

REQUEST FOR INVESTIGATION AND DETERMINATION OF DEVELOPER NON-COMPLIANCE WITH  
ORANGE COUNTY CONDITIONS OF APPROVAL FOR GATED COMMUNITY

07/16/2019

To: Mayor Jerry Demings  
Orange County Board of County Commissioners  
Orange County Development Review Committee  
State of Florida

**This is a Complaint and Request for Orange County to institute an investigation into substantial Developer non-compliance with the Orange County Gated Community Ordinance, in Violation of the Conditions of Approval for the Eagle Creek Development, and for Orange County to enforce the Gated Community Ordinance and Conditions of Approval against Eagle Creek Development and Homeowners Association of Eagle Creek (HOA) by taking action up to and including issuing a stop work order until the community is brought into compliance.**

**This is also a Request for Orange County to make a determination that the Eagle Creek Development Project may be treated as a single subdivision with respect to Infrastructure Turnover based upon the facts presented in this document.**

I am Robert Rice, an Orange County resident, member of the Homeowners Association of Eagle Creek, duly elected Village Representative and former Chairperson of the Village Representatives of the Developer Controlled Homeowners Association of Eagle Creek (HOA), representing the homeowner members of the Eagle Creek community, situated in unincorporated Orange County. I have resided within community at 10421 Chorlton Circle, Orlando, FL 32832 since 2005.

The Village Representatives, representing the majority of members of the Homeowners Association of Eagle Creek, support this request and actions for the preservation and protection of the community's financial interests. (See Exhibit A)

**Basis of the Complaint of Non-Compliance with Development Order**

This is a case where a Developer has been using an obscure and ambiguous Florida Statute and ambiguity in a Declaration to circumvent paying its fair share into Assessments, which fund reserve accounts, and we are asking for Orange County to investigate and to intervene by enforcing the Developer's conditional approval and subsequent agreement with Orange County, as Orange County has jurisdiction to enforce the agreement without necessitating that the community seek relief in the 9<sup>th</sup> Judicial Circuit Court. Orange County has a duty to protect its citizens by enforcing its ordinance and conditions of approval. (See Exhibit B)

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**Basis of the request for determination that infrastructure turnover be a single subdivision**

This is also a case where the Developer originally had no intention of performing “partial” infrastructure turnovers, took no previous actions to do so, the HOA budgets were never set up for partial infrastructure turnovers and, more than a decade has passed since some plats were over 90% completed, yet the Developer or County made no attempts for infrastructure turnovers, as was allegedly required by the Orange County Gated Community Ordinance, Chapter 34, but is now attempting to do so which could be detrimental to the community and is contrary to what the community desires.

We are asking Orange County to investigate, intervene and to not allow partial infrastructure turnover unless certain conditions are met including a full audit of the reserve accounts and to ensure compliance with the Gated Community Ordinance with respect to the payment of assessments, by Developer and builders, and the setting up of proper separate accounts for each plat, based on the information provided below, which proves the Developer has not properly met its agreement with respect to the payment of assessments and reserves for the plats in question. (See Exhibit I, Page 2 wherein Developer stated Development was scheduled for completion in 2013 and Exhibit C- Chapter 34-291 (2) and (3) Last sentences of each paragraph)

**Summary:**

Eagle Creek Development Corporation has been Developing the Eagle Creek Golf Community since 2002. It received its original Development order from Orange County on December 11, 2001. (Exhibit D) Eagle Creek is a community made up of several plats comprising a single, gated, subdivision community, with three (3) main gated entrances and several sub gated areas, all operated by a single Homeowners Association sharing a single account for Reserves. There are no sub homeowners associations within the subdivision or development. Based on the factual data, it was the Developer’s original intention to turn over the infrastructure of the entire community at one time and to not turnover separate plats.

Based upon the language in the Declaration of Covenants of the HOA, recorded in Orange County on January 07, 2004, (Exhibit E) , infrastructure turnover is to occur simultaneous with turnover of control and there are no set dates for infrastructure turnover and no provisions for the separation of plats or partial turnovers of infrastructure within the Declaration. The budget and reserve accounts of the community are not prepared in such a manner that would account for or accommodate “partial” infrastructure turnover.

**Failure of the Developer to Pay Required Assessments and into Reserve Accounts:**

There is only one reserve account for each of the five reserve accounts and singular infrastructure accounts. Infrastructure and plats that have been completed for many years by the Developer have never been “split off” or “partially” turned over, therefore, the community has no reasonable expectation that the Developer would arbitrarily start “partial” infrastructure turnovers and the County has never before indicated partial turnovers are necessary. (Exhibit F)

Recently, based upon interpretation of language in the Orange County Gated Community Ordinance, by the County Attorney and the Developer, the Developer has stated it must attempt to do “partial” infrastructure turnovers. (See Exhibit G)

This resulted in immediate requests by members of the HOA for an accounting of all reserve deposits and verification of assessments paid in, as were required by Orange County Ordinance and the Declaration of the HOA, to no avail, which led to further investigation that revealed the Developer did not pay regular assessments, and into reserve accounts, in the manner agreed to and prescribed by the Orange County Gated Community Ordinance which is a condition of approval for the Eagle Creek Development and which creates a binding contract between Developer, County and HOA.

It was brought to the attention of the Developer and HOA that the Orange County Gated Community Ordinance requires the Developer and any builders to pay assessments, and subsequently into reserves, of the HOA, without exception, and that the Developer has neglected to do so. The HOA attorney and the Developer attorney have stated that a provision of Chapter 720 of the Florida Statutes, negates the Orange County Ordinance. I disagree that the Developer is afforded the opportunity to avoid paying into Assessments and, especially into reserve accounts, as the County Ordinance is clear, and the Declaration agrees with this. Any ambiguity in the Florida Statute was clarified in the Mackenzie V. Centex Case and, the Agreement between Developer and County supersedes any perceived right by the Developer as the Developer entered into a contractual agreement in exchange for the privilege of gating a community. Furthermore, the Developer is claiming it extended this right to third party Residential Builders and, this is an abuse of a right the Developer was not afforded and goes against the provisions of both the Florida Statutes and the Orange County Ordinance designed to protect the members of the HOA.

We hereby request that Orange County confirm the Developer is bound by the Ordinance and also inform the Developer that they must follow the ordinance as part of their agreement with Orange County. (Exhibits H and J)

**Factual Background:**

1. The original development order for the Eagle Creek DRI was approved by the Orange County Board of County Commissioners (the "BCC") on December 11, 2001 (the "Original Development Order"). The Original Development Order was amended as follows: (i) the BCC approved that certain First Amendment to Development Order for Eagle Creek Development of Regional Impact on October 28, 2003, which is recorded at Official Records Book 7250, Page 3477, Public Records of Orange County, Florida; and (ii) the BCC approved that certain Second Amended and Restated Development Order for Eagle Creek Development of Regional Impact on December 16, 2008, which is recorded at Official Records Book 9826, Page 9176, in the Public Records of Orange County, Florida (the "Eagle Creek DRI Development Order"). (See Exhibit D.)
2. The community has 2,253 Residential entitlements (Lots) and is approximately 60 percent built out. (Exhibit K – as to verifying the count)
3. The Orange County Gated Community Ordinance requiring the Developer and Builders pay Assessments, Section 34-290 applies to ALL gated communities approved by the Board of County Commissioners on or After August 14, 2001, therefore it applies to Eagle Creek. (See Exhibit L- Last sentence which proves this was in force at time of Development order.)
4. Substantial compliance with the Gated Community Ordinance is required to give contract rights to develop gated community and the HOA's right to keep subdivision as gated community. According to Orange County, Gated Communities are a privilege, not a right, of developer and property owners and, in exchange for this right, Developers must enter in a contractual agreement with Orange County by agreeing to the provisions of the gated community ordinance. (See Exhibit C- 34-280 (c) )
5. Florida Statutes 720.308 states that "While the developer is in control of the homeowners' association, it may be excused from payment of its share of the operating expenses and assessments related to its parcels for any period of time for which the developer has, in the declaration, obligated itself to pay any operating expenses incurred that exceed the assessments receivable from other members and other income of the association." This is the basis that the Developer is alleging it does not have to pay into assessments. It is not an unalienable right as the statute says "may", not "must". The statute has been in force since the inception of the community and Gated Community Ordinance. (See Exhibit M -720.308)
6. The HOA attorney has stated the Developer is not required to follow the Orange County Ordinance because the Florida statute gives the Developer the "right" to deficit fund. (See Exhibit H. and, the Developer has no such "right" under the conditional approval.)

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7. The Developer has the legal right to enter into contracts and to give up any rights it deems prudent to enable itself to develop. It chose to pay assessments on ALL lots by agreeing to the County Ordinance Chapter 34 as a condition of its approval to develop a gated community.
8. The Developer entered into a contractual agreement with Orange County Florida and, in exchange for the "Privilege" of developing a gated community, gave up certain "rights" or agreed to certain restrictions (Consideration) by agreeing to the Orange County Gated Community Ordinance.
9. The Developer entered into a contractual agreement with Orange County and agreed to the conditions of approval without waiving its responsibility to pay assessments. The Orange County Gated Community Ordinance REQUIRES a developer and builders to pay Assessments. There are "no Exceptions" and "no waivers". The County Ordinance also requires that the HOA collect assessments that are fair and equitable from the Developer and Builders and this is also emphasized in the Community's Declaration which is recorded. The ordinance and Declaration state there are "No Exceptions" to the requirement of Developer and Builder paying reserves and State Laws do not preclude a Developer that may be Deficit funding to entering into a more stringent agreement in exchange for special privileges with a municipality. (See Exhibit C-34-291-(c) (7) "without exception")
10. Where an exception "may" be applied, it can not be inferred or assumed that an exception "does" or "is" applied to a Development. It must be waived during the approval process by the DRC and BCC and agreed upon by Orange County. No such agreement exists exempting the Developer from paying its fair share of Assessments or Reserves. We ask that Orange County confirm this.
11. The Developer controlled HOA has stated, through its attorney, Karen Wonsetler, that it is not required to follow the ordinance requiring assessments be paid because "it has always elected, as to fund deficits to the HOA, in lieu of paying assessments on lots owned by the Developer." This is written evidence that the Developer has violated the terms of its conditional approval from Orange County. While the HOA Declaration, Article IX Section 6 mentions this, Section 12 of the same Declaration states that "The Association shall impose and collect such Assessments against the Parcels, including Parcels owned by the Declarant (Developer) and by any Residential Builder, without exception" and is therefore in agreement with the Orange County Gated Community Ordinance and, subsequently the Contractual Agreement entered into between Developer, Orange County, and the HOA. The Developer, through its attorney, Larry Pitt, has stated the Developer had a right to deficit fund and also that it transferred this "right" to builders. This establishes that the assessments and subsequent reserves were not paid proportionately or in a "fair share" by the developer or its builders, thereby violating the conditions of the Orange County Conditions for Development Approval. This has potentially had a dramatic effect on reserves. It is important to note that a request for an accounting of reserves was denied by the HOA.

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**11. Cont.** If the Developer agreed to pay assessments thorough its agreement with Orange County, it never had the “right” to allow its builders to not pay assessments and may have offered something it didn’t have the right to offer builders. There is absolutely no ambiguity between the Ordinance and the Declaration with this respect. We are asking that Orange Country determine that the Ordinance applies in this case and is enforceable. It is the jurisdiction of Orange County to make this determination, not the circuit court.

**12.** Florida Case Law, *Mackenzie v. Centex Homes*, 228 So. 3d 578 (Fla. Dist. Ct. App. 2017) provides that whether a Developer deficit fund or not, a developer is Required to pay into reserves, therefore the HOA attorney’s argument that the Developer can “deficit fund” is moot. The Developer, at the very least, is required to have paid into reserves on every Developer or Builder owned lot. It was the intent of the County Ordinance that the Developer pay assessments. There are no exceptions. Based upon the HOA and Developer’s attorney’s responses, they did not. (See Exhibits H and O.)

**13.** The developer is claiming they MUST turn over partial plats despite having never set the community’s reserve accounts up for partial turnover. This is incorrect and disagrees with the Declaration of the community. (See Exhibit E – Article XIII- Page 53).

**14.** Certain financial records have been requested of the Developer and HOA and, to date, they have been unable to provide them with respect to providing evidence of the initial reserve funding of each recorded plat as required by Orange County. (See Exhibit I.)

**15.** Because the Developer controlled HOA attorney is potentially incorrect, the Village Representatives of the Eagle Creek Community, representing the majority of the homeowners of the community, have requested the HOA provide third party legal counsel to represent them. Despite the legal fund being paid by the members of the community, the request has been denied. Requests for an audit of reserves has also been denied. (See Exhibit A)

**16.** Reserve accounts are complex and there has never been an audit to verify if the initial deposits of assessments were made by the Developer for each plat. A request was made for a third-party CPA to verify the funds and the request was denied by the HOA.

**17.** Because the reserve accounts of the HOA are not separated by plat, turnover of any plat before turnover of control of the HOA, could enable access to the entire infrastructure bank account for all plats and violate the terms of the County Ordinance that certain reserve funds must not be used until turnover of control such infrastructure. (See Exhibit C -34-291). We therefore, ask that the accounts be separated by plat if individual plats are to be turned over.

**18.** There are no provisions for partial infrastructure turnover in the Declaration of the HOA nor were any provisions made in the budgets or reserves accounts set up by the Developer.

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19. If, the Developer was, in fact, required to perform a “partial” turnover of infrastructure, the Developer has been, and is currently in violation of the Conditions of Approval for almost a decade and, this has been ignored by both the Developer and County until it became “convenient” for the Developer to make a run for Capital Reserve Account funds. This would also mean the Developer is currently and has been in violation of the Conditions of Approval for almost a decade and, under Florida Statutes 720.307 (c), There is a rebuttable presumption that the developer has abandoned and deserted the property if the developer has unpaid assessments or guaranteed amounts under s. 720.308 for a period of more than 2 years; (See Exhibit M- Florida Statutes 720.307)

20. To date, the HOA and Developer have refused to produce evidence that they met the following Orange County Requirement: *Developer's required contribution*. To help ensure the financial ability of the HOA to maintain the infrastructure after turnover of the infrastructure, the five (5) required accounts must be created and funded by the developer, in the initial amount required for the storm debris removal account insection 34-291(c)(5), and for the other four (4) required accounts, in an amount equal to one (1) year of assessments prior to plat recording or issuance of certificate of completion for the streets, drainage, or other related improvements for the subdivision. Such initial assessments are in addition to any other assessments required to be paid by the developer under section 34-291(c)(7).

Therefore, on behalf of the Citizens of Orange County, specifically members of the HOA of Eagle Creek, I am making a formal complaint and request, in my capacity of Village Representative for the Eagle Creek Community, that the Developer, Eagle Creek Development, is not in substantial compliance with the Orange County Gated Community Ordinance and am asking that Orange County investigate this matter and place all new development permits and any infrastructure turnover attempts, on the subject project, on hold, until such time that a determination is made by Orange County, as to the contractual liability between the Developer and Orange County, with respect to the Orange County Gated Community Ordinance.

I also request that a determination be made with respect to “partial” turnover of infrastructure, and respect to the ordinance requiring the payment of assessments which fund reserves, liability to the HOA by the Developer’s contractual agreement with Orange County and the HOA’s responsibility to collect any monies due for Assessments or Reserves, and that the Developer bring the project back into compliance with the Orange County Gated Community Ordinance before any new approvals are granted to the Developer.

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I am requesting that Orange County enforce the Orange County Gated Community Ordinance or, at the very least, ensure that Developer(s) follow the ordinance in cases where a conditional approval has been granted and Development is still ongoing. What good is a conditional approval if a Developer can violate the terms of the conditions of approval and then the county merely tells citizens they need to seek relief in the courts? This potentially causes great harm to the 3,000 plus Orange County residents of Eagle Creek.

This is not a case where the community feels it should be brushed off and be left out in the cold to have to litigate against a Developer to get them to do the right thing. This is a case of the community wanting the county to enforce its Ordinance against the Developer. Adherence to the County ordinance is a condition of approval for the Gated Community and that condition still exists and development is still under way. Please stop the Development until the Developer complies with the Ordinance.

If the Developer has not followed the County Ordinance, the County should place the Developer on notice of the deficiency and ultimately place all Development in the Eagle Creek Community on hold if the Developer does not comply or until such time that Orange County is satisfied that the Developer has paid the appropriate amounts into the reserve funds for each plat and has paid the assessments required by the Orange County Ordinance. The onus should be on the Developer to provide Orange County evidence that they have done so. This is for the protection of Orange County as well as its citizens.

The community of Orange County Citizens should have a reasonable expectation that if a Developer is not following an ordinance or code, especially when that ordinance was a condition for approval of the Developer's project, that the County intervenes and not force a citizen to solely rely upon relief in the 9th Judicial Circuit as the Deputy Attorney has indicated. We believe this is wrong and that the courts would most likely agree that Orange County should enforce its ordinance and subsequent conditional approval.

Upon receipt of a citizen complaint or concern, it should be up to the County to determine if the code is being followed or not, as is written in the ordinance. In the event there is ambiguity between a County Ordinance and a State Law, the County should, at a minimum, offer clarification as to the intent of the ordinance. In this case, the Declaration of the HOA and Orange County Ordinance coincide and the County Ordinance, agreed to by the Developer, as a condition for approval, constitutes a contractual agreement between the Developer and Orange County AND the HOA, to its terms.

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The Developer is trying to use an obscure, ambiguous State law to circumvent its responsibility to the County to the potential detriment of its citizens. This ambiguity was already settled in Mackenzie V. Centex but the Developer is ignoring this.

Please investigate this matter, clarify the intent of the contractual agreement to the Gated Community Ordinance and have the Developer placed on notice that they MUST meet ALL the requirements of the Chapter 34 Gated Community Ordinance including Initial funding, by the Developer, for each recorded plat in accordance with the conditional approval for the project together with the payment of assessments on all lots as is stated in the Ordinance.

A. Request is hereby made for Orange County to determine and confirm that Eagle Creek Development Corporation entered into an agreement with Orange County, requiring adherence to the Orange County Gated Community ordinance, as a condition of approval and/ or in exchange for the Privilege of developing a gated community. (See Orange County Ordinance Chapter 34-280 (c))

B. Request is hereby made for Orange County to enforce the conditions of the Eagle Creek Development approval, namely the provision of the Orange County Gated Community Ordinance Chapter 34, requiring that the Developer and Builders pay Assessments to the HOA and to make a written determination that there are no exceptions or waivers to this Orange County ordinance.

C. Request is hereby made for Orange County to determine that, for the purposes of infrastructure turnover, the Eagle Creek Development Project may be treated as a single subdivision with respect to Infrastructure Turnover, based upon the series of events that have taken place and the facts provided herein.

D. Request is hereby made that Orange County enforce its ordinance against Eagle Creek Development Corporation. Citizens should not have to go to court to have Orange County enforce its own ordinances where it is proven that the Developer is not in compliance as this would make no sense and would contradict the issuing of conditional approvals.

E. A written response or hearing on this matter would be appreciated.

Respectfully,

**Robert  
Rice**

Digitally signed by  
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Robert Rice, 10421 Chorlton Circle, Orlando, FL 32832 407-535-1060

Class Member and Village Representative of the Homeowners Association of Eagle Creek

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