and remanded the board of county commissioners' order, which upheld the denial of appellants', cities and their airport authority, request for a special exception permit, for a de novo hearing because the complaints of citizens did not constitute substantial competent evidence to conclude that the public interest would be adversely affected by granting appellants the special exception.

LexisNexis® Headnotes

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN1 Although notice to and hearing of the proponents and opponents of an application for a special exception or other zoning change are essential and all interested parties should be given a full and fair opportunity to express their views, it is not the function of the board of county commissioners to hold a plebiscite on the application for the special exception.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN2 The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Appeals > Standards of Review > De Novo Review

Environmental Law > Land Use & Zoning > Judicial Review

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Real Property Law > Zoning > Judicial Review

HN3 If a decision of the zoning board is deemed to be arbitrary or unreasonable, the aggrieved party will then have the option of a judicial review by certiorari pursuant to Florida Rules of Appellate Procedure or a trial de novo in the circuit court pursuant to the Florida Rules of Civil Procedure. Fla. Stat. ch. 163 (1971).

Counsel: [**1] William G. Mitchell, of Giles, Hedrick & Robinson, Orlando, for Appellants.

Steven R. Bechtel, of Mateer & Harbert, Orlando, for Appellee Orange County.

Carter A. Bradford, of Bradford, Oswald, Tharp & Fletcher, Orlando, for Appellee Clarcona Improvement Assn.

Judges: Downey, Judge. Walden and Mager, JJ., concur. On Rehearing: Walden, Mager and Downey, JJ., concur.

Opinion by: DOWNEY

Opinion

[*658] This is an appeal by the cities of Apopka, Ocoee, and Winter Garden and the Tri-City Airport Authority from a final judgment of the circuit court denying their petition for certiorari which sought review of an order denying appellants' application for a special exception. This is a companion appeal to those consolidated appeals numbered 72-1204 and 72-1209, *299 So.2d 652*.

The appellant cities formed the appellant Tri-City Airport Authority pursuant to Chapter 332, F.S.1971, F.S.A., commonly known as The Airport Law of 1945, for the purpose of building an airport to serve the three cities and the surrounding area. Appropriate engineering studies were made and various sites for the proposed airport were considered. Finally, the Authority determined that a parcel of property located in [**2] Orange County outside any municipality and zoned A-1 was the most suitable site for the proposed airport. The Authority thereafter obtained options to buy that property. Orange County's zoning legislation permits construction and operation of "airplane landing fields and helicopter ports with accessory facilities for private or public use" in an A-1 district as a special exception. Thus, the three cities and the Authority filed an application for a special exception with the Orange County Zoning Board of Adjustment to build their proposed airport. Without entering any finding of fact, the Zoning Board of Adjustment denied the application on the ground that granting it "would be adverse to the general public interest." On appeal to the Board of County Commissioners a de novo hearing was held with the following result:

> "A motion was made by Commissioner Pickett, seconded by Commissioner Poe, and carried, that the decision of the Board of Zoning Adjustment on December 2, 1971 denying application No. 2 for a Special Exception in an A-1 District for the construction of a proposed Tri-City Airport be affirmed and upheld on the grounds that the granting of the proposed Special [**3] Exception would adversely affect the general public and would be detrimental to the public health, safety, comfort, order, convenience, prosperity and general welfare and, therefore, not in accordance with the Comprehensive Zoning Plan of Orange County."

Appellants then filed a petition for a writ of certiorari in the circuit court in accordance with the provisions of the Orange County Zoning Act, Chapter 63-1716, Laws of Florida, as amended, to obtain review of the foregoing decision of the Board of County Commissioners. While the petition for certiorari was pending appellants filed another action in the Circuit Court of Orange County. The new action sought a declaration that implementation of Chapter 332, F.S.1971, F.S.A., by the appellants constituted a governmental function thereby exempting appellants from the operation of Orange County zoning regulations.

In order to determine whether there was substantial competent evidence to support the decision below we must of necessity resort to the evidence introduced at the hearing before the Board of County Commissioners. The appellants adduced evidence from (a) the Tri-City Airport Authority consulting engineer, (b) [**4] a representative of the Federal Aviation Agency, (c) and a representative of the Florida Department of Transportation, Mass Transit Division. Their testimony showed that there was a definite public need for the airport; that serious in depth studies had been made to determine the most appropriate location for the airport;

that the location in question was the best available considering such factors as (1) convenience to users, (2) land and area requirements, (3) general **[*659]** topography, (4) "compatibility with existing land use, plans and land users", (5) land costs, (6) air space and objections, (7) availability of utilities, (8) noise problems, (9) bird habitats and other ecological problems. The mayors of the three municipalities and the members of the Airport Authority also demonstrated that the selection of the site in question resulted from long study and competent advice on the subject. Approval had been received from every interested government agency including the Federal Aviation Administration, the Florida Department of Transportation, and the Florida Department of Air and Water Pollution Control.

The evidence upon which the Board of County Commissioners relied **[**5]** to deny appellants' application came from one abutting owner, Richard Byrd; several other owners within a two to five mile radius of the proposed airport site; a petition signed by some two hundred members of the Clarcona Improvement Association; and approximately thirty-five people in attendance at the hearing who objected but did not testify. Byrd's testimony was mainly directed to his opinion of what the airport would do to construction costs in the area and his opinion of what would happen to zoning in the area as a result of the proposed use. It also developed that Byrd is interested in buying the property proposed to be used as the airport. Several other property owners speculated about what would happen to the area's zoning, complained about the anticipated noise, and generally wanted to keep the status quo in the area. One witness who admitted he was a layman with no special training or experience advised the Board about his opinion of the damage to the Florida aquifer which would result from the proposed airport.

HN1 Although notice to and hearing of the proponents and opponents of an application for a special exception or other zoning change are essential and all interested **[**6]** parties should be given a full and fair opportunity to express their views, it was not the function of the Board of County Commissioners to hold a plebiscite on the application for the special exception. *Rockville Fuel and Feed Co. v. Board of Appeals, 257 Md. 183, 262 A.2d 499, 504 (1970)*. As pointed out by Professor Anderson in Volume 3 of his work, American Law of Zoning, § 15.27, pp. 155-156:

> "It does not follow, . . . that either the legislative or the quasi-judicial functions of zoning should be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings. Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:
>
> > 'Public notice of the hearing of an application for exception . . . is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of . . . public health . . . . The board should **[**7]** base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application.'
>
> ***HN2***
>
> The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect. While the facts disclosed by objecting neighbors should be considered, the courts have said that:
>
> > 'A mere poll of the neighboring landowners does not serve to assist the board in determining whether the exception **[*660]** applied for is consistent with the public convenience or welfare or whether it will tend to devaluate the neighboring property.'"

Instead the Board's purpose was to make findings as to how construction and operation of the proposed airport would affect the public and base its granting or denial of the special exception on those findings. Cf. *Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465, 146 A.L.R. 202 (1942)*; *Veasey **[**8]** v. Board of Public Instruction, Fla.App.1971, 247 So. 2d 80*.

The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by

any competent facts. Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly, we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for.

The judgment appealed from is therefore reversed and remanded to the circuit court with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application **[**9]** for special exception.

HN3 If the decision of the board is deemed to be arbitrary or unreasonable the aggrieved party will then have the option of a judicial review by certiorari pursuant to Florida Appellate Rules or a trial de novo in the circuit court pursuant to the Rules of Civil Procedure. Section 163. *250 F.S. 1971*, F.S.A.

Reversed and remanded with directions.

WALDEN and MAGER, JJ., concur.

ON PETITIONS FOR REHEARING.

PER CURIAM.

On petitions for rehearing the parties have advised this court that Orange County has not taken formal suitable action declaring its election to proceed under the provisions of Part II of the act entitled County and Municipal Planning For Future Development (163.160-163.315, F.S.1971, F.S.A.). Accordingly, the petitions for rehearing filed by the parties are granted and we recede from all references in our opinion of February 22, 1974, to the availability of Section 163.250, F.S.1971, F.S.A., in this case.

We maintain the view however, that the judgment appealed from should be reversed with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application **[**10]** for a special exception, at which time said board will have the opportunity to apply the balance-of-interests test to the evidence adduced before it. Thereafter, any aggrieved party may have that decision reviewed by the circuit court on petition for certiorari pursuant to the provisions of Chapter 63-1716, Special Acts of Florida, as amended.

WALDEN, MAGER and DOWNEY, JJ., concur.

End of Document

Appendix 57.

Board of Clinical Lab. Personnel v. Florida Ass'n of Blood Banks

Court of Appeal of Florida, First District

August 3, 1998, Opinion Filed

CASE NO. 97-1540

Reporter
721 So. 2d 317 *; 1998 Fla. App. LEXIS 9730 **; 23 Fla. L. Weekly D 1851

BOARD OF CLINICAL LABORATORY PERSONNEL, Appellant, v. FLORIDA ASSOCIATION OF BLOOD BANKS, etc., Appellee.

Subsequent History: [1]** Rehearing Denied December 4, 1998. Released for Publication December 22, 1998.

Prior History: An appeal from the Division of Administrative Hearings. P. Michael Ruff, Judge.

Disposition: REVERSED.

Core Terms

proposed rule, licensing requirements, specialty, blood, laboratory, banking, training, requirements, invalid, testing, preponderance of the evidence, clinical laboratory, immunohematology, capricious, hematology, chemistry, serology, federal regulation, enabling statute, personnel, exceeded, license, minimum qualifications, substantial evidence, federal law, blood bank, eliminated, performing, authorize, licensure

Case Summary

Procedural Posture
Appellant, the clinical laboratory personnel board, sought review of the order from the Florida administrative law judge invalidating appellant's proposed rules regarding licensure requirements for laboratory employees performing blood banking tests.

Overview

Appellant, the clinical laboratory personnel board, proposed new rules regarding licensure requirements for laboratory employees performing blood banking tests. The administrative law judge (ALJ) invalidated the rules, but the court reversed the ALJ's decision. The ALJ erred when he required appellant to establish by a preponderance of the evidence that the proposed rules satisfied Fla. Stat. ch. 120.52(8). The proposed rules were not inconsistent with the enabling legislation set forth in Fla. Stat. ch. 483.811(2) or ch. 483.823(1). The proposed rules concerning high complexity testing were not arbitrary, capricious, or unsupported by the evidence because they had been adopted to meet the minimum federal requirements set forth by the Clinical Laboratory Improvements Amendments of 1988, 42 C.F.R. § 493.1489. Appellant's action in eliminating Florida's blood banking specialty was not arbitrary or capricious because that specialty was inconsistent with the federal licensure requirements.

Outcome
The court reversed the administrative law judge's order because the rules proposed by appellant, the clinical laboratory personnel board, were consistent with the enabling legislation and were not arbitrary, capricious, or unsupported by the evidence.

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1 Fla. Stat. ch. 120.56(2)(c) provides that in a rule challenge proceeding, the proposed rule is not presumed to be valid or invalid. Once a party files objections to a proposed rule, however, the agency has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Fla. Stat. ch. 120.56(2)(a). A proposed rule may be held invalid on a number of

grounds, including that the agency has exceeded its rulemaking authority, that the proposed rule is arbitrary or capricious, or not supported by competent, substantial evidence. Fla. Stat. ch. 120.52(8). An "arbitrary" decision is one not supported by facts or logic. A "capricious" action is one taken irrationally, without thought or reason. On appeal, the district court should affirm the hearing officer's determination as to the rule's validity if the factual findings are supported by competent, substantial evidence and the legal determinations are not contrary to law. Fla. Stat. ch. 120.68(7)(b), (d).

Education Law > ... > Curriculum > Regulation & Selection > Governmental Authority

Education Law > Academic Instruction > Curriculum > Curriculum Challenges

Governments > State & Territorial Governments > Licenses

Healthcare Law > Business Administration & Organization > Facility & Personnel Licensing > General Overview

HN2 Fla. Stat. ch. 483.811(2) authorizes the Board of Clinical Laboratory Personnel to establish rules for training programs, including, but not limited to, rules relating to curriculum, educational objectives, evaluation procedures, personnel licensure requirements, preentry educational requirements, and length of clinical training. Fla. Stat. ch. 483.823(1) provides that the agency shall prescribe minimal qualifications for clinical laboratory personnel and shall issue a license to any person who meets the minimal qualifications and who demonstrates that she or he possesses the character, training, and ability to qualify in those areas for which the license is sought.

Governments > State & Territorial Governments > Licenses

HN3 Florida laboratory licensure requirements must satisfy the federal Clinical Laboratory Improvements Amendments of 1988 and regulations implemented thereunder.

Governments > State & Territorial Governments > Licenses

HN4 As of September 1, 1997, federal regulations promulgated under the Clinical Laboratory Improvements Amendments of 1988 require that all new personnel seeking licensure to perform "high complexity" testing have earned an associates degree in laboratory science or medical laboratory technology, or have 60 semester hours including various lab and natural science requirements and laboratory training approved by certain accrediting bodies, or at least three months documented laboratory training in each specialty in which the individual performs high complexity testing. 42 C.F.R. § 493.1489.

Governments > State & Territorial Governments > Licenses

Healthcare Law > Medical Treatment > Blood & Organ Donations > Blood Donations

HN5 42 C.F.R. §§ 493.835, 493.839, 493.849, 493.857 treat chemistry, serology, hematology, and immunohematology each as a specialty in its own right.

Counsel: Robert A. Butterworth, Attorney General, and Edwin A. Bayo, Assistant Attorney General, Tallahassee, Attorneys for Appellant.

Thomas J. Guilday and Vikki R. Shirley of Huey, Guilday & Tucker, P.A., Tallahassee, Attorneys for Appellee.

Judges: BOOTH, J., ERVIN and PADOVANO, JJ., CONCUR.

Opinion by: BOOTH

Opinion

[*318] BOOTH, J.

This cause is before us on appeal from the order of the administrative law judge (ALJ) invalidating Appellant's proposed rules [1] regarding licensure requirements for laboratory employees performing blood banking tests. The ALJ invalidated the proposed rules on the grounds that Appellant did not prove the rules' validity by a preponderance of the evidence; that Appellant exceeded the enabling statute in issuing the proposed rules; that the proposed rules exceeded federal licensure requirements; and that the proposed rules improperly eliminated the "blood banking" licensing specialty. We reverse.

[2]** ***HN1***

Florida Statutes section 120.56(2)(c) provides that in a rule challenge proceeding, the proposed rule "is not presumed to be valid or invalid." Once a party files objections to a proposed rule, however, the agency "has

[1] Proposed rules 590-3.001(6)(1), 590-3.003(2)(a), 590-5.003(1)(c), (g), 590-5.004(3), 590-7.001, Florida Administrative Code.

the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised." § 120.56(2)(a), Fla. Stat. A proposed rule may be held invalid on a number of grounds, including that the agency has exceeded its rulemaking authority, that the proposed rule is arbitrary or capricious, or not supported by competent, substantial evidence. § 120.52(8), Fla. Stat. An "arbitrary" decision is one not supported by facts or logic. A "capricious" action is one taken irrationally, without thought or reason. Board of Trustees, Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995). On appeal, the district court should affirm the hearing officer's determination as to the rule's validity if the factual findings are supported by competent, substantial evidence and the legal determinations are not contrary to law. § 120.68(7)(b), (d), Fla. Stat.

In the instant case, the order of the ALJ states: **[**3]** " Section 120.56(2), Florida Statutes, . . . requires the agency to establish by a preponderance of the evidence that the proposed rules satisfy [section 120.52(8)]," and further states that Appellant "has not established by a preponderance of the evidence the proposed rules' validity." However, proof "by a preponderance of the evidence" is not required in Florida Statutes section 120.52(8), and the ALJ erred in imposing that burden on the agency.

Nor does it appear that the rules are inconsistent with the enabling legislation. ***HN2*** Florida Statutes section 483.811(2) authorizes Appellant to establish "rules for training programs, including, but not limited to, rules relating to curriculum, educational objectives, evaluation procedures, personnel licensure requirements, preentry educational requirements, and length of clinical training." Florida **[*319]** Statutes section 483.823(1) provides that the agency "shall prescribe minimal qualifications for clinical laboratory personnel and shall issue a license to any person who meets the minimal qualifications and who demonstrates that she or he possesses the character, training, and ability to qualify in those areas for which the license is sought." **[**4]** While the enabling statutes authorize Appellant to establish educational and training requirements for licensure, the Legislature conspicuously did not prohibit the agency from setting more rigorous requirements than those set by federal law. Thus, even if the proposed rules exceed federal licensure requirements, Appellant has not violated the Florida enabling statutes.

2

The proposed rules increase the former state licensure requirements to meet increased federal standards. The ALJ recognized, and the parties do not dispute, that ***HN3*** Florida laboratory licensure requirements must satisfy the federal Clinical Laboratory Improvements Amendments of 1988 and **[**5]** regulations implemented thereunder.

Current Florida licensure requirements for clinical laboratory "technicians" conducting "high complexity" testing involving chemistry, serology, hematology, and immunohematology for blood banking purposes, need only have graduated high school and have completed 400 hours/three months' total training in the "blood banking" specialty. Rule 59O-5.004(1)(c),(2)(b), Fla. Admin. Code. ***HN4*** As of September 1, 1997, however, federal regulations promulgated under the Clinical Laboratory Improvements Amendments of 1988 require that all new personnel seeking licensure to perform "high complexity" testing have "earned an associates degree in laboratory science, or medical laboratory technology" or have "60 semester hours" including various lab and natural science requirements and "laboratory training" approved by certain accrediting bodies, or at "least 3 months documented laboratory training in each specialty in which the individual performs high complexity testing." 42 C.F.R. § 493.1489. As Florida licensure requirements must, at a minimum, satisfy federal licensure requirements, the ALJ erred in holding that the proposed rules, adopted to meet the minimum federal **[**6]** requirements, are invalid as arbitrary, capricious, or unsupported by the evidence.

Current Florida rules define the "blood banking" specialty as various facets of immunohematology, and processes and principles concerning serology, chemistry, and hematology that are associated with blood product testing and processing. *See* Rule 590-3.003(4)(e)9, Fla. Admin. Code. ***HN5*** The Code of Federal Regulations, however, treats chemistry, serology, hematology, and immunohematology each as a specialty in its own right. *See, e.g.*, 42 C.F.R. §§

---

[2] The limitation urged by Appellant here is expressly imposed on the so-called "exclusive use laboratories" under section 483.035, which does not include blood banks, thereby further supporting the view that the Legislature did not intend that limitation as to laboratories such as blood banks. *See* Yount v. Varnes, 691 So. 2d 1129, 1130 (Fla. 4th DCA 1997).

493.835, 493.839, 493.849, 493.857 (serology, chemistry, hematology, and immunohematology, respectively). Federal regulations do not provide for the specialty of "blood banking." 42 C.F.R. §§ 493.821-493.865. Florida's "blood banking" specialty in effect combines various specialties. Under federal law, each of these specialties has its own licensure requirements. Florida's current blood banking specialty is inconsistent with the federal licensure requirements, therefore, the agency's action in eliminating that specialty is not arbitrary or capricious.

We hold that the proposed rules are valid. Accordingly, the order below is REVERSED.

ERVIN [**7] and PADOVANO, JJ., CONCUR.

End of Document

Appendix 58.

Prinsell, Joel

From: Prinsell, Joel
Sent: Tuesday, May 31, 2016 2:06 PM
To: Testerman, Chris; Weiss, Jon
Subject: FW: Windermere Country Club/Access Rights

Chris and John:

FYI.

Joel D. Prinsell
Deputy County Attorney
Orange County Attorney's Office
201 S. Rosalind Ave., 3rd Floor
Orlando, FL 32801
407-836-7320

From: Prinsell, Joel
Sent: Tuesday, May 31, 2016 2:05 PM
To: Dethlefs, Diana
Cc: Hossfield, Carol; Plante, Alan; Windom, Bob
Subject: RE: Windermere Country Club/Access Rights

Diana:

While we cannot provide legal advice to citizens, the Zoning Division reviews applications for fence permits, and in this particular case it's our understanding that the Zoning Division approved the issuance of the fence permit by the Building Safety Division (B16900231) based on the applicant's ownership of the underlying property; the Zoning Division's review of the plan for the fence did not indicate any encroachment on abutting private property. Therefore, as the owner of the underlying property (Tract "A," the former golf course property), the applicant was able to pull a fence permit and construct the fence.

Although the notes on the plat say that development rights and access rights to McKinnon Rd. and Lake Butler Blvd. are dedicated to Orange County, we don't think the owner's act of obtaining a permit to install a 4-foot high wire fence around the perimeter of its property (Tract "A") constitutes redevelopment of the property or a change in those access rights. Tract "A" remains as open space.

With regard to any other building or development permits, none would be authorized unless and until the Board of County Commissioners were to release the dedication of development rights and access rights, and a new development plan was approved by the County for Tract "A."

Joel D. Prinsell
Deputy County Attorney
Orange County Attorney's Office
201 S. Rosalind Ave., 3rd Floor
Orlando, FL 32801
407-836-7320

From: Dethlefs, Diana
Sent: Thursday, May 26, 2016 1:10 PM
To: Prinsell, Joel
Cc: Crooke, Sheri; Boyd, S. Scott (Commissioner)
Subject: FW: Windermere Country Club/Access Rights

Joel,

In follow up to the below exchange, Commissioner Boyd asked me to reach out to you regarding the Mr. Tottle's closing questions (copied/inserted below and highlighted in the below forwarded communication).

"The legal question is: can the golf course property owner assert Orange County's private property rights on other Orange County residents with a physical barrier and enforce notice? If no, what are the remedies? If no, How does the Orange County Building Department vet future building permit applications from the property owner in the absence of access and development rights? If the fence is legal, thank you for the work researching access rights for the golf course property."

Do you have any insight to help in responding to Mr Tottle?

Sincerely,

Diana M. Dethlefs
Aide to Commissioner S. Scott Boyd
District 1 Office, Orange County Government
407-836-5918
facebook.com/commissionerboyd
www.ocfl.net/district1

From: District1, Mail
Sent: Friday, May 20, 2016 1:14 PM
To: 'David Tottle'
Subject: RE: Windermere Country Club/Access Rights

Good afternoon Mr. Tottle,

On behalf of Commissioner Boyd, thank you for the feedback and follow-up question. We will be researching this on your behalf and look forward to reaching out with any feedback. Please feel free to reach out with any additional questions or concerns in the meantime.

Sincerely,

Diana M. Dethlefs
Aide to Commissioner S. Scott Boyd
District 1 Office, Orange County Government
407-836-5918
facebook.com/commissionerboyd
www.ocfl.net/district1

From: David Tottle [mailto:dtottle@gmail.com]
Sent: Wednesday, May 18, 2016 12:33 PM
To: District1, Mail
Subject: Windermere Country Club/Access Rights

Thank you for your very positive message last night at the Windermere Club Home Owner's Association monthly meeting. Your knowledge of the Windermere Country Club history and current situation is commendable. Much of the conversation focuses on the development rights. However, the dedication of access rights to Orange County reinforces the BCC's intent 30 years ago to ensure open space for Orange County in perpetuity as noted below:

Access rights from Tract A to McKinnon Road and Lake Butler Bay Boulevard which were dedicated to Orange County by Plat Note 13 as set forth in Plat Book 18, Page 4. Note No. 13 ("Plat Note 13"), which Plat Note 13 dedicated access rights from Lot 101 and Tract A to McKinnon Road and Lake Butler Boulevard, to Orange County.

Windermere County Club access is conditioned via a roadway easement with the Windermere Club HOA. Clearly the property is privately owned. However, the usual private property access rights belong to Orange County. Since the closing the golf club, the property owner has

1. obtained Orange County Building Permit Number: B16900231
2. installed fence only for the portion of the golf course that faces homeowners
3. installed private property and no trespassing notices

At no time was there a fence between homeowner private property and the golf course property prior to the recent installation of the current fence. Public access to the golf course and Orange County open space was established long before the current property owner purchased the property.

The legal question is: can the golf course property owner assert Orange County's private property rights on other Orange County residents with a physical barrier and enforce notice? If no, what are the remedies? If no, How does the Orange County Building Department vet future building permit applications from the property owner in the absence of access and development rights? If the fence is legal, thank you for the work researching access rights for the golf course property.

It is my desire the Windermere County Club situation is resolved before you leave office. Your support is recognized and appreciated.

Sincerely,

David Tottle
2411 Butler bay Dr N
Windermere, FL 34786

Appendix 59.

#94-1

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS AT THEIR MEETING
JAN 8 1974

An act to be entitled

An ordinance relating to the landscaping of paved ground surface areas within the unincorporated areas of Orange County; providing definitions; providing general landscaping requirements; providing specific landscaping requirements for properties adjacent to public rights-of-way; and certain other properties; providing for internal landscaping; providing for and maintaining visibility at intersections; providing for existing developed areas; providing for rules and regulations; providing for variances; providing for severability; providing for liberality of construction; providing penalties; and providing an effective date.

Be It Ordained by the Board of County Commissioners of Orange County:

Section 1. This ordinance is enacted under the Home Rule power of the County for the purpose of providing minimum landscaping standards for paved ground surface areas in Orange County in the interest of the public health, safety and welfare of the citizens of Orange County. This ordinance shall apply and be in force in all areas of Orange County not within the boundaries of any municipality.

Section 2. Definitions. For the purposes of this ordinance, the following words and terms are defined:

(a) Encroachment: The protrusion of a vehicle into a vehicular accessway, pedestrian way or landscaped area.

(b) Landscaped Dividing Strips: Landscaped areas containing ground cover, shrubs and trees or other landscaping used to partition parking areas into individual bays.

(c) Landscaping: Landscaping shall consist of, but not be limited to, grass, ground covers, shrubs, vines, hedges, trees, berms and complementary structural landscape architectural features such as rock, fountains, sculpture, decorative walls and tree wells.

(d) Paved Ground Surface Areas: Any paved area, excluding public rights-of-way, used for the purpose of driving, maneuvering, parking, storing or display of motor vehicles, boats, trailers, mobile homes, and recreational vehicles including new and used automobile lots, other parking lot uses and paved outdoor sales areas. Parking structures and covered drive-in parking areas shall not be considered as paved ground surface areas.

(e) Parking Area: A paved ground surface area used for the temporary parking of vehicles by employees or customers, either for compensation or to provide an accessory service to a commercial, industrial or residential use.

(f) Parking Bays: Parking areas subdivided into uninterrupted rows of parking spaces and their adjoining accessways, the individual spaces of which are generally separated by only single or double painted lines.

(g) Parking Space: A paved ground surface area used for the temporary storage of a single vehicle to serve a primary use. Groups of spaces and abutting accessways are called parking bays.

(h) Trees: Self-supporting woody plants of species which normally grow to a minimum overall height of fifteen (15) feet and have an average mature crown spread greater than fifteen (15) feet within Orange County, Florida. Sable Palms (cabbage) are considered trees; however, the total number of Sable Palms used shall not exceed fifty percent (50%) of the trees required to be on site.

(i) Shrubs: A self-supporting woody species of plants characterized by persistent stems and branches springing from the base.

(j) Vehicle: A form of transportation, including motorized and non-motorized vehicles designed and required to be licensed for use upon a highway in the State of Florida.

(k) Vines: Plants which normally require support to reach mature form.

Section 3. General Landscaping Requirements. All paved ground surface areas which require land-

scaping shall meet or exceed the following general landscaping requirements which shall be considered complementary to the landscaping provisions of any other Orange County ordinance or resolution.

(a) Installation: All landscaping shall be installed according to accepted commercial planting procedures. Soil, free of lime rock, pebbles or other construction debris shall be provided. All landscaped areas shall be protected from vehicle encroachment by wheel stops or curbing. If curbing is used abutting landscaped areas, it shall be perforated to permit drainage from the paved ground surface area onto the landscaped areas.

(b) Maintenance: The owner of a property shall be responsible for the maintenance of all landscaping in good condition so as to present a neat, healthy and orderly appearance free of refuse and debris. All landscaped areas shall be provided with an irrigation system or a readily available water supply with at least one outlet located within one hundred fifty (150) feet of the plant material.

(c) Planting: All plant material shall meet or exceed Standards for Florida, No. 1, as presented in "Grades and Standards for Nursery Plants," Part I, 1963, and Part II, State of Florida, Department of Agriculture, Tallahassee, and any amendments thereto. Trees shall have a minimum height of six (6) feet immediately upon planting. No planting area shall have an area of less than twenty-five (25) square feet

and a minimum radius of two and one-half (2.5) feet measured from the center of the tree trunk to the near edge of the landscaped area.

(d) Additional Permissive Landscaping: Where a wheel stop or curb is utilized, the paved area between the curb and the end of the parking space may be omitted, providing it is landscaped in addition to the required landscaping herein, and further provided said landscaping is of material such as ground cover, rock or gravel, that requires minimal maintenance.

(e) Natural Vegetation: The preservation and utilization of the property's natural trees and shrubbery is encouraged.

Section 4. Specific Landscaping Requirements. All paved ground surface areas shall meet the following specific landscaping requirements which shall be considered complementary to the landscaping provisions of any other Orange County ordinance or resolution.

(a) Required Landscaping Adjacent to Public Rights-of-Way: Where paved ground surface areas are located adjacent to sidewalks, streets and other public rights-of-way, landscaping shall be provided between the public right-of-way and the paved ground surface area. Said landscaping shall include: a landscaped yard at least five (5) feet in width containing an opaque screen of landscaping at least three (3) feet in height. Said screen may be composed of a berm at least two (2) feet in height or maintenance-free wall at least three (3) feet in

height, or a screen of landscaping at least two and one-half (2.5) feet in height at time of planting. If a berm is utilized, additional landscaping at least one (1) foot in height shall be planted. If a screen of living landscaped material is utilized, it shall attain opacity and a height of three (3) feet within twelve (12) months of planting under normal growing conditions. One tree shall be planted for each fifty (50) linear feet, or fraction thereof, of frontage on a public right-of-way. Landscaping is not required if the paved ground surface area is completely screened from the public right-of-way by an intervening building or structure.

(b) Required Landscaping Adjacent to Other Properties: Where paved ground surface areas are adjacent to surrounding properties, landscaping shall be installed to screen paved ground surface areas from adjacent properties as provided below. Landscaping is not required if the paved ground surface area is completely screened from surrounding properties by intervening buildings or structures.

1. Where paved ground surface areas are adjacent to properties zoned exclusively for residential land uses, all land between the paved ground surface area and the property line shall be landscaped. Said landscaping shall include: a buffer yard at least five (5) feet in width,

containing either a berm at least two (2) feet in height, or a hedge or other durable screen of landscaping at least six (6) feet in height. If a berm is utilized, additional landscaping at least one (1) foot in height at time of planting shall be installed. Where said screen of landscaping is composed of living plant material, it shall be thirty (30) inches in height at time of planting and shall attain opacity within twelve (12) months under normal growing conditions. A minimum of one (1) tree shall be planted for each seventy-five (75) linear feet of common lot line or fraction thereof.

2. Where the adjacent property is zoned for non-residential land uses or where the adjacent property contains a conforming hedge, wall or other durable landscape feature, the provisions of Section 4 (b) 1. shall not apply to the rear or side lot lines, except that the tree planting provisions shall still apply. Said trees shall be installed in the buffer areas adjacent to each of the adjoining properties.

(c) Internal Landscaping Regulations: All parking areas and other paved ground surface areas used for vehicular parking shall have internal landscaping to provide visual and climatic relief from broad expanses of pavement and to channelize and define logical areas for pedestrian and vehicular circulation. Interior landscaping shall account for a minimum of five (5) per cent of parking areas. Other paved ground surface areas shall have one (1) square foot of interior landscaping for each fifty (50) square feet of paving in all areas exceeding five thousand (5,000) square feet. Each separate landscaped area shall contain at least one (1) tree, and a tree shall be planted for each one hundred (100) square feet on interior landscaping. All interior landscaping shall be protected from vehicular encroachment by curbing or wheel stops and should be raised. Landscaped dividing strips with or without walkways shall be used to subdivide parking areas into parking bays with not more than forty (40) spaces, provided that no more than twenty (20) spaces shall be in an uninterrupted row. If the site contains both parking areas and other paved ground surface areas, the two areas may be separated to determine the interior landscaping requirement by multiplying the total number of parking spaces by 380 and subtracting the resulting figure from the total square footage of the paved ground surface area.

(d) Intersection Visibility: When an accessway intersects a public right-of-way, landscaping shall be used to define the intersection, provided, however, that all landscaping within the triangular areas described below shall provide unobstructed cross-visibility at a level between two (2) and six (6) feet. Trees having limbs and foliage trimmed in such a manner that no limbs or foliage extend into cross-visibility shall be allowed, provided they are so located so as not to create a traffic hazard. Landscaping, except grass and ground cover, shall not be located closer than three (3) feet from the edge of any accessway pavement. The triangular areas are:

1. The areas of property on both sides of an accessway formed by the intersection of each side of the accessway and the public right-of-way pavement line with two (2) sides of each triangle being ten (10) feet in length from the point of intersection and the third side being a line connecting the ends of the two other sides.

2. The area of property located at a corner formed by the intersection of two or more public streets with two (2) sides of the triangular area being measured thirty (30) feet in length along the

abutting edges of pavement, measured from their point of intersection, and the third being a line connecting the ends of the other two lines.

Section 5. Existing Developed Areas. All property with existing paved ground surface areas on the effective date of this ordinance shall not be required to conform to the provisions of this ordinance unless reconstruction or expansion of improvements on property requiring a building permit is undertaken. No structure shall be required to be altered or moved, except during reconstruction, to meet the provisions of this ordinance. No parking area shall be required to lose more than one (1) out of every twenty (20) required parking spaces. It shall not be necessary for any parking area to be reduced below the minimum standards of any other Orange County ordinance or resolution in order to meet the provisions of this section.

Section 6. Regulations. The Board of County Commissioners may enact reasonable rules and regulations to carry out the provisions of this ordinance.

Section 7. Enforcement. The landscaping required by this ordinance shall be installed prior to the issuance of the certificate of occupancy by the Building Official of Orange County, Florida, when such certificate is required for any reason.

Section 7A. It shall be the duty of the property owner on whose land the paved area is installed, after the date of enactment of this ordinance, to

provide proper maintenance of the landscape planting so it, at all times, conforms to standards established within the ordinance. This includes, but is not limited to, the replacement of plants damaged by insects, diseases, vehicular traffic, acts of God and vandalism. Necessary replacements shall be made within a time period not to exceed ninety (90) days after notification by the County of a violation of this section of the ordinance.

Section 8. Variances. The Board of County Commissioners may grant a variance from the provisions of this ordinance, when such variance would not be contrary to the public interest. Such variance may also be granted where it furthers the intent and purposes of this ordinance.

Section 9. Severability. It is declared to be the intent of the Board of County Commissioners of Orange County, Florida, that if any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity and remaining portions hereof.

Section 10. Liberal Construction. The provisions of this ordinance shall be liberally construed in order to effectively carry out the purposes of this ordinance in the interest of the public health, welfare and safety of the citizens and residents of Orange County and the State of Florida.

Section 11. Penalties. A violation of this ordinance is a misdemeanor and shall be prosecuted and punished in accordance with general law. The Board of County Commissioners of Orange County, Florida, may bring suit in the Circuit Court of Orange County to restrain, enjoin or otherwise prevent violation of this ordinance.

Section 12. Effective Date: This ordinance shall take effect when the Board of County Commissioners of Orange County has received notification from the Secretary of State that this ordinance has been filed with the Secretary of State.

Appendix 60.

ORDINANCE NO. 91-9

An Ordinance Adopting and Enacting a New (Recodified) Code for Orange County, Florida; Providing for the Repeal of Certain Ordinances Not Included Therein; Providing a Penalty for the Violation Thereof; Providing for the Manner Amending Such Code; Providing for Severability; and Providing When Such Code and This Ordinance Become Effective.

Whereas, the Board of County Commissioners of Orange County, Florida, contracted with the Municipal Code Corporation of Tallahassee, Florida to recodify the existing County Code; and

Whereas, the recodification project involved hundreds of hours of staff time analyzing the various code provisions and how they should be recodified and organized; and

Whereas, the Municipal Code Corporation has submitted a recodified code consisting of two volumes appropriately tabbed, organized, indexed and bound; and

Whereas, recodified code contains an appendix which includes a code comparative table which references the old code provisions by number and correlates them to the new section numbers in the recodified code; and

Whereas, the appropriate staff has reviewed the recodified code; and

Whereas, the Board of County Commissioners have been informed by Memorandum of all changes to the Code effectuated by the recodification process; and

Whereas, the Memorandum of Substantive Changes is attached hereto and made a part hereof as Exhibit "One"; and

Whereas, the Local Planning Agency for Orange County has reviewed the recodified code with emphasis on the zoning provisions and approved same finding no substantive changes to the Zoning Code resulting from the recodification process; and

Whereas, codification of ordinances adopted by counties is provided for in Section 125.68, Florida Statutes and Section 211 of the Orange County Charter; and

Whereas, the Board of County Commissioners find it to be in the public interest to adopt the recodified code as submitted by the Municipal Code Corporation.

Now Therefore Be It Ordained by the Board of County Commissioners of Orange County.

Section 1. The Code entitled "Orange County Code," published by Municipal Code Corporation consisting of two volumes and chapters 1 through 38, each inclusive, is adopted. (Volumes One and Two as identified above are made a part hereof as composite Exhibit #2).

Section 2. All ordinances of a general and permanent nature enacted on or before August 27, 1990, and not included in the Code or recognized and continued in force by reference therein, are repealed.

Section 3. The repeal provided for in section 2 hereof shall not be construed to revive any ordinance or part thereof that has been repealed by a subsequent ordinance that is repealed by this ordinance.

Section 4. Unless another penalty is expressly provided, every person convicted of a violation of any provision of the Code or any ordinance, rule or regulation adopted or issued in pursuance thereof shall be punished by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed sixty (60) days, or both such fine and imprisonment. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. The penalty provided by this section, unless another penalty is expressly provided, shall apply to the amendment of any Code section whether or not such penalty is reenacted in the amendatory ordinance. In addition to the penalty prescribed above, the county may pursue other remedies such as abatement of nuisances, injunctive relief, and revocation of licenses or permits.

Section 5. Additions or amendments to the Code when passed in the form as to indicate the intention of the county to make the same a part of the Code shall be deemed to be incorporated in the Code, so that reference to the Code includes the additions and amendments.

Section 6. Ordinances adopted after August 27, 1990, that amend or refer to ordinances that have been codified in the Code shall be construed as if they amend or refer to like provisions of the Code.

Section 7. Severability. If any provision of this ordinance or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are declared severable.

Section 8. This ordinance shall become effective as provided by law.

Approved April 16, 1991

Effective April 26, 1991

Appendix 61.

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS AT THEIR MEETING

DEC 15 1992

ORDINANCE NO. 92-42

Effective Date:
December 31, 1992

AN ORDINANCE PERTAINING TO THE USE OF LAND IN ORANGE COUNTY, FLORIDA; AMENDING THE ORANGE COUNTY CODE IN REGARDS TO LANDSCAPING BUFFERING AND OPEN SPACE REQUIREMENT; AMENDING CHAPTER 24, LANDSCAPING, TO PROVIDE FOR COMPREHENSIVE AND CENTRALIZED REGULATIONS REGARDING LANDSCAPING, BUFFERING AND OPEN SPACE; AMENDING CHAPTER 38, ZONING, TO PROVIDE FOR CONSISTENCY WITH AND CROSS REFERENCE TO CHAPTER 24, LANDSCAPING, BUFFERING AND OPEN SPACE; AMENDING CHAPTER 34, SUBDIVISION REGULATIONS, TO PROVIDE FOR CONSISTENCY WITH AND CROSS REFERENCE TO CHAPTER 24, LANDSCAPING, BUFFERING AND OPEN SPACE; AMENDING SECTION 34-226 TO PROVIDE FOR STORMWATER NATURAL TERRAIN COMPATIBILITY AND IRRIGATION; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Orange County Comprehensive Policy Plan, Future Land Use Policies 4.1.2, 4.1.6, 4.1.12, 4.1.17, Conservation Policies 1.1.8, 1.7.7, 1.11.3, 1.11.5, Open Space Objective 1.1, Open Space Policies 1.1.1, 1.1.2, 1.1.4, Potable Water Policy 2.2.12, Wastewater Policy 2.2.3, and Stormwater Management Policy 1.1.4 all call for amendments to the regulations of Orange County which deal with landscaping, buffering, open space and/or stormwater, and

WHEREAS, in furtherance of the above listed Comprehensive Policy Plan Policies, Orange County has solicited public input and conducted public workshops to development the following amendments which implement such Policies, and

WHEREAS, the Board of County Commissioners deems it to be in the best interest of the people of Orange County to adopt the following amendments which are consistent with the above-referenced Comprehensive Policy Plan policies and serve to centralize and treat in a comprehensive manner those regulations dealing with landscaping, buffering, and open space, and to provide for consideration of natural terrain compatibility and irrigation regarding stormwater.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY:

Section 1. Orange County Code, Chapter 24, Landscaping, is being amended by this ordinance with changes too numerous to indicate in strike-through and underline fashion; therefore, Orange County Code, Chapter 24, Landscaping, is hereby deleted in its entirety and shall be replaced by the following:

CHAPTER 24
LANDSCAPING, BUFFERING AND OPEN SPACE

ARTICLE I. LANDSCAPING AND BUFFERING

Sec. 24-1. Purpose and Intent.

These regulations are enacted by Orange County for the purpose of the following:

(1) Maintaining and protecting property values;

(2) Providing an acceptable degree of transition between abutting uses;

(3) Providing appropriate barriers and relief from traffic, noise, heat, glare, and the spread of dust and debris;

(4) Conserving and extend the County's water supply and natural resources through the implementation of water-efficient landscape practices;

(5) Enhancing the visual and aesthetic appearance of the community; and,

(6) Preserving the natural terrain and vegetation where possible.

Sec. 24-2. Definitions.

As used in this Chapter/Article, the following terms shall have the meanings given herein.

Berms. Maximum slope permitted is 3:1. Berms must be completely covered with shrubs, sod or other landscape quality living ground cover.

Bufferyard. A land area, together with a specified type and quantity of planting and/or structures thereon required between abutting land uses to eliminate or minimize the impacts of one (1) or both such land uses on each other.

Caliper. A measurement of the size of a tree equal to the diameter of its trunk six (6) inches above the top of the rootball.

Certificate of Completion. An official document issued by the County evidencing that facilities constructed in support of a subdivision, have been completed in a form and manner acceptable to Orange County, Florida.

Certificate of Occupancy (C.O.). Certificate of Occupancy shall mean an official document evidencing that a building satisfies the requirements of Orange County for the occupancy of the building.

Change of use. Change of use shall mean a change from one (1) zoning use classification to another.

Encroachment. The protrusion of a vehicle into a vehicular accessway, pedestrian way or landscaped area.

Hedge. A close planting of shrubs which forms a compact, dense, living barrier which protects, shields, separates or demarcates an area from view and which is eighty percent (80%) opaque within twelve (12) months after planting. Material used shall not be less than thirty (30) inches in height at time of planting.

Landscape Plan. A scaled plan that clearly delineates vehicular use areas, and displays and describes all landscaping, to include method or irrigation and maintenance of the landscaped areas.

Landscaping. The use of plants, construction, and grading to create a desired effect. Landscaping elements may consist of, but are not limited to, turf and other ground covers, shrubs, vines, hedges, trees, berms, and complementary structural landscape features such as rock, fountains, sculpture, decorative walls and tree wells.

Masonry Wall. A wall and footing constructed of masonry material and meeting the requirements of the Southern Building Code.

Planning Manager. Performs the duties required by Orange County Personnel Job Classification Code 5230. The Planning Manager may designate a proxy to act on his/her behalf with respect to the implementation of this Chapter.

Qualified Professional. For projects other than single family and two-family dwellings on individual lots, qualified professionals can be an engineer, architect or landscape architect registered in the State of Florida or any nurseryman, nursery stock dealer, or agent as defined by Florida Statutes, Chapter 581, who is required under Chapter 581 to hold a valid license issued by the Division of Plant Industry of the Department of Agriculture and Consumer Services and who does hold a valid license to engage in the selling of nursery stock in this state, insofar as he engages in the preparation of plans or drawings as an adjunct to merchandising his product, so long as he does not use the title, term, or designation "landscape architect," "landscape architectural," "landscape architecture," "L.A.," "landscape engineering," or any description tending to convey the impression that he is a landscape

architect unless he is registered as provided in Florida Statutes, Chapter 481, or is exempt.

Reuse Water. Water that has received at least secondary treatment and is reused after flowing out of a wastewater treatment system.

Shade trees. Acceptable species as defined in Section 21-5 County Code. Each shade tree must be minimum eight (8) feet tall, with two (2) inch caliper.

Site Plan Review. Site Plan Review refers to Commercial Site Plan Review (Chapter 30, Orange County Code).

Understory Trees. Material used shall not be less than four (4) feet tall, one and one-half (1.5) inch caliper.

Vehicular use area. Any ground surface area (paved or unpaved) used for storage, display, temporary parking and/or maneuvering of vehicles by employees or customers, either for compensation or to provide an accessory service to a commercial, industrial or residential use, excluding single family and duplex residences.

Water-efficient Landscaping. Landscaping that maximizes the conservation of water, via the application of one (1) or more of the principles of Xeriscape™.

Xeriscape™. A set of design and maintenance principles which promote good horticultural practice and economic and efficient use of water.

Sec. 24-3. Applicability; Certificates of Occupancy; Maintenance; Penalties; Deviations.

(a) The provisions of this Chapter shall apply to the development of all real property in unincorporated Orange County that is subject to Commercial Site Plan

Review (Chapter 30, Orange County Code), unless otherwise found exempt by this Chapter.

(b) Construction requiring site plan review shall not be permitted until a landscape plan prepared by a qualified professional, consistent with this code, has been approved by the Planning Department.

(c) The redevelopment, reconfiguration, expansion, or change of use of a previously developed site requiring site plan review must comply with all elements of this Chapter, unless any of the following exemptions apply:

(1) The provisions of this code shall not apply to any property, structure or building for which a building permit has been issued by the Orange County Building Official, a complete application for a building permit has been submitted to the Orange County Building Department, a complete application for a Development Plan or Preliminary Subdivision Plan has been submitted to Orange County, prior to the effective date of this ordinance.

(2) Existing development of five thousand (5,000) square feet or less if the expansion is less than fifteen hundred (1,500) square feet.

(3) Existing development greater than five thousand (5,000) square feet if the expansion is less than twenty percent (20%) of the existing gross floor area on the parcel or lot, and not in excess of five thousand (5,000) square feet.

(d)(1) Expansions exempt via (C)(2) or (3) shall be aggregated over the five (5) year period following the issuance of a building permit. If at anytime during that five (5) year period additional permit(s) for expansion exceed that allowed by exemptions in (c)(2) or (3), the permit for construction that exceeds the exempted

amount shall require full compliance with this Chapter.

(2) The exemptions provided for in (C)(2) and (3) do not apply to new vehicular use areas that may be associated with the exempt development.

(e) No final Certificate of Occupancy/Completion shall be given or issued to the owner or his/her agent until all conditions of this Chapter have been met and the Planning Department has granted final approval and acceptance of the finished landscape product. Final approval shall include either a landscape inspection conducted by the Planning Department or as-built certification from a qualified professional that the landscaping is installed and functioning as intended.

A temporary Certificate of Occupancy/Completion may be issued in those instances where all site improvements except landscaping have been completed, and where electrical power is required to operate irrigation, or where lighting is needed to conduct preliminary business within the permitted structures or where weather conditions are not conducive to planting. Such temporary issuance is subject to the developer of the project certifying in writing that the required landscaping, as depicted on the approved plan, will be installed within a time period acceptable to the Planning Manager. The applicant may be required to post as surety a Letter of Credit or cash escrow with the Board of County Commissioners of Orange County, Florida, in a form acceptable to Orange County. Said surety, if posted, shall be in an amount no less than one-hundred twenty-five percent (125%) of the estimated cost of completing the approved landscape plan including but not limited to plant material, irrigation and labor. Failure to satisfactorily complete the required landscaping within the specified time period shall be grounds for the immediate and summary revocation of the temporary

Certificate of Occupancy/Completion by the County, and/or the forfeiture of the bond fund.

(f) Maintenance. All requisite landscaping, whether preserved or newly planted, must demonstrate health and viability after issuance of the Certificate of Occupancy/ Completion. Orange County may perform a courtesy inspection of the landscaping within ninety (90) days after issuance of the Certificate of Occupancy/Completion. If the landscaping appears to be under stress, staff shall notify the property owner. A compliance inspection will be performed approximately one (1) year after issuance of Certificate of Occupancy/Competition, or after actual landscape installation, whichever occurred last.

Alternatively, a qualified professional may certify in writing to the Planning Department that the landscape functions as designed and has been maintained properly. If the landscaping is not viable, notice shall be given to the property owner and the property owner shall be responsible for restoring the landscaping, within a time period acceptable to the Planning Manager.

(g) Penalties. Failure to have viable landscaping consistent with the approved landscape plan shall constitute a violation subject to penalties and shall be prosecuted and punished in accordance with Orange County Code, Secs. 1-9. The Board of County Commissioners may bring suit in the Circuit Court to restrain, enjoin or otherwise prevent violation of and/or enforce compliance with this Chapter.

(h) Deviations from regulations; variances. The provisions of this Chapter shall be liberally construed in order to effectively carry out the purpose of this Chapter in the interest of the health, safety and welfare of the residents of Orange County. The Planning Manager is authorized to grant deviations from this

Chapter where the application of the ordinance to a specific site would result in a practical difficulty or a physical hardship affecting the economic use of the property. Where substantial deviation from this Chapter is proposed, that in the opinion of the Planning Manager does not further the intent and purpose of this Chapter, the Board of County Commissioners may consider an appeal of the Planning Manager's decision,, pursuant to the standards contained in Orange County Code, Section 34-27. In applying Section 34-27 to a variance request hereunder, the term "subdivision improvements" shall be interpreted to mean "landscaping improvements."

Sec. 24-4. General design and development standards.

The requirements of this section apply in all circumstances, unless otherwise specified in this chapter.

(a) Vehicular use areas.

(1) Landscaping adjacent to street right-of-way. Landscaping shall be provided between vehicular use areas and any adjacent public street or right-of-way as follows:

a. A landscape strip at least seven (7) feet wide, or a landscape strip at least five (5) feet wide, where a minimum four (4) foot radius is provided for required shade trees;

b. One (1) shade tree for each forty (40) lineal feet, or fraction thereof;

c. A continuous hedge at least thirty inches (30") high at planting

of a species capable of growing to at least thirty-six inches (36") in height within eighteen (18) months; which hedge shall be maintained at a height not less than thirty-six inches (36"). The height of the hedge shall be measured from parking lot grade; and

d. Where wheel stops are not used, the required plantings shall not be planted within two (2) feet of the curb, to allow for vehicle overhang.

(2) Landscaping adjacent to other properties. Where a vehicular use area is adjacent to surrounding properties, landscaping shall be installed to screen the vehicular use area from adjacent properties as follows:

a. Where a vehicular use area is adjacent to existing residential properties or properties designated for residential use on the Official Zoning Maps or the Future Land Use Map of the Comprehensive Policy Plan, a landscape buffer shall be provided. The buffer shall be completely opaque from the ground up to a height of at least six (6) feet, and shall be a minimum of seven (7) feet wide. The buffer may utilize a masonry wall, berm, planted and/or existing

vegetation or any combination thereof which maintains the minimum requirements. The buffer must be four (4) feet high and seventy (70) percent opaque at planting and be capable of attaining full height and opacity within three (3) years. The buffer shall have at least one (1) shade tree every sixty (60) feet of common lot line or fraction thereof.

b. Where the adjacent property is zoned for non-residential use, or where the adjacent property maintains a conforming hedge, hedge/berm, or wall, the provisions of subsection (a) above shall not apply, except for the tree planting provisions.

c. The provisions of this section shall not be applicable in the following situations:

1. When the property line abuts a dedicated alley or railroad right-of-way; and/or,

2. For those portions of the property where a non-residential structure is opposite another non-residential structure located on the abutting property.

d. Plantings required in this Section may be counted toward satisfying the buffer requirements of Section 24-5.

e. A vehicular use area shall be considered adjacent to other properties if it is within thirty (30) feet of the property boundary.

(3) Vehicular use area interior landscaping. Landscaped areas shall be provided within the interior vehicular use areas to provide visual and climatic relief from broad expanses of pavement and to define logical areas for pedestrian and vehicular circulation. This section only applies to paved vehicular use areas used for employee and customer parking and maneuvering.

a. Interior vehicular use areas consist of all vehicular use areas except those parking spaces contiguous to a perimeter for which a landscape screen (hedge and trees) is required.

b. At least five percent (5%) of the remaining interior vehicular use area shall be landscaped. Each separate landscaped area shall be a minimum of twenty-five (25) square feet, with one (1) shade tree required for each one-hundred (100) square feet of required interior landscaping. All landscaped areas, adjacent to parking

areas shall be protected from vehicle encroachment by curbing or wheel stops.

c. A maximum of twenty (20) continuous parking spaces are permitted without a landscape break. The landscape break shall be a minimum of eight (8) feet in length and eight (8) feet in width, and include one (1) shade tree. As an alternative, landscaped seven (7) foot wide center medians located between all lineal rows of parking which face head-to-head may be provided, with one (1) shade tree provided per sixty (60) lineal feet of median.

(b) Intersection visibility. When an accessway intersects a public right-of-way, landscaping shall be used to define the intersection, provided, however, that all landscaping within the triangular areas described below shall provide unobstructed cross-visibility at a level between two (2) and six (6) feet. Trees having limbs and foliage trimmed in such a manner that no limbs or foliage extend into cross-visibility shall be allowed, provided they are located so as not to create a traffic hazard. Landscaping, except for grass and ground cover, shall not be located closer than three (3) feet from the edge of any accessway. The triangular areas are as follows, unless otherwise deemed necessary by the County Engineer.

(1) The areas of property on both sides of an accessway formed by the intersection of each

side of the accessway and the public right-of-way line with two (2) sides of each triangle being ten (10) feet in length from the point of intersection and the third side being a line connecting the ends of the two other sides; and,

(2) The area of property located at a corner formed by the intersection of two (2) or more public streets with two (2) sides of the triangular area being measured thirty (30) feet in length along the abutting edges of pavement, from their point of intersection, and the third being a line connecting the ends of the other two (2) lines.

(c) Parking garages. Perimeter landscaping shall be the same as for buildings.

(d) Building Perimeter. A landscaped area shall be provided between all buildings and the right-of-way. The required landscaping may be provided anywhere between the property line and the base of the building.

(1) The landscaped area shall be equal to fifty percent (50%) of the linear length of the building base oriented toward right-of-way by a minimum width of five (5) feet.

(2) At least fifty percent (50%) of the required landscaped area shall consist of

landscape which is capable of achieving a minimum of thirty (30) inches in height, with one (1) tree provided for each two-hundred (200) square feet of required landscaping or fraction thereof.

(3) The application of the required landscape shall be at the discretion of the owner, such that the required square footage may be aggregated to provide maximum aesthetic value. However, each perimeter requiring landscape must have at least fifty percent (50%) of the required landscape along that perimeter.

(e) Service areas. Service areas visible from a public right-of-way or abutting properties shall be screened by a six (6) foot masonry wall or ten (10) foot wide landscape buffer. The landscape buffer must be a minimum of three (3) feet in height, and fifty (50) percent opaque at planting, and be capable of attaining a height of five (5) feet and seventy-five percent (75%) opaque within eighteen (18) months.

(f) Solid waste storage areas. Solid waste refuse facilities shall be screened on three (3) sides by a six (6) foot high masonry wall if located within the building setback area or located in areas visible to patrons or pass-by traffic.

(g) Screening walls. Walls on side property lines shall be no more than four (4) feet high when forward of the building setback line. Landscaping shall be provided in the form of hedge and shrubs planted adjacent to the wall equal to at least twenty-five (25) percent of its length.

(h) Open storage. Open storage shall not be permitted unless totally screened

from public right-of-way and adjacent properties. Open storage shall be screened by a six (6) foot masonry wall or ten (10) foot wide landscape buffer. The landscape buffer must be a minimum of three (3) feet in height, and fifty (50) percent opaque at planting, and be capable of attaining a height of five (5) feet and seventy-five percent (75%) opaque within eighteen (18) months.

Sec.24-5. Bufferyards.

The bufferyards prescribed in this section are intended to reduce, both visually and physically, the negative impacts generated by abutting uses. Bufferyards shall be located on the outer perimeter of a lot or parcel, extending to the parcel boundary. Bufferyards shall not be located on any portion of an existing or dedicated public or private street or right-of-way.

(a) Buffer Classifications:

(1) Type A, opaque buffer. This buffer classification shall be used to separate heavy industrial (I-4 and M-1) uses from all residential uses. This buffer shall be completely opaque from the ground up to a height of at least eight (8) feet, and shall be a minimum of fifty (50) feet wide. The type A buffer shall utilize a masonry wall.

(2) Type B, opaque buffer. This buffer classification shall be used to separate community commercial (C-2) and general industrial (I-2, I-3 or I-5) uses from all residential uses. This buffer shall be completely opaque from the ground up to a height of at least six (6) feet, and shall be a minimum of twenty-five (25) feet wide. The type B buffer may utilize a masonry wall, berm, planted and/or existing vegetation or any combination thereof which maintains a completely opaque buffer. This buffer must be four (4) feet high and seventy percent (70%) opaque at planting and

be capable of attaining full height and opacity within three years.

(3) Type C, opaque buffer. This buffer classification shall be used to separate neighborhood commercial (C-1), and light industrial (I-L) uses from all residential uses. This buffer shall be completely opaque from the ground up to a height of at least six (6) feet, and shall be a minimum of fifteen (15) feet wide. The Type C buffer may utilize a masonry wall, berm, planted and/or existing vegetation or any combination thereof which maintains a completely opaque buffer. This buffer must be three (3) feet high and fifty percent (50%) opaque at planting and be capable of attaining full height and opacity within three (3) years.

(4) Type D, opaque buffer. This buffer classification shall be used to separate professional office (P-O) use from all residential uses. This buffer shall be completely opaque from the ground up to a height of at least six (6) feet and shall be a minimum of ten (10) feet wide. The Type D buffer may utilize a masonry wall, berm, planted and/or existing vegetation, o any combination thereof which maintains a completely opaque buffer. This buffer must be three (3) feet high and fifty percent (50%) opaque at planting and be capable of attaining full height and opacity within three (3) years.

(5) Type E, mobile home and R-V park buffer. This buffer classification shall be used to separate mobile home and RV parks from all abutting uses. This buffer shall be twenty-five (25) feet wide. Where the park abuts an arterial highway, the buffer shall be fifty (50) feet wide. This buffer shall not be considered to be part of an abutting mobile home space, nor shall such buffer be used as part of the required recreation area or drainage system (ditch or canal). This buffer may utilize a masonry wall, berm, planted and/or existing vegetation, or any combination thereof.

This buffer must be at least five (5) feet in height and fifty percent (50%) opaque within eighteen months after installation.

(6) Type F, residential subdivision buffer. See Subdivision Regulations (Chapter 34, Orange County Code.)

(b) All buffers shall include one (1) shade tree for each forty (40) lineal feet or fraction thereof.

(c) Minimum bufferyard widths of Types B through E may be decreased by twenty percent (20%) if the buffer incorporates any of the following components:

(1) Utilize plantings and berms to meet minimum buffer requirements.

(2) Utilize plantings, berms and wall to meet minimum buffer requirements, where wall is combined with berm to meet minimum height requirements.

(3) Utilize wall with plantings, where the plantings parallel for at least seventy-five percent (75%) of the linear length of the wall, and covers at least twenty-five percent (25%) of the required buffer width.

(d) Use of bufferyards. All of the bufferyard options may be counted toward zoning district yard setbacks and open space requirements. Passive recreational uses such as walkways, par courses, golf courses, bikeways and retention areas may be located within bufferyards to the extent they are allowed by Zoning, provided that bufferyard width and screening requirements are maintained. The following uses are prohibited in bufferyards: playgrounds, swimming pools, tennis courts, vehicular use areas, storage, or buildings.

(e) Bufferyard maintenance. Bufferyards may be maintained as follows:

(1) The bufferyards may be placed in common ownership of the property owners with maintenance by the property owners' association; or,

(2) The bufferyard may be placed on private property within a landscape buffer easement dedicated to the property owners' association, with maintenance provided by the property owners' association.

Sec. 24-6. Water-efficient landscaping.

(a) Purpose. Because water restrictions have become a common occurrence in Central Florida, the County is incorporating water efficient landscape standards into this Section, however, where reuse water is utilitized water-efficient landscaping may be inappropriate. Xeriscape™ is a set of landscape design and maintenance principles which promote good horticultural practice and the economic and efficient use of water. The term Xeriscape™ is the registered trademark of the National Xeriscape™ Council and means water conserving, drought tolerant landscaping or simply the use of appropriate plant materials that do not require special attention and which require little supplemental water to grow properly. Xeriscape™ designs do not resemble desert landscapes, but reflect the lush traditional appearance of Florida gardens.

(b) Water-efficient Design. The following water-efficient principles shall be considered when designing the landscape plan:

(1) Design. Tree and plant material shall be grouped into zones designated by the water requirements of the plants. The water use zones shall be shown on the Landscape Plan. Plants of lower water use maybe used in a zone of higher water use, but higher water use plants shall not be placed into a lower water use zone. All newly installed plants require regular watering for the first year to become

established. Installed trees and vegetation shall be spaced and located to accommodate their mature size on the site. The Water Use Zones are as follows:

a. High Water Use Zone. A zone containing plants which are associated with moist soils and require supplemental water in addition to natural rainfall to survive. This zone includes most turfgrass areas.

b. Moderate Water Use Zone. A zone containing plants which survive on natural rainfall with supplemental water during seasonal dry periods. This zone includes St. Augustine, Bahia and other turfgrass areas.

c. Low Water Use Zone. A zone containing plants which survive on natural rainfall without supplemental water.

(2) Plant selection. Plant material shall be selected that is best suited to withstand the growing and soil conditions which are found in the microclimate of each particular location on a site. Plant species that are freeze and drought tolerant are preferred.

(3) Turfgrass. Turfgrass areas shall be consolidated and limited to those areas on the site that receive pedestrian traffic, provide for recreational uses, provide soil erosion control such as on slopes or in swales, where turfgrass is used as a design unifier, or other similar practical use. The Landscape Plan shall label the use of turf areas.

(4) Mulch. A layer of organic mulch to a minimum depth of 2" shall be specified on the landscape plans in plant beds and around individual trees in turfgrass areas. Mulch shall not be required in annual beds.

(5) Irrigation. Reuse water maybe used. The irrigation system shall be designed to correlate to the organization of plants into zones as described in (a) above. The water use zones shall be shown on the Irrigation Plan, when required by this Part. Irrigation shall be required as follows:

a. High Water Use Zone. All portions of high water use zones shall be provided with central automatic irrigation systems.

b. Moderate Water Use Zone. All portions of moderate water use zones shall be provided with a readily available water supply within 25 feet.

c. Low Water Use Zone. All portions of low water use zones shall be provided with a readily available water supply within 50 feet.

Turfgrass areas shall be irrigated on separate irrigation zones from tree, shrub and groundcover beds. Moisture sensor and/or raingauge equipment shall be required on automatic irrigation systems to avoid irrigation during periods of sufficient rainfall. The use of low water volume, emitter, or target irrigation is preferred for trees, shrubs and groundcovers. No significant irrigation overthrow shall be allowed onto impervious surfaces.

(c) Reuse Water Design. Where reuse water is utilized the design principles of water-efficient landscaping maybe used in conjunction with plantings consistent with the volume of reuse water to be discharged on the property.

Sec. 24-7. Irrigation.

A permanent underground central irrigation system providing one-hundred percent (100%) coverage of all landscape/buffer areas is required. This central irrigation system shall use reuse water if the reuse source is adjacent to the parcel boundary and available with adequate capacity and pressure. All non-reuse central irrigation systems shall have a rain sensor device or switch which will override the irrigation cycle of the sprinkler system when adequate rainfall has occurred. The requirement for central irrigation providing one-hundred percent (100%) coverage may be waived by the Planning Manager under the following circumstances:

(1) When site dimensions and landscape requirements could be serviced by spigots within fifty (50) feet of all plant material;

(2) Where native plant habitat is retained;

(3) Where water-efficient landscaping and irrigation is proposed as defined in Section 24-6.

Sec. 24-8. Landscape materials/installation.

(a) Materials.

(1) Plant quality. Plant material used to satisfy Sections 24-4 and 24-5 must meet or exceed "Florida No. 1", as established in the latest publication by the State. of Florida, Department of Agriculture and Consumer Services, Tallahassee, Florida.

(2) Potable Water Conservation. Unless reuse water is utilized, plant material must be native to, or adaptable to the site, and possess appropriate water requirements according to appropriate Water Management District Guidelines.

(b) Installation. All landscaping shall be installed according to accepted commercial planting procedures. Soil shall be free of lime rock and other construction debris. All landscaped areas shall be protected from vehicle encroachment by wheel stops or curbing.

Sec. 24-9. Planned developments.

The following are additional requirements that apply to non-residential projects submitted for review under the Planned Development (P-D) district.

(a) Land use plan. The land use plan shall graphically display and/or note the location, width and opacity requirements of all landscape buffers required in this chapter.

(b) Development/subdivision plan. Landscape plans shall contain the following information:

(1) Location of all existing or proposed structures, vehicular use areas, easements, and surveyed conservation boundaries, if applicable.

(2) Tree survey, consistent with Section 15-301(b), Orange County Code.

(3) The location of all landscape/buffer areas proposed to be planted on the site. This shall include specifications as to size, spacing and opacity of plant material and shall include

building perimeter and internal landscape details.

(4) Proposed method of irrigation.

(5) Method of maintenance.

Sec. 24-10. Activity Center/tourist commercial development.

The following standards apply to all properties located within a designated Activity Center or tourist commercial corridor, unless exempted as a Development of Regional Impact (DRI) or as a binding letter of vested rights development by Section 30-363, and are supplemental to all other requirements of this Chapter.

(a) Activity Center requirements.

(1) Streetscape buffers. The buffers depicted in Exhibit A are required along all roadways located within the International Drive Activity Center.

(2) Perimeter landscaping.

a. Trees shall be provided within buffer areas described in #1 at the rate of one (1) shade tree for each forty (40) feet of road frontage or fraction thereof, planted on-center. These shade trees are to be a minimum of sixteen (16) feet high, with a minimum caliper of three and one-half (3-1/2) inches, with a minimum six (6) foot clear trunk, at planting. Shade trees shall be provided along side and rear lot lines not abutting right-of-ways at a rate of one (1) tree for each fifty (50)

linear feet or fraction thereof.

b. All paved parking and vehicular use areas shall be screened as follows:

1. A continuous hedge at least thirty (30) inches high, spaced no greater than thirty (30) inches on-center at planting, which shall reach at least forty-eight (48) inches high, and eighty percent (80%) opacity within twelve (12) months.

2. When two (2) hedges occur along a common property line, compatible species shall be used.

Additional screening requirements along side and rear property lines may be required based upon the abutting land use (See Section 24-4(2) and Section 24-5).

Conventional stormwater retention facilities shall be designed as a site amenity (per Section 38-1234, Orange County Code). If design as an amenity is determined infeasible by the County Engineer, the stormwater facilities shall be screened from public right-of-way by a

continuous hedge, berm, or combination of both.

(3) Interior landscaping.

a. Landscaping shall be provided throughout parking areas in an amount equal to ten (10) percent of the total paved area. Each landscaped area shall be a minimum of one hundred (100) square feet. One (1) shade tree shall be required for each seventy-five (75) square feet of required landscaping. A landscape starter shall be provided at the end of each parking area adjacent to the travel lane serving the parking aisle. A minimum of fifty (50) percent of the required landscape areas shall be landscaped with plant materials other than ground cover. All landscaped areas shall be protected from vehicular encroachment by curbs or wheel stops.

b. No more than fifteen (15) parking spaces shall be placed in a continuous row without a landscape break. The landscape break shall be a minimum of eight (8) feet in length or eight (8) feet in width, and include one (1) shade tree. As an alternative, landscaped seven (7) foot wide center medians located

between all lineal rows of parking which face head-to-head may be provided, with one (1) shade tree provided per fifty (50) lineal feet of median.

(4) Building perimeter. A landscaped area shall be provided around the base of all buildings oriented toward right-of-way or public parking areas.

a. The landscaped area shall encircle the building base oriented toward right-of-way or parking area. Minimum width shall be five (5) feet.

b. At least fifty percent (50%) shall consist of landscape other than ground cover, with one (1) tree provided for each one-hundred (100) square feet of required landscaping or fraction thereof.

c. The application of the required landscape shall be at the discretion of the owner, such that the required square footage may be aggregated to provide maximum aesthetic value. However, each perimeter requiring landscape must have at least fifty percent (50%) of the required landscape along that perimeter.

(b) Tourist commercial corridor requirements.

(1) Perimeter landscaping. Trees shall be provided along bufferyard areas abutting public rights-of-way at a frequency of one (1) tree for every fifty (50) feet of road frontage or fraction thereof. Trees shall be provided along side and rear lot lines not abutting rights-of-way, at a ratio of one (1) tree for each seventy-five (75) linear feet or fraction thereof. Existing trees will be counted to meet this requirement. Trees must be placed within the buffer yard areas with at least fifty (50) percent of the required trees located within fifteen (15) feet of the property line.

a. The application of the perimeter landscaping criteria shall be flexible with preference being given to aesthetically pleasing landscape design over a rigid interpretation of the tree spacing standard; however, no more than one hundred fifty (150) contiguous feet along the perimeter of the property shall be void of trees.

b. The type and size of landscape material shall conform with the plant material specifications contained in this section.

(2) **Screen hedges/berms.** All paved areas and fenced stormwater retention facilities shall be screened from the public right-of-way by a continuous hedge or berm, or combination of both. The use of plant materials to provide a continuous hedge shall conform to the plant material specifications provided herein.

a. Berms may be utilized to provide screening of paved areas or stormwater retention facilities, provided they are a minimum of two (2) feet in height and no more than five (5) feet in height. Berms shall be supplemented with landscaping in order to provide a minimum thirty-six-inch (36) high screen.

b. Berms constructed adjacent to the public right-of-way shall not exceed seventy-five (75) feet in length without a landscape break. Overlapping Berms may be utilized in lieu of landscape breaks.

c. Paved areas adjacent to side or rear property lines shall be screened from abutting properties by hedging or Berms equaling twenty-five (25) percent of the paved frontage. No more than fifty (50) continuous feet along the property line shall be void of screening. Additional landscaping shall be provided to screen any on-site uses having a negative impact on adjacent property.

(3) **Interior landscaping.** Landscaping shall be provided in scattered locations throughout the parking areas and the aggregate square footage covered by such landscaping shall not be less than five (5)

percent of the total paved area. Each landscaped area shall be a minimum of two hundred (200) square feet. A landscape starter shall be provided at the end of each parking area adjacent to the travel lane serving the parking isle. A minimum of fifty (50) percent of the required landscape areas shall be landscaped with plant materials other than ground cover.

a. All landscaped areas shall be protected from vehicle encroachment by curbing or wheel stops.

b. No more than twenty (20) parking spaces shall be placed in a continuous row without a landscape break. Flexibility in the application of this standard shall be given to parking areas serving more than five hundred (500) cars, provided that the proposed design produces an acceptable alternative.

c. A minimum of fifty (50) percent of the required trees provided within the interior landscaped area shall be of a large shade tree variety.

(4) Building landscaping. A landscaped area shall be provided around the base of all buildings oriented toward public rights-of-way or public parking areas. The rear of the building shall not be included within the landscaped area unless it is oriented to a public right-of-way.

a. This landscaped area shall be equal to fifty (50) percent of the linear length of the building base oriented toward the rights-of-way

or parking areas, with a minimum width of four (4) feet.

b. At least half of the required landscaped area shall contain landscape material other than ground cover, with trees provided at a ratio of one (1) tree per two hundred (200) square feet of required landscaped area or fraction thereof. The distribution of the landscaped areas shall be at the discretion of the owner.

ARTICLE II. OPEN SPACE

Sec. 24-26. Definitions.

As used in this Article, the following terms shall have the meanings given herein.

Open space shall mean lands set aside for the following: (1) 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 soils); or (2) recreation areas; or, (3) the enhancement of the developed urban environment (including buffer areas, landscaped areas, plazas, and hardscapes).

Common open space shall mean a type of open space designed and intended for use or enjoyment to the occupants of a project.

Residential private open space shall mean the usable open space on individual lots maintained by the required front, rear and side yards of the residential zoning district and excluding paved driveways, principal and accessory structures. However,

for purposes of this article, recreational structures such as, but not limited to, pools, tennis courts and porches shall not be considered accessory structures and shall be included in calculating residential private open space.

Sec. 24-27. Legislative findings.

(a) Open space provides protection of natural resources by encouraging preservation of aquifer recharge areas, floodplains, wetlands and wildlife habitat;

(b) Open space enhances the quality of life by providing space for recreation;

(c) Open space enhances the urban environment by providing visual relief, and improving light infiltration and air circulation in developed areas;

(d) Private open space can be provided in residential areas by required lot setbacks and minimum lot sizes;

(e) Consistency in the definition of open space and the provisions for open space are necessary for the balance between private property rights and the protection of the public health, safety and welfare.

Sec. 24-28. Applicability.

The regulations herein are applicable to all development applications permitted by the County. The percentages listed below are considered minimum standards; however, an applicant may provide a greater percentage of open space but a greater percentage will not be required by the County.

Sec. 24-29. Open Space Requirements.

(a) In the following residential zoning districts, residential private open space shall be 40%:

R-A
RCE-5

RCE-2
A-R
R-CE
R-1AAAA
R-1AAA
R-1AA
R-1A
R-1
R-2 (single family detached housing only)
R-3 (single family detached housing only)

Provided, however, that when a variance to the building setbacks for an addition to the principal residence is successfully obtained from the Board of Zoning Adjustment, then the residential private open space requirements shall be automatically reduced by an amount sufficient to accommodate the setback variance.

(b) In the following residential zoning districts, residential private open space shall be 45%:

R-2 (excluding single family detached housing)

R-3 (excluding single family detached housing)

(c) In the non-residential zoning districts, open space shall be provided as follows:

Office - 25%
Commercial - 20%
Industrial - 15%
Institutional - 35%

(d) For planned development zoning districts, open space shall be provided in accordance with Section 38-1234 of the Orange County Code.

(e) For residential cluster districts, common open space shall be provided as follows:

Gross Residential Density	% Common Open Space Req'd
less than or equal to 1 unit/acre	None req'd
greater than 1 units/acre	10%

Sec. 24-30. Open space design guidelines.

The following design guidelines are provided to encourage proper design, location and use of open space. For facilities that serve a primary purpose other than open space, performance standards are established for use in obtaining open space credits for these areas.

(a) Location - Open space, other than private residential open space, should be located within the project to enhance its functions as follows:

(1) Landscape buffers should be located on the perimeters of the project and along major collectors and arterials to provide maximum screening from adjacent land uses.

(2) Recreational open space should be located internal to the project and be easily accessible to all residents and employees.

(3) Open space areas that provide natural resource protection should be located to preserve floodplains, wetlands, aquifer recharge areas, wildlife habitat and other unique natural resources.

(b) Size - Open space areas should be the appropriate size for their primary function.

(c) Distribution - Open space should be distributed with reasonable uniformity throughout the project so that remnant open space areas are not created that are unusable or function as private open space

to only a small percentage of the development.

(d) Integration

(1) Integrated open space systems, i.e. connected by greenways, bike paths and/or walkways, are encouraged.

(2) If the project is located next to off-site open space whose primary function is conservation of natural resources, connection of open space with compatible functions is encouraged.

(e) Ownership and Maintenance - Common open space areas, shall be the responsibility of a property owners association or a method shall be provided for assuring the maintenance of and access to all Common open space areas in perpetuity, either by transferring ownership and maintenance responsibilities for the open space areas to a trustee or mandatory homeowners association, or by some other method acceptable to the Board of County Commissioners. The County shall not be responsible for the maintenance of Common open space areas.

(f) Irrigation - All development containing a contiguous irrigated open space tract or parcel greater than twenty (20) acres, including golf courses, shall be required to accept reclaimed water for irrigation when such reclaimed water is available adjacent to the development's boundary and has sufficient capacity and pressure. Connection shall be consistent with the connection policies of the applicable utility provider.

(g) Open Space Credits - All of the uses below shall be credited towards open space if all performance standards are met. The amount of credits depends on the category of open space but in no case shall Category A open space constitute less than 25% of the total open space required.

(1) Category A Open Space. All of the uses listed below shall count one hundred (100) percent towards meeting the total open space required:

a. Buffer zones and greenbelts;

b. Recreational areas (active and passive);

c. Landscaped areas;

d. All other permanently undeveloped uplands.

e. Dry bottom stormwater management ponds that meet the following requirements:

1. Sodded;
2. Unfenced;
3. Must be dry within seventy-two (72) hours after a twenty-five year storm event;
4. A skimmer must be provided to minimize the accumulation of trash and pollutants;
5. At least five (5) percent of the area above the peak stage elevation must be landscaped with at least fifty (50) percent of the required area landscaped with plant materials other than ground cover (the use of native plant species is encouraged).

(2) Category B Open Space. All of the uses listed below may be credited towards meeting the minimum open space requirements if the performance standards are met, but shall not account for more than fifty (50) percent of the total open space required:

a. Wet bottom stormwater management ponds that meet the following requirements:

1. Minimum of 1.0 acre;

2. 5:1 side slopes;

3. Sodded or an equivalent ground cover;

4. Unfenced;

5. Curvilinear in shape rather than angular;

6. Landscaped in accordance with the following criteria:

i. 1.0-2.5 acres: At least ten (10) percent of the land above the design highwater level excluding maintenance Berms shall be landscaped with at least fifty (50) percent of the required area landscaped with plant materials

other than ground cover (the use of native plant species is encouraged); or a littoral zone band of at least five (5) feet in width for at least fifty (50) percent of the shoreline established with native aquatic or semi-aquatic plant species;

ii. 2.5-5.0 acres: At least five (5) percent of the land above the design highwater level excluding maintenance berms shall be landscaped with at least fifty (50) percent of the required area landscaped with plant materials other than ground cover (the use of native plant species is encouraged); or a littoral zone band of at least five (5) feet in

width for at least thirty-five (35) percent of the shoreline established with native aquatic or semi-aquatic plant species;

iii. More than 5.0 acres: A littoral zone band of at least five (5) feet in width for at least twenty (20) percent of the shoreline established with native aquatic or semi-aquatic plant species.

7. Access provided for all residents/employees.

b. Easements that meet the following requirements:

1. Minimum twenty-five (25) feet wide;

2. Accessible for public use;

3. Written verification from the easement holder authorizing unrestricted access.

c. Plazas/hardscapes that meet the following requirements:

1. Twenty (20) percent landscaped;

2. Seating areas;

3. Thirty (30) percent or gross pedestrian accessible (excluding sidewalks) for area remaining after landscaping and water features/ sculptures.

d. Natural lakes that meet the following requirements:

1. Only that portion of lakes which are within the legal description of the project shall be credited towards open space;

2. Must be accessible to all residents/ employees. Common access to natural lakes shall be at least equal to the minimum lot size established by the zoning districts or one-half acre, whichever is greater.

(3) Category C Open Space. Areas within a project, phase, or tract, which are classified as conservation areas (including mitigation area), pursuant to Chapter 15, Article X (Conservation Ordinance), shall be identified at the time of plan submission. Conservation areas shall qualify as open space. However, to insure that conservation areas or mitigation areas which comprise a high percentage of a project or tract do not

constitute the only open space for the project, the amount of open space credit shall be limited to no more than seventy-five (75) percent of the total open space required.

(4) Open space categories "B" and "C" cannot count more than seventy-five (75) percent of the total open space required for the project, phase or tract.

Section 2. Orange County Code, Chapter 38, Zoning, is hereby amended in part as shown in Sections 3 through 12 below with the additional language indicated by underlining and the deleted language being struck through.

Section 3. Orange County Code, Chapter 38, Zoning, Article I, In General, Section 38-1, Definitions, the definition of open space is hereby amended as follows:

Sec. 38-1. Definitions.

• • •

Open Space shall mean ~~an area uneneumbered with any structure (except signs), off street parking or other impervious surfaces and shall be landscaped in accordance with chapter 24, article II (pertaining to landscaping of paved ground surface area), the purposes for requiring open space are to provide for adequate light, air, visual relief, rainfall percolation, and in residential areas, recreational use.~~ land set aside for: (1) 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 soils); (2) recreation areas; and, (3) the enhancement of the urban

environment (including buffer areas, landscaped areas, plazas, and hardscapes).

• • •

Section 4. Orange County Code, Chapter 38, Zoning, Article VI, Residential Districts, Division 9, R-2 Residential Districts, Section 38-452, Definitions, is hereby amended in part by deleting the definition of open space as follows:

Sec. 38-452. Definitions.

• • •

~~Open space shall mean the net land area of a site, including required yards and recreation space, but exclusive of buildings, vehicular accessways, and paved parking areas.~~

• • •

Section 5. Orange County Code, Chapter 38, Zoning, Article VI, Residential Districts, Division 9, R-2 Residential Districts, Section 38-455, Site Development Standards, is hereby amended in part as follows:

Sec. 38-455. Site development standards.

• • •

(1) h. Open space shall account ~~for a minimum of fifty-five (55) percent of the net area of the site. This provision shall not apply to single or two family dwelling unit construction on parcels classified in the R-3 district on the effective date of this resolution.~~ be provided in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

• • •

(10) Open space shall ~~account for a minimum of fifty five (55) percent of the net area of the site.~~ be provided in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

• • •

Section 6. Orange County Code, Chapter 38, Zoning, Article VI, Residential Districts, Division 13, Cluster District, Section 38-557, Common Open Space, Subsection (a) is hereby amended in part as follows:

Sec. 38-557. Common open space.

(a) ~~All common open space areas~~ The amount of common open space, as required by Orange County Code, Chapter 24, Article II, Open Space Regulations, 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 homeowners' association, or by some other method acceptable to the Board of County Commissioners. The County shall not be responsible for the maintenance of common open space areas.

Section 7. Orange County Code, Chapter 38, Zoning, Article VI, Residential Districts, Division 13, Cluster District, Section 38-559, Performance Standards, Subsection (b) is hereby amended in part as follows:

Sec. 38-559. Performance standards.

(b) Common open space ~~should be easily accessible to all residents and include~~

~~irreplaceable natural features of the site (such as, but not limited to, stream beds, lakes and conservation areas). The development layout should accent these features by providing visibility from as many units as possible and/or public streets.~~ shall comply with the design guidelines in Orange County Code, Chapter 24, Article II, Open Space Regulations.

Section 8. Orange County Code, Chapter 38, Zoning, Article VII, Commercial Districts, Division 2, P-O Professional Office District, Section 38-801, Definitions, the definition of open space is hereby deleted as follows:

Sec. 38-801. Definitions.

• • •

~~Open space shall mean the area of a lot or parcel of land exclusive of buildings, accessory uses, vehicular accessways and parking areas.~~

• • •

Section 9. Orange County Code, Chapter 38, Zoning, Article VII, Commercial Districts, Division 2, P-O Professional Office District, Section 38-806, Site Development Standards, Subsection (8), is hereby amended as follows:

Sec. 38-806. Site development standards.

(8) Minimum open space shall be ~~thirty-five (35) percent.~~ in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

Section 10. Orange County Code, Chapter 38, Zoning, Article VII, Commercial Districts, Division 3, C-1 Retail Commercial District, Section 38-830, Performance Standards, Subsection (8), is hereby amended as follows:

Sec. 38-830. Performance standards.

(8) ~~Minimum open space: Fifteen (15) percent, excluding retention areas, or twenty (20) percent, including retention areas.~~ Minimum open space shall be in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

Section 11. Orange County Code, Chapter 38, Zoning, Article VII, Commercial Districts, Division 4, C-2 General Commercial District, Section 38-855, Performance Standards, Subsection (7), is hereby amended as follows:

Sec. 38-855. Performance standards.

(7) ~~Minimum open space: Fifteen (15) percent, excluding retention areas, or twenty (20) percent, including retention areas.~~ Minimum open space shall be in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

Section 12. Orange County Code, Chapter 38, Zoning, Article VII, Commercial Districts, Division 5, C-3 Wholesale Commercial District, Section 38-880, Performance Standards, Subsection (7), is hereby amended as follows:

Sec. 38-880. Performance standards.

(7) ~~Minimum open space: Fifteen (15) percent, excluding retention areas, or twenty (20) percent, including retention areas.~~ Minimum open space shall be in

accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations.

Section 13. The specific sections of Orange County Code, Chapter 38, Zoning, listed below each regulate landscaping, buffering and/or open space requirements and the textual contents of such sections are hereby deleted and are hereby replaced with language stating: "Landscaping, buffering and open space requirements shall be as provided for in Orange County Code, Chapter 24."

38-578(2)(d)
38-806(12)
38-830(10)
38-855(9), (10), (13)
38-880(9), (10), (13)
38-906(c)
38-931(c)
38-956(d)
38-958(2), (3)
38-981(c)
38-1006(c)
38-1031(c)
38-1529(4)

Section 14. Orange County Code, Chapter 34, Subdivision Regulations, Article V, Design Standards, Division 1, Generally, Section 34-155, Public Sites and Open Spaces, Subsection (a) is hereby amended as follows, with the additional language being underlined and the deleted language being struck through:

Sec. 34-155. Public sites and open spaces.

(a) Private Open Spaces. ~~Developers may include private parks and recreation areas in subdivisions provided that the~~

~~proposed--areas--are--clearly--designated--as "tracts"--on--the--plat,--are--adequate--for--the intended--purposes,--and--assurance--is--given--in the--form--of--subdivision--deed--restrictions that--they--will--be--adequately--maintained. Private--parks--and--recreation--areas--shall--be identified--on--the--plat--as--common--areas--for the---owners---of---property---within---the subdivision.---For--parks--or--recreation--areas over--five--(5)--acres--in--size,--the--applicant may--petition--the--County--to--own,--operate--and maintain--the--park--or---recreation---areas.~~ Subdivisions are required to provide open space in accordance with Orange County Code, Chapter 24, Article II, Open Space Regulations. Open space and/or common open space areas shall be clearly designated as tracts or easements.

Section 15. Orange County Code, Chapter 34, Subdivision Regulations, Article VII, Stormwater Management, Division 1, Generally, Section 34-226, Required Features, is hereby amended in part by adding Subsections 4 as follows with the additional language being indicated by underlining:

Sec. 34-226. Required features.

A stormwater management system shall be designed and installed for the development that will contain features to provide for:

• • •

(4) Natural terrain compatibility. The natural terrain features of the site may be utilized where practicable and feasible to protect the site against flooding.

Section 16. Severability. If any section, phrase, sentence or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof, assuming the remaining portions can be given effect.

Section 17. Effective Date. This Ordinance shall become effective pursuant to general law.

Appendix 62.

Sec. 30-35. - Same—Functions, powers and duties.

(a) The functions, powers and duties of the planning and zoning commission shall be in general:

(1) To acquire and maintain in current form such basic information and materials as are necessary to an understanding of past trends, present conditions, and forces at work or cause changes in these conditions. Such basic information and materials may include maps and photographs of manmade and natural physical features of the area concerned, statistics on past trends and present conditions with respect to population, property values, economic base, land use and such other information as is important or likely to be important in determining the amount, direction and kind of development to be expected in the area and its various parts.

(2) To prepare and from time to time amend and revise the comprehensive and coordinated general plan for meeting present requirements and such future requirements as may be foreseen; to prepare and from time to time amend and revise an official zoning map showing the zones and districts as established by the comprehensive plan.

(3) To establish principles and policies for guiding action in the development of the area.

(4) To prepare and recommend to the board of county commissioners resolutions promoting orderly development along the lines indicated in the comprehensive plan.

(5) To determine whether specific proposed developments conform to the principles and requirements of the comprehensive plan for the growth and development of the area, and to approve all proposed plats in accordance with the standards and requirements of the comprehensive plan and the regulations adopted hereunder.

(6) To provide for an orderly street development and alignment in all plats and subdivisions developed in the county.

(7) To keep the board of county commissioners and the general public informed and advised as to these matters.

(8) To conduct such public hearing as may be required to gather information necessary for the drafting, establishment and maintenance of the comprehensive plan, and such additional public hearings as are specified under the provisions of this article.

(9) To cooperate with municipalities, regional planning councils and other governmental agencies for the purpose of achieving a harmonious and coordinated plan for the development of the land resources under their respective jurisdictions.

(10) To make similar and compatible use determinations, provided each such determination relates to a specifically enumerated permitted use in the zoning district for which the determination is sought, each determination furthers the intent and purpose of the particular zoning district, and each such determination is made at a duly noticed and advertised public hearing.

(11) Upon application for changes in zoning categories, the planning and zoning commission has the authority to recommend a variance from the requirements of section 38-1501 as it relates to minimum lot area and minimum lot width only.

(b) In addition, the planning and zoning commission may make, cause to be made, or obtain special studies on the location, condition, and adequacy of specific facilities of the area. These may include, but are not limited to, schools, school sites, churches, sewer facilities, air and water pollution, studies on housing, commercial and industrial facilities, parks, playgrounds and other recreational facilities, cemeteries, public and private utilities, and traffic, transportation, parking and drainage facilities.

(c) All public officials serving the county shall, upon request, furnish to the planning and zoning commission, its employees or agents, within a reasonable time, such available records or information as it may require.

(Code 1965, § 37-5; Laws of Fla. ch. 63-1716, § 5; Ord. No. 92-1, § 3, 1-21-92; Ord. No. 98-37, § 33, 12-15-98)

Charter reference— Functions of planning and zoning commission, § 501.

Appendix 63.

Sec. 30-83. - Plats; vertical construction prior to plat approval; vacation.

(a) A plat shall be approved and recorded in the manner provided in sections 34-48 and 34-133, and, to the extent that it is not inconsistent with sections 34-48 and 34-133, part I, chapter 177, Florida Statutes.

(b) With the exception of developments and model homes authorized by subsections 30-83(c) and (d), respectively, vertical construction shall not be permitted to commence at a development requiring a plat unless and until the plat has been approved and recorded. However, for single-family development, where it is expected or determined that the plat for a particular development cannot be approved and recorded through no fault of the developer's before vertical construction is ready to commence, the development review committee may approve vertical construction in advance of platting pursuant to terms and conditions that are acceptable to the DRC, provided that in no event may a temporary or permanent certificate of occupancy be issued for such vertical construction before the plat is approved and recorded.

(c) For developments having an expected construction duration of six months or more and consisting of commercial, industrial, hotel, office, or multi-family uses, or other non-single family developments which, when platted, will contain three lots or less, the DRC may approve a request to allow vertical construction in advance of plat approval, provided all of the following conditions are met:

(1) The PSP, or DP, as applicable, for such project has received final approval;

(2) A plat has been submitted for review and approval pursuant to the applicable PSP or DP and has been deemed sufficient for initial review by the County; and

(3) The project landowner has executed and delivered to the county, and the county has approved, an indemnification and hold harmless agreement, in form and substance acceptable to the county, acknowledging:

a. The issuance of building permits prior to recordation of the plat;

b. The continuing obligation of the owner to record the project plat;

c. The owner's understanding that under no circumstances will the county issue a temporary or permanent certificate of occupancy until the plat is approved and recorded; and

d. The owner's indemnification of the county from any damages, costs, or claims arising from the issuance of building permits prior to approval and recordation of the plat.

(d) Model homes may be permitted on not more than twenty (20) percent of the lots in a single family residential development with an approved preliminary subdivision plan, or phase thereof, but in no event may the number of model homes exceed five (5) per phase. The model homes shall be situated on contiguous lots or clustered within a readily identified area. Not more than one (1) model home may be used as a sales office/center, subject to the requirements of subsection 38-79(5).

(1) An applicant/developer requesting a model home permit shall submit a complete and sufficient model home application, with the applicable application fee, to the zoning division manager, and include the following documents:

a.

Three (3) copies of the site plan for the lot proposed for the model home, depicting the proposed structure, footprint, setbacks, and proposed easements for the model home being requested;

b. Three (3) copies of the subdivision plan (or plat) indicating where the model home(s) will be located; and

c. An executed notarized statement by the applicant/developer showing that it understands, agrees to, and shall comply with all applicable permitting restrictions, requirements and conditions, including those set forth in this section 30-83.

(2) The following permitting restrictions, requirements, and conditions shall apply for a model home permit:

a. The applicant/developer shall utilize a preliminary final plat with street names approved by the zoning division for issuance of a permanent street address (fee required);

b. Permitting is at the risk and expense of the applicant/developer, including if any changes are made with respect to the final recorded plat;

c. No certificate of occupancy shall be issued until an amended building permit (additional fee required) for a final permanent address is issued;

d. All construction is at the applicant/developer's own risk and expense;

e. Curb and stabilized road base shall have been installed to the satisfaction of the public works department;

f. Drainage infrastructure shall have been completed for the development to the satisfaction of the public works department;

g. a fully functional, readily accessible, county-approved fire hydrant shall be in place within five hundred (500) feet of the lot line of the proposed model home;

h. The water system serving the proposed model home shall have been partially or fully cleared for service by the Florida Department of Environmental Protection;

i. A risk affidavit and indemnification and hold harmless agreement satisfactory to the risk management division shall have been executed and provided;

j. Temporary or permanent street signs and a street address number for each proposed model home shall be in place to facilitate emergency response, as determined by the Orange County Fire Marshal; and

k. Applicant shall have complied with any and all other Orange County Code provisions, including zoning regulations.

(3) A certificate of occupancy shall not be issued for a model home until a certificate of completion for infrastructure has been issued for the subdivision, or phase thereof. However, a temporary certificate of occupancy (TCO) may be issued by the division of building safety prior to issuance of a certification of completion, provided the following restrictions, requirements, and conditions are met:

a. The public works department shall have verified completion of installation of an asphalt surface from the nearest public right-of-way to the lot line of the model home(s);

b. The public works department shall have verified completion of installation of the drainage infrastructure and its functionality, and all inspections shall have been satisfactorily completed;

c. All required traffic control signs and devices shall be in place from the nearest public road right-of-way to the lot line of the model home(s), as determined by the public works department;

d. All permits issued by the division of building safety for the model home(s) have received approved final inspections;

e. A permanent, fully functional public restroom is located in an easily accessible place within the model home(s);

f. Sufficient and clear access for emergency vehicles shall be available, as determined by the Orange County Fire Marshal;

g. the wastewater system serving the model home(s) shall have been partially or fully cleared for service by the Florida Department of Environmental Protection; and

h. The applicant shall have complied with any and all other applicable Orange County Code provisions, including platting.

A TCO shall be effective for a period not to exceed ninety (90) days. An extension of no more than thirty (30) days may be granted upon good cause shown and acceptable to the county.

An appeal of a determination related to a model home application or permit shall be filed in writing within fourteen (14) days of the determination, accompanied by the applicable appeal fee. The appeal shall be heard by the development review committee.

(e) 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.

(Code 1965, § 32-35; Laws of Fla. ch. 65-2015, § 5; Laws of Fla. ch. 83-480, § 1; Ord. No. 2009-05, § 1, 2-24-09; Ord. No. 2016-11, § 1, 5-24-16)

Editor's note— Ord. No. 2016-11, § 1, adopted May 24, 2016, amended § 30-83 and in so doing changed the title of said section from "Plats; approval; vacation" to "Plats; vertical construction prior to plat approval; vacation," as set out herein.

Appendix 64.

Sec. 30-48.5. - Application for rezoning, variances, special exceptions, and appeals of the zoning manager's determinations.

(a) Applications for rezonings, variances, special exceptions and appeals of zoning manager determinations shall be submitted to the zoning division, with the applicable fee, prior to consideration of the request. Prior to application submittal, the applicant is encouraged to meet on an informal basis with the planning or zoning division, as applicable, to review the request. Complete applications must be submitted at least six (6) weeks prior to the public hearing. Application deadlines shall be posted in the zoning division. All complete applications received by the deadline shall be placed on the public hearing agenda for the next available public hearing. Staff shall review the request and generate a recommendation. Staff review shall involve the following:

(1) Generation of appropriate maps showing the subject property and the surrounding areas;

(2) Site inspections to visualize what is on the site and to determine the character and nature of the surrounding area;

(3) Review of the zoning records to verify zoning trends, if any, in the area;

(4) Review of comprehensive policy plan to make a consistency finding;

(5) Review of applicable county regulations and criteria; and

(6) Consolidation of information obtained in subsections (1) through (5) and finalization of staff recommendations.

Staff recommendations on rezonings shall be delivered to the planning and zoning commission on the Friday prior to the public hearing. Staff recommendations shall also be mailed to the applicants. The information shall also be available to the public for review in the planning and zoning divisions.

(b) The public hearings on rezoning requests shall be held in the county commission chambers or other designated location on the third Thursday of every month, unless as otherwise designated due to holidays. The public hearings on variances, special exceptions and appeals of the zoning manager's determination shall be held in the county commission chambers or other designated location on the first Thursday of the month, unless otherwise designated due to holidays. At the public hearing, the request shall be read into record; staff recommendation shall be presented and then the applicant shall be given the opportunity to make a presentation.

People wishing to speak in favor of or in opposition to the request shall then be given the opportunity to make a presentation. The applicant is given the opportunity to briefly respond to any opposition. Prior to closing the public hearing, the planning and zoning commission or board of zoning adjustment may question the applicant. Discussion shall then takes place among the members of the planning and zoning commission or board of zoning adjustment and a motion and vote shall be made to either make a recommendation to approve or deny request.

(c)

The planning and zoning commission or board of zoning adjustment recommendations shall be presented to the board of county commissioners no sooner than ten (10) days and no later than thirty (30) days after the planning and zoning commission or the board of zoning adjustment make their respective recommendations. Provided, however, the board of county commissioners, by majority vote, may elect to consider the recommendations of either the planning and zoning commission or the board of zoning adjustment sooner than ten (10) days after the recommendations are made. The board of county commissioners may accept the planning and zoning commission recommendations or board of zoning adjustment recommendations or call its own public hearing for any request. Any person aggrieved by a recommendation of the planning and zoning commission or board of zoning adjustment may appeal to the board of county commissioners within fifteen (15) days of the planning and zoning commission or board of zoning adjustment meeting at which such recommendation was made by following those procedures set forth in section 30-45. If there is no appeal or board called public hearing of planning and zoning commission recommendation or board of zoning adjustment recommendation, then the recommended action shall become final after approval of the recommendations by the board of county commissioners, but no sooner than fifteen (15) days after the planning and zoning commission or board of zoning adjustment action. If a board of county commissioners public hearing is held and there is no appeal of the board of county commissioners' decision, then the decision shall become final ten (10) days following the rendering of board of county commissioners decision. Once the rezoning special exception, or variance decision is finalized, the zoning maps shall be revised to reflect the decision.

(Ord. No. 91-29, § 2(Exh. A), 12-10-91; Ord. No. 98-02, § 8, 1-27-98; Ord. No. 98-37, § 35, 12-15-98; Ord. No. 2003-17, § 6, 11-11-03)

Appendix 65.

Sec. 38-551. - Purpose and intent.

The intent and purpose of the R-CE-Cluster district is as follows:

(Ord. No. 97-03, § 4, 2-25-97)

(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.

(P & Z Res., art. XXXVI, § 1)

Sec. 38-552. - Processing procedure.

(a) A complete R-CE-Cluster development zoning application shall be required for any development coming under this article. Such application shall include the following:

(Ord. No. 97-03, § 5, 2-25-97)

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

(2) Existing street network and anticipated access points.

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

(4) Gross density.

(5) Proposed type of housing and location.

(6) Location of common open space and percent of gross land area.

(7) Names of abutting subdivisions.

(8) Source of water and sewer service.

(9) Proposed method of buffering cluster development from adjacent lands.

(10) Proposed method of ownership and maintenance of all common open space areas.

(b)

Four (4) copies of the R-CE-Cluster development plan shall be submitted with the zoning application. The R-CE-Cluster zoning applications shall follow the zoning processing schedule. The R-CE-Cluster development plan shall be reviewed by the planning, zoning and engineering departments, as well as other appropriate county departments. Each department shall submit recommendations to the planning director for incorporation into a consolidated staff report which shall be available to the applicant prior to the public hearing.

(Ord. No. 97-03, § 5, 2-25-97)

(c) After a review, the planning and zoning commission shall hold a public hearing and submit its recommendation, which may include conditions of approval, to the board of county commissioners. If the cluster district is approved by the board of county commissioners, the cluster development plan and any conditions of approval shall become a part of the cluster district and shall be the basis for review and evaluation of development plans.

(P & Z Res., art. XXXVI, § 2)

Sec. 38-553. - General requirements of the district.

The number of units permitted under R-CE-Cluster development shall not exceed one (1) du per acre, unless a density credit is granted pursuant to Section 38-558.

(P & Z Res., art. XXXVI, § 3; Ord. No. 97-03, § 6, 2-25-97; Ord. No. 98-37, § 9, 12-15-98; Ord. No. 2004-01, § 8, 2-10-04)

Sec. 38-554. - Permitted uses.

A use shall be permitted in the cluster district if the use is identified by the letter "P" in the use table set forth in section 38-77.

(P & Z Res., art. XXXVI, § 4; Ord. No. 95-16, § 18, 6-27-95)

Sec. 38-555. - Special exceptions.

(a) A use shall be permitted as a special exception in the cluster district if the use is identified by the letter "S" in the use table set forth in section 38-77.

(b) Each application for a special exception shall be accompanied by a site plan incorporating the regulations established herein. The site plan shall be drawn to scale indicating property lines, rights-of-way, and the location of buildings, parking areas, curb cuts and driveways. The site plan shall be submitted to, and approved by, the board of zoning adjustment prior to the granting of a land use and building permit. Upon such approval, the site plan becomes part of the land use and building permit and may be amended only by the board of zoning adjustment.

(P & Z Res., art. XXXVI, § 5; Ord. No. 91-15, § 32, 6-18-91; Ord. No. 95-16, § 18, 6-27-95)

Sec. 38-556. - Site and building standards.

(a) *Standards.* Development under this article shall meet the following standards:

	Minimum Lot Size	Minimum Lot Width (Feet)	Minimum Living Area (Square Feet)	Building Height (Feet)
R-CE-Cluster	½ acre*	100**	1,500	2-story/ 35

* If central water service is provided, the minimum lot size is one-third (1/3) acre. Lakefront lots are one-half (½) acre. The minimum lot size for lakefront lots on the Butler Chain of Lakes is one (1) acre.

** Lot width is measured at the building front yard setback line.

(Ord. No. 97-03, § 7, 2-25-97)

(b) *Setbacks.* The following minimum setbacks shall apply:

	Front (Feet)	Rear (Feet)	Side (Feet)
R-CE-Cluster	30	25	10

There shall be a minimum of a fifty-foot setback from the normal high water elevation from natural water bodies.

(Ord. No. 97-03, § 7, 2-25-97)

(c) *Maximum lot coverage.* The maximum coverage of all impervious surfaces on a lot shall not exceed sixty (60) percent of the land area of the lot.

(P & Z Res., art. XXXVI, § 6)

Sec. 38-557. - Common open space.

(a) The amount of common open space, as required by Orange County Code, chapter 24, article II, open space regulations, shall be shown on the R-CE-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. The county shall not be responsible for the maintenance of common open space areas.

(Ord. No. 92-42, § 6, 12-15-92; Ord. No. 97-03, § 8, 2-25-97)

(b) The owner shall offer to dedicate development rights for all common open space areas to the county. The county may accept the offer of dedication. If, however, the county refuses to accept the offer, an alternative method acceptable to the 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.

(P & Z Res., art. XXXVI, § 7)

Sec. 38-558. - Density credit.

(a) The developer may offer to dedicate land within Orange County for 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.

(b) If the offer of dedication is accepted, the development shall transfer the density from the dedicated property to the development plus a sixty (60) percent credit from the property being dedicated. The allowable density on the property being dedicated shall be the same as the property being developed.

(c) The applicant may opt to pay into an Orange County Parks and Recreation Department parks fund in lieu of dedication of property. The payment in lieu of dedication shall be equal to the market value of at least 5 acres of unimproved, developable land in the subdivision. The applicant shall transfer the density for payment plus a sixty (60) percent density credit for the payment in lieu of dedication. The value of the payment in lieu of dedication shall be based upon a valid appraisal of the property as approved by Orange County. Such payment in lieu of dedication is subject to approval by the parks and recreation department and the board of county commissioners.

(Ord. No. 97-03, § 9, 2-25-97)

(P & Z Res., art. XXXVI, § 8; Ord. No. 91-29, § 2(Exh. A), 12-10-91; Ord. No. 98-37, § 10, 12-15-98)

Sec. 38-559. - Performance standards.

(a) A primary intent of this article is to reduce development cost through flexible design. Therefore, the development design should provide diversity and originality in street design and lot layout to achieve the optimum relationship with the natural character of the land and enhance the living environment.

(Ord. No. 97-03, § 10, 2-25-97)

(b) Common open space shall comply with the design guidelines in Orange County Code, chapter 24, article II, open space regulations.

(Ord. No. 92-42, § 7, 12-15-92)

(c) The keeping of poultry (SIC Group 025) and cows and horses (SIC Group 0272) for domestic purposes on individual residential lots one (1) acre in size or greater is permitted, subject to the conditions listed in subsections 38-79(38) and (44). Further, within the R-CE-Cluster tracts, common animal areas may be established, provided that the total number shall not exceed one (1) animal per acre of designated common animal area.

(Ord. No. 97-03, § 10, 2-25-97)

(d) Lots located [adjacent] to the perimeter of the tract must be designed to be compatible with the abutting zoning district. This may be accomplished by providing lot widths equal to the minimum requirements of the conventional zoning, or the provision of an adequate buffer between a clustered unit and the property boundary. Consideration will be given to rights-of-way which separate property boundaries.

(Ord. No. 97-03, § 10, 2-25-97)

(e) Off-street parking shall be provided in accordance with article XI of this chapter.

(Ord. No. 97-03, § 10, 2-25-97)

(P & Z Res., art. XXXVI, § 9)