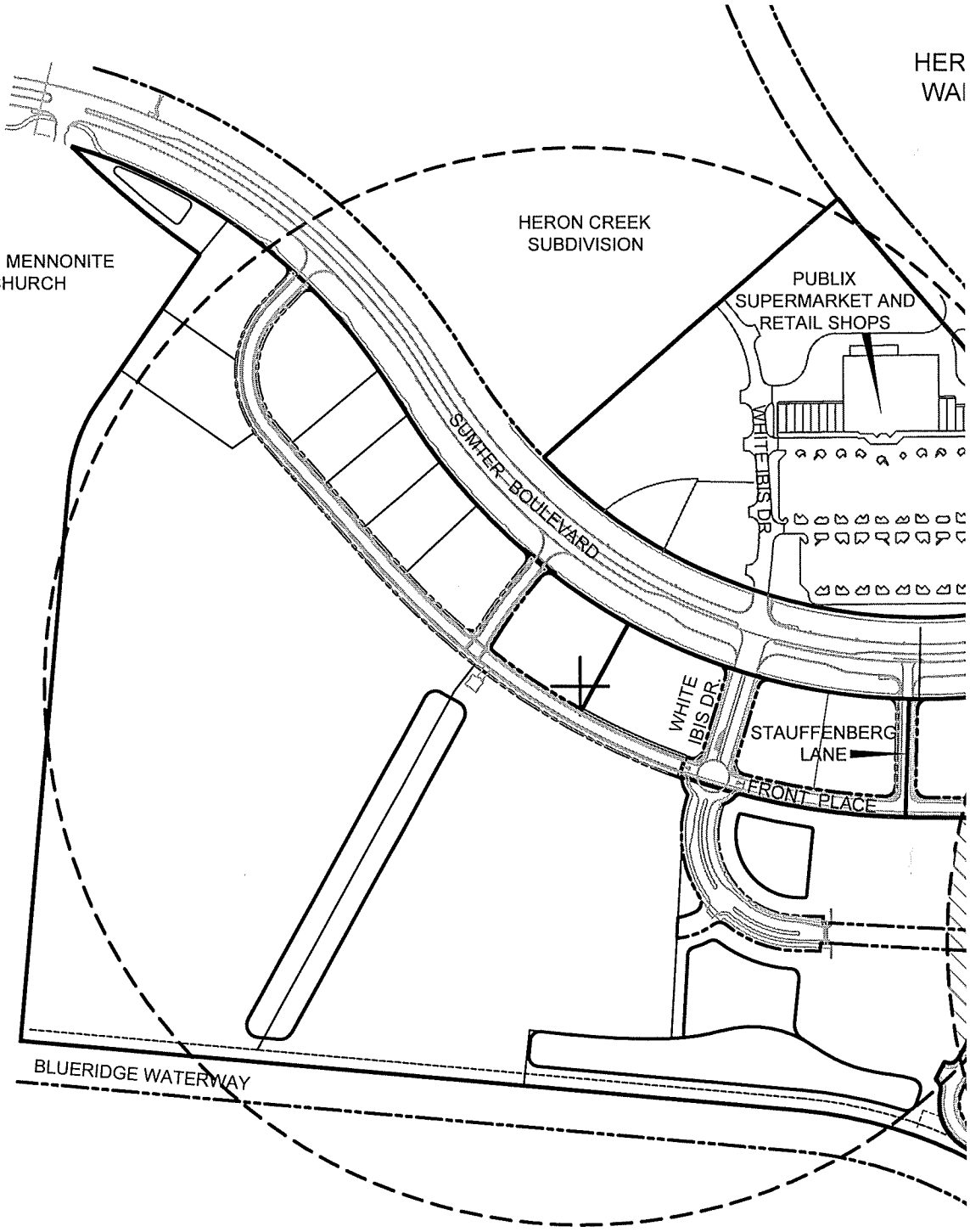
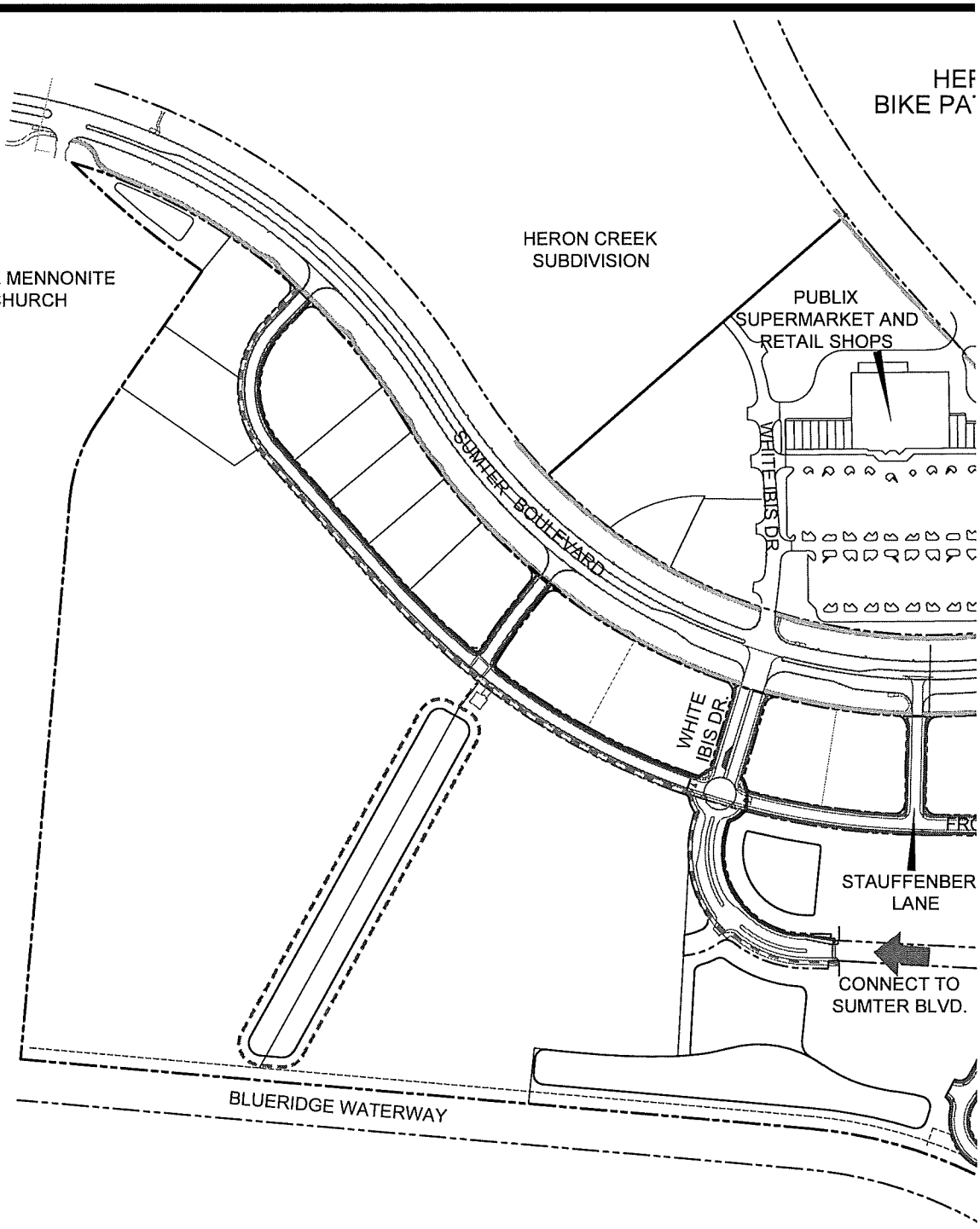
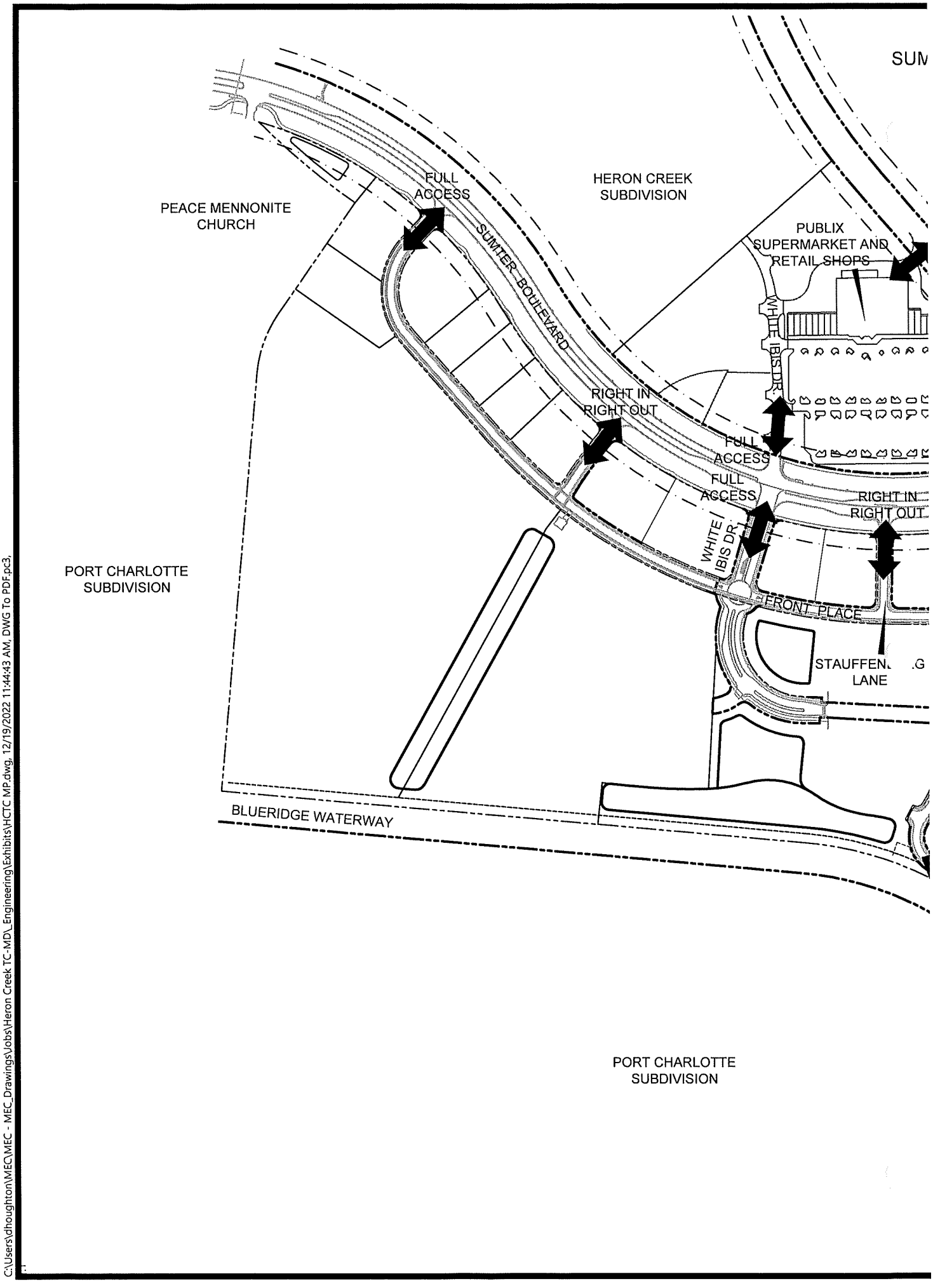


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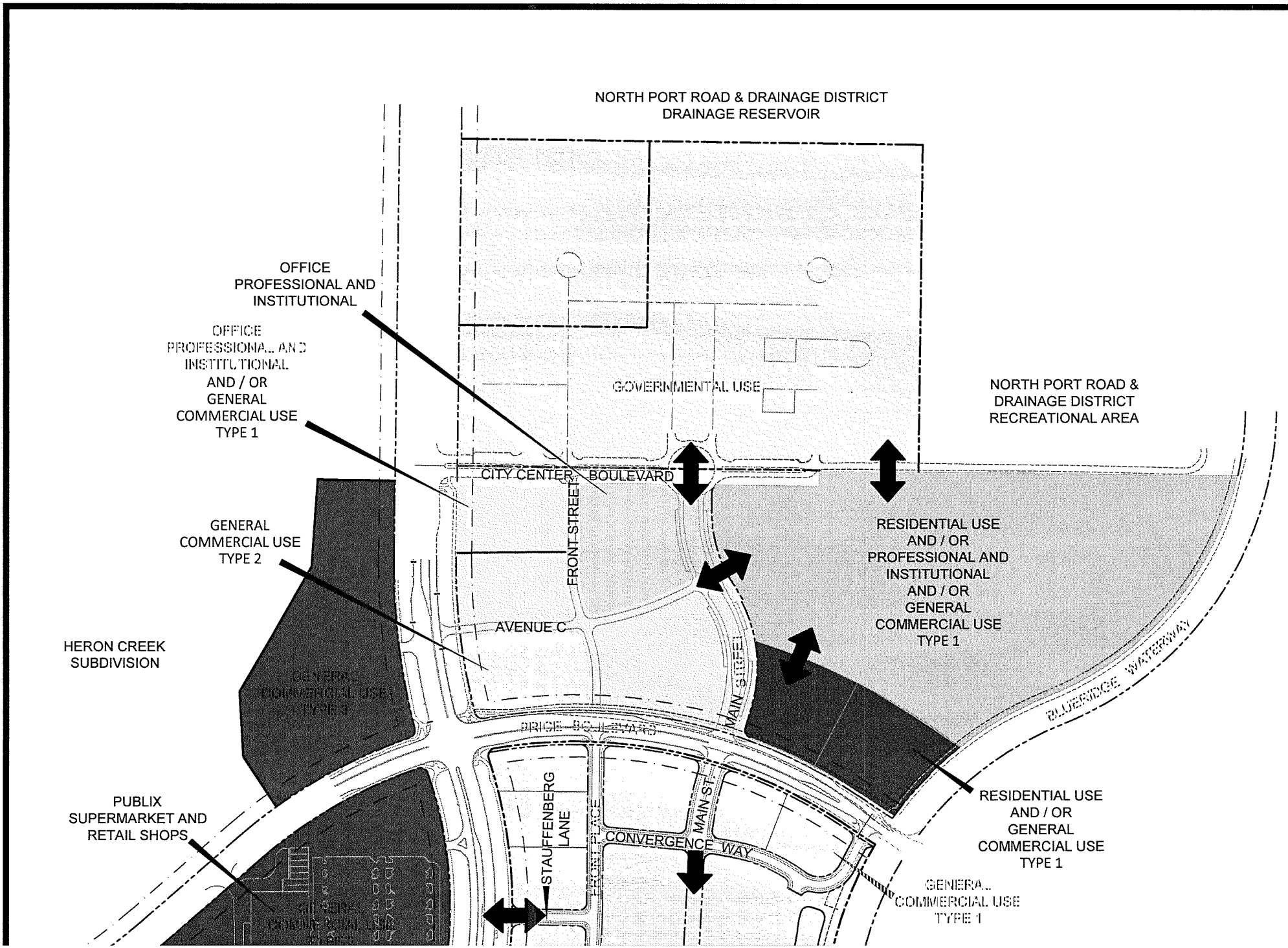


NOTE:
SIDEWALKS AND BIKE PATHS SHOWN ON THIS EXHIBIT ARE FOR ILLUSTRATIVE PURPOSES ONLY AND DEPICT THE INTENT TO INTERCONNECT AREAS OF THE TOWNE CENTER FOR PEDESTRIAN AND BIKE TRAFFIC. ACTUAL LOCATIONS SHALL BE APPROVED WITH INDIVIDUAL SUBDIVISION AND/OR MAJOR SITE AND DEVELOPMENT PLANS.

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NORTH PORT ROAD & DRAINAGE DISTRICT
DRAINAGE RESERVOIR
OFFICE
PROFESSIONAL AND
INSTITUTIONAL
OFFICE
PROFESSIONAL AND
INSTITUTIONAL
AND / OR
GENERAL
COMMERCIAL USE
TYPE 1
GOVERNMENTAL USE
NORTH PORT ROAD &
DRAINAGE DISTRICT
RECREATIONAL AREA
CITY CENTER BOULEVARD
FRONT STREET
GENERAL
COMMERCIAL USE
TYPE 2
RESIDENTIAL USE
AND / OR
PROFESSIONAL AND
INSTITUTIONAL
AND / OR
GENERAL
COMMERCIAL USE
TYPE 1
AVENUE C
HERON CREEK
SUBDIVISION
GENERAL
COMMERCIAL USE
TYPE 3
MAIN STREET
PRICE BOULEVARD
BLUEGRIDGE WATERWAY
PUBLIX
SUPERMARKET AND
RETAIL SHOPS
STAUFFENBERG
LANE
FRONT PLACE
MAIN ST.
CONVERGENCE WAY
RESIDENTIAL USE
AND / OR
GENERAL
COMMERCIAL USE
TYPE 1
GENERAL
COMMERCIAL USE
TYPE 1

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Exhibit A - Proposed Revisionary Boundary, 12-11-95.

Exhibit B - Conditions of Approval of Heron Creek DRI. September 11, 2000. Pgs.1-15.

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New Urbanism and Traditional Neighborhood Development. Pgs4-6 - 4-20, 5-3 - 5-5, 9-7 - 9-18, 11-3 - 11-10, and 14-3 - 14-8.

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Table 2. Heron Creek DRI Proportionate Share Calculation. Revised 7-16-00.

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5.0 Contact Information

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Once beyond the commercial/retail area of the Southeast quadrant, Main Street will make a turn to the west and transition into White Ibis Drive via a roundabout to promote efficient vehicular and pedestrian movements, with White Ibis Drive continuing on to a signalized intersection at Sumter Boulevard. Access to the residential use areas of the Southeast quadrant will be from both this "transition" portion of Main Street as well as from Front Place, which will be directly connected to the Main Street/White Ibis Drive transition via the aforementioned roundabout, thus creating a comprehensive connection for vehicles and pedestrians throughout the various uses in the Northeast and Southeast quadrants of Town Center. Along Front Place and where appropriate, additional sidewalks to interior roadways and mid-block pedestrian crossings will connect pedestrians from the residential uses to the commercial uses along Sumter, providing further connectivity throughout the Town Center.

4.5 Minor Streets - The minor access drives or streets within the Towne Center may occupy access easements or actual dedicated right-of-ways. These drives or streets will consist of 2 lane curb and gutter sections with lane widths varying from 10' to 12,' and may incorporate sidewalks and/or bike paths depending on their location within the Towne Center.

4.6 Pedestrian Ways - As illustrated by the Towne Center Bike Path/Sidewalk Master Plan (Figure 4.4A), the development will include a close grid network of interconnected bike paths and sidewalks, so as to encourage pedestrian and alternate transportation means throughout the Towne Center. Walking distances within Towne Center are illustrated by the Towne Center Walking Distance Analysis. (See Figure 4.4B)

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4.0 Public Space Features - Circulation Elements That Serve Everyone

4.1 Sumter Boulevard - Sumter Boulevard, within the limits of the Towne Center, functions as an arterial with a 4 lane section and a 16'-20' planted median that allows sufficient width for auxiliary turn lanes at cross street intersections. Locations of directional controlled intersections and full access intersections will be as shown in the Sumter Boulevard/Price Boulevard Access Plan (Figure 4.1). Drainage of the 200' foot right-of-way will be via closed drainage system of gutters, curb inlets, and culvert piping. 8' wide sidewalks/bike paths are included on both sides of the right-of-way.

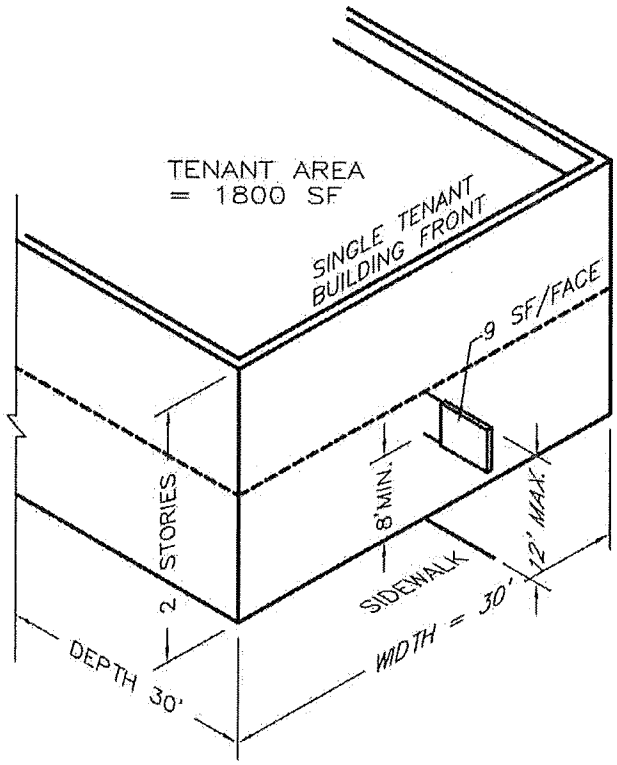
4.2 Price Boulevard - Price Boulevard functions as an arterial with a 100' right-of-way. The typical section includes four 12' travel lanes, with 2' curb and gutters on both sides of the road. 8' sidewalks/ bike paths will also be provided on both sides of the right-of-way. Locations of directional controlled intersections and full access intersections will be as shown in the Sumter Boulevard/Price Boulevard Access Plan (Figure 4.1). Price Boulevard drainage within the limits of the project will also be a closed system of gutters, curb inlets, and culvert pipes. The intersection of Price Boulevard with Sumter Boulevard has been recognized as the focus of Towne Center and as such, will receive special landscape treatment described in 2.7.2.

4.3 City Center Boulevard - City Center Boulevard is a collector for the City Center and half of the private office and professional buildings with a 100 foot right-of-way. The typical section includes two 16 foot travel lanes with parallel parking and sidewalks along each side and a 15 foot planted median in the center. At the heart of the City Center, Main Street creates a cross axis, and the intersection is in the form of a small, landscaped traffic circle.

4.4 Main Street - Main Street is the collector road extending from the front of City Hall in the heart of City Center southward through a traffic circle and the various use areas wihin the Northeast quadrant of the Towne Center. Main Street crosses busy Price Boulevard to link the northeast and southeast quadrants. As the use areas changes, so does the character of Main Street. In the Governmental and Northeast quadrant, where the tall buildings are encouraged to be very close to the street, Main Street will have two 14 foot lanes with parallel parking and sidewalks on each side and a generous landscaped median in the center.

In the commercial/retail area of the Southeast quadrant, Main Street will function as the main drive aisle in front of the shopping center area with generous walkways and pedestrian gathering areas in front of proposed retail and commercial uses. Where there are off-street parking areas across Main Street from the buildings, the on-street parking will be maximized by utilizing 45 degree parking stalls between the travel lanes and the off-street parking areas, and the streetscape will be enhanced by a sidewalk and landscaping to screen the large parking areas from the street pedestrians. Special attention will be paid to the design and location of pedestrian crossing facilities, which will tend to be near the main entrances of the larger businesses.

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BUILDING "C"

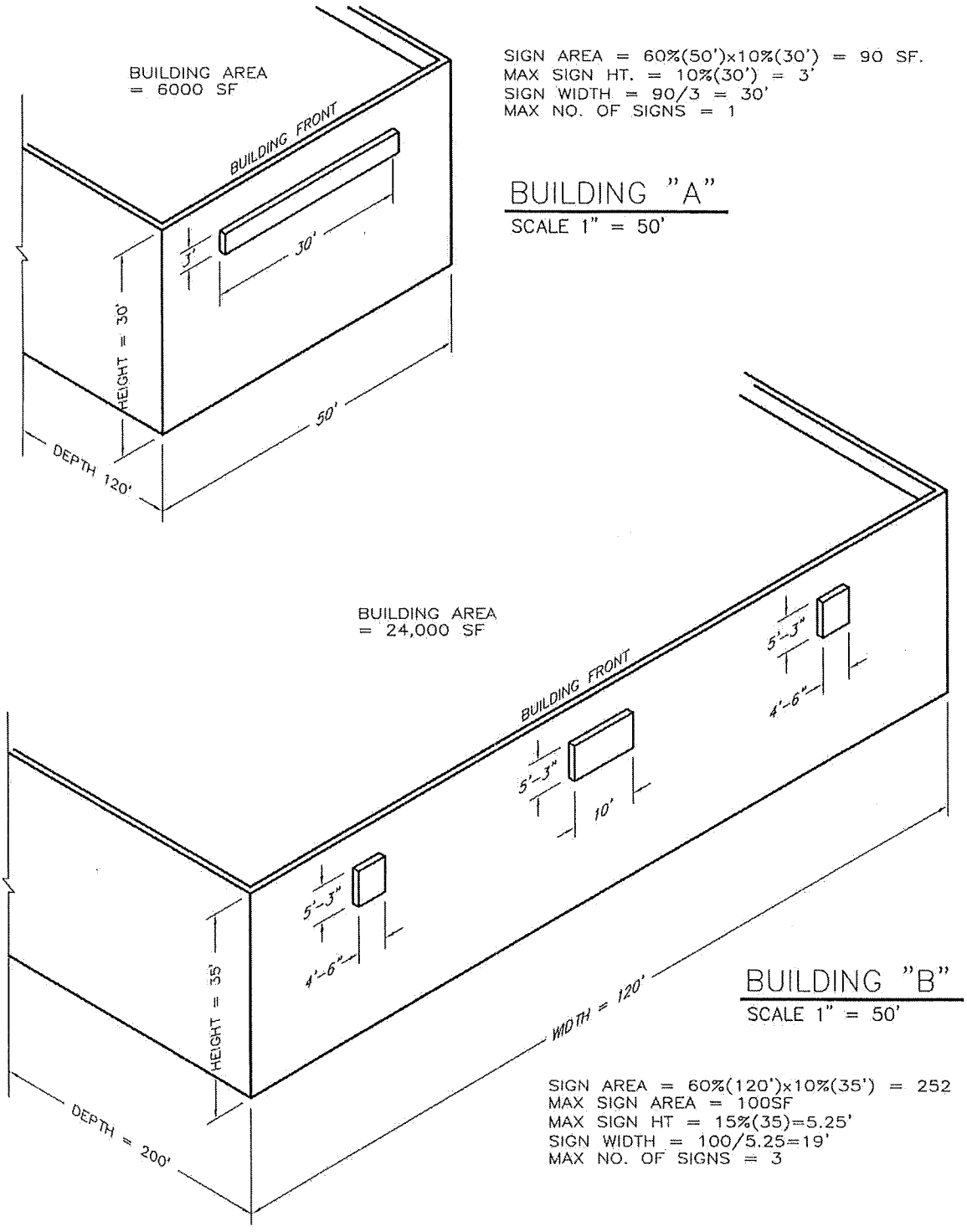
SCALE 1" = 50'

MAX SIGN FACE AREA = 1800/200 = 9 SF

SIGN CALCULATIONS

FIGURE 3.3.3

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SIGN AREA = 60%(50')x10%(30') = 90 SF.
MAX SIGN HT. = 10%(30') = 3'
SIGN WIDTH = 90/3 = 30'
MAX NO. OF SIGNS = 1

BUILDING "A"
SCALE 1" = 50'

BUILDING "B"
SCALE 1" = 50'

SIGN AREA = 60%(120')x10%(35') = 252
MAX SIGN AREA = 100SF
MAX SIGN HT = 15%(35)=5.25'
SIGN WIDTH = 100/5.25=19'
MAX NO. OF SIGNS = 3

SIGN CALCULATIONS

FIGURE 3.3.2.4

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mounted on the building, they shall not be directly visible to pedestrians approaching the building. Building mounted lights shall not be used to light vehicular areas surrounding buildings.

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area shall be limited to one square foot per every 500 square feet of gross building area up to a maximum of 20 square feet.

3.3.2.2 For buildings located in the Office, Professional & Institutional Use area, there shall be a maximum of one sign per tenant. For signs serving the building as a whole, there shall be a maximum of one sign per building facade. The maximum sign area shall be limited to one square foot per every 200 square feet of tenant or building area up to a maximum of 100 square feet.

3.3.2.3 Building signs (other than address signs) are not allowed at single and two family residences in the Residential Use area. Otherwise, there shall be a maximum of one sign per building per facade. The maximum sign area shall be limited to one square foot per every 500 square feet of gross building area up to a maximum of 10 square feet.

3.3.2.4 For buildings located in all General Commercial Use areas, there shall be a maximum of one sign per facade per tenant up to 20,000 square feet of tenant area and three signs per facade per tenant for larger areas. The maximum total sign area shall be limited to the product of 60% of the width of the building or tenant facade and 10% of the facade height up to a maximum of 100 square feet. The maximum sign height shall be limited to 10% of the facade height for facades 80 feet or less in width and 15% of the facade height for wider facade.

For example, Building 'A' is 50 feet wide by 120 feet deep (6,000 square feet in area) with a facade that is 30 feet high. Therefore it shall be limited to a single sign of area equal to (0.6 x 50) x (0.1 x 30) = 90 square feet with a maximum sign height of 0.1 x 30 = 3 feet. Building 'B' is 120 feet wide by 200 feet deep (24,000 square feet in area) with a facade that is 35 feet high. Therefore it shall be limited to three signs of total area equal to (0.6 x 120) x (0.1 x 35) = 252 square feet with a maximum sign height of 0.15 x 35 = 5.25 feet. However, the maximum sign area shall not exceed 100 square feet. (Refer to Figure 3.3.2.4)

3.3.3 A two sided building sign mounted perpendicular to the facade of the building shall be externally illuminated. Such signs are primarily for pedestrian information, and shall be located at a minimum height of 8 feet and maximum height of 12 feet above the walking surface. There shall be a maximum of one sign per tenant. The maximum sign area shall be limited to one square foot per sign face per every 200 square feet of tenant building area up to a maximum of 10 square feet. (Refer to Figure 3.3.3)

3.4 Building Exterior Lighting - The pedestrian area surrounding a building shall be lighted to a minimum level of one foot candle during building operation hours. If light sources are

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3.2.2 Building Entries – Shrubs of varying heights, accent plants, palm trees and color should be used at the entries to provide visual interest and emphasis to these areas. Layering and curvilinear forms are encouraged.

3.2.3 Building Corners – Provide semi-circular beds for addition of larger shrubs, accent trees and palms to soften the buildings hard edge and to frame in the view of the building facades. Allow adequate separation from buildings so tree canopies do not grow into the building walls.

3.2.4 Courtyards – Use asymmetrical groupings and accents of varying height to soften paved environment and to provide shade. The use of water features and sculpture is encouraged.

3.2.5 Utility Areas – Screen all exposed sides of dumpsters, pump stations, utility boxes, backflow preventers, etc., with screening shrubs and trees that will provide 100% screening within two years.

3.2.6 The relation of building to landscape shall be also regulated by the following:

3.2.6.1 Any planter or planting area left between the building and paving areas shall be a minimum of 3' wide. Where minimum planting area cannot be provided, pavement shall abut building.

3.2.6.2 The use of low volume micro-irrigation systems is encouraged to eliminate over spray on building walls and paving areas.
Planter walls shall be a minimum of 30" tall to avoid tripping hazards.

3.3 Building Signs - For well designed buildings, signs are not only essential for directing and informing the public, but signs can become an integral part of the architecture. To be effective, building signs need to relate to their context, the same as the architecture. Towne Center is designed as a pedestrian oriented area of North Port, but the reality of a large portion of the public continuing to arrive by vehicle requires that building signs be of a scale that is visible to motorists as well as pedestrians.

3.3.1 Building mounted signs shall be located only on facades of buildings oriented toward a pedestrian or vehicular way directly adjacent to the building, excluding off-street parking areas. Other building mounted signs or advertising signs are prohibited from buildings. Building directories and street numbers are exempt.

3.3.2 A building sign mounted parallel with the facade of a building may be internally or externally illuminated. The total area for this type of sign shall be limited based upon the land use category of the building location. The sign area shall be defined as the area of a rectangle large enough to contain the perimeter of the sign letters and logo.

3.3.2.1 For buildings located in the Governmental Use area, there shall be a maximum of one sign per building per facade. The maximum sign

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3.1.10.2 Buildings located in the Southeast and Southwest quadrants of the Towne Center shall be limited to two stories for commercial, office and retail buildings and three stories for residential and hotel buildings.

3.1.11 Colors of building exteriors shall be consistent throughout Towne Center.

3.1.11.1 Favored colors shall be earth tones, warm tones, whites, beiges, historic colors.

3.1.11.2 Excluded colors shall be primary colors, black, cool tones.

3.1.12 Exterior building materials exposed to public view shall be consistent throughout Towne Center.

3.1.12.1 Wall materials for dominant exposed surfaces shall be smooth or troweled stucco (cement or synthetic) or natural or simulated stone. Accent areas of red brick, painted or stained concrete masonry units or concrete are acceptable. Reflective glazing and aluminum colored glazing frames are prohibited.

3.1.12.2 Exposed roof materials shall be red clay tile or a reasonable simulation of tile, dimensional asphalt shingles, or metal.

3.1.12.3 Exterior walkway surfaces shall be cement colored concrete with accent areas of red brick pavers or stained concrete.

3.1.13 Future buildings with frontage on Sumter Boulevard and Front Place shall be oriented towards Sumter Boulevard and must provide comparable aesthetics on building sides facing all internal and external roadways and adequately provide for access and circulation to and through the use.

3.2. Building Landscaping – The roll of the building landscape is to continue the site landscape theme, to enhance the buildings and their features, provide transition from the ground plane to the vertical building planes, help reduce site and building maintenance and to provide energy conservation measures.

3.2.1 Building Foundations – The main length of the foundation walls shall be edged with a hedge of small shrubs to provide transition and to eliminate the need for grass trimming along the building edge. Layering with groundcovers in front of the hedge will be appropriate in areas that have full view of the foundation. Allow adequate separation distance to building walls to avoid trimming against the building.

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3.1.1 Buildings comprising the Towne Center shall be of a consistent appearance with proper hierarchy given to public buildings. Each building shall be composed in such a manner as to ensure a harmonious environment.

3.1.2 Elements such as towers, arcades and galleries are recommended as means of creating points of interest. For example, galleries may be used to overlook public green spaces as a way of creating interaction between people on upper levels with people below. Also, restaurants may incorporate such elements as a garden court as a way of extending the restaurant environment to the outside.

3.1.3 Building massing and details are permitted to vary from building to building as a means of creating interest to the extent that the harmonious environment is not compromised.

3.1.4 Retail facades that engage a sidewalk shall incorporate multiple openings on the shop front as a means of creating interaction between the shops and people on the sidewalks. One way this may be achieved is through the use of continuous storefront or multiple storefront openings.

3.1.5 Professional buildings shall not be required to use a continuous shop front opening. Professional buildings are encouraged to use elements such as stone, carved wood doors and wrought iron as a means of creating a more professional image.

3.1.6 Each building shall incorporate either a hipped roof, low pitched roof or a flat roof with parapets. No part of a flat roof or roof top equipment, shall be exposed and shall be enclosed in the building material that matches the structure.

3.1.7 Residential buildings shall incorporate a porch. Garages are prohibited on the front and shall be either attached to the rear of the house or totally detached. Any detached garage or outbuilding shall be consistent in design and building materials to the house.

3.1.8 Buildings to the north of Price Boulevard are permitted to be based on a looser interpretation of Mediterranean Style in order to relate architecturally to the North Port City Center.

3.1.9 All building material finishes shall be appropriate to Mediterranean Architecture.

3.1.10 Building heights shall relate to their use and location in Towne Center.

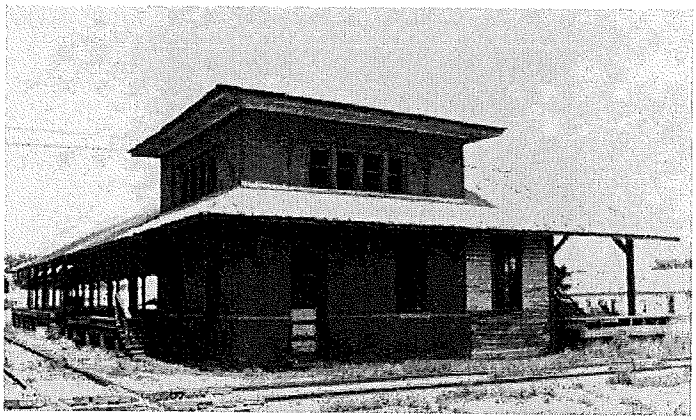
3.1.10.1 Buildings located in the Northeast quadrant of the Towne Center shall be limited to three stories at the property line of each outparcel and five stories in the interior of each outparcel.

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PUNTA GORDA WOMEN'S CLUB



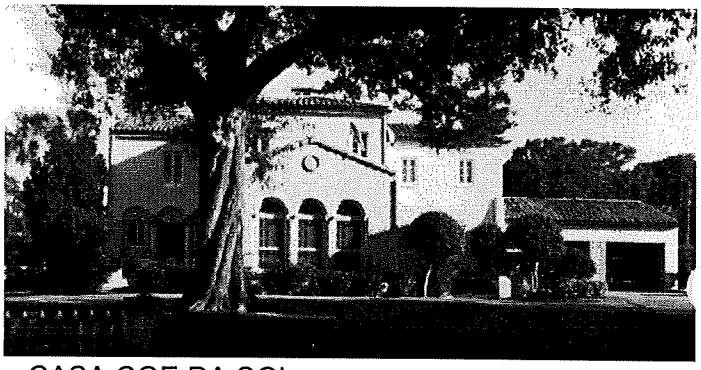
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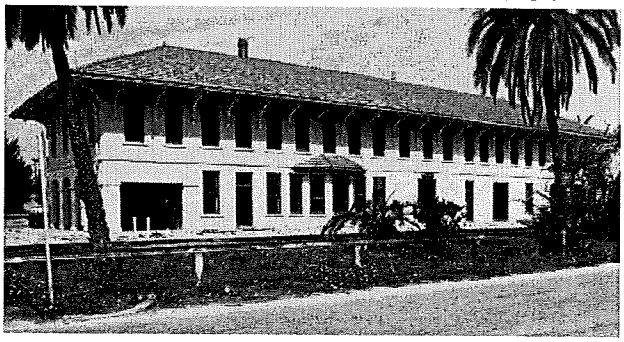
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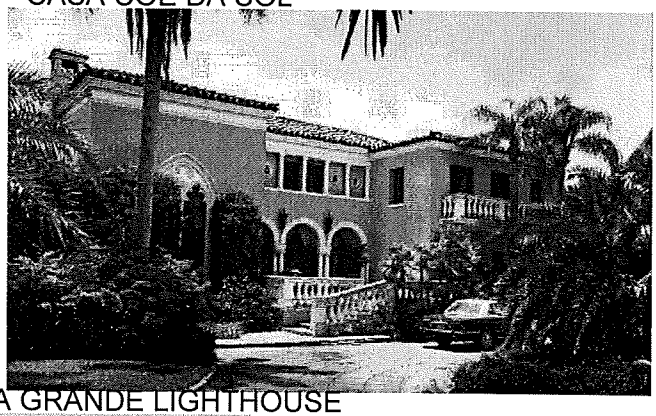
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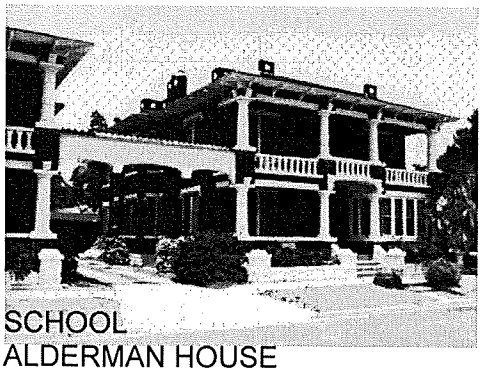
CHARLOTTE HARBOR RAILWAY DEPOT



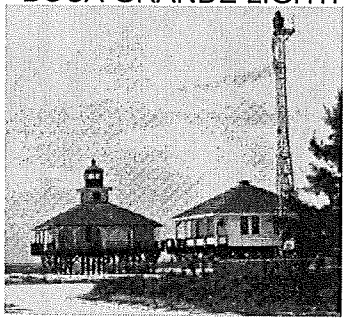
CASA COE DA SOL



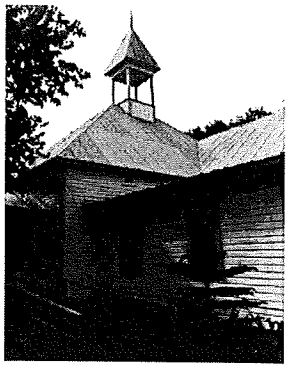
LE CLAIRE APARTMENTS



BOCA GRANDE LIGHTHOUSE



BUCKINGHAM SCHOOL



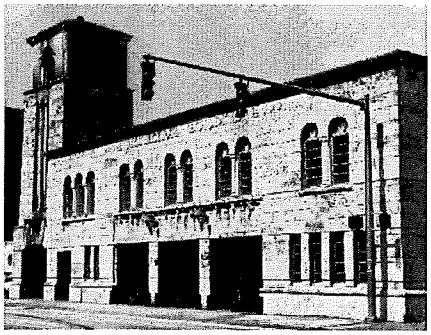
ALDERMAN HOUSE



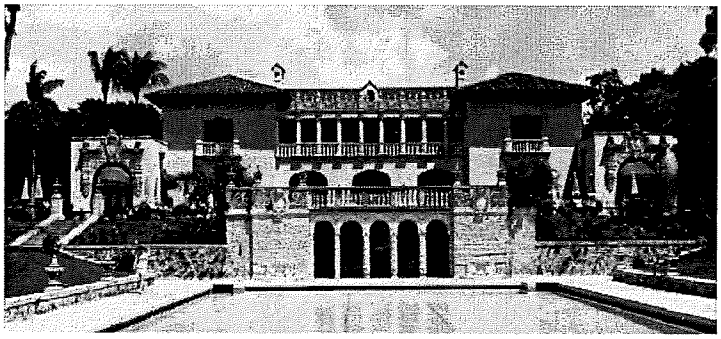
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Historic Florida - Figure 3.1T

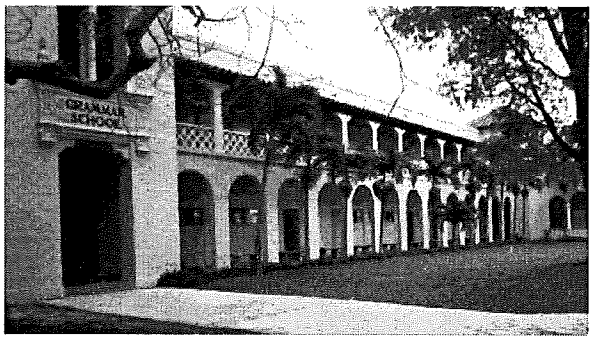
CORAL GABLES POLICE AND FIRE STATION



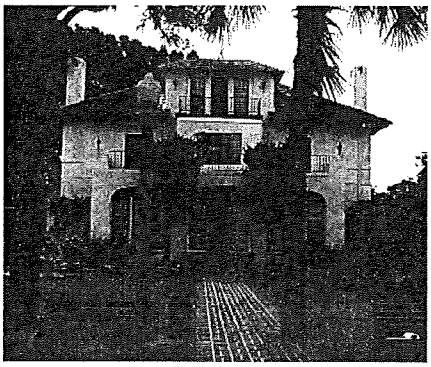
EL JARDIN



CORAL GABLES ELEMENTARY SCHOOL



VILLA BIANCA



RALPH M. MUNROE HOUSE (The Barnacle)



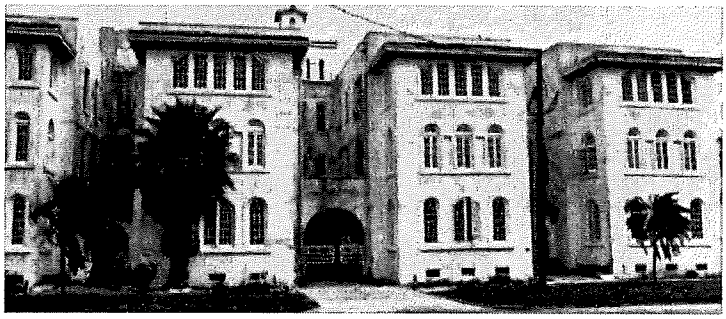
ROTH CIGAR FACTORY



DEMARCAY HOTEL APARTMENTS



FRANCIS-CARLTON



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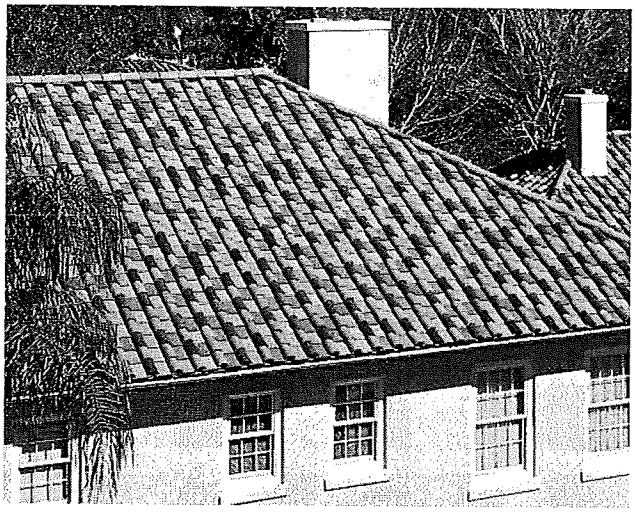


Figure 3.1K

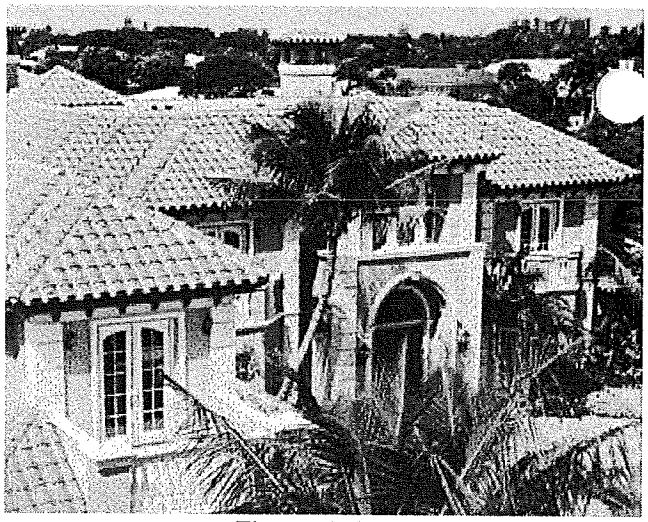


Figure 3.1L



Figure 3.1M

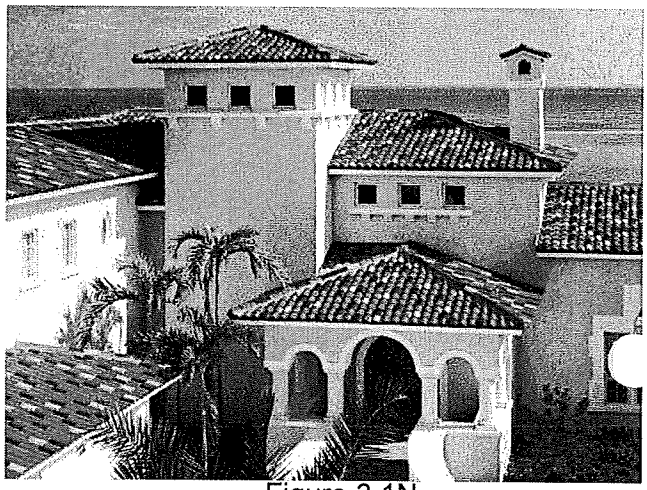


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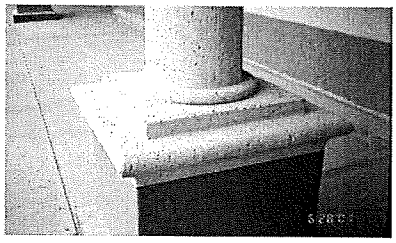


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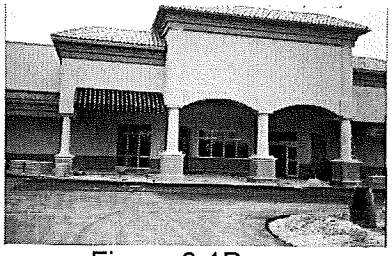


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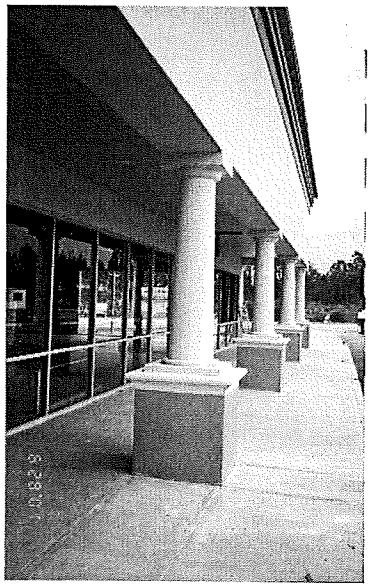


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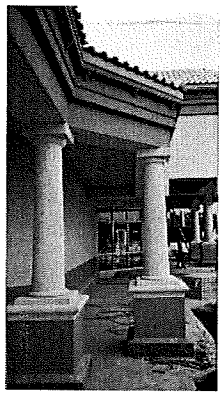


Figure 3.1Q

Figure 3.1S



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Figure 3.1B

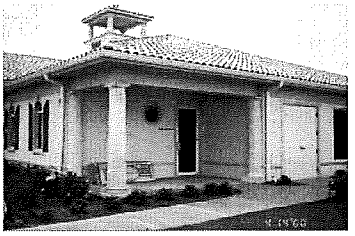


Figure 3.1C



Figure 3.1D



Figure 3.1E



Figure 3.1F

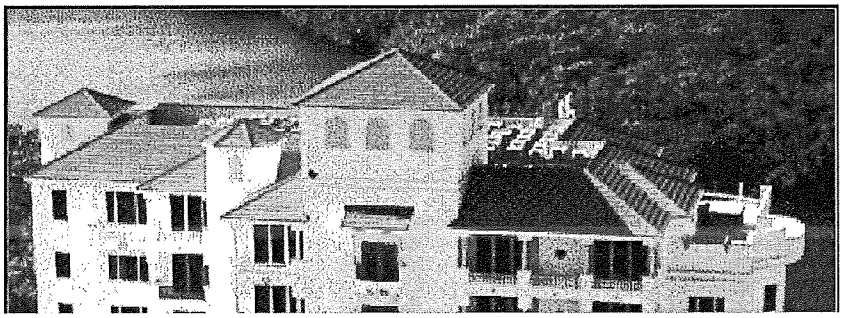


Figure 3.1G



Figure 3.1H



Figure 3.1I

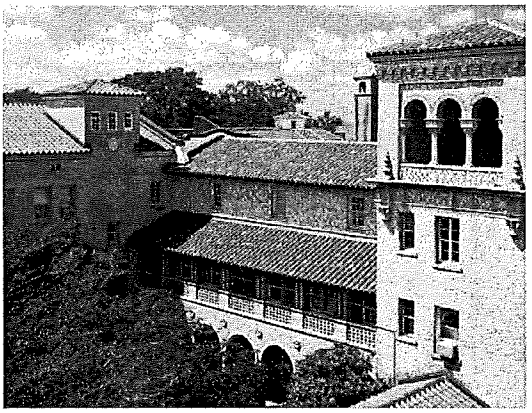


Figure 3.1J

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3.0 Private Building Features - The Built Environment

One of the stated goals of the Pattern Book is to attempt to mesh the existing architectural styles into a harmonious whole by stating some simple guidelines for the designer. If achieved, the goal will give Heron Creek Towne Center a recognizable and pleasant identity. However, nothing in the Pattern Book is intended to hinder the design professional's quest to fit the building to its particular site and context

3.1 Architectural Guidelines - Two trends exist in and around Towne Center: the Florida Country style of the City Center and the Mediterranean style of Heron Creek and the Publix Retail Facility. (Refer to Figures 3.1A, 1.3.2B, 1.3.2C, 1.3.3A, 3.1C, 3.1D, and 3.1O - 3.1S) The City Center should retain its separate status by keeping its architectural identity. Its style is suited to its civic use and the planned density of that area. However, in the adjacent Business Use area, where the density is higher and the buildings potentially taller, and elsewhere in Towne Center, a Mediterranean style more in keeping with the Heron Creek, the Publix Retail Facility and the US 41 Corridor Improvements would be more appropriate. Ample opportunities exist for relating the Mediterranean style to the stuccoed country style allowing the two to coexist harmoniously. Characteristic features of the Mediterranean Style are:

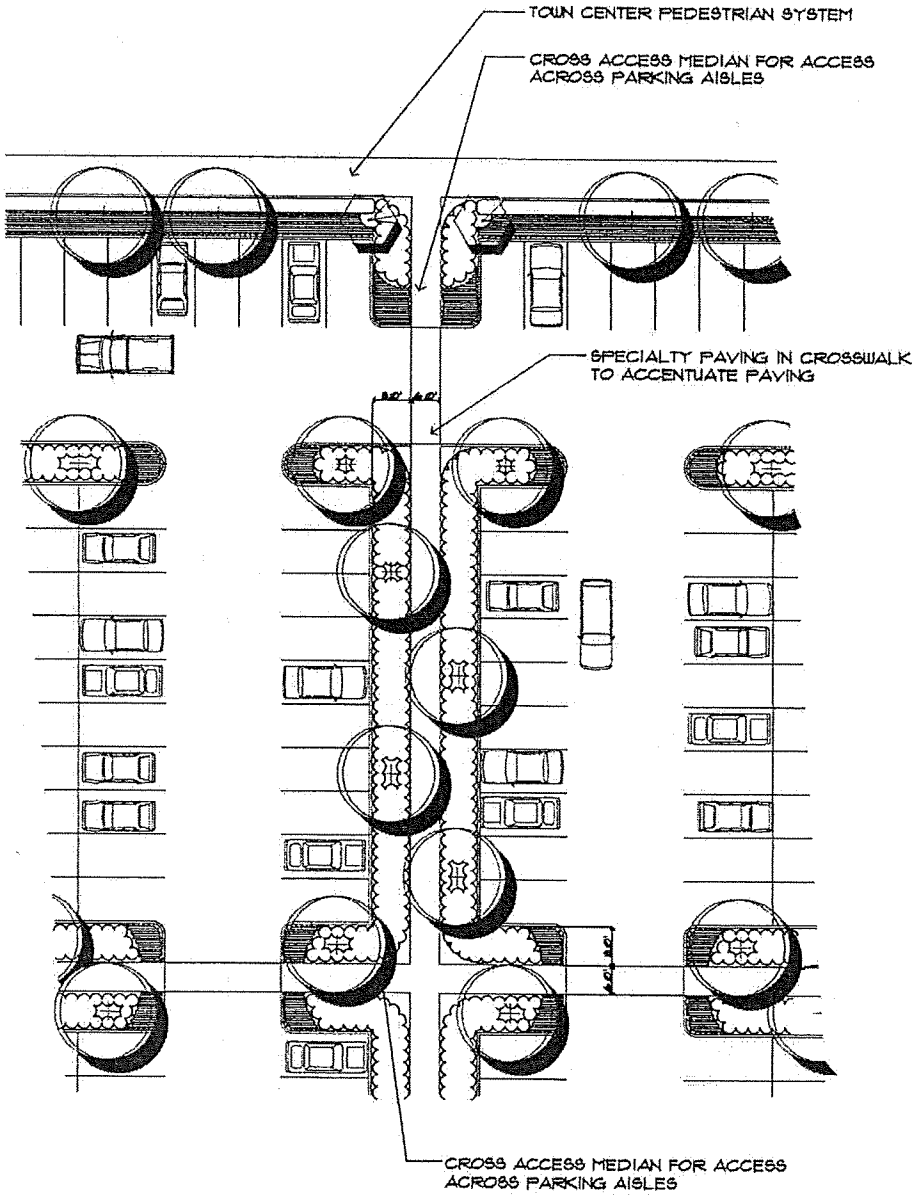
- Stucco Exterior
- Arcaded Porches
- Balconies
- Decorative Details
- Towers/Corner Features
- Multiple Stories
- Colonnaded Garden Court Yards
- Belt Courses Separating First and Second Stories
- Wrought Iron Details
- Arches Above Doors, Porch Entries and Main Windows
- Rectangular Shapes
- Asymmetrical Shapes with Cross-Gable and Side Wings
- Spiral Columns and Pilasters
- Court Yards
- Carved Stonework or Cast Ornaments
- Patterned Tile Floors and Wall Surfaces
- Hipped Roofs
- Shed Roof Loggias
- Low Pitched Roofs
- Red Roof Tiles
- Little or No Overhanging Eaves
- Flat Roof and Parapets
- Terra Cotta Roofs
- Wooden Casement or Double Hung Windows
- Earthy Pinks and Beige Colors

(Refer to Figures 3.1B - 3.1T)

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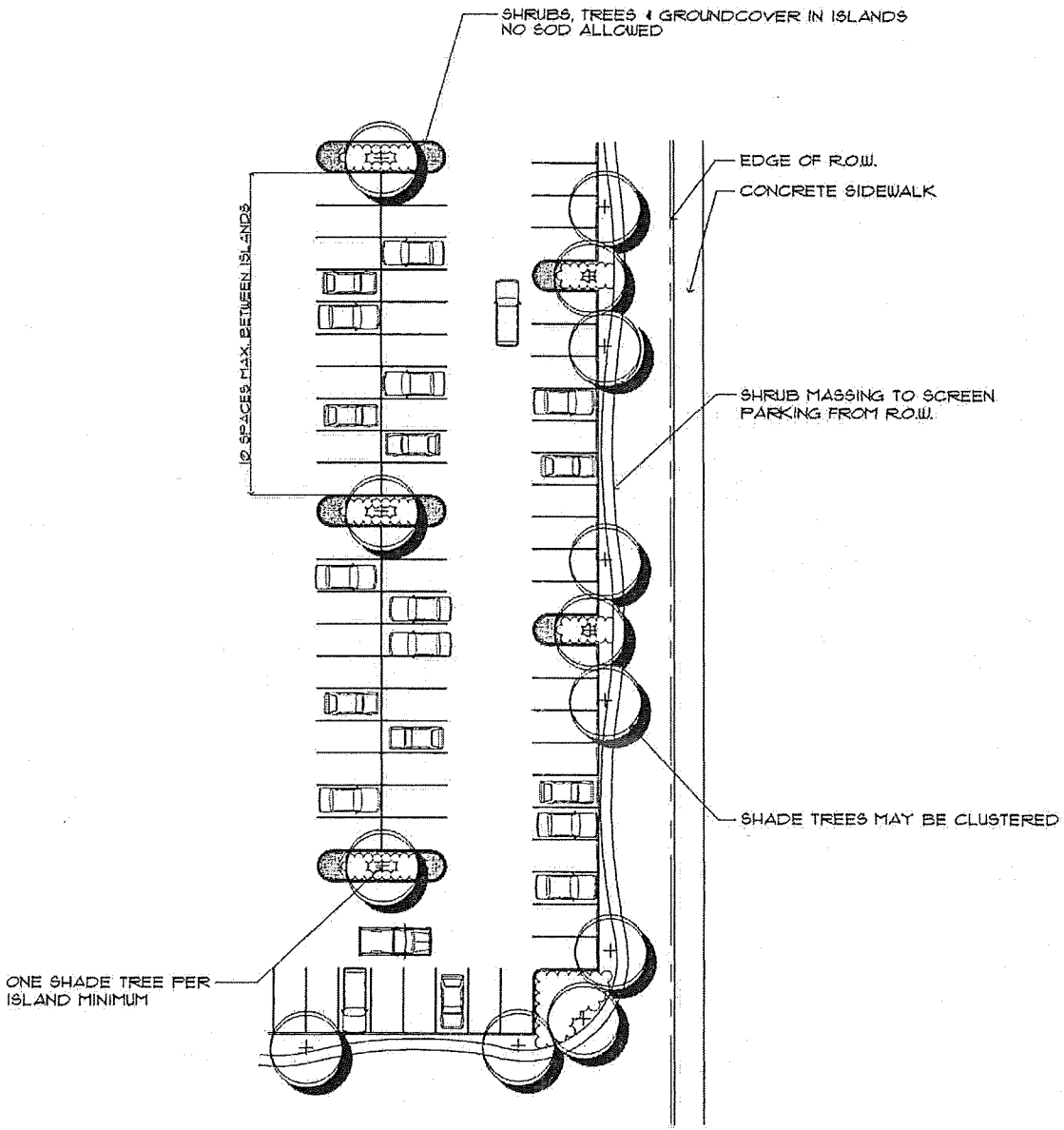
2.13 Storm Water Management - In keeping with current City of North Port development standards, all storm water runoff from within the Towne Center will be treated and attenuated in accordance with Southwest Florida Water Management District (SWFWMD) criteria. Over and above SWFWMD criteria, all Towne Center developments shall collect and convey runoff to the internal treatment areas via a "closed" drainage system. Drainage of buildings and paved surfaces to "open" ditches will be discouraged in favor of collecting runoff with a system of gutters and inlets connected to storm drainage culverts, which will discharge to treatment areas and/or treatment lakes. All treatment areas shall be designed in an aesthetic manner. Avoid the use of rectilinear forms, use curves with large radii and incorporate natural material at the normal water's edge.

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PARKING AREA CROSS ACCESS MEDIAN
FIGURE 2.11.14

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TYPICAL PARKING LOT
FIGURE 2.11.10

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$P_{min} = \frac{5000}{1000} [4.0 - 0.1(5000 / 10000)] = 20$ parking spaces for a parking ratio of 3.95 spaces per 1000 square feet

For Residential uses within Town Center, each unit shall require a minimum of 1.5 parking spaces.

2.11.8 Landscaping shall be provided in landscape islands throughout the parking areas equal to ten percent (10%) of the total paved area.

2.11.9 Landscape islands shall be located at the end of each parking aisle adjacent to the travel lane serving that aisle.

2.11.10 No more than ten (10) parking spaces shall be placed in a continuous row without a landscape island. (See Figure 2.11.10)

2.11.11 Landscape areas shall have a minimum width of eight feet (8') of planting area.

2.11.12 A minimum of seventy percent (70%) of required trees within the parking area shall be a shade tree.

2.11.13 Landscape islands shall be planted with trees, small shrubs and groundcovers. No sod will be allowed in landscape islands.

2.11.14 Every parking area shall provide a minimum of one (1) continuous cross access median with landscaping to provide a pedestrian walkway connection to offsite walkways. This median shall have a six foot (6') paved walkway with a landscape area on both sides. (See Figure 2.11.14)

2.11.15 Where a parking area is not screened by roadway buffer requirements, the parking area will be screened with one (1) shade tree every forty linear feet (40' l.f.) and a continuous shrub massing that shall obtain a height of three feet (3') within two years. Trees may be clustered where appropriate. Two (2) accent trees may be substituted per shade tree where available clearance will not allow for use of shade trees. Layering of shrub masses is encouraged where space permits. Knee walls with decorative railing sections may be substituted for large shrub massing, however small shrubs will be required in front of the wall.

2.11.16 All landscaped areas shall be protected from vehicle encroachment by curbing or wheel stops.

2.11.17 Landscape areas shall be designed so as not to interfere with traffic sight line requirements.

2.12 Public Transportation - Bus service along Sumter Boulevard is an asset to Towne Center, and accommodations shall be made that enhance its effectiveness and encourage patronage by the public. One main, covered bus stop shall be located along Sumter Boulevard in the southwest quadrant , three others located elsewhere in Towne center, and if the transportation authority will cooperate, other stops may be designated along the pedestrian and vehicular spines, "Main Street" and City Center Boulevard. At present, the preference for location of the main bus stop is directly across Sumter from White Ibis Drive.

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does not exceed 1000 square feet; (2) the use of the tenant or building shall be consistent with the permitted uses for that area.

2.11.5 In Governmental Use areas the number of required parking spaces shall be based upon the gross floor area of the building or tenant area and the use of that area. (Refer to North Port Development Code, Appendix 6.8)

2.11.6 In Office, Professional & Institutional Use areas the number of required parking spaces shall be based upon the gross floor area of the building or tenant area and the use of that area, except as noted in 2.10.4. Parking areas shall comply with minimum and maximum numbers of spaces. (Refer to North Port Development Code, Appendix 6.8)

2.11.7 In all General Commercial Use areas the number of required parking spaces shall be based upon the gross floor area of the building except for restaurants and motion picture theaters. (For restaurants and theaters, refer to North Port Development Code, Appendix 6.8) Parking areas shall comply with minimum and maximum numbers of spaces. For any building the ratio of parking spaces to area shall decrease relative to the size of the building. Calculate the number of parking spaces as illustrated.

Parking for commercial buildings or tenants located in General Commercial Use areas shall be calculated as follows:

Minimum number of parking spaces = P_{min}

Maximum number of parking spaces = P_{max}

Gross building or tenant area = A

$$P_{max} = \frac{A}{1000} [5.5 - 0.1(A / 10000)]$$

$$P_{min} = \frac{A}{1000} [4.0 - 0.1(A / 10000)]$$

example:

For a building of 150,000 square feet the maximum parking requirements shall be:

$P_{max} = \frac{150000}{1000} [5.5 - 0.1(150000 / 10000)]$ = 600 parking spaces for a parking ratio of 4.0 spaces per 1000 square feet

$P_{min} = \frac{150000}{1000} [4.0 - 0.1(150000 / 10000)]$ = 375 parking spaces for a parking ratio of 2.5 spaces per 1000 square feet

For a building of 5,000 square feet the minimum parking requirements shall be:

$P_{max} = \frac{5000}{1000} [5.5 - 0.1(5000 / 10000)]$ = 27 parking spaces for a parking ratio of 5.45 spaces per 1000 square feet

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2.9.1.8 Prohibited Signs:

- _ Animated signs (except electronic, digital message boards changing no more than once per hour)
- _ Signs with visible neon tubing
- _ Window signs
- _ Bench signs
- _ Obscene signs
- _ Roof signs
- _ Painted wall signs
- _ Portable changeable copy signs
- _ Balloons of all types
- _ Sandwich signs
- _ Revolving or rotating signs
- _ Flashing or audible signs

2.10 Lighting - In the interest of creating a consistent and pleasant atmosphere inside Towne Center, outdoor area lighting along streets and inside future developments should seek a balance between safety/security and aesthetics. Outdoor lighting designs should be appropriate for the specified use of a particular area.

2.11 Parking - Almost every building or tenant in Towne Center requires some off-street parking for vehicles. However, the Towne Center has been planned in such a way as to encourage pedestrian circulation and on-street parking. Also, due to the mixed occupancy of Towne Center, the various buildings will reach their peak parking demand at different times of day. Therefore, the opportunity exists to reduce the number of off-street parking spaces from that traditionally required for the Towne Center occupancies if one assumed that each building was located in a free-standing location and ample parking was provided for that building for the time of its highest parking demand. The following parking guidelines assume that parking may be shared between several buildings in the same vicinity and that on-street parking may be included in a building's parking requirement, thereby decreasing the total number of parking spaces and area of paving.

2.11.1 On-street parking on the same side of the street and directly fronting a lot shall count toward the minimum parking requirement for that lot. Any portion of a particular parking space fronting on the lot will count as one whole parking space.

2.11.2 A group or common parking area is permitted to serve multiple tenants or buildings.

2.11.3 The required number of parking spaces may be reduced below the minimum numbers based upon a demonstrated peak demand time differential between two or more of the uses sharing the same parking area.

2.11.4 Parking for community related retail and service occupancies in Office, Professional & Institutional Use areas shall not require off-street parking provided that: (1) the gross floor area of the individual tenant or building

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2.9.1.3 Outparcel Identification – Each Outparcel will be allowed one monument sign for each frontage of Sumter and Price Boulevards, and each residential parcel will be allowed one monument sign at each entrance into the residential use off of internal Town Center roadways (regardless of the roadway classification), a maximum of 25 square feet in area and 8' in height. The design of the sign shall be in keeping with the architectural theme of the Towne Center and will match architecture of the building on the outparcel.

2.9.1.4 Internal Directional Signs – Each outparcel shall be allowed one directional sign at each of its connections to the internal roadways of the Towne Center. These signs shall be limited to 4 square feet in area and 4' in height. The design of the sign shall be in keeping with the architectural theme of the Towne Center and will match the architecture of the building on the outparcel.

2.9.1.5 Building Identification – Identifies building address and/or building tenant(s). Refer to Building Signs. Each parcel fronting on Sumter or Price Blvds. may have one monument sign along internal road that identifies the building. Parcels greater than two acres may have up to two monument signs no closer together than 300 ft. All ground signs shall be located consistent with access drives and landscape elements.

2.9.1.6Temporary – Identifies available property information and development information.

Real Estate signs may be single sided or V-shaped. Single sided signs shall be no more than 8 feet wide by 4 feet high. Each of the two visible faces of a V-shaped sign shall be limited to 8 feet wide by 4 feet high. Information shall be limited to property identification, realty company's name, phone number and agent to contact. Sign must be removed upon completion of building sale or when building is fully leased. All signs shall be set back 10 feet from the property line.

Construction signs shall be single sided only and shall be limited to 8 feet wide by 4 feet high. Only one sign per development will be permitted. Information shall be limited to the name of the project, identification of owner / developer, design firms, contractor and financing source. No individual subcontractor signs will be permitted. Sign shall be removed upon construction completion.

All signs shall be set back 10 feet from the property line.

2.9.1.7 Directional / Information – Provides directions and/or information to tenant location, parking areas, etc. Not included in above limitations.

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2.8.3 Site Furniture – The following list shall regulate the use of site furniture in the streetscape. This list may be modified by approved equals. All substitutions must be approved by Heron Creek and the City of North Port. (Figure 2.8.3)

2.8.3.1 Bench – C-10 Model, Victor Stanley, Inc. (800) 368-2573 – www.victorstanley.com

2.8.3.2 Trash Containers / Ash Trays – Ironsites Series, Victor Stanley, Inc.

2.8.3.3 Tree Grates – R-8754 Square, Neenah Foundary Co., (414) 725-7000 – www.nfco.com

2.8.3.4 Plant Vases – Terra-form Westlake II Series, Wausau Tile, Inc. (800) 388-8728 – www.wausautile.com

2.8.3.5 Bike Racks – Bike Multi-Hoop, Bike Security Racks Co., Inc., (800) 545-2757 – www.bikeracks.com

2.8.3.6 Drinking Fountain – 1776 Old Style, Murdock, Inc. (513) 471-7700 – www.murdockfountains.com

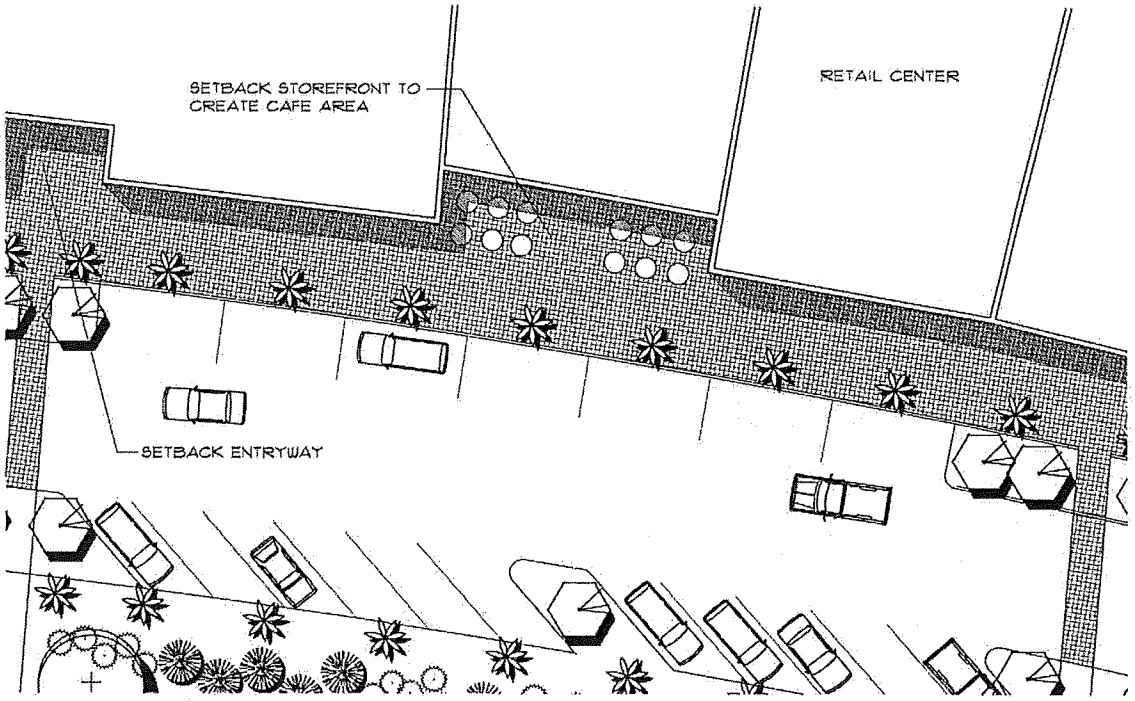
2.9 Site Signage – The purpose of this criteria is to regulate the type, number, designand placement of signs within the Towne Center. Guidelines provide a consistent hierarchy of signage, clear and concise enough to allow for easy site navigation while enhancing the overall appearance of the Center.

2.9.1 Sign hierarchy will be designated as follows:

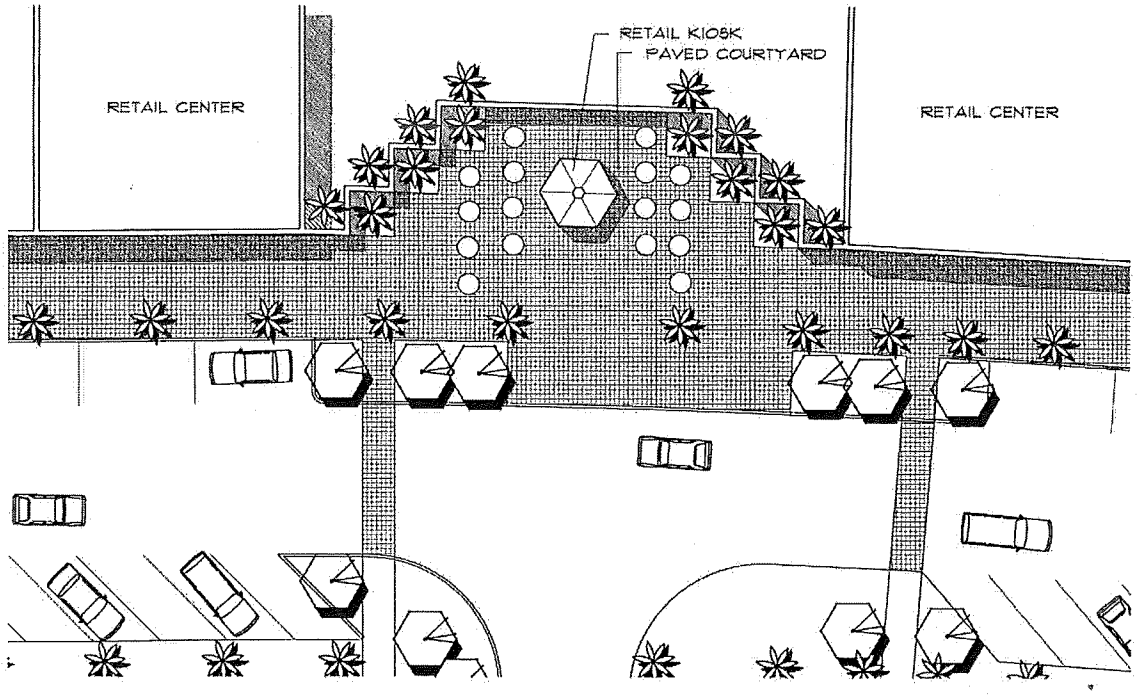
2.9.1.1 Center Identification – Identifies the Towne Center. Four monument signs located at the intersection of Sumter Boulevard and Price Boulevard and one monument sign located at each edge of the Town Center along Sumter and Price. Each sign shall not exceed 200 sq. ft. and shall be designed in harmony with the landscape architectural features of the site. Other off-premises signs shall not be allowed.

2.9.1.2 Project Identification – Identifies the major entrances to the major use areas. This includes the intersection of Price Boulevard and Main Street (south side of intersection) as well as the intersection of White Ibis Drive and Sumter Boulevard and Main Street and Sumter Boulevard. These signs shall be multi-tennant signs installed within the landscaped median of these Towne Center roadways. The height of these signs shall be a maximum of 25' measure from finished grade and will be designed with architecture that will be in harmony with the architecture of the Towne Center overall. An 8' high multi-tennant sign will be allowed at the intersection of Main Street and Price on the north side of Price.

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OUTDOOR CAFE AREA



OUTDOOR KIOSK AREA

FIGURE 2.8.2.3

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2.8 Streetscape

The details that are specified within the Towne Center will meld to create the character of the streetscape. Whereas the individual components used cannot provide a sense of place, the way they are combined to create the individual spaces of the Center can. The scope of these guidelines is insufficient to provide designs for each public space, however, suggestions will be listed concerning hardscape treatment, site furniture and opportunities for the enhancement of the streetscape experience.

2.8.1 Pedestrian system – To encourage foot traffic over vehicular traffic, ample cross connections need to be provided from one side of the site to the other. These connections must provide a direct access, with limited detours, and shall provide connections within and between the different use areas. The design of these systems shall be regulated by the following:

2.8.1.1 The majority of the system shall be composed of six foot (6') wide concrete sidewalks in the locations initially depicted on Figure 4.4A. Five foot (5') wide sidewalk segments over 100 ft that need to be replaced in their entirety shall be replaced with six foot (6') wide concrete sidewalks. The sense of enclosure shall vary based on the desired scale of the space.

2.8.1.2 Areas of visual interest, special use and roadway crossings shall use specialty concrete paving, such as concrete pavers or colored and textured concrete.

2.8.1.3 The pedestrian system shall be designed to utilize the shade provided by required street trees or shall provide additional shade trees.

2.8.1.4 Provide adequate rest areas with benches at convenient locations of intersection, visual interest, and public gathering.

2.8.1.5 Provide for the inclusion of items of visual and auditory interest (i.e. public art, display fountains, kiosks, etc.).

2.8.1.6 Include utilitarian features into a homogenous design element (i.e. bus stop shelters, newspaper rack locations, traffic signage, etc.).

2.8.1.7 Include features of visual interest at the visual termini of roadways and walkways.

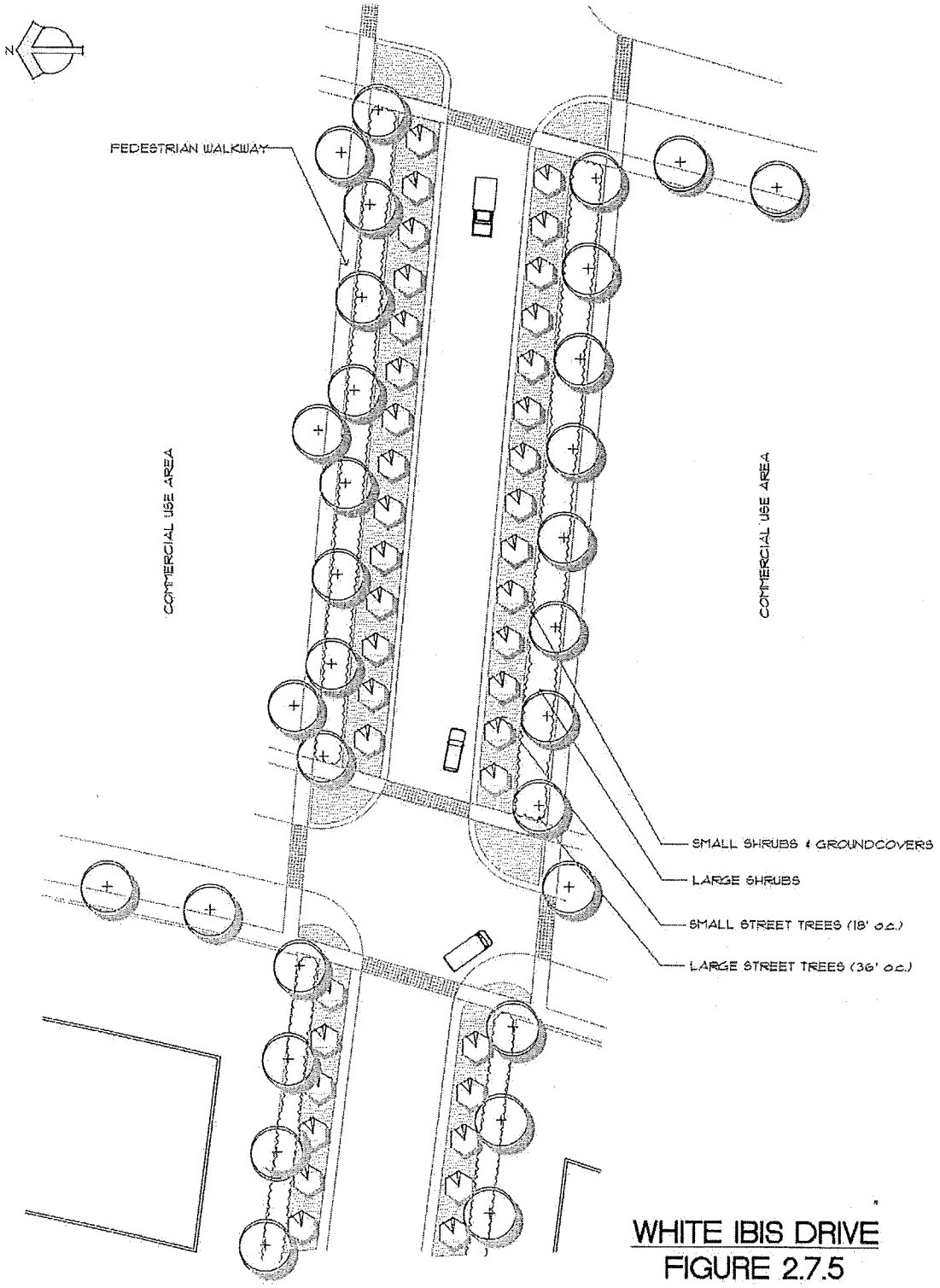
2.8.2 Public Spaces – all public spaces should be designed to allow for and encourage personal interaction. These spaces shall be regulated by the following:

2.8.2.1 Provide locations for intimate conversations to occur outside of the direct pedestrian flow.

2.8.2.2 Provide bench areas that include face-to-face bench placement.

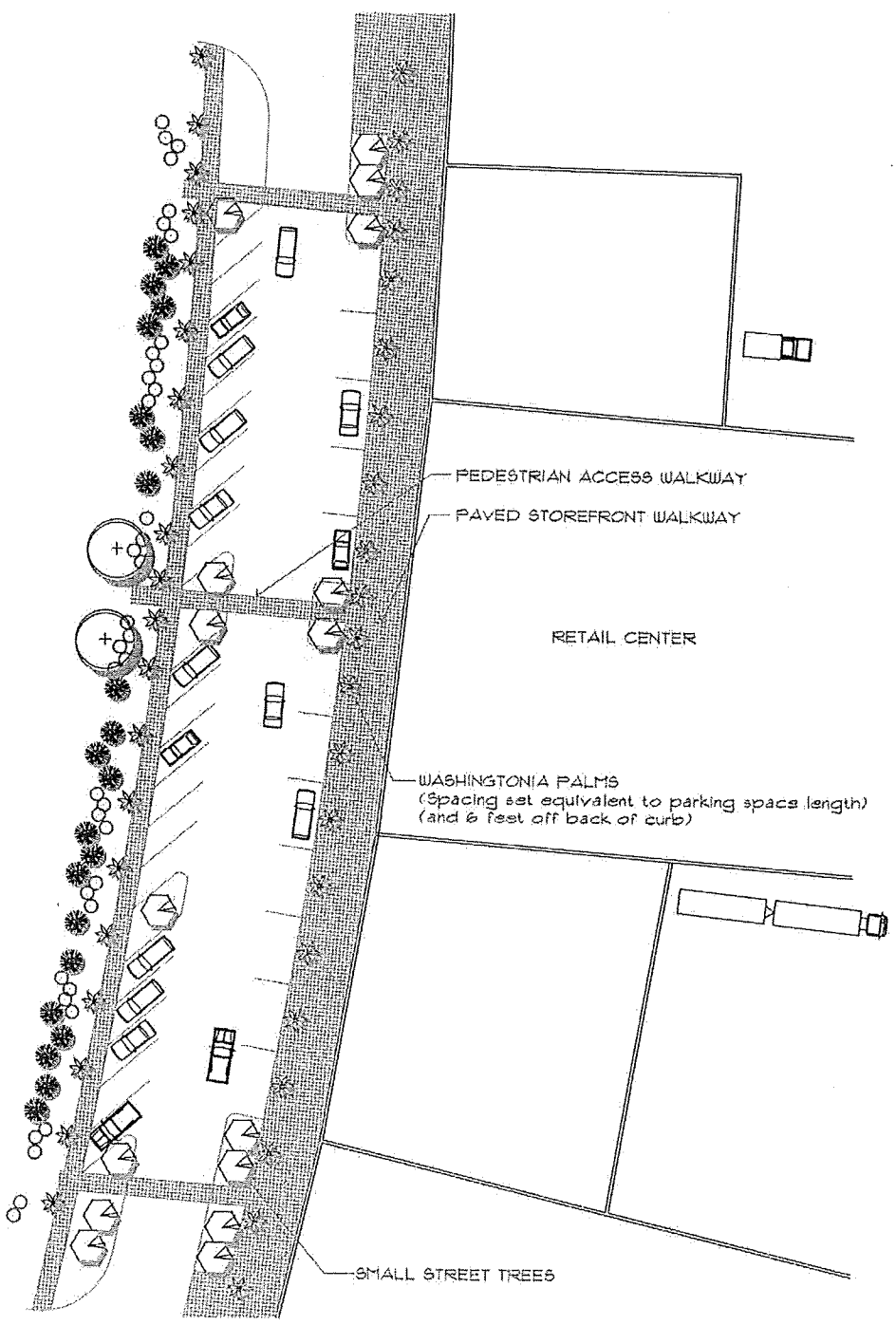
2.8.2.3 Encourage varied setbacks from "Main Street" in the retail center to allow for visual interest and outdoor use areas.

2.8.2.4 Provide areas for kiosk establishments.



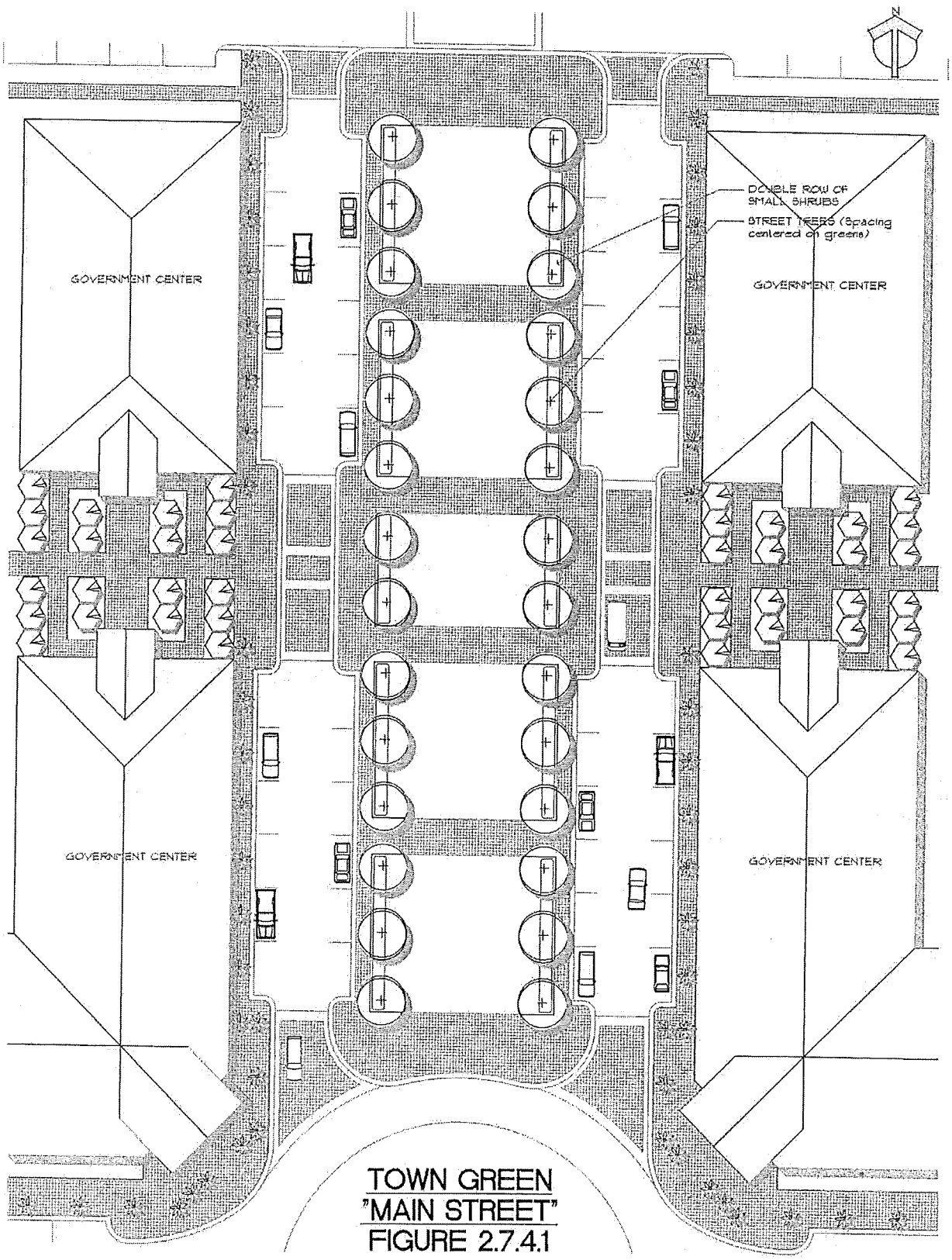
WHITE IBIS DRIVE
FIGURE 2.7.5

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MAIN STREET
ON-STREET PARKING LANDSCAPE
FIGURE 2.7.4.2

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TOWN GREEN
"MAIN STREET"
FIGURE 2.7.4.1

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2.7.4 Main Street- This roadway serves as the central spine that joins the Governmental Use area, Office Professional and Institutional Use area and main portion of the General Commercial Use area. As it unites three distinct uses so does it have three distinct cross sections, The Towne Green section, a boulevard section and an on-street parking section.

All three sections will have the same basic treatment scheme as City Center Boulevard with Washingtonia palms in the strip between the edge of right-of-way and edge of pavement, however, the medians for the Towne Green and boulevard sections may use a different combination of street trees. In addition, the Towne Green and on-street parking roadways must follow additional criteria.

2.7.4.1 The interior section of the Towne Green shall be primarily sod. A double row of small shrubs will be planted along the interior edge of the walkway. The interior street trees shall be planted in line with the interior row of shrubs. (See Figure 2.7.4.1)

2.7.4.2 Small street trees shall be planted in the parking islands of the on-street parking section in conjunction with the Washingtonia palms. In addition, should landscape screening be required between on-street parking and additional Vehicular Use areas, this area shall be heavily screened with berming, shrubs and other screening material. This will serve to maintain the streetscape environment by providing a continuous enclosure. (See Figure 2.7.4.2)

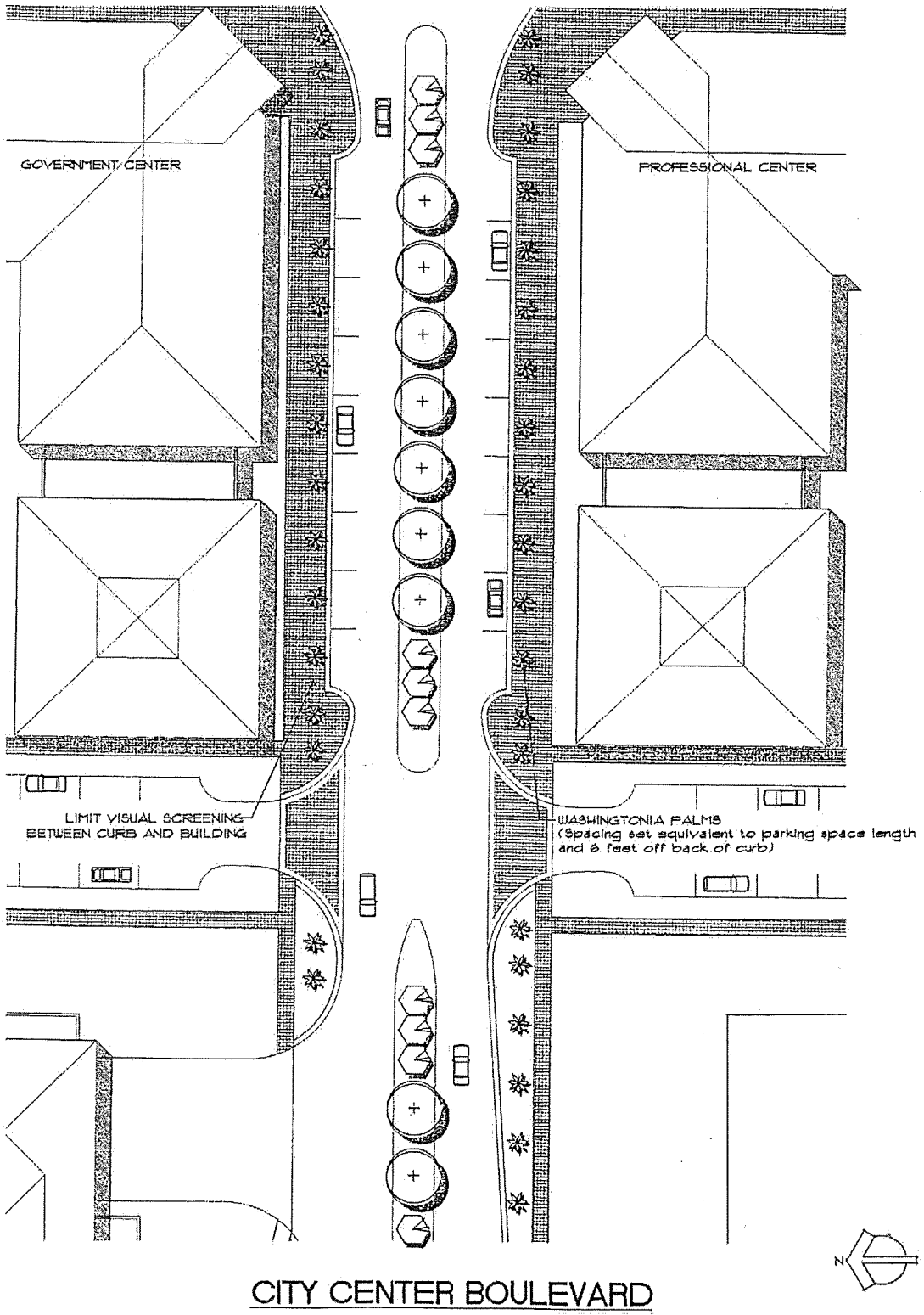
2.7.5 White Ibis Drive - This roadway section provides access into the main eastern commercial area and cross access to the Heron Creek residential area to the west. To emphasize the importance of this access point, the landscape strip between the roadway and the parking area shall have a double row of street trees set on staggered spacing. The row of trees closest to the roadway shall be of the smaller street tree variety. The row behind shall be of the large street tree type. The understory shall be planted with large shrubs, small shrubs and groundcover in a layered arrangement. (See Figure 2.7.5)

2.7.6 Interior Roadways - All other interior roadways shall have street trees or Washingtonia palms planted on equal spacing. The selection of tree type shall be based on the most restrictive factor on that roadway (i.e. building setback, landscape strip width, proximity to pavement, etc.). Street tree spacing shall be governed by the following:

Large street trees - 36' o.c.
Small street trees - 18' o.c.
Washingtonia Palm - 18' o.c.

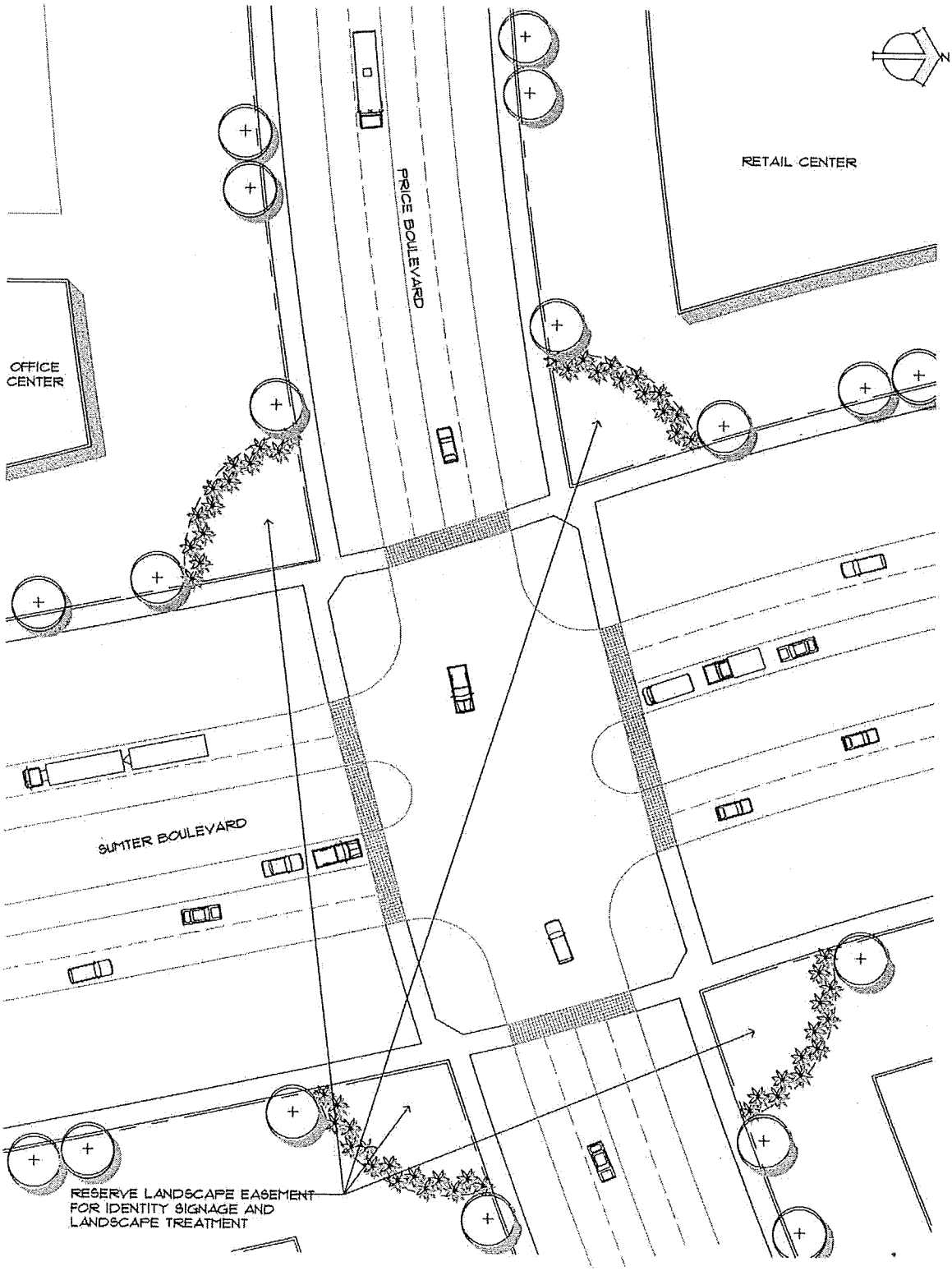
These spacings are based on parking space dimensions. Placement of street trees may need to be modified so that trees will be placed at the ends of a parking space, if parking exists on the roadway in question.

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CITY CENTER BOULEVARD
FIGURE 2.7.3

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PRICE BOULEVARD
FIGURE 2.7.2

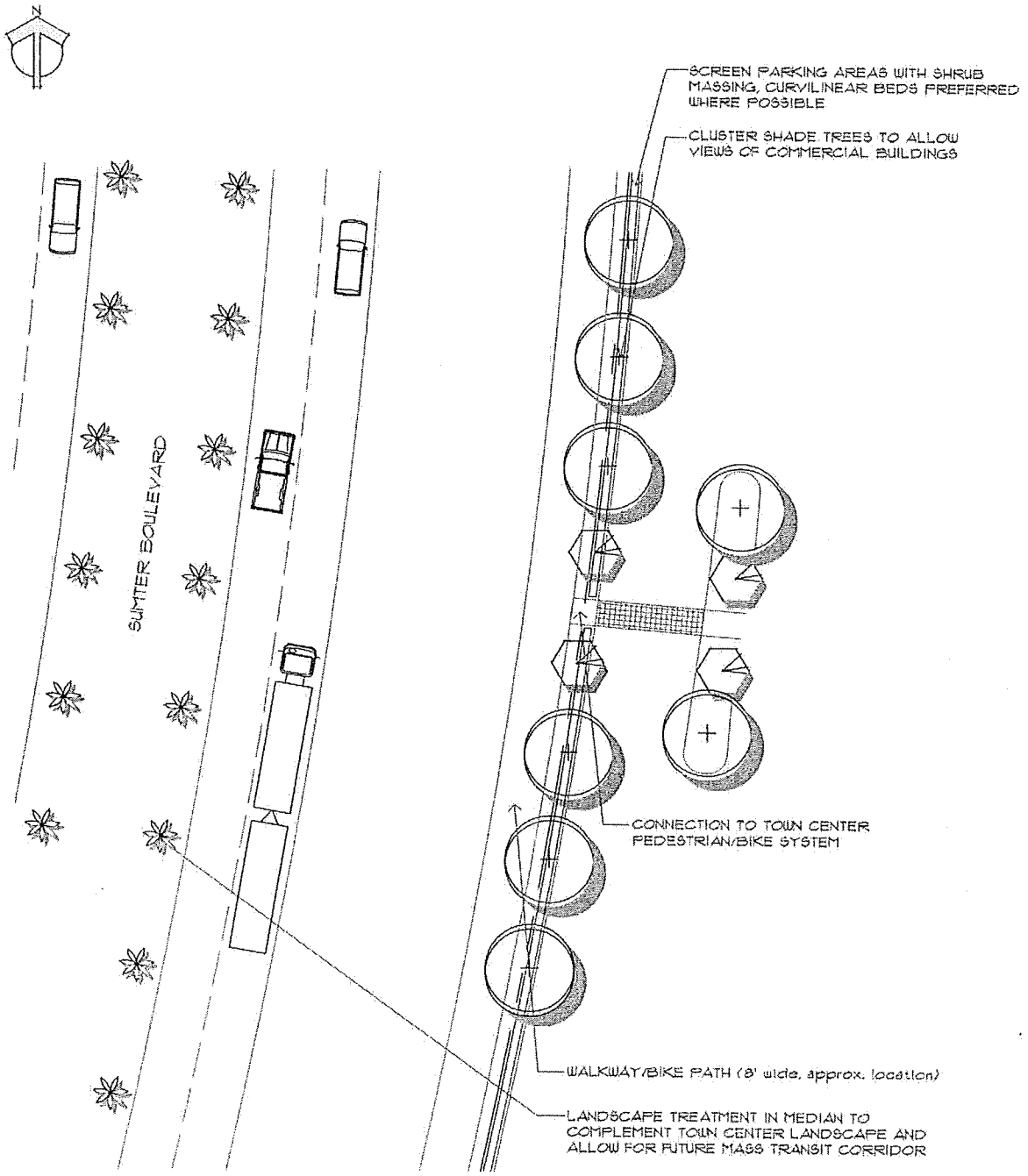
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2.7.2 Price Boulevard - This one hundred foot (100') right-of-way roadway provides connections to the residential area to the west and Toledo Blade Boulevard to the east. The intersection of Price and Sumter has been designated as an identity intersection by the City. This intersection has obvious importance for reasons other than its traffic handling capacity. As the key intersection in Towne Center, it is essential to preserve a fifty foot (50') radius landscape easement at all four corners of Sumter and Price for identity signage and associated landscape treatments. (See Figure 2.7.2). The form and style of the identity signage shall evolve in conjunction with the sense of place that emerges as the Towne Center develops over time. Materials, lettering style and aesthetic features will be tied to the theme of the Towne Centers public spaces. Shade trees and accent trees shall be clustered for strategic locations on site to allow for views of buildings. Space will be designated for the inclusion of public art projects within these easements. Heron Creek shall review and approve all public art proposals for this area. Allow space for four foot (4') by seven foot (7') v-shaped project identification signage along the entire length of roadway.

Buffer Requirements Per 100 L.F. of Roadway:
- Two (2) large street trees
- Three (3) small street trees
- Thirty-three (33) large shrubs
- Thirty-three (33) small shrubs

2.7.3 City Center Boulevard - This roadway serves as the main access into the government center office center from Sumter Boulevard. The one hundred foot (100') right-of-way is essentially the division between the two use areas of this Towne Center quadrant, however, it must be treated as a unifying element through the use of landscape and hardscape materials and arrangement. Building setbacks along City Center Boulevard have been reduced to ten feet (10') to strengthen the tie between building and roadway. To further foster this relationship, the planting program shall limit the addition of visual screening. The landscape strip between the edge of right-of-way and on street parking shall consist of Washingtonia palms planted on spacing established by the length of parallel parking spaces and a combination of small shrubs and groundcovers. Plant material within the median consist of street trees, shrubs and ground covers. There shall be no sod used in the medians, except in the roundabout. The palm trees and the street trees will provide contrast and help to soften the roadway cross section. This treatment must also be carried out on the extension of City Center Boulevard across Sumter Boulevard to the end of the commercial use parcels. (See Figure 2.7.3)

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SUMTER BOULEVARD
FIGURE 2.7.1

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2.7 Roadway Landscape Treatments

2.7.1 Sumter Boulevard-This two hundred foot (200') right-of-way roadway is one of the main routes from Interstate 75 into the City of North Port. Currently, Sumter Boulevard is a 4-lane divided roadway with pedestrian interconnectivity to the surrounding areas. The landscape treatment along Sumter must work in harmony with any landscaping that the City has installed in the right-of-way and provide a transition to the more urban aspects of the Towne Center. All vehicular use areas are to be screened from the right-of-way by beds of shrub massing, the largest of which shall reach a height of thirty-six inches (36") within twenty-four (24) months of planting or screening walls. Screening beds shall allow for breaks to provide connections from the Sumter Boulevard walkway to the interior circulation system. Any walls used shall provide some degree of opacity through the use of decorative metal railings or other compatible material. Shade trees and accent trees shall be clustered in strategic locations to allow for views of commercial buildings closest to Sumter Boulevard. (See Figure 2.7.1) However trees shall not be spaced more than 60' apart to allow for adequate shading of sidewalks within the right-of-way. Allow space for four foot (4') by seven foot (7') v-shaped project identification signage along the entire length of roadway. Any landscape planted within the Sumter Boulevard right-of-way shall meet city requirements for sight distance and installation.

Buffer Requirements Per 100 L.F. of Roadway:
- Two and one-half (2.5) large street trees
- Five (5) small street trees
- *Thirty-three (33) large shrubs
- Sixty (60) small shrubs

*Large shrub requirement can be waived with inclusion of screening wall.

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2.6.2.13 All plant material sizes to be considered minimum. Substitutions may be used with prior approval from Heron Creek and the City of North Port.

2.6.2.14 Place Oaks a minimum of 6' from all sidewalks.

2.6.2.15 Place palms far enough away from pedestrian areas to avoid liability issues such as thorns, leaf boots, and falling fronds.

2.6.2.16 Allow adequate separation of trees and palms from pedestrian areas to avoid conflicts with stakes and guy lines.

2.6.2.17 Plant material with toxic qualities shall be placed in areas separated from contact with the general public.

2.6.2.18 Weeping Fig to be used only in areas without underground utilities.

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Podocarpus macrophyllus, Podocarpus, 30" Ht., 3 Gal., 3' o.c.
Serenoa repens, Saw Palmetto, 12" Ht., 3 Gal., 4' o.c.
Myrcianthes fragrans, Simpson Stopper, 2' Ht., 3 Gal., 3' o.c.
Hamelia patens, Firebrush, 2' Ht., 3 Gal., 5' o.c.
Ixora coccinea 'Nora Grant', Nora Grant Ixora, 2' Ht., 3 Gal., 3' o.c.
Nerium oleander 'nana', Dwarf Oleander, 18" Ht., 3 Gal., 3' o.c.
Rhaphiolepis indica 'Majestic Beauty', Majestic Beauty Indian Hawthorn, 18"
Ht., 3 Gal., 3' o.c.

Accents:
Hibiscus rosa-sinenis, Hibiscus, 18" Ht., 3 Gal., 4' o.c.
Cycas revoluta, King Sago, 18' Ht., 3 Gal., 4' o.c.
Crinum asiaticum, Crinum Lily, 2' Ht., 3 Gal., 4' o.c.
Gardenia jasminoides, Gardenia, 30" Ht., 3 Gal., Grafted
Bougainvillea spp., Bougainvillea, 24" Ht., 3 Gal.
Strelitzia reginae, Bird of Paradise, 18" Ht., 3 Gal., 3' o.c.
Alpinia zerumbet 'variegata', Variegated Shell Ginger, 18" Ht., 3 Gal., 3' o.c.
Nandina domestica, Heavenly Bamboo, 24" Ht., 3 Gal., 30" o.c.
Jatropha integerrina, Jatropha, 18" Ht., 3 Gal., 4' o.c.
Pennisetum setaceum, Fountain Grass, 24" Ht., 3 Gal., 3' o.c.

Small Shrubs:
Ilex vomitoria 'nana', Dwarf Yaupon Holly, 12" Ht., 3 Gal., 3' o.c.
Rhaphiolepis indica, Indian Hawthorn, 12" Ht., 3 Gal., 30" o.c.
Muhlenbergia capillaris, Muhly Grass, 18" Ht., 3 Gal., 30" o.c.
Tripsacum floridana, Gamma Grass, 18" Ht., 3 Gal., 30" o.c.
Zamia pumila, Coontie, 12" Ht., 3 Gal., 30" o.c.
Ixora coccinea 'Maui', Maui Ixora, 12' Ht., 3 Gal., 30" o.c.
Ilex cornuta 'Dwarf Burford', Dwarf Buford Holly, 14" Ht., 3 Gal., 30" o.c.
Spartina bakeri, Sand Cordgrass, 24" Ht., 3 Gal., 30" o.c.

Groundcovers:
Liriope muscari 'Evergreen Giant', Evergreen Giant Liriope, 1 Gal., 24" o.c.
Lirope muscari 'variegata', Aztec Grass, 1 Gal, 18" o.c.
Rhoeo spathacea, Oyster Plant, 1 Gal., 18" o.c.
Trachelospermum asiaticum, Asian Jasmine, 1 Gal., 18" o.c.
Trachelospermum jasminoides, Confederate Jasmine, 3 Gal., 3' o.c.
Hemerocallis spp., Daylilies, 1 Gal., 12' o.c.
Dietes bicolor, African Iris, 1 Gal., 24" o.c.
Lantana spp., Lantana, 1 Gal., 24" o.c.
Penta lanceolata, Penta, 1 Gal., 18" o.c.
Seasonal Annuals, 4" pots, 8" – 12" o.c.

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Shade Trees:
Quercus virginiana, Live Oak, 12' – 14' Ht. x 5' Spd., 3" Cal.
Quercus laurifolia, Laurel Oak, 12' – 14' Ht. x 5' Spd., 3" Cal.
Acer rubrum, Red Maple, 7' – 9' Ht. x 4' Spd., 3" Cal.
Liquidambar styraciflua, Sweetgum, 9' – 11' Ht. x 4' Spd., 3" Cal.
Ulmus parvifolia 'Drake', Drake Elm, 8' – 10' Ht. x 5' Spd., 3" Cal.
Bucida buceras 'Shady Lady', Black Olive, 10' – 12' Ht. x 5' Spd., 3" Cal.
Conocarpus erectus, Buttonwood, 8' – 10' Ht. x 5' Spd., 3" Cal.
Pinus elliottii, Slash Pine, 9' – 11' Ht. x 4' Spd., 3" Cal.

Palm Trees:
**Washington robusta,* Washington Palm, 12' – 16' Ht. o.a.
**Sabal Palmetto,* Sabal Palm, 12' – 20' Ht. o.a.
Acoelorraphe wrighti, Paurotis Palm, 10' – 14' Ht. o.a., Min. 7 canes
Livistonia chinensis, Chinese Fan Palm, 6' – 12' Ht. o.a.
Trachycarpus fortunei, Windmill Palm, 3' – 6' Ht. o.a.
Rhapidophyllum hystrix, Needle Palm, 2' – 4' Ht. o.a.
* Palms to be clustered in groups of five (5) or more.

Accent Trees:
Ligustrum lucidum, Ligustrum Tree, 6' – 8' Ht. x 4' Spd., 2" Cal. MT
Lagerstroemia indica 'Tuscarora', Crape Myrtle, 6' – 8' Ht. x 4' Spd., 2" Cal. MT
Ilex x attenuata 'East Palatka', East Palatka Holly, 6' – 8' Ht. x 2½' Spd., 2" Cal.
Ilex x attenuata 'Savannah', Savannah Holly, 6' – 8' Ht. x 2½' Spd., 2" Cal.
Tabebuia caraiba, Silver Trumpet Tree, 6' – 8' Ht. x 3' Spd., 2 Cal.
Koelreuteria elegans, Goldenrain Tree, 8' – 10' Ht. x 4' Spd., 2" Cal.
Magnolia grandiflora, Southern Magnolia, 6' – 8' Ht. x 3' Spd., 3" Cal.

Screening:
Ilex cassine, Dahoon Holly, 6' – 8' Ht. x 2½' Spd, 1½" Cal., 15 Gal.
Bucida buceras 'Shady Lady', 6' – 8' Ht. x 3½' Spd., 1½" Cal., 15 Gal.
Ficus benjamina, Weeping Fig, 6' – 8' Ht. x 3½' Spd., 1½" Cal., 15 Gal.
Conocarpus erectus, Buttonwood, 6' – 8' Ht. x 2½' Spd., 1½" Cal., 15 Gal.
Pinus elliottii, Slash Pine, 6' – 8' Ht. x 2' Spd. 1½" Cal., 15 Gal.
Taxodium distichum, Bald Cypress, 6' – 8' Ht., 2' Spd., 1½" Cal., 15 Gal.
Myrica cerifera, Wax Myrtle, 6' – 8' Ht. x 2½' Spd., 1½" Cal., 15 Gal.
Nerium oleander, Oleander, 4' – 6' Ht., 7 Gal.
Podocarpus macrophyllus, Podocarpus, 4' – 6' Ht., 7 Gal.

Large Shrubs:
Tripsacum dactyloides, Fakahatchee Grass, 2' Ht., 3 Gal., 5' o.c.
Viburnum obovatum, Walter's Viburnum, 2' Ht., 3 Gal., 3' o.c.
Viburnum suspensum, Sandankwa Viburnum, 18" Ht., 3 Gal., 3' o.c.
Philodendron selloum, Split leaf Philodendron, 18' Ht., 3 Gal., 4' o.c.

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2.6.2.3 A minimum three inch (3") thick layer of approved mulch shall be placed to cover the planting area of all new plant material.

2.6.2.4 All palms and trees shall be warranted by developer for a period of one year. All shrubs and ground covers shall be warranted for a period of three months.

2.6.2.5 Container grown trees are preferred over balled and burlaped. Balled and burlaped trees may be substituted with prior approval from Heron Creek.

2.6.2.6 All landscaping shall be installed according to accepted commercial planting standards by a qualified landscape contractor.

2.6.2.7 Landscape designs shall promote the reduction of future maintenance (i.e., elimination of small or isolated areas of sod, adequate separation of trees from sidewalks, height limitations under power lines, trees located in shrub beds, etc.).

2.6.2.8 The owners of individual parcels shall be responsible for the maintenance of all landscaping. Replacement of dead material shall be of the same type and quality of material originally installed and shall be accomplished within 90 days of plant failure.

2.6.2.9 All newly landscaped areas shall be irrigated with an automatic system that provides 100% coverage. Irrigation systems shall be incorporated into Heron Creek Towne Center irrigation supply system.

2.6.2.10 Irrigation systems will be designed to provide separate zones for turf areas.

2.6.2.11 Tree and shrub beds shall be irrigated with lower volume micro-irrigation systems.

2.6.2.12 Approved Plant List:

Street Trees:
Quercus virginiana, Live Oak, 12' – 14' Ht. x 6' Spd., 4" Cal. (Large Street Tree)
Quercus laurifolia, Laurel Oak, 12' – 14' Ht. x 6' Spd., 4" Cal. (Large Street Tree)
Washingtonia robusta, Washington Palm, 14' – 16' Ht. o.a., Matched
Ilex x attenuata 'East Palatka", East Palatka Holly, 10' – 12' Ht. x 4' Spd., 4" Cal. (Small Street Tree)
Lagerstroemia indica "Tuscarora", Crape Myrtle, 9' – 11' Ht. x 7' Spd., 4" Cal. MT. (Small Street Tree)

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2.6.1.3 Buildings, roads, parking and all site features shall be sited to preserve existing trees over 6" caliper, wherever possible.

2.6.1.4 Any pine tree that is to be preserved shall have a protected area equivalent to twice the diameter of its canopy. No fill or construction equipment shall be allowed within the limits of the protective barricades and tree wells will not be permitted to retain the tree.

2.6.1.5 Tree barricades shall be constructed at the drip line of existing hardwood trees and at two times the drip line of all pine trees. These barricades shall be maintained intact throughout the construction on the site surrounding the trees. These barricades shall be sturdy and clearly visible.

2.6.1.6 The majority of plant material approved for use around paved areas shall be street trees or shade trees. Accent trees and palm trees may be used at intersections or other areas of emphasis.

2.6.1.7 This selection of plant material for the various areas of the Towne Center shall take into consideration existing soil and groundwater conditions. The use of material that can withstand periods of inundation is critical in areas of poor percolation or high groundwater levels.

2.6.1.8 All site development shall conform to the minimum standards set forth in the City of North Port codes including tree preservation, tree replacement, minimum open space required and maximum allowable paved area requirements. In case of discrepancy, the more stringent standard shall always apply.

2.6.1.9 Once landscape material has been installed for a site feature that continues throughout the Towne Center, such as street trees on "Main Street", that pattern must be repeated for the entire length of that feature.

2.6.1.10 Landscape plans must be prepared by a Landscape Architect registered by the State of Florida and submitted to Heron Creek and the City of North Port for review and approval.

2.6.2 Landscape plan material selection, installation and maintenance shall be governed by the following:

2.6.2.1 All plant material shall be Florida Grade No. 1 or better, as defined in Grades and Standards for Nursery Plants, State of Florida, Department of Agriculture.

2.6.2.2 All planting areas shall receive soil amendments and fertilizer as appropriate.

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plazas shall not be included in the building footprint. For purposes of calculating the FAR and SOR, buildings fronting on "Main Street" in the Governmental and Office, Professional & Institutional Use areas may include 50% of the "Town Green" space on which they front in the area of their parcel.

The maximum FAR for any individual parcel within the Towne Center is 1.00 and the maximum SOR for any individual parcel within the Towne Center is 0.50. Overall, density within the Towne Center is restricted based on the maximum densities allowed in the DRI Development Order, which does have some flexibility built-in due to the implementation of the Conversion Matrix in a recent change to the DRI. The Conversion Matrix allows uses within Towne Center to be interchanged without impacting the City services being provided and having a detrimental impact to the surrounding areas.

2.5 Buffers - The Towne Center is recognized as a special area within the larger community. In order to transition smoothly from Towne Center to surrounding residential areas, buffering will be required. Buffering is also required within Towne Center in certain instances.

2.5.1 A 40 foot wide buffer is required ~~between non-residential buildings inside~~ along the boundaries of the Towne Center ~~and any adjacent~~ where the adjoining ~~residential~~ property outside Towne Center has a residential use, specifically adjacent to the Blueridge Waterway and the drainage canal at the south of the southeast quadrant. Where existing vegetation inside that 40 foot buffer is removed for development or is insufficient to maintain a screen that is 75% or more opaque, a Type 'C' buffer shall be installed. (Refer to North Port Land Development Code, Chapter 21) An eight foot high opaque wall with appropriate landscaping may be substituted for the buffer opaque landscape requirement.

No buildings shall be constructed in the buffer.

2.5.2 Trash dumpsters and trash compactors inside Towne Center shall be screened from sight by an opaque wall at least 6 feet high.

2.6 General Landscaping – A consistent landscape theme must be maintained throughout the development of the Towne Center. Visual continuity in the built environment can be accentuated by the use of an approved palette of plant material and set of standards for treatment of major site features. In order to blend with the Heron Creek residential development and the City of North Port entry features along Sumter Boulevard, the Towne Center will be governed by guidelines that will emphasize and enhance the natural environment that still exists around the development.

2.6.1 The landscape theme for the Towne Center shall be governed as follows:

2.6.1.1 Only the use of native and indigenous plants will be permitted.

2.6.1.2 Wherever possible, stands of existing vegetation shall be maintained (including understory vegetation). Dead and undesirable material may be removed.

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2.3.5 "Main Street" shall have a Build-To Line, which shall be the outside edge of the sidewalk on either side of the street or the right-of-way/property line. At least 50% of the facade of buildings fronting on "Main Street" shall be built upon the Build-To Line. Buildings with projecting facade elements, such as columns or pilasters, may be setback a maximum of 5 feet from the Build-To Line, and flat front walls, uninterrupted by projections or recesses, shall not exceed 40 feet in length. Open space for uses such as café seating, exhibition of sculpture, fountains and raised planters may be placed between building and the build-to-line.

2.3.6 Detached single and two family residences, townhouses and portions of adult congregate living facilities built as detached single and two family residences shall have a minimum 20 foot setback from the right-of-way or property line at any street or alley.

2.3.7 Multiple-family dwellings and adult congregate living facilities, except those along Front Place and White Ibis, shall have a minimum 40 foot setback from the right-of-way or property line at any street or alley. Balconies at the second floor level or above roofs and open-air patios or porches surrounded by knee walls may project 20 feet into the setback. Residential buildings along Front Place and White Ibis shall have a minimum 0' and maximum 30' setback from internal property lines.

2.3.8 Residences located on the upper floors of Office, Professional & Institutional buildings shall be subject to the same setback restrictions as the building in which they are located.

2.3.9 All buildings, with side or rear setbacks adjacent to drainage canals or waterways, whether residential or commercial, shall have side and rear setbacks of a minimum 40' from all other internal and external property lines, provided minimum buffer requirements are being met.

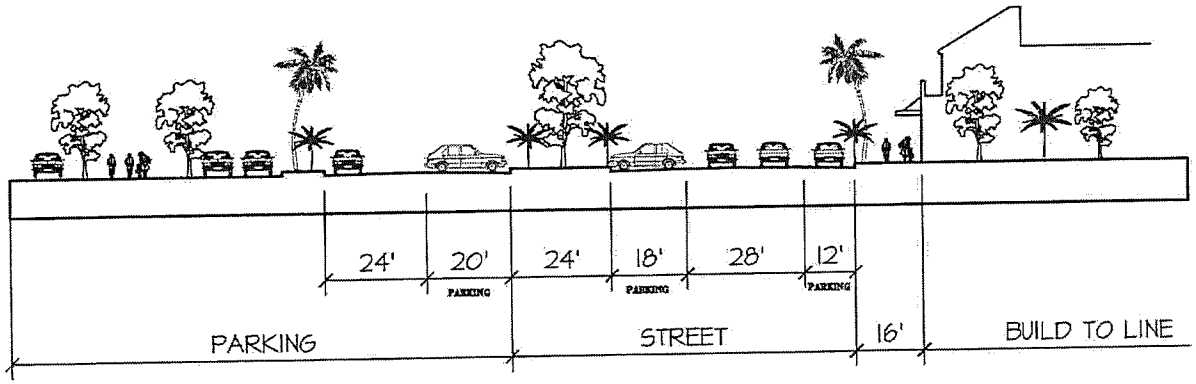
2.3.10 All buildings, not adjacent to drainage canals or waterways or with internal road or alley frontage, shall have a setback of 20' from the property line.

2.4 Floor Area Ratio (FAR) and Site Occupancy Ratio (SOR) - The density of each use area of Towne Center shall be regulated by two principal means: 1) maximum Floor Area Ratio, which expresses the relationship between the amount of useable floor area permitted in a building and the area of the parcel on which the building stands, and 2) maximum Site Occupancy Ratio, which expresses the relationship between the footprint area of a building and the area of the parcel on which the building stands.

The FAR is obtained by dividing the gross floor area of a building by the total area of the parcel. Proper FAR regulations allow for flexibility in site design while placing reasonable limits on density. The stated maximum FAR may be exceeded only if the developer "purchases" bonuses by providing additional site amenities or improved access.

The SOR is obtained by dividing the gross area of the building footprint by the total area of the parcel. Proper SOR regulations allow for flexibility in site design while preserving a reasonable amount of open space. The stated maximum SOR may be exceeded only if the developer "purchases" bonuses by providing additional site amenities or improved access. Outdoor spaces, open to the sky, such as parking and driveways, patios and

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"MAIN STREET" @ COMMERCIAL USE TYPE 1 & 2

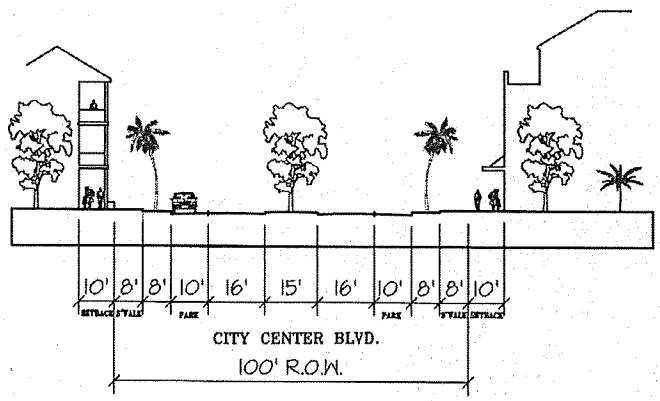
FIGURE 2.3.4

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2.3.4 Non-residential buildings with frontage on any other Towne Center street, whether private or public, shall not have a minimum set back from the right-of-way or property line. (Refer to Figure 2.3.4) Buildings fronting on one of the above streets shall be separated from their property lines by distances that comply with the applicable building code, based upon their construction type and area.

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2.3.2 Buildings with frontage on Price Boulevard shall be set back a minimum of 30 feet from the 100 foot right-of-way. Balconies at the second floor or above and roofs may project 15 feet into the setback. Open-air patios or porches surrounded by knee walls may project 30 feet into the setback. (Refer to Figure 2.3.2)

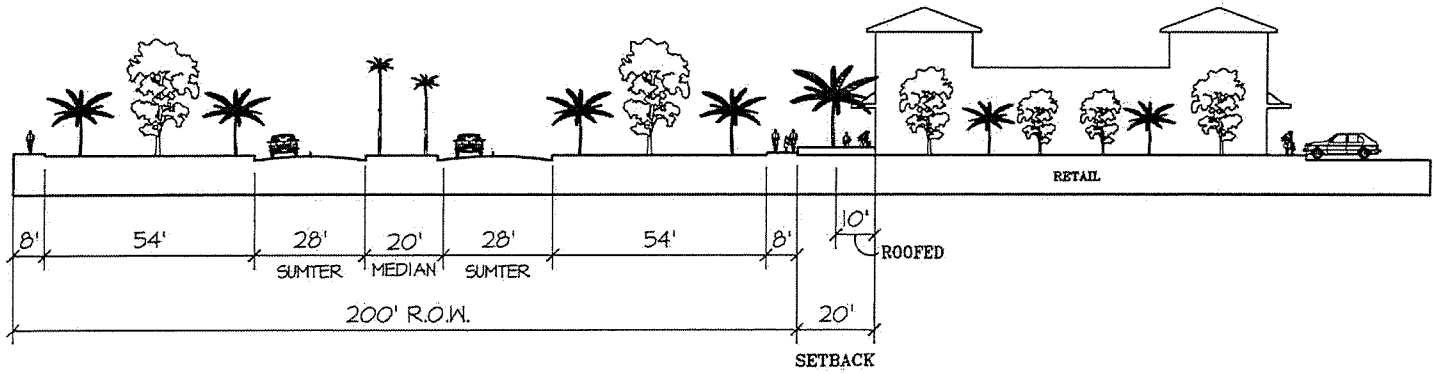


"CITY CENTER BOULEVARD"

FIGURE 2.3.3

2.3.3 Buildings with frontage on City Center Boulevard shall be set back a minimum of 10 feet from the 100 foot right-of-way. Balconies at the second floor or above, roofs and open-air patios or porches surrounded by knee walls may project 10 feet into the setback. (Refer to Figure 2.3.3)

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SUMTER BOULEVARD

FIGURE 2.3.1

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2.2.6 The northwest quadrant is the smallest of all and is surrounded by golf course residential development areas of Heron Creek. This quadrant has been developed as a retail center with multiple free-standing buildings Drug Store, Bank) as well as a multi-tenant building with restaurants and retail uses. Development on this quadrant has been undertaken similar to that in the southwest quadrant as is typical of retail development in Southwest Florida. (Refer to Figure 2.2.7) This is an area of General Commercial Use, Type 3.

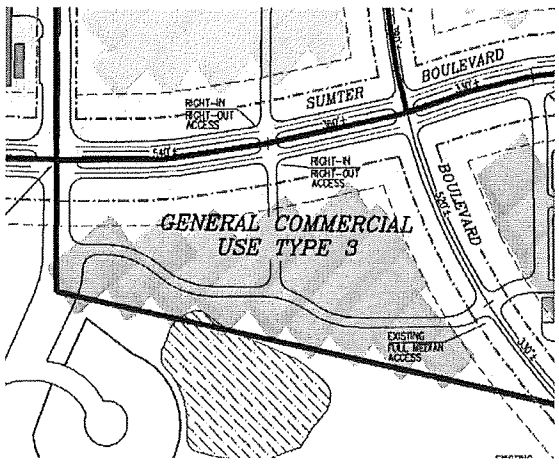


Figure 2.2.7

2.3 Building Setbacks and Build-To Lines - In order to accommodate the design delineated in the Towne Center Conceptual Site Plan, sweeping changes must be made to the traditional zoning ordinance in regard to building setbacks. The whole concept of setbacks and yards needs rethinking in a planned neighborhood where buildings are not perceived as islands surrounded by a sea of grass and asphalt. Closer proximity of the buildings to the street favors the pedestrian over the vehicle and forces vehicle parking to the interior of the parcel. Fortunately, if Towne Center is administered as if the whole were zoned PCD Planned Community Development District, as suggested in 1.1.2, then the emphasis is shifted away from setbacks and to Floor Area Ratios (FAR) or Site Occupancy Ratios (SOR) (Refer to 2.4). Thus, the valid use for setbacks in Towne Center is to create open areas for landscaping, circulation or visibility along roadways of all sizes. The opposite of a setback is a Build-To Line, and its use is to pull buildings close to a street to favor pedestrians and calm traffic. The following setbacks and build-to lines ~~are recommended for~~ shall apply to buildings in Towne Center:

2.3.1 Buildings with frontage on Sumter Boulevard shall be set back a minimum of 20 feet from the 200 foot right-of-way. Balconies at the second floor or above and roofs may project 10 feet into the setback. Open-air patios or porches surrounded by knee walls may project 20 feet into the setback. (Refer to Figure 2.3.1)

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2.2.5 In the southwest quadrant, adjacent to the Publix Retail Facility, are four outparcels, one of which (at the hard corner of Sumter and Price) has been developed as a 7-11 gas station and convenience store, one is being developed as a Dunkin Donuts and the other 2 outparcels currently sitting vacant and ready for development. (Refer to Figure 2.2.6) This quadrant may be developed more in keeping with traditional, vehicle oriented, commercial development, and perhaps that is appropriate since it straddles one of the vehicle access points of the Heron Creek Golf Community, White Ibis Drive. The Publix, with its large parking lot, is typical of the prevailing wisdom among retailers, that convenience for the automobile is everything. However, maintaining the pedestrian connections to Heron Creek community and to the City Center across Sumter will be very desirable. Developments on the remaining outparcels present the opportunity to locate buildings close to the right-of-way, as in the northwest quadrant and other commercial areas. This is an area of General Commercial Use, Type 3.

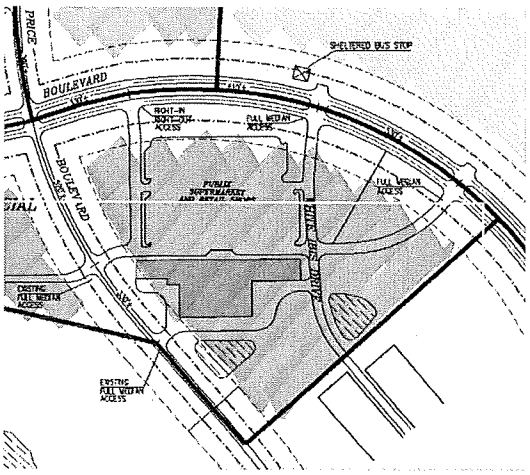


Figure 2.2.6

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CONCEPTUAL VIEW @ GENERAL COMMERCIAL USE 2

Figure 2.2.5.B

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2.2.4 Moving across Price Boulevard to the southeast quadrant, the occupancy transitions toward commercial buildings with the potential for additional mixed use residential development. The pedestrian/vehicular axis, "Main Street," which originated in the City Center, continues into the development, but transitions into the General Commercial Type 2 portion of the Town Center as being incorporated into the drive aisle fronting the commercial uses and separating the buildings and parking areas, while maintaining the necessary vehicular and pedestrian connectivity to Main Street to the north of Price Boulevard. As this transition occurs, the corridor turns towards Sumter Boulevard and connects to White Ibis Drive via a roundabout to promote smooth vehicular connections where, ultimately, White Ibis Drive will connect to Sumter Boulevard at a signalized intersection to form one of the main access points for this quadrant of the Town Center. At this location, Front Place (which begins at Price Boulevard and runs south, parallel to Sumter Boulevard, providing vehicular and pedestrian connectivity to the commercial outparcels along Sumter Boulevard) will continue south from the roundabout to a terminal connection with full access at Sumter Boulevard at the extreme south of the Town Center to serve as a connection to the southern outparcels and residential areas.~~continues here but begins a sweeping arc similar to that of Sumter Boulevard as it progresses southward.~~ Here built-to lines and minimal setback lines will located buildings close to Price and Sumter for easy access by pedestrians; however, their vehicular access will be via small interior roadways, which will provide a calmer traffic area near their main entrances. The majority of parking will be on the interior of the parcel, not between the buildings and Sumter or Price. This is an area where General Commercial Type 1 and Type 2 uses will be encouraged, with a mix of traditional commercial development for shopping centers, and Type 1 and 2 individual uses on outparcels along Sumter and Price. Sidewalks and integrated vehicular access will be provided in an effort to make connectivity and ease of travel within the southeast quadrant as pedestrian friendly as possible. The southern-most area of this quadrant may be conducive to a typical multi-family residential development, with the potential for mixed use residential on upper floors above the commercial uses allowed where noted on the Conceptual Plan. Main Street and Front Place will ~~continue through the parcel, but~~ serve as the main vehicular connector between the various uses and will separate the commercial uses themselves on the east side of the parcel with their associated parking areas, and wide sidewalks will be provided in front of the commercial buildings to promote pedestrian traffic. Front Place will serve as a connector through the roundabout at the White Ibis/Main Street transition to fully connect the uses to the north and south of White Ibis Drive, thus providing for a smooth transition and promoting vehicular and pedestrian connectivity throughout the Southeast Quadrant of the Town Center.

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CONCEPTUAL VIEW @ GOVERNMENTAL USE

Figure 2.2.1C

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2.2.2 Beginning in the northeast quadrant of the Sumter/Price intersection, the City Center area is depicted. This is the current location of City Hall, the Fire Station, Police Headquarters and the Post Office, and is an area intended to be built out as the municipal center of the City functions. To the east, the Mullen Activity Center and its playing fields provide some open space for the public. This is an area of Governmental Use. (Refer to Figure 2.2.1C)

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2.1.5 General Commercial Use, Type 2 - designated space for the customary and traditional conduct of trade, retail sales and commerce by large size businesses in an environment which facilitates pedestrian use while providing necessary parking and circulation areas for large numbers of automobiles.

2.1.5.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "CG Commercial General District." "High Tech," non-obtrusive, industrial uses, shall be considered permitted uses.

2.1.6 General Commercial Use, Type 3 - designated space for the customary and traditional conduct of trade, retail sales and commerce by businesses in an environment which provides necessary parking and circulation areas for automobiles while maintaining features that facilitate pedestrian use.

2.1.6.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "CG Commercial General District."

2.2 Conceptual Site Plan - To achieve the stated goals of Activity Center #2, or Towne Center, on paper is not a very difficult task. For an architect or planner the opportunity to dream about a community with a healthy mix of residential, commercial and office uses, a place where people can live and work with a lifestyle not centered around the automobile, is a design problem which brings out the ideals that are typical of charrettes in architectural and planning schools. To encourage design creativity, economics often are not considered in those situations. However, for the actual Towne Center to succeed as a hub of the community, indeed for private development to take place there at all, it is essential that the realities of economics not be ignored. While designating districts for each use category, the Conceptual Site Plan attempts to balance the stated goals of Towne Center against the needs of the developer to first raise the interest of potential office and retail tenants and second to be able to build for those tenants in a manner that allows the project to be a profitable undertaking. The Conceptual Site Plan does not depict future buildings, drainage features or parking areas since that is rightfully the responsibility of the design architect or engineer for those future projects. Public space features, such as future roadways, whether drawn schematically as heavy dashed line or with greater detail, are intended to convey the need for vehicular and pedestrian circulation between areas of Towne Center. The proposed designs for future buildings and roadways will be subject to review and approval by the city at that time to determine its compliance with the Pattern Book guidelines.

2.2.1 The Towne Center Conceptual Site Plan (Refer to Figure 2.2.1A) encompasses the entire Activity Center #2.

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2.0 Activity Center #2 Overall Site Features - A Plan for the Future

Activity Center #2, known as Towne Center, has stated goals "to provide for governmental, low, medium and high residential densities, offices, commercial and medical facilities. Buildings shall be encouraged to abut or be placed very near sidewalks within this area." Activity Center #2 "shall be pedestrian oriented with a mixture of commercial/office with residential uses, de-emphasis on the vehicular traffic, and emphasis on sidewalks, street tree landscaping and pedestrian oriented signs and street designs that incorporate traffic calming techniques."

2.1 Towne Center Land Use Categories - The following use categories are referenced for the parcels in the Towne Center:

2.1.1 Governmental Use - designated space for civic use containing community buildings open to the public, including meeting halls, libraries, police stations, fire stations, post offices, playgrounds, playing fields, utility offices and governmental buildings.

2.1.1.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "GU Government Use District."

2.1.2 Office, Professional & Institutional Use - designated space for professional and business offices, institutional uses, and very limited industrial uses.

2.1.2.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "OPI Office, Professional, Institutional District" with the following exception: Residential and Commercial uses, subject to Heron Creek Towne Center Pattern Book restrictions regarding their size and location within Office, Professional & Institutional buildings, shall be considered permitted accessory uses, and nursing homes, adult congregate living facilities and "High Tech," non-obtrusive, industrial uses shall be considered permitted uses.

2.1.3 Residential Use - designated space for medium to high density residential units, day care or assisted living facilities.

2.1.3.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "RMF Residential Multifamily District, including, but not limited to medical and dental offices."

2.1.4 General Commercial Use, Type 1 - designated space for the customary and traditional conduct of trade, retail sales and commerce by small and medium size businesses in a moderately dense environment, which facilitates pedestrian use.

2.1.4.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "CG Commercial General District" with the following exceptions: Automotive service stations, automotive parts, automotive car washes, automobile rental agencies, and motor bus terminals shall be removed from the list of permitted uses. "High Tech," non-obtrusive, industrial uses, shall be considered permitted uses.

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1.4.3 The Heron Creek Publix Retail Facility was completed in September of 2001 on the southwest quadrant of the intersection between Price Boulevard and White Ibis Boulevard, which connects to the residential community to the southwest. (Refer to Figure 1.3.3) The retail facility contains a 44,000 square foot Publix super market and 20,400 square feet of small retail shops with an exterior design in harmony with the Heron Creek Golf and Country Club. The exposed roofs and walls are red tile and painted stucco respectively. The facade of the building is flat with a small shed roof supported by classical, round columns shading the aluminum storefront system. The architectural style of the facade is in harmony with the Heron Creek community, but the other faces of the building are strictly utilitarian.

The site is designed in typical shopping center fashion with a parking area in front large enough to provide five spaces for every 1,000 square feet of building area. The asphalt paving is punctuated by landscape islands at regular intervals, each containing one small live oak tree or palm tree.

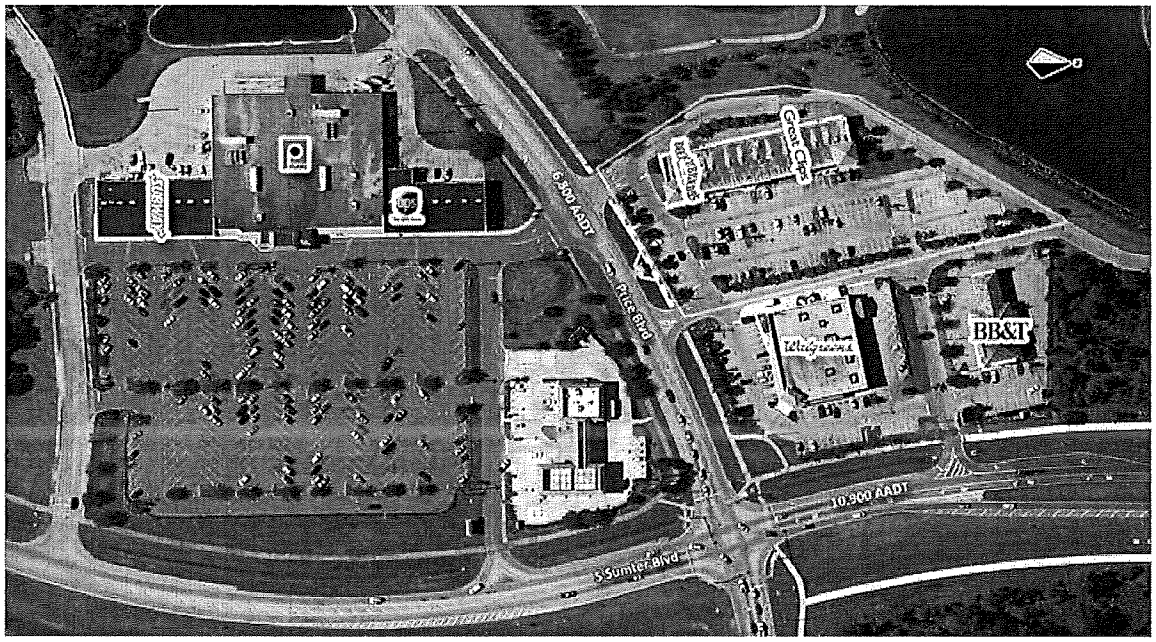


Figure 1.3.3

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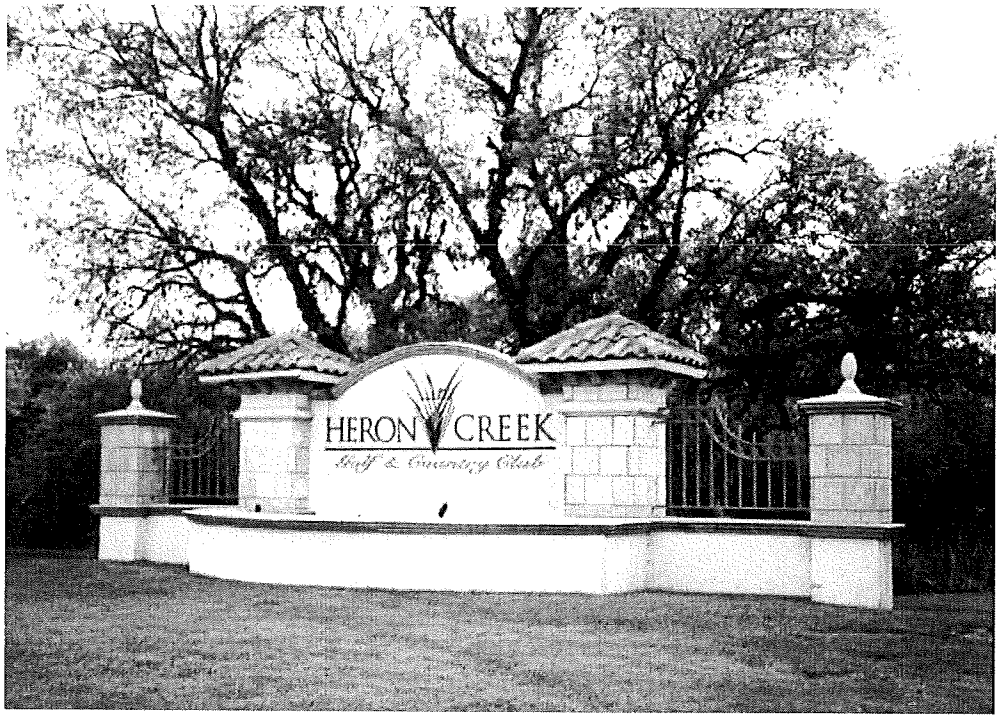


Figure 1.4.2B



Figure 1.4.2C

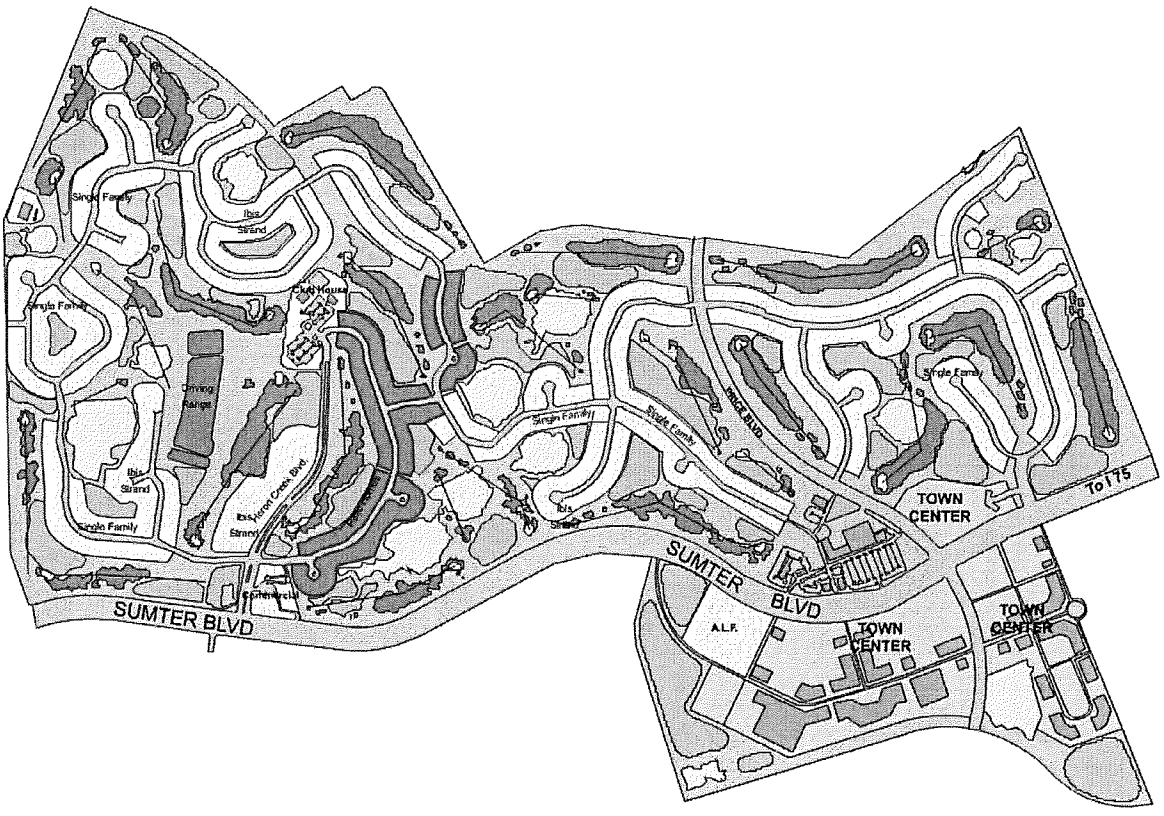
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1.4.2 The Heron Creek Golf & Country Club Community is located adjacent to Towne Center parcels in the southwest and northwest quadrants of the Sumter-Price intersection. Heron Creek Golf & Country Club is a gated community designed around a 27-hole golf course created by world-renowned architect, Mr. Arthur Hills. Each of the nine hole designs is purposefully distinctive with names to emphasize this, such as the Marsh 9, the Oaks 9, and the Creek 9. Along with the golf course, additional amenities include a 25-acre golf learning center and academy, and a clubhouse facility which will provide a tennis and fitness center, heated swimming pool, the Hide-A-Way Restaurant and Grill, golf and tennis pro shops, locker facilities and meeting rooms.

The community is permitted to include 1,203 residential units on approximately 831 acres. The latest DRI Development Order allows the use of a Conversion Matrix to "swap" uses within the DRI to allow some level of flexibility in the proposed use within specific areas of the overall development to keep up with changing markets. The predominant architectural style can be described as Mediterranean, with tile roofs, stucco exteriors, arches and with community buildings using classical columns with earth tone colors. (Refer to Figures 1.3.2A -1.3.2C)

Site Plan for Heron Creek (Including Towne Center)

➔ N



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1.4 Existing Developments

1.4.1 North Port City Center is located on approximately 60 acres in the northeast quadrant of the intersection of Sumter and Price Boulevards. A master plan of the entire parcel, designed by the ADP Group for the city, divides the area with a rectangular grid. The formal entry from Sumter via City Center Boulevard leads past the fire department to a traffic circle, which allows for easy left turns into the heart of the governmental offices on a broad street divided by a landscaped plaza, named Main Street. The plaza doubles as a pedestrian axis. Anchoring the end of the plaza is City Hall, a large, multi-story building housing many of the City Departments and the Commission Chambers and Police Headquarters along Sumter Boulevard adjacent to City Hall. The rectilinear grid is in contrast to the naturally flowing lines of the Snover Waterway and ponds to the north of the parcel. At the easternmost extension of City Center Boulevard is the Mullen Activity Center Building, which serves the adjacent athletic fields.

The City Center buildings are arranged symmetrically along City Center Boulevard and Main Street. In the Master Plan, the roofs are depicted as sloped metal, with gabled ends. Some describe that style as "Old Florida" or "Florida Cracker," a reference to the rustic appearance of the sloped, shiny metal roofs, the exposed rafter ends and the shaded porches. (Refer to Figures 1.3.1A & 1.3.1B) Existing colors are earthy red and pale yellow. The majority of the buildings in the Master Plan appear to be single or two stories; however, the City Hall is three or four stories, a very imposing structure to visually anchor the north end of "Main Street." Upon completion, the City Center will be fairly dense, with the only appreciable open areas located in the formal landscaped plazas between the one way lanes of Main Street.



Figure 1.4.1A

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Center sense of place.

1.1.2.4 Chapter 37, Subdivision Regulations, governs design standards for all new property development in the city for such things as right-of-way and roadway width. The pattern book sets new standards for Towne Center which relate to its pedestrian friendly concept, the need for on-street parking, and the desire to incorporate traffic calming techniques into the street design, all of which contribute to the Towne Center sense of place.

1.1.3 If the process is successful, the end result not only should be a well planned and attractive Towne Center for North Port's governmental, office and commercial hub, with its focus at the intersection of Sumter and Price Boulevards. Towne Center should be the heart of a growing community, a place of which the citizens can be proud and where they can live, work, shop and play in an atmosphere of subtle but sensible planning.

1.2 Urban Design Standards Pattern Book

In addition to the Unified Land Development Code, the City of North has also adopted an Urban Design Standards Pattern Book which further defines specific elements of each Activity Center within the City limits. The Urban Design Standard Pattern Book is designed to ensure that each Activity Center within the City has its own, unique identity through the use of architectural features, site furnishing color and style and common area elements designed to set each center apart.

The Urban Design Pattern Book is designed to work in conjunction with both the Unified Land Development Code and the Towne Center Pattern Book to ensure development within the Towne Center is undertaken in a cohesive manner that will immediately identify the Towne Center as a major Activity Center in the City.

1.3 Location and Nature of the Towne Center

Due to the strategic location of Towne Center, it will be readily accessible for the population mass of the city. Sumter Boulevard, a designated hurricane evacuation route, provides a direct route from U.S. 41, the city's existing southern commercial strip, north to Interstate-75. It is reasonable to expect that there will be pressure to upgrade Sumter to a four-lane roadway with a median and turn lanes in the near future. A signalized intersection already exists on Sumter at its intersection with Price Boulevard, the focus of Towne Center. Price Boulevard provides a direct route to Towne Center from the east and Toledo Blade Boulevard, another major, north/south, U.S. 41 to I-75 artery, and from Biscayne Boulevard to the west. Situated just to the west and located on Price Boulevard is the new North Port High School and Performing Arts Center with its 104 acre campus and 1,000 seat auditorium, which will dramatically increase the daily trips in the vicinity of Towne Center. It is possible that future traffic counts will warrant upgrading Price from its current two-lane section.

Towne Center itself will consist of approximately 160 acres. Commercial land uses will predominate and include a mix of uses from retail and professional office development to clustered multi-family residential, with an anticipated build-out by 2017. Although North Port's City Center municipal complex is independent of these guidelines, urban design relationships between the neighboring areas are discussed.

1.1.2 Chapter 53, Zoning Regulations, of the Unified Land Development Code defines the city's full range of zoning districts and, for each, governs the permitted principal uses, permitted accessory uses, prohibited uses and conditional uses. It also governs densities, setbacks, and building heights, and is intended to supersede the requirements found in other city codes and ordinances. In the event the Pattern Book and the Unified Land Development Code provide standards for the same subject item, the Pattern Book standard shall prevail. The entire Towne Center has been designated a "PCD Planned Community Development District."

"The purpose of the PCD...District is to provide an area for the coordinated development of industrial, commercial, service, residential, and government uses within a park-like setting. The establishment of this district provides a mechanism to attract major employers to the city, which can contribute to the diversification of the economic base in a manner consistent with the City's Comprehensive Plan. The PCD District provides a variety of uses where the project components and land use relationships are physically and functionally integrated." Minus the reference to possible industrial use, this language, quoted from the Zoning Regulations, sounds very similar to the Comprehensive Plan's general description of an Activity Center and in particular, Towne Center. Therefore, the PCD District regulations should be viewed as a framework, complete with procedures and exceptions that can be utilized for evaluation of development proposals in the special Towne Center area. It is appropriate that the Conceptual Site Plan contained in this pattern book indicates land use districts with names similar to those contained in the Zoning Ordinance and referenced in the PCD District regulations. Included in the PCD District regulations are requirements for submission, review and approval of all development plans proposed in that district. Those requirements are very similar to the submission, review and approval process mandated for future Towne Center developments.

Other chapters of the Unified Land Development Code that relate to the Heron Creek Towne Center Pattern Book are as follows:

1.1.2.1 Chapter 21, Landscape Regulations, governs landscaping standards for all new property development in the city. The pattern book sets landscaping standards for Towne Center that are more stringent than those in the Landscaping Regulations and are intended to contribute to the Towne Center sense of place.

1.1.2.2 Chapter 25, Parking and Loading Regulations, governs parking standards for all new property development in the city. The pattern book sets new standards for Towne Center which relate to the Towne Center's mixed uses, shared parking and on-street parking, and which recognize that the usual ratios of parking spaces to building area are not relevant to large retail development, especially in an environment that values open land over empty parking spaces.

1.1.2.3 Chapter 29, Sign Regulations, governs sign standards for all new property development in the city. The pattern book sets sign standards for Towne Center that are more stringent than those in the Sign Regulations and are intended to contribute to the Towne



Figure 1.1K
Harbor Town - Memphis, TN

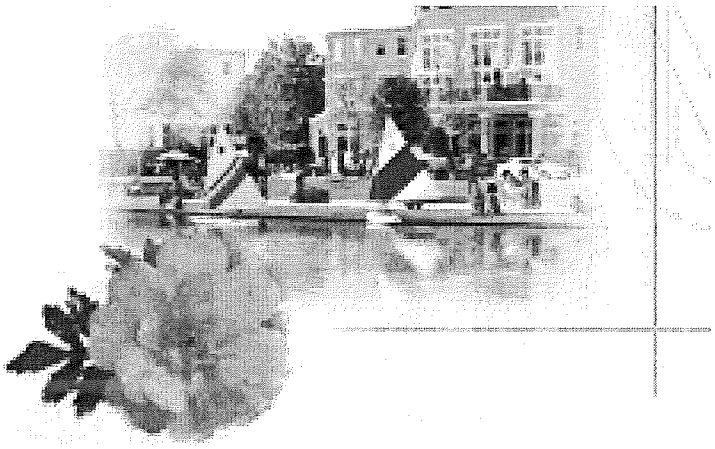


Figure 1.1L
Celebration, FL

1.1.1 The City of North Port has existing ordinances and regulations for the purpose of protecting the public health, safety and welfare. Among these is the "Unified Land Development Code of the City of North Port." The Heron Creek Towne Center Pattern Book is intended to relate to those existing rules and to set some new standards for the future development of the special Towne Center area. Future development proposals for parcels in Towne Center will be evaluated against the pattern book to determine whether they are reasonably compatible with the book's intentions.

The concept of the "Pattern Book" as a tool for evaluation of proposed Towne Center developments is a break through in the traditional development approval process. Ideally, a proposed development which complies with the Pattern Book guidelines could receive a streamlined, staff level review. A compliant development's first formal approval would be of its Major Site Development Plan.

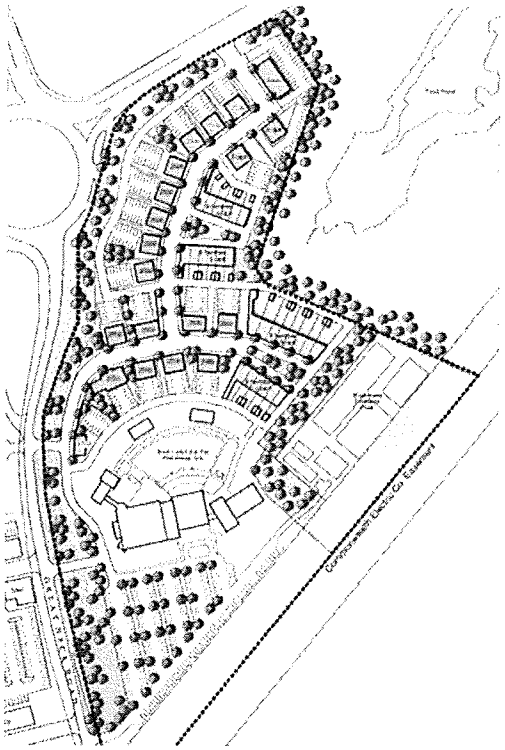


Figure 1.1H Trout Pond - Mashpee, MA

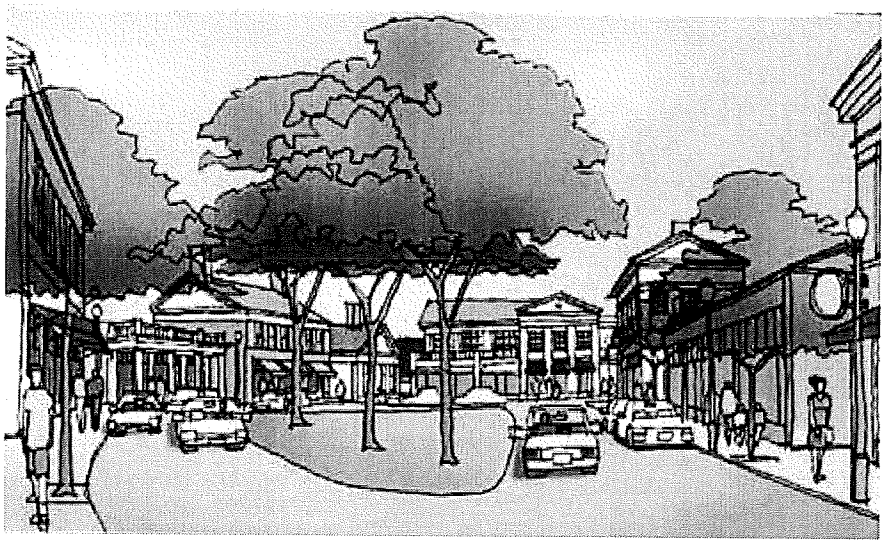


Figure 1.1I
East Steeple Street –Mashpee, MA

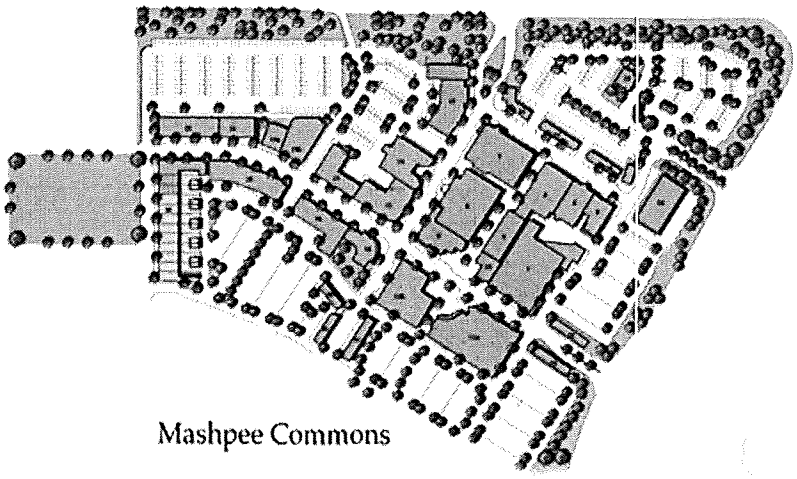


Figure 1.1J
Mashpee Commons – Mashpee, MA

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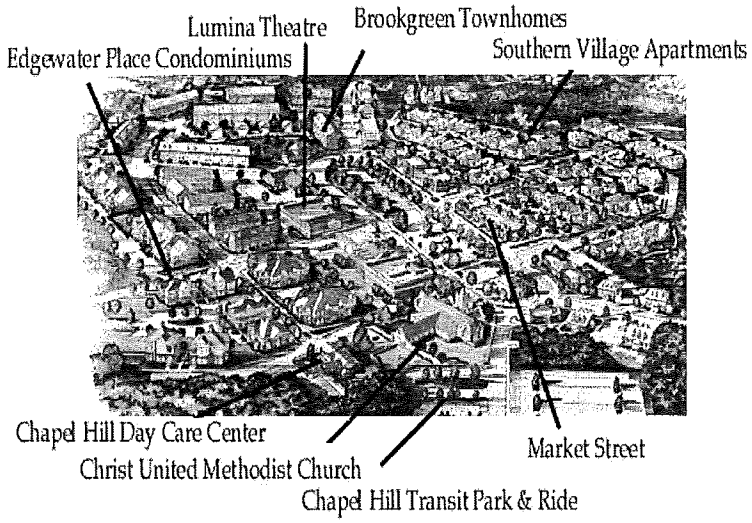


Figure 1.1E
Southern Village, Chapel Hill, NC



Figure 1.1F
Seaside, FL



Figure 1.1G Mashpee Commons – Mashpee, MA



Figure 1.1C Mashpee
Commons - Mashpee, MA

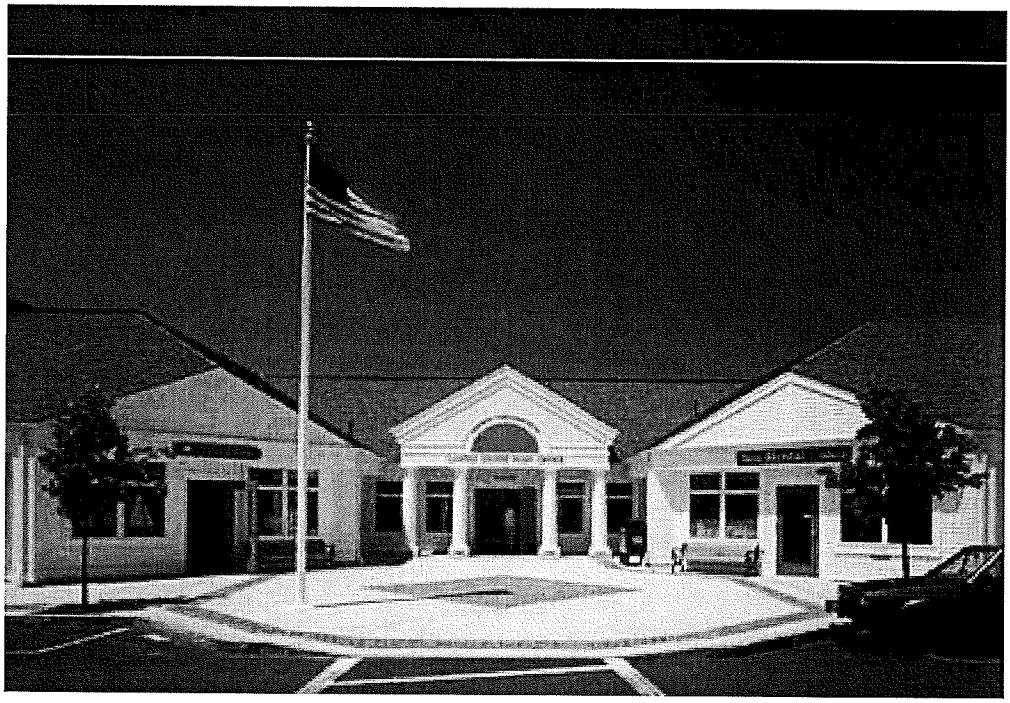
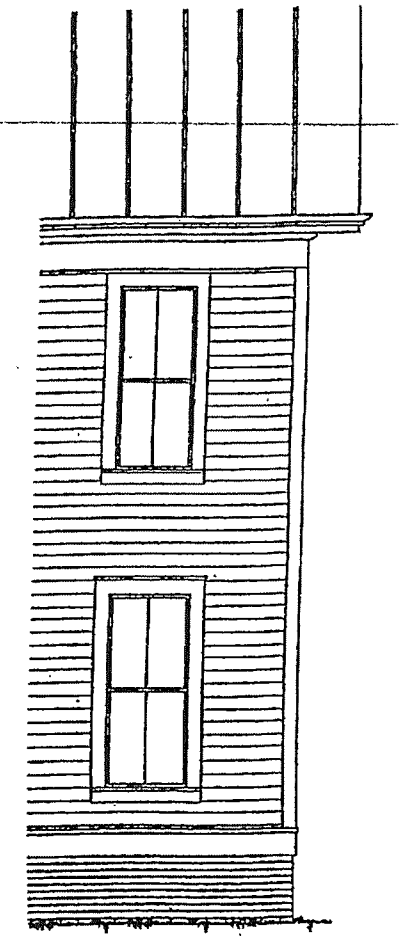


Figure 1.1D Mashpee
Post Office - Mashpee, MA

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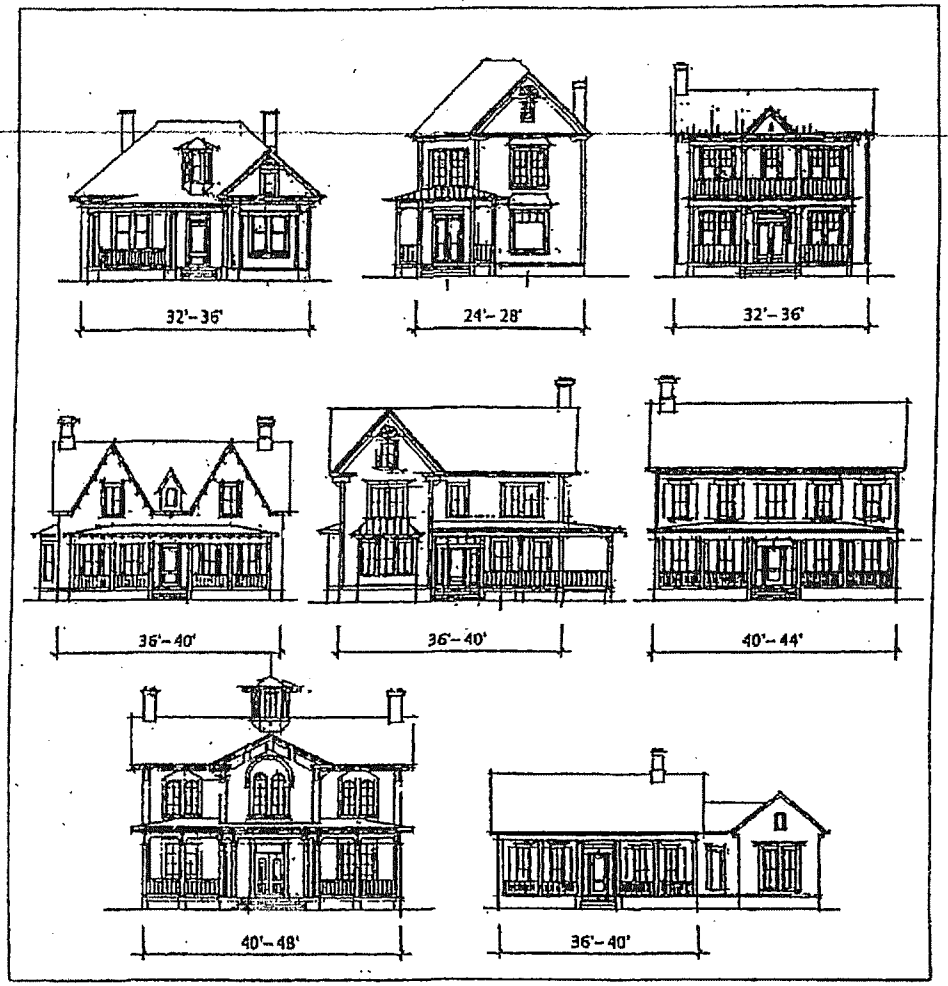
Italianate

Materials

Shutters: Panel or louver, painted. Width equals 50% of sash width.
Siding: Wood, composition board, fiber-cement board or vinyl with Beveled, Shiplap or Beaded Lap profile. Also board and batten vertical siding. Common brick in Flemish, Common or English bond patterns (rusticated brick not permitted), and stucco with smooth/sand finish.
Roofing: Standing seam metal, slate, asphalt or fiberglass shingles.
Windows: Divided light sash with sill.
Trim: Wood, composition board, fiber-cement board and molded millwork for built-up sections; Corner Boards 5/4 x 6.
Soffits and porch ceilings: GWB, plaster, T&G wood or composite. (Continuous perforated soffit materials not permitted).
Gutters: Half round or ogee profile metal.
Downspouts: Round or rectangular metal.
Foundations: Common brick, stone/cast stone or stucco in Front Facade Zone
Columns: Wood, fiberglass or composite
Railings: Straight or turned balusters
Chimneys: Common brick or stone/cast stone/stucco.
Front Fences: White picket painted or prefinished metal.
Rear Yard Fences: Painted wood or prefinished metal.

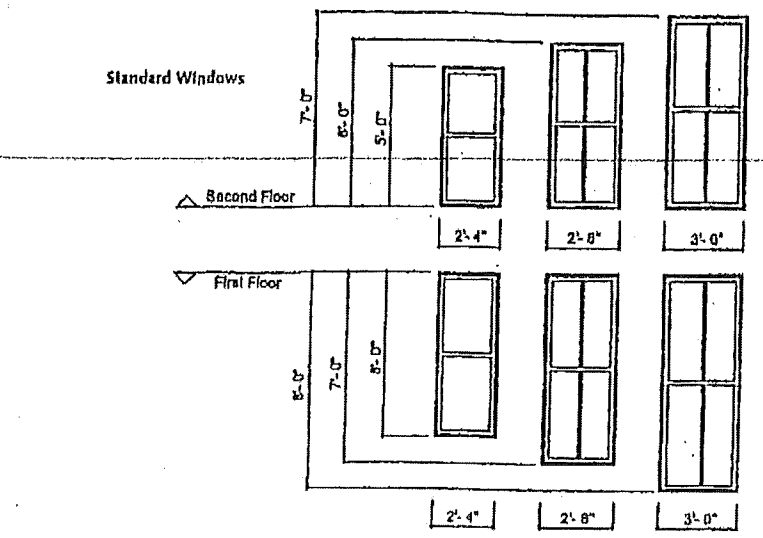
Colors

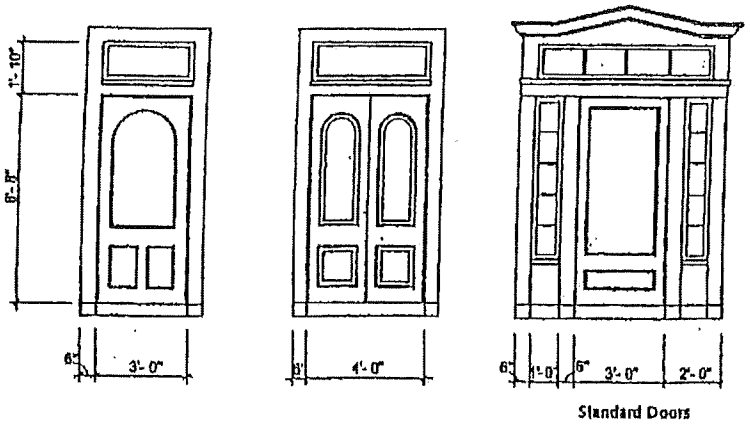
Siding: White. Other colors to be selected from approved list. (Refer to Baxter's extensive color palette).
Roof Shingles: Roof shingles to be typically black or dark grey. Standing seam may be black, dark green or dark red.
Accent: White or a rich color to match trim.
Brick: All brick to be selected from Ledges palette.
Windows: Sashes and frames to be white.
Trim: All windows, doors, corner and eave trim to be white. Columns should also be white.
Gutters: White or copper.
Downspouts: White or copper.
Shutters: Black or dark green.
Fencing: Wood to be white, metal to be black or dark green. No stockade fences permitted.



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Figure 1.1B (Part 2)





Standard Doors

Standard Doors

Doors are centered in their bays and are either paneled or glazed wood doors. Double doors are often used as well as single doors with sidelights and transoms.

Standard Windows

Windows are typically vertical in proportion with narrow widths from 2 feet to 3 feet. Two basic window patterns are 1 over 1 and 2 over 2 double hung with wide trim. The window often has a decorative header. Italianate houses often have windows with rounded upper sashes and ornate trim.

Special Windows

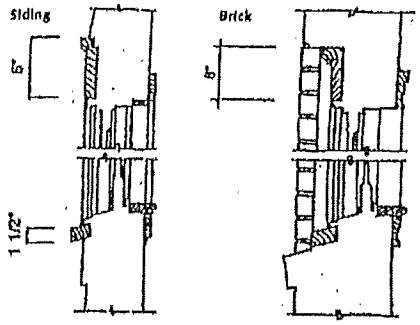
Special windows include box bay windows, paired dormer windows, and round top windows. Box bay windows have a continuous base to the ground.

Trim

Windows and doors typically have a 5-1/2 inch wide trim with a cap molding.

Shutters

Painted, operable shutters are encouraged on single windows. Shutter styles can either be paneled or louvered.



Typical Window Details

Figure 1.1B (Part 1)

URBAN CODE ★ THE TOWN OF SEASIDE

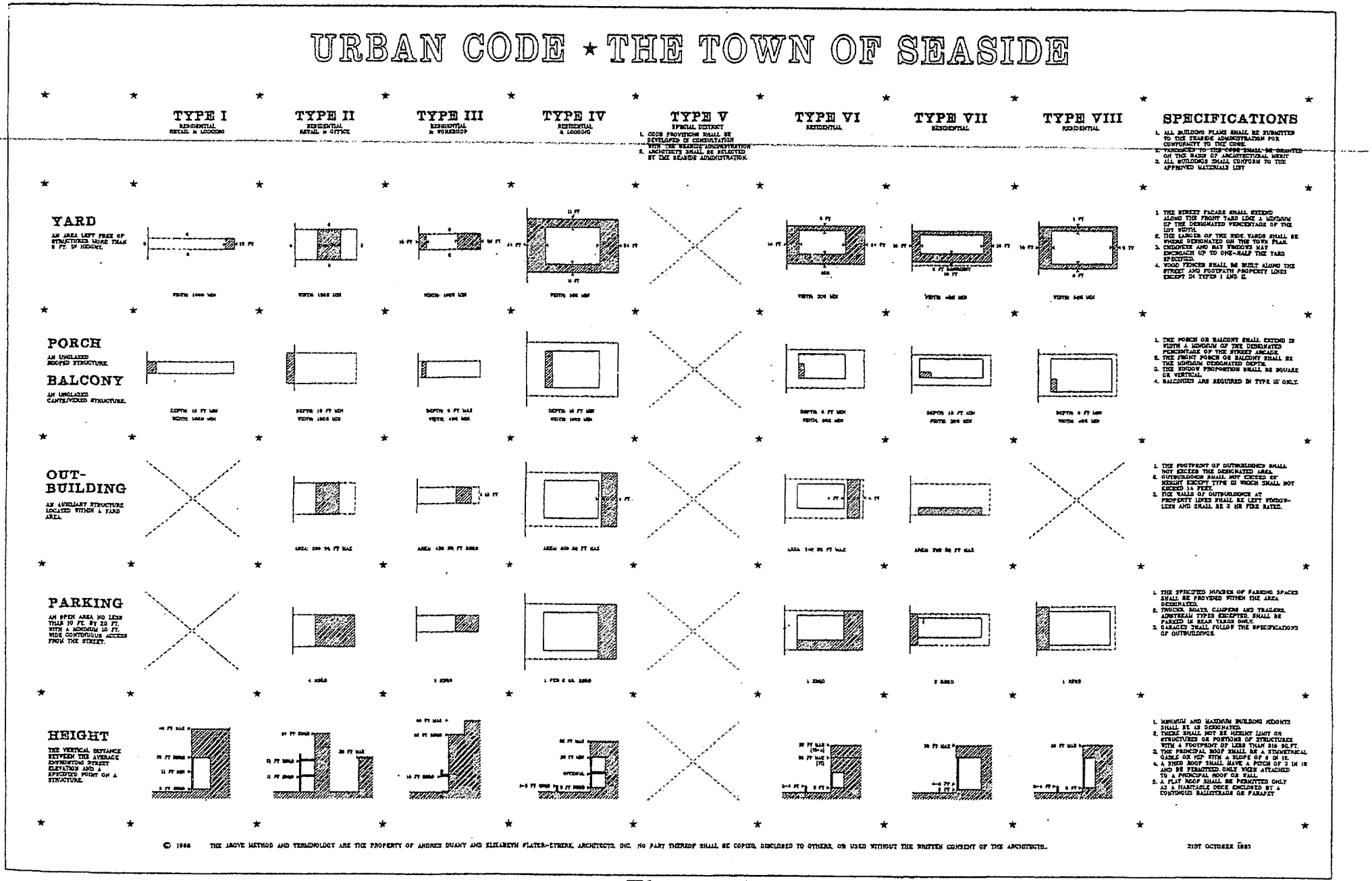


Figure 1.1A

One of the requirements of the Heron Creek Development Order is that Heron Creek submit a "Pattern Book," which "includes design guidelines that dictate urban form and architectural controls for nonresidential development of Towne Center. The Pattern Book will also address the urban form for the City of North Port's civic development (North Port City Center) in the northeast quadrant of Price and Sumter. After sufficient staff and public review, the City of North Port will adopt the Pattern Book."

1.1 Pattern Book for Towne Center

The term "pattern book" has been interpreted in many ways. Another term, used somewhat interchangeably, is "urban code." For example, at Seaside, Florida an urban code was created for the town by Elizabeth Plater-Zyberk and Andres Duany. In contrast to the usual zoning ordinance or building code, the Seaside Urban Code is a one page document with simple drawings and concise text. Its aim was to produce highly predictable results in the three-dimensional form of the community. (Refer to Figure 1.1A) Buildings are sorted into types based on their use, and such features as maximum height and placement and size of yards, porches and parking are dictated in a way that does not set the exact footprint. Usually an urban code is augmented by an architectural code, which goes into much more detail regarding the form of the building including its color, building materials and detailing.

Generally pattern books emphasize architectural features to a greater degree than urban codes. The Park DuValle development in Louisville, Kentucky was developed using a pattern book designed by Urban Design Associates of Pittsburgh. (Refer to Figure 1.1B Part 1 and 1.1B Part 2) An overview of historic neighborhood patterns, architectural styles and landscaping trends is usually included. Details such as colors, materials, window and door types and roof shapes are dictated. Such a document can be used by a planning department as an illustration of what they are expecting from the developer.

The Heron Creek Towne Center Pattern Book is intended to fall somewhere in the middle. The goal is to examine the existing development trends in the area and relate them to this center of obvious importance to the community. The entire area of Towne Center will be planned conceptually, not to carve the land into small parcels, but to start to recognize that certain functions can occur more naturally in one place than in another and to design a framework of pedestrian and vehicular movement about which later development can take place. The Pattern Book will attempt to knit the existing architectural styles into a harmonious whole by stating some simple guidelines for the designer. Finally, the goal is to give Heron Creek Towne Center a recognizable and pleasant identity. (Refer to Figures 1.1C - 1.1L, photos of examples of similar developments)

Activity Center #2, known as Towne Center, with its stated goals "to provide for governmental, low, medium and high residential densities, offices, commercial and medical facilities. Buildings shall be encouraged to abut or be placed very near sidewalks within this area." Activity Center #2 "shall be pedestrian oriented with a mixture of commercial/office with residential uses, de-emphasis on the vehicular traffic, and emphasis on sidewalks, street tree landscaping and pedestrian oriented signs and street designs that incorporate traffic calming techniques." In contemporary planning circles, this concept is referred to as "New Urbanism."

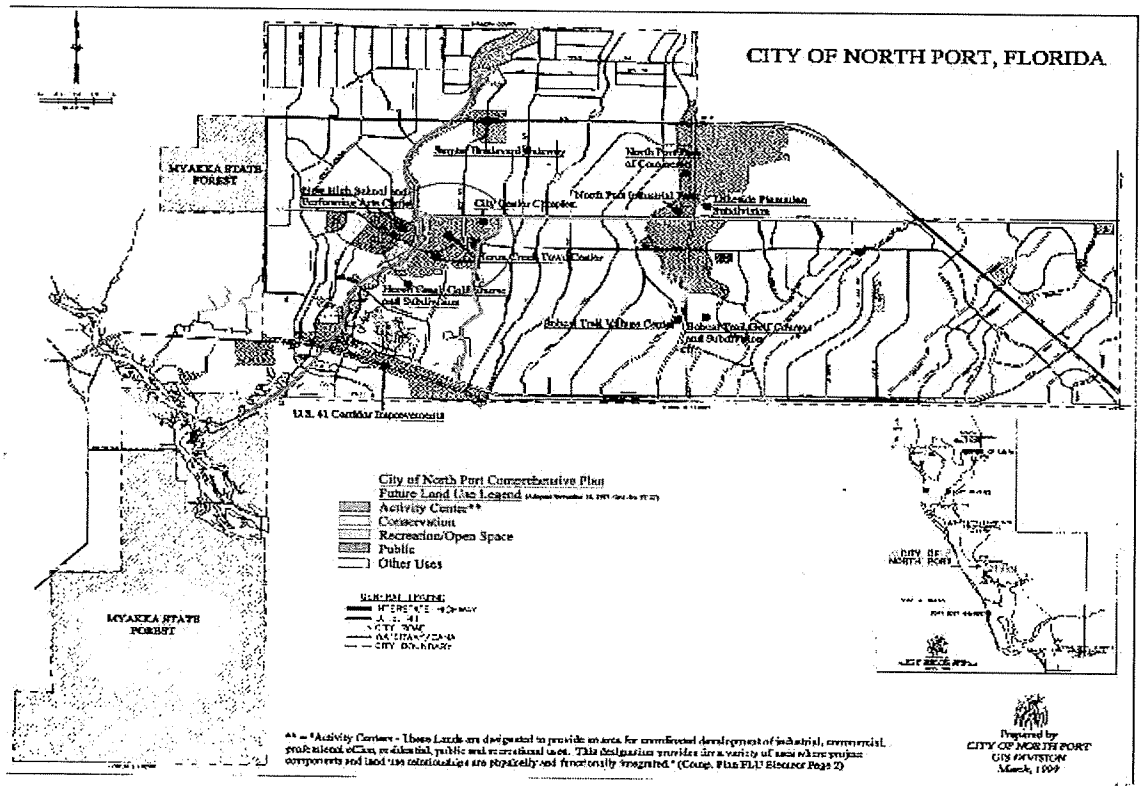


Figure 1.0B

Towne Center, with its hub at the intersection of Sumter Boulevard and Price Boulevard, comprises both public and private land, most of it undeveloped currently. The City of North Port has embarked upon a master plan for the public land in Towne Center and is in the process of constructing North Port City Center, a development which incorporates the City Hall and Public Safety buildings as well as a possible new branch library, amphitheater and other municipal offices. Already completed are the City Hall complex, Police Station, Fire and Rescue Facility No. 81 and George D. Mullen Activity Center. Sharing the "focal point of the city" with North Port City Center is the private development by Heron Creek on all four quadrants of the Sumter/Price intersection, which will include the residential, office, commercial, professional and other permitted uses of Towne Center. The authority for Heron Creek to proceed with this development as well as its adjacent golf community is derived from City of North Port Ordinance No. 2000-13, the Development Order for Heron Creek, a Development of Regional Impact. (Appendix 7.2)

1.0 Introduction - A Pattern for Successful Development

The official web page for the City of North Port, Florida contains the following language regarding the city:

"Just 20 minutes from the Gulf of Mexico, North Port offers that rare combination of a relaxed country lifestyle and easy access to all the conveniences of a big city. Every day feels like a vacation in North Port, with its unlimited recreational opportunities and 1,000 acres of beautiful parks right at home in one of the best year-round climates to be found anywhere. We also take pride in providing only the highest quality government services, like police and fire protection, emergency medical, libraries, schools and utilities. This may explain why North Port, the fifth largest city in Florida in land area, is one of the fastest growing communities in the state. So leave the hustle-bustle and traffic jams behind and discover one of Florida's most liveable cities. We call it Paradise...you can call it home." (Figure 1.0A)

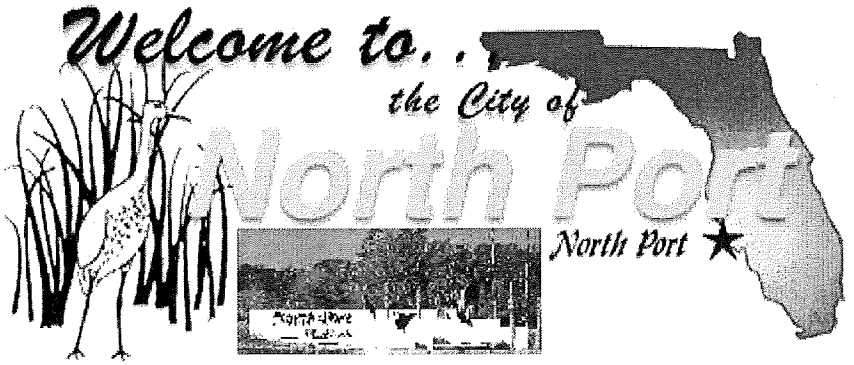


Figure 1.0A

Some hyperbole is inevitable when selling, whether it is products or ideas, or even cities, and pride plays a large part also. Excusing the writer for referring to North Port as "paradise," the basic truth that remains is that North Port, Florida is a very desirable place to live and work. Major assets include its suburban setting, good weather and many conveniences. The largest challenge may be to deal with the population growth rate, which is among the highest in the state. Unchecked development eventually could change most of the desirable features. If that happened, North Port could become "Paradise Lost."

The City, through its Community Development Department, focuses on insuring the public health, safety and welfare while accomplishing the city's goals, as stated in the North Port Comprehensive Plan. Among other things, the Comprehensive Plan states the long range guidelines for development inside the city. It designates areas of the city for certain functions and lays the ground work for orderly and sustainable development in the city.

One of the designated area types is that of "Activity Center," with the stated goal "to promote an intensive mixture of employment, goods and services, and residential uses in Activity Centers; to promote a wide variety of residential and employment alternatives; to achieve the highest standards of quality in the urban environment; and to provide a balanced and healthy tax base."

The North Port Comprehensive Plan (Refer to Figure 1.0B and Appendix 7.1) establishes

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Pattern Book

for

Development of Heron Creek Towne Center

City of North Port, Sarasota County, Florida

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I would like to express my appreciation for the cooperation, support and contributions of the following people and organizations, who have been instrumental in the process of research and production of the pattern book.

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The process of writing this pattern book has been an interesting form of continuing education for me. I had never realized with such clarity that we all are responsible for participating in the process of designing our communities and our buildings in a way that produces design solutions that are successful on many different levels: aesthetics, cost, safety, durability and, perhaps most important, in terms of how well they relate to human scale.

Philip A. Royer, AIA

The Pattern Book which resulted is organized by chapters with numbered articles, paragraphs, subparagraphs, and illustrative figures. The first number of an article's designation refers to the chapter in which it is located. Similarly, the second number of a paragraph's or subparagraph's designation refers to the article in which it is located. The numbering of the illustrative figures is derived from the paragraph, subparagraph or clause in which they are first referenced, and if more than one figure is referenced, they are assigned an alphabetical postscript.

Chapter 1.0, Introduction - A Pattern for Successful Development, sets the stage for the pattern book by giving references to the actual public documents from which the requirements originated. It then cites some prior examples of pattern books and "new urbanism" community designs. Finally the chapter focuses on the existing development trends in and around Towne Center.

Chapter 2.0, Activity Center #2 Overall Site Features - A Plan for the Future, defines land use categories that relate to the existing zoning ordinance and illustrates the proposed location of these uses by way of the Conceptual Site Plan. Each use category is highlighted and explained in closer detail. There is a discussion of the Towne Center's proposed setbacks, buffers, landscaping, streetscape, lighting, parking and public transportation.

Chapter 3.0, Private Building Features - A Vocabulary for Quality Architecture, seeks to define the character of the architectural design for the structures in Towne Center. A balance is sought between the desire for harmony and the respect for the site specific design of the architect in such areas as building form, materials, signage, landscaping and lighting,

Chapter 4.0, Public Space Features - Circulation Elements that Serve Everyone, gives some detail regarding the public spaces, generally the right-of-ways, in Towne Center. Although the developer is rarely in control of design decisions that are made for these areas, and the city may have to differ to agencies such as FLDOT, the Pattern Book gives the developer and city a chance to state their preferences.

Footnotes are not used, but wherever possible references have been included to one of the listed bibliography sources. For the reader's further information, some sources and related items have been included in their entirety in the separate Appendix booklet.

Preface

Are you familiar with the term "pattern book?" Perhaps you have heard it used in connection with a planned community such as Seaside, Florida. I believe that my first exposure to the term, and the concept behind it, was in one of the many books that have been published to document the process that led to the planning and design successes for which that community is famous. When the possibility that I would be involved in writing a pattern book for Towne Center in North Port, Florida first presented itself, I had to look at the subject in much more detail than I had before.

As our team began to research pattern books, invariably the trail led to books and magazine articles written in the past ten years or so which discussed "new urbanism." Seaside, Florida figured prominently in those resources, but we began to be aware of other developments all over the country which explored facets of new urbanism with varying degrees of success. One thing was clear to me: Whoever had written the language in the North Port Comprehensive Plan about activity centers, specifically about Towne Center, and whoever had written the language in the Heron Creek Development Order, where the adoption of a pattern book is required, had read and taken to heart some of the concepts I now was gleaning from my research. I felt confident that I was on the right track.

My concept of the pattern book was formed both by what I saw others implement in their particular developments and by the stated goals of the Heron Creek Development Order: to create a viable, mixed-use town center with a sense of place and a pedestrian friendly, orderly design. On the other hand, I had to address the concerns of the private developer, who desired an architectural style guideline but feared that the pattern book might include language that would create entanglements for future development efforts. In the best case, both parties' goals would be woven together making the development more successful than it would have been if either party had complete control.

Therefore, the Mission of the Pattern Book is as follows:

1. Examine the existing development trends and zoning rules in the area and relate them to Towne Center.
2. Develop a conceptual plan for Towne Center recognizing natural use patterns and the importance of location.
3. Apply lessons learned from successes and failures of prior development concepts.
4. Design a framework of pedestrian and vehicular movement for Towne Center.
5. Blend the existing architectural styles in harmony.
6. Create an identity for Towne Center, a sense of place.
7. Promote an atmosphere of subtle but sensible planning in Towne Center.

Pattern Book

for

Development of Towne Center

(A subcategory of Activity Center #2, identified in the North Port Comprehensive Plan)

A part of a Development of Regional Impact known as

Heron Creek

in the

City of North Port, Sarasota County, Florida



Originally Prepared by

Architectural Services Group, Inc.

May 1, 2002

Amended by

Morris Engineering and Consulting, LLC

(Amendments denoted by Underline Text)

December 14, 2015

AND September 2022

Additional Property or Contiguous Property is made subject to this Declaration or any portion of the Properties is identified as a Neighborhood, as such instrument may be amended from time to time.

1.70 "Surfacewater Management System" shall mean the waters of all lakes, ponds, swales, culverts, inlets, and outfalls used in connection with the retention, drainage, and control of surface waters within the Community, together with all drainage control devices and apparatus used in connection therewith and all easements therefor as may exist by virtue of this Declaration or other recorded instrument or plat.

1.71 "SWFWMD" shall mean the Southwest Florida Water Management District.

1.72 "Tract CR1" shall mean Tract CR1, Heron Creek, Unit I, as per plat thereof recorded in Plat Book 40, page 47, of the Public Records.

1.73 "Tract CR2" shall mean Tract CR2, Heron Creek, Unit I, as per plat thereof recorded in Plat Book 40, page 47, of the Public Records.

1.74 "Turnover" shall mean the date on which the Turnover Meeting described in Article 6.2 of the Articles of Incorporation occurs.

1.75 "Unimproved Parcel" shall mean an Assessable Parcel on which no bona fide construction of Improvements has commenced.

1.76 "Voting Member" shall have the meaning set forth in Article 4.4.

ARTICLE 2
THE COMMUNITY

2.1 Description. Declarant intends to develop the Community for residential, recreational, commercial, and other uses and purposes. In keeping with such intent, the Community may contain, by way of illustration and not as a limitation, single-family lots; attached or detached single-family housing (including zero-lot-line homes, duplexes, cluster homes, villas, and townhouses); multi-family housing (some or all of which may be in the form of condominiums, if approved by Declarant pursuant to Article 2.6); golf courses, open spaces, and parks; recreational facilities and clubhouses; commercial buildings and offices; hotels, motels, and resort facilities; and sites for utilities, schools, fire stations, and other public purposes. The manner in which, and the extent to which, portions of the Properties may be made a part of the Community shall be governed by the provisions of Articles 2.2 - 2.4. The Community will include both Neighborhoods, which will be established pursuant to Article 3, and Common Areas, which will be managed and maintained by the Association pursuant to Article 5. Each Owner will be a member of the Association pursuant to Article 4. Each Parcel will be subject to Assessments by the Association pursuant to Article 9.

2.2 Initial Property within the Community. The Community initially shall be comprised of the Initial Property, which is hereby made, and henceforth shall be held, transferred, sold, conveyed, and occupied, subject to this Declaration. Although Declarant contemplates expanding the Community by making portions of the Additional Property and Contiguous Property subject to this Declaration in the future, no portion of the Additional Property or the Contiguous Property shall be subject to this Declaration except pursuant to a Supplemental Declaration executed and recorded in accordance with the provisions of Article 2.3.

CITY OF NORTH PORT ADMINISTRATIVE APPEAL

IN RE: Appeal of MAS-23-160 by Heron Creek Community Association, Inc.

_____/

HERON CREEK ASSOCIATES, LTD MEMORANDUM REGARDING STANDING REQUIREMENTS

I. Summary

To establish standing to bring an Appeal of MAS-23-160, Heron Creek Community Association, Inc. (the "Association") must first file a written notice to the city clerk and prove that it is an "aggrieved or adversely affected person" as defined by Section 2-80 of the Code of the City of North Port. In doing so, the Association must prove that: (1) it has an interest or interests recognized by law, and (2) those legally recognized interests will be adversely affected by the City of North Port Development Order, MAS-23-160, (not just possibly or speculatively); and (3) the alleged adverse interest exceeds in degree the general interest in the community.

II. The Association Failed to Provide Notice

Section 2-81 permits an aggrieved or affected person to be heard. However, that aggrieved or affected party must first give appropriate notice and the Association here, has not complied. Section 2-81(b) states:

> (b) Notice required. Any aggrieved or adversely affected person desiring to become a party in the quasi-judicial proceeding **must provide written notice to the city clerk**.
>
> (1) Contents. The aggrieved or adversely affected person's notice must include:
>
> a. The person's name, address, email, and telephone number;
>
> b. A description of the effect that the decision will have on the person and their particular interests, such that the person meets the definition of "aggrieved or adversely affected person" in section 2-80;
>
> c. A statement whether the person is in favor of or opposed to the application; and
>
> d. A statement whether the person requests notice of any special magistrate proceedings subsequent to the city commission's determination.

(2) Filing deadline. **The city clerk must receive the required notice no later than 5:00 p.m. on the eighth calendar day before the hearing.** Delivery of the notice to the city clerk will be deemed notice of the aggrieved or adversely affected person's intent to appear at all applicable quasi-judicial proceedings to present testimony and evidence, cross-examine witnesses, and participate as described in the procedures for quasi-judicial proceedings. The city clerk will include the notice of an aggrieved or adversely affected person with the agenda for the hearing(s).

(emphasis added).

Pursuant to Section 2-81(c), any other party to the proceeding may challenge whether the aggrieved or adversely affected person's notice complies with the requirements. Upon such a challenge, the quasi-judicial body may consider only the content of the notice and may not consider any additional evidence.

The Association did not previously seek aggrieved or affected party status and failed to submit any notice before December 6, 2024, the eighth calendar day before the hearing. At this time, there is no content for the quasi-judicial board to consider. Therefore, the Association does not have standing to bring the instant appeal and cannot be considered an aggrieved or affected party with regard to the City of North Port Development Order, MAS-23-160.

III. Should the Association's Notice be Found Sufficient, the Code's "Aggrieved or Adversely Affected Person" Standard Requires a "Legally Recognized Interest" and Evidence of Adverse Impacts.

Any appeal under Article II, Sections 1-10.A(2) and 1-10.C of the North Port Unified Development Code (ULDC) requires that the appellant be an aggrieved person.

Section 2-80 defines "aggrieved or affected party" as:

> **Any person who will suffer a negative effect to a protected interest** as a result of the quasi-judicial action sought by the applicant. The alleged adverse interest may be shared in common with other members of the community at large, but shall exceed in degree the general interest in the community.

(emphasis added).

As noted above, the Association failed to provide the required notice of their intent to be considered an aggrieved person. The Association's appeal submission is the only document which provides some guidance on whether they are considered an aggrieved party. In that submission, the Association claims:

> The Association and its members, who are the homeowners in the Heron Creek Community, stand to be adversely impacted in their interests by the Development Order more than the general public at large with regard to neighborhood compatibility (aesthetics, privacy, scale, ambiance, views, traffic, etc.) with the low-density single family homes throughout the entirety of the Heron Creek Community -- including those adjacent to Parcel K --, the impacts on Common Facilities, the precedent for disregard for density limits and other applicable provisions in the Comprehensive Plan and Unified Development Code if applied to other development in the Heron Creek DRI, and otherwise.

First, it needs to be clarified that the parcel at issue is *not* a part of the Association. This is not a situation where an HOA is seeking to protect the interests created by a common Declaration.

Second, and more to the point, the "protected interests" set forth in the appeal submission do not apply here and are not "legally recognized interests." Furthermore, and as a matter of statutory construction, the City intentionally used a more restrictive term and standard for appeals the Code. If the City had intended to allow appeals based on considerations such as negative traffic impact or physical appearance, it would not have used the "aggrieved or affected person" standard.

A. Interests that are Not "Legally Recognized."

Legally recognized interests mean rights that are recognized apart from regulatory rights or interests, property rights, and contract rights. Property rights, in this context, means rights in one's own property. The Association may assert interests that are not legally recognized, including:

1) "Neighborhood Compatibility". The PCD and DRI approvals authorize both single family and multifamily units. There can be no legally recognized interest in maintaining compatibility with low-density single-family homes when use of the property as a condominium development was expressly contemplated by both the original zoning for the property as well as the subsequent DRI approval. *Ocean Concrete, Inc. v. Indian River County*, 241 So. 3d 181, 188 (Fla. 4th DCA 2018). ("It is axiomatic that if an area is zoned for a particular use, that use is deemed compatible with surrounding uses."). Moreover, there are no multifamily units that abut single family units. In fact, the intended site and architectural design techniques including a boulevard and the golf course with fairways and dense vegetation separates the multifamily residential units from the single-family residential units. Nevertheless, compatibility issues based on aesthetics, privacy, scale, ambiance, and views are not a legally recognized interest.

2) Impacts to view, light, or air. Florida courts have repeatedly held that a landowner has no right to unobstructed views, light, or air, or to be free from shadows. *Messett v. Cohen*, 741 So. 2d 619, 622 (Fla. 5th DCA 1999) ("a claim of 'obstructed view' does not constitute a 'legally recognizable interest.'"); *Fontainebleau Hotel Corp.*

v. Forty- Five Twenty-Five, Inc., 114 So. 2d 357, 359 (Fla. 3d DCA 1959); *Indialantic v. Nance*, 400 So. 2d 37, 41 (Fla. 5th DCA 1981).

3) Impacts on Common Facilities. In addition to the fact that the PCD and DRI approvals authorize both single family and multifamily units, development of Parcel K was always anticipated. Preventing traffic increases on an adjacent street, or changes to sidewalks from a permitted use is not a legally protected interest. *See, e.g., Fla. Mining & Materials Corp. v. Port Orange*, 518 So. 2d 311, 314 (Fla. 5th DCA 1987) (reversing denial of special exception based on truck traffic that was similar to permitted uses). Similarly, abutting property owners have no legally recognized interest in parking that may be available on an adjacent street. *Orlando v. Cullom*, 400 So. 2d 513, 516 (Fla. 5th DCA 1981); *Weir v. Palm Beach County*, 85 So. 2d 865, 869 (Fla. 1956) ("one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need."). *Compare Exchange Investments, Inc. v. Alachua County*, 481 So. 2d 1223, 122x (Fla. 1st DCA 1985) (plaintiffs had legally recognized interest in impacts to their own parking lot that would be created by development).

4) Use of or impacts to adjacent streets or sidewalks that do not rise to the level of permanent obstructions. Property owners have a legally recognized right to access (e.g. to ingress and egress) its property from adjacent streets and not have streets or sidewalks obstructed. *See, e.g., Selden v. Jacksonville*, 10 So. 457, 459 (Fla. 1891) (adjacent property owners are entitled to ingress and egress to street); *compare Shamhart v. Morrison Cafeteria Co.*, 159 Fla. 629, 630, 32 So. 2d 727, 727 (1947) (unreasonably obstructing a sidewalk is a nuisance.); *Bozeman v. St. Petersburg*, 74 Fl. 336, 343 (Fla. 1917). They do not have a legally recognized interest in any particular configuration of the right-of-way.

5) Density Limits. Again, the use of the property for a condominium development is expressly contemplated by both the original zoning for the property as well as the subsequent DRI approval. The use therefore is presumed compatible with adjacent uses – including the Association. *Ocean Concrete*, 241 So. 3d at 188. Likewise, the PCD and DRI approvals authorize both single family and multifamily units. DRI Map H specifies where residential uses can be located, and without differentiating single family and multifamily units. Instead, the DRI simply reflects "residential use" as being appropriate in areas designated on the Future Land Use Map (FLUM) as Activity Center and in areas designated as Low Density.

IV. The Association Must Prove Competent Substantial Evidence of a Legally Recognized Interest that *Will* Be Adversely Affected to a Greater Degree than the General Public.

To proceed with this appeal, the Association must present competent substantial evidence of an adverse effect to a legally recognized interest it has - that *will be* created by the Development Order. It cannot do so. Lay people can testify as to facts, but experts must provide opinion testimony. *Jesus Fellowship, Inc.*, 752 So. 2d at 710 ("where technical expertise is required lay opinion testimony is not valid evidence."). Issues that require expert testimony include:

A. Planning concepts or "zoning trends." *Metro Dade County v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995).

B. Traffic impacts or increases in traffic. *Flowers Baking Co. v. Melbourne*, 537 So. 2d 1040, 1041 (Fla. 5th DCA 1989) ("objections of local residents to the conditional use permit based on fears as to increased traffic do not constitute such substantial, competent evidence."); *Pollard v. Palm Beach County*, 560 So. 2d 1258, 1359-60 (Fla. 4th DCA 1990) (lay neighbors' speculation about traffic problems not considered substantial evidence.)

C. Impacts to property values. *Katherine's Bay LLC v. Fagan,* 52 So. 3d 19, 28 (Fla. 1st DCA 2010). Note: While a property owner can testify as to the value of their own property, or to damages already suffered by the property, they are not competent to testify as to the impact of future actions or activities to the value of their property.

The Association can point to no adverse effect to a legally recognized interest it has - that *will be* created by the Development Order. The Association does not own Parcel K and it is uncertain whether ownership of the Parcel K will be transferred to the Association in the future. In fact, the only ownership which the Association can point to is the boulevard that runs along Parcel K. All other property surrounding Parcel K is owned by the Developer and consists only of golf course. There are no home sites on the boulevard or in close proximity to Parcel K. Further, there are no parking spots on the boulevard. The Association is not in a special position and there is no homeowner in the Heron Creek Community that will suffer to a greater degree than the general public. Without showing an adverse effect to a legally recognized interest, the Association is not an aggrieved or affected person under the Code.

THOMAS, C. J., and TERRELL and CHAPMAN, JJ., concur.

BUFORD and BARNS, JJ., and PARKS, A. J., dissent.

BARNS, Justice (dissenting).
I regret that I am compelled to dissent to the Court's opinion prepared by Mr. Justice ADAMS.

I am unable to conclude that Morrison Cafeteria is doing anything wrong toward plaintiff.

It is a maxim of law that one should so use his property as to not injure another but every inconvenience, discomfort, and annoyance is not a nuisance.

The annoyance to the plaintiff is not from the restaurateur but from the public who are the patrons apparently because of the excellent qualities of the food served.

I fail to see that Morrison Cafeteria has done more than use its property as others in like businesses should be encouraged to do-to-wit: serve food so good, wholesome and delectable as to cause the public to be willing, if necessary, to stand in line and wait for the opportunity to enter and satisfy their hunger. Some competition seems to be the only justified interference.

It is the people of the street who are using the sidewalk in the manner complained of and not Morrison Cafeteria. The Cafeteria's act is the remote cause but not the proximate. The regulation of traffic on the sidewalk is one for the municipality and not for the Cafeteria nor a court of equity.

***632** The plaintiff may be suffering some damages because of the great patronage of Morrison Cafeteria but this damage is not the proximate result of any wrongful act of the Cafeteria. The Cafeteria's acts are the remote and not the proximate cause-Morrison Cafeteria's act being only to make its food wanted.

As stated in the opinion of Paty v. Town of Palm Beach, Fla., 29 So.2d 363, 364: 'It appears that the appellee is sued for doing of an authorized act and the exercise of a lawful right and that the damages were without wrong.'

BUFORD, J., concurs.
PARKS, Associate Justice (dissenting).
Injunction proceedings are brought to declare and abate an alleged private nuisance and for damages. The defense denies the existence of the nuisance and further, that even though the nuisance be found to exist, it was not of defendant's creation. There is little substantial dispute in the evidence. The problem, not infrequent in this character of case, is the determination of the law applicable to the facts.

****729** For the period involved, April 2, 1945 to April 25, 1946, Shamhart operated a drug store, including a soda luncheonette, with entrances at or near the northeast corner of Olive Avenue and Datura street in the City of West Palm Beach. About 108 feet north, on Olive Avenue, on the same side of the street, Morrison operated its cafeteria. Both parties were lessees of the real estate occupied. Their places of business were not adjacent-between them were two places of business of other ownership. During this period, from time to time, while serving the noon (11:30 A.M. to 1:30 P.M.) and night (4:30 P. M. to 6:30 P.M.) meals the lobby and approach to Morrison's serving line was inadequate to house all persons waiting to be served at its counter. These waiting persons of their own volition formed queues on the sidewalk beginning at the entrance of the cafeteria and extending along Olive Avenue in front of and past the entrances to the drug store and were of such numbers and so placed themselves as materially to obstruct, and at time block, its ***633** entrances. Business was adversely affected to a very substantial degree or practically halted. The extent of the queues and the obstructing or blocking of the entrances was much more accentuated during the winter or tourist season than at other seasons of the year. Neither Shamhart nor Morrison made any affirmative attempt to control or prevent the queues from obstructing the entrances. Both attempted unsuccessfully to secure the intervention of the city police in an effort to abate or ameliorate the condition. They were advised that the city did not have sufficient officers available for such duty.

Morrison in its operation and arrangement of its premises employed the space available so that the most people in the shortest space of time were served. It operated in such manner as to facilitate the serving of the largest number of people reasonably possible during the serving hours. It made no effort by unusual advertising or by signs at its place of business to attract large numbers of people. The opening of its doors for the operation of its business at an earlier hour

held the defendant responsible to plaintiff for the action and conduct of the crowd.

While much is said in the opinions in these cases supporting the contention made, each possesses elements of material difference. In each of these cases, (except the Tushbant case) by the chosen method of operating its business, the defendant ***636** was guilty of an act of omission or commission, resulting in obstruction of access to plaintiff's premises by the crowd which could have been avoided if other reasonable and practical methods of conducting the business had been employed. In each of the cases the contention that it was a matter solely for the police control was disallowed. In none is municipal liability suggested.

Reliance is also placed on Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343; Mechanics' Mutual Telephone Co. v. Hirschman, 43 Ind.App. 283, 87 N.E. 238; Frick v. Kansas City, 117 Mo.App. 488, 93 S.W. 351; Harmon v. Louisville, etc., Railroad Co., 87 Tenn. 614, 11 S.W. 703; Smith v. Mitchell, 21 Wash. 536, 58 P. 667, 75 Am.St.Rep. 858. It is hardly necessary to say that these cases involving physical invasion of the streets bear little analogy to this case other than enunciate the general principles of law of nuisances and are of no great value as precedents.

****731** Whether the conduct of the queues of people be determined a public nuisance of a character affording a cause of action to Shamhart or to him a private nuisance based on the maxim, sce utere tuo ut alienum non laedas, the sole act for which Morrison may be held responsible for their conduct is the failure to provide sufficient space on its premises to house them while waiting to be served. The facts absolve it of all incompetency or inefficiency in the operation of its business or failure to employ its premises to the best advantage to serve its customers, nor could it be reasonably required to enlarge or reconstruct its premises. The waiting persons of their own volition formed the queues on the sidewalk and interfered with access to Shamhart's place of business. At the time of interference no tradesman-customer relationship existed between these persons and Morrison and it has no authority to control their conduct or authorize its employee to go on the sidewalk and do so. Neither could the Court have clothed Morrison or its employee with such police authority. Such person, if so placed, could have done no more than appeal to the persons in the line to keep open the entrances. Had such an appeal been ignored, compliance could not have been enforced. To ground liability on the questionable success of such an appeal is obviously harsh, unreasonable, and extends ***637** liability beyond the principles of sic utere tuo ut alienum non laedas. Furthermore, Morrison's failure, in view of the independent intervening conduct of the queues, was not the proximate cause of the injury and damage to Shamhart's business. Before there is liability,

'The acts done by the defendant must be the proximate and efficient cause of the creation of the nuisance complained of * * *. Ordinarily, a person is not civilly liable for a nuisance caused or promoted by others over whom he has no control; nor is one bound to go to the expense or litigation to abate such nuisance.' 39 Am. Jur. 299, § 17.

In my opinion Shamhart's remedy, if any, is against the city of West Palm Beach. Generally, under our law the power of supervision and control of the streets and their traffic as well as the power to abate nuisances, is vested in municipalities. This supervision and control is proprietary rather than governmental in its nature. Having such power, the duty to supervise and regulate the conduct of the pedestrian traffic unreasonably obstructing access to Shamhart's place of business as reflected in this record devolved upon the city. City of Tallahassee v. Fortune, 3 Fla. 19, 52 Am. Dec. 358; Kaufman v. City of Tallahassee, 84 Fla. 634, 94 So. 697, 30 A.L.R. 471; Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682; City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150; Douglass v. Sapotnick, 126 Fla. 753, 756, 171 So. 765; F.S. 1941, 167.01 and 167.05, F.S.A.

The decree of the lower Court should be affirmed.

BUFORD and BARNS, JJ., concur.

All Citations

159 Fla. 629, 32 So.2d 727

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28 Fla. 558
Supreme Court of Florida.

SELDEN *et al.*
v.
CITY OF JACKSONVILLE.

Dec. 22, 1891.

Synopsis
Appeal from circuit court, Duval county; JAMES M. BAKER, Judge.

Suit by George Selden and others for an injunction to restrain the city of Jacksonville from erecting a viaduct for the purpose of changing the grade of a certain street. From an order denying the application plaintiffs appeal. Affirmed.

Syllabus by the Court

1. The guaranty of a constitution that private property shall not be 'taken' or 'appropriated' without compensation does not extend to mere consequential damages resulting to property abutting on a street from a change of grade of the street, or other improvement thereof not constituting a diversion of the street from street purposes, by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the abutting property.

2. The provisions of the constitution of 1885, that private property shall not be 'taken' without just compensation, (section 12, Declaration of Rights;) that the legislature may provide for the drainage of the land of one person over or through that of another upon just compensation therefor to the owner of the land over which such drainage is had; and that no private property nor right of way shall be 'appropriated' to the use of any corporation or individual until full compensation shall first be made to the owner, or first secured to him by deposit of money, such compensation to be irrespective of any benefit from any improvement proposed by such corporation or individual, (sections 28, 29, art. 16,)—do not of themselves render a municipality liable for mere consequential damages resulting to property abutting on a street from the lawful change of grade or other authorized improvement of the street by the municipality.

3. Upon the voluntary dedication of land to the purposes of a street, it becomes, to the extent that it is necessary to be used for a street, the property of the people of the state; and the dedication carries with it the continuing power to change its grade, or otherwise improve it, in so far as such improvements are for street pur poses. This power may be delegated by the legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the owners of abutting lots in the street to its center is at all times subject.

4. There are incident to the ownership of property abutting on a street certain property rights which the public generally do not possess, viz., the right of egress and ingress from and to the lot by the way of the street, and of light and air which the street affords. These incidental rights are, under a constitutional prohibition simply against the 'taking' or 'appropriation' of private property, subordinate of the right of the state, or of any duly-authorized governmental agency acting for it, to alter a grade or otherwise improve a street for street purposes. The original and all subsequent purchasers of abutting lots take with the implied understanding that the public shall have the right to improve or alter the street, so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the improvement or destruction of such incidental rights as a mere consequence from the lawful use or improvement of the street as a highway.

5. The erection by a municipal government within the limits of a street, and for street purposes, and under street conditions justifying it, of a viaduct for the purpose of changing the grade of the street, and in the exercise of its power to change such grades, is not a 'taking' or 'appropriation' of private property, within the constitutional guaranty against such taking or appropriation, even though the abutting owners' rights of ingress, egress, light, and air are destroyed thereby; nor is this result of law changed by the mere fact that other corporate bodies than the municipality have contributed to the expense of the erection of the viaduct. Whether, however, it would not be a diversion of the street from the street purposes, and a 'taking' and 'appropriation' for which compensation must be made, if the necessity for the viaduct was created by railroad tracks crossing the street, not presented.

Attorneys and Law Firms

***560 **458** *A. W. Cockrell & Son*, for appellants.

***566** *W. B. Young* and *J. M. Baris*, for appellee.

Opinion

RANEY, C. J.

The last clause in the twelfth section of the declaration of rights of our constitution is: 'Nor shall private property be taken without just compensation.' This is not, however, the only provision of that instrument relating to the exercise of the right of eminent domain. There are two sections in the 'Miscellaneous Provisions,' or sixteenth article, which read as follows:

'Sec. 28. The legislature may provide for the drainage of the land of one person over or through that of another, upon just compensation therefor to the owner of the land over which such drainage is had.

'Sec. 29. No private property nor right of way shall be appropriated to the use of any corporation or individual until full compensation shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve ***567** men, in a court of competent jurisdiction, as shall be provided by law.'

It cannot be denied that the almost uniform course of decision has been that a municipal government was not liable for any consequential damages resulting to dwelling lots from an authorized or lawful change of grade of the street by the municipal authorities, where the constitutional provision obtaining has been like that of our declaration of rights: 'Nor shall private property be taken without just compensation.' Such seems to have been this court's understanding of the law 20 years ago, as is shown by Dorman v. City of Jacksonville, 13 Fla. 538.

The meaning given by the courts and commentators to the words 'taken' or 'appropriated,' as used in such a provision, is that there must be a trespass upon or a physical invasion of the abutting property, to bring municipal authorities within the constitutional prohibition, so long as such authorities keep within the scope of their powers in using or improving the street. If they do no illegal act, as by creating a nuisance, or do not appropriate the street to other than street purposes, or do not invade, or do physical injury to, the abutting property, there is, in the absence of negligence, or of the want of due skill and care in making improvements, (which negligence or want of care or skill may, of itself, be a ground of corporate responsibility for damages,) no liability to the owners of such property ***568** for any damage resulting from a change of grade or other improvement in the street made by the municipal powers for the convenience or benefit of the public in using the highway as such. The voluntary dedication of the street as a highway creates certain rights in the public; the land so dedicated becomes, to the extent that it is necessary to be used for a street, the property of the people of the state; and the dedication of it to such purpose carries in this country, as well as in England, the continuing power to change its grade or otherwise improve it, in so far as such improvements are for street purposes. This power may be delegated by the legislature to a municipality as one of its governmental agencies, and to the exercise of these powers the fee of the abutting owner in the street to its center is at all times subject, in the manner or to the extent indicated above, under a constitutional provision like that in our bill of rights.

In some cases holding these views there has been an omission, at least, to notice any distinction between the rights of an abutting owner, as such, and the public generally, in or as to the streets; but there can be no doubt that there is a ****459** substantial and clearly-defined difference. There is incident to abutting property, or its ownership, even where the abutter's fee or title does not extend to the middle of the street, but only to its boundary, certain property rights which the public generally do not possess. They are the right of egress and ingress from and to the lot by the way of ***569** the street, and the right of light and air which the street affords. Viewing property to be not the mere corporal subject of ownership, but as being all the rights legally incidental to the ownership of such subject, which rights are generally said to be those of user, exclusion, and disposition, or the right to use, possess, and dispose of, (Lewis, Em. Dom. §§ 54, 55; Dill Mun. Corp. § 587 *b;* Cooley, Const. Lim. 675, 676,) we are satisfied that the rights just mentioned are within the meaning of the word 'property,' as it is used in this constitutional provision. These incidental rights of property are, under a constitutional guaranty, simply against the 'taking' or 'appropriation' of property, subordinate to the right of the state, or any duly-authorized governmental agency acting for it, to alter the grade or otherwise improve the streets for street purposes. An original purchaser of an abutting lot, and all subsequent purchasers, take with the implied understanding, or as tacitly agreeing, that the public shall have the right to thus improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the impairment or destruction of such incidental rights, as a mere consequence from the

use or improvement of the streets as highways. Ohio and Kentucky alone, of all the courts of this country, have denied such subordination of these incidental rights to the highway rights of the *570 public. The doctrine of the courts of the other states and of the United States is that, so long as there is no application of the street to purposes other than those of a highway, or no diversion of it from street purposes, any changes of grade made lawfully, and in the exercise of good faith, or not maliciously, or for the purpose of doing injury to the abutter, is not within the constitutional inhibition against taking property without compensation, nor the basis for an action for damages. Lewis, Em. Dom. § 96, and authorities cited in note; Dorman v. City of Jacksonville, supra.

The Ohio doctrine, as summarized by Lewis in his work on Eminent Domain, (pages 121, 122, § 98,) gives a right of recovery not only under the circumstances indicated above, but also where one builds to an established grade, and it is changed to his damage; or where one builds before a grade is established, but succeeds in anticipating the grade which is afterwards established, and the grade after being so established is changed; or where one builds before a grade is established, and afterwards an unreasonable grade is established. The right of recovery is based, in the later cases there, upon the guaranty that private property shall not be taken for public use without just compensation, (Lewis, Em. Dom. p. 122,) and the property taken is spoken of in these cases as the right of access. In the earlier cases, *571 however, the ground of the decision was that of natural right and justice. Judge Dillon, in a note to his work on Municipal Corporations, (page 1226, § 990,) says, of the doctrine obtaining in this state, that the common-law measure of the liability of municipal corporations has been designedly and deliberately carried beyond the limits established by the current of decision elsewhere.

In Kentucky, in the case of Louisville v. Mill Co., 3 Bush, 416, the grade of the street was to be raised 12 feet above the mill company's lot at the only point of ingress and egress, the improvement entirely closing the passway; and in Bridge Co. v. Foote, 9 Bush, 264, there was sufficient space left between the appellee's lot and the bridge for two wagons to pass abreast; and in the former the abutting owner was held entitled to relief, on the ground that there was a taking of his private property, an interference with his private right of air, light, and passway, while in the latter relief was denied, as there was no interference with the private rights of the appellee; the lessening in value of his lots from the lawful construction of the bridge, and the avenues leading to it, being regarded as mere consequential damages, not constituting a cause of action. See, also, Kemper v. Louisville, 14 Bush, 87; Lewis, Em. Dom. § 99; 2 Dill. Mun. Corp., note to page 1226, § 990. Both Judge Dillon and Mr. Lewis treat the *572 Kentucky doctrine as virtually making the extent of the injury, and not the fact of injury, the basis of municipal liability.

The provision of the Kentucky constitution is: 'Nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.' Art. 13, § 14.

In Ohio there are two sections on the subject in the constitution of 1851. They are the nineteenth section of the bill of rights, and the fifth section of the thirteenth, or 'Corporations,' article, and they read as follows:

'Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use a compensation therefor shall be first made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction, for benefits to any property of the owner.' Section 19, art. 1, 'Bill of Rights.'

'No right of way shall be appropriated to the use of any corporation until full compensation shall be first made in money, or first secured by a deposit of *573 money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall **460 be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.' Section 5, art. 13, 'Corporations.'

The courts of Ohio do not attempt to sustain their peculiar doctrine upon the theory that there is anything exceptional in the constitution of that state. They hold, as indicated above, that there is a 'taking' of property. As much as the decisions of Ohio have been discussed by other courts and by commentators, there can be found neither in those discussions, nor in the decisions themselves, any suggestion that the Ohio doctrine is referable to anything peculiar in the constitution of that state. The same is true of the Kentucky decisions.

It is not to be denied that much hardship has resulted to individuals in their property rights from time to time from the established doctrine, nor have the courts failed to appreciate

these hardships. In O'Connor v. Pittsburgh, 18 Pa. St. 187, a case in which the city authorities reduced the previously established grade, with reference to which the church of the plaintiff had been constructed, and cut down the street 17 feet in front of the church, Chief Justice GIBSON, delivering the opinion of the court, said: 'We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law; but I grieve to say we have discovered ***574** none.' Still this doctrine has been so firmly established as law, based upon the principle of the rights of the state in highways, and the immunity of itself, and of governmental agencies acting for it, and for the benefit of the people, that, notwithstanding the departure of the Ohio courts, they have found themselves unable to ignore or change it, though suggestions have at times fallen from them as to the advisability of the law-making power doing so. These suggestions, and doubtless a growing sense of the harsh consequences of the doctrine, have led to not only legislative action, but also to changes in the organic law of many states, as shown by the constitutions of Pennsylvania of 1873, and that of Alabama of 1875, by which it is provided that municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured, or destroyed; * * * and that of Arkansas of 1874, providing that private property shall not be 'taken, appropriated, or damaged;' and those of Illinois of 1870, West Virginia of 1872, Missouri of 1875, Colorado and Texas of 1876, Georgia of 1877, and California of 1879, that it shall not be 'taken or damaged.' The purpose and the effect of this introduction of the words 'injured,' 'destroyed,' or 'damaged' was to give compensation for damages often resulting to private property where there was not a 'taking' of the property. There being no taking of private property, and consequently no infraction of the constitutional guaranty against ***575** taking without making just compensation, there were yet, as just intimated, many cases in which damages resulted to property owners, although the works or improvements were constitutionally authorized by the law making power of a state, and carefully and skillfully executed by governmental agencies. Such damage, not being occasioned by any illegal or wrong act, has found expression in the phrase, *damnum absque injuria*. It has also become the custom to speak of such damages as 'consequential damages,' meaning that they are simply the consequence of a legal act, and therefore are not a basis of recovery in the courts, nor of a lawful claim for compensation. It seems not to have been the purpose of these amendments to give a right of recovery for all damaging consequences, resulting from the improvement, to the owner of the property affected, but only for such as affect physically some right of property incident to the abutting property.

This is illustrated by the cases of Edmundson v. Railroad Co., 111 Pa. St. 316, 2 Atl. Rep. 404; Railroad Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. Rep. 871; Chester Co. v. Brower, 117 Pa. St. 647, 12 Atl. Rep. 577; Railroad Co. v. Marchant, 119 Pa. St. 541, 13 Atl. Rep. 690; Railroad Co. v. Walsh, 124 Pa. St. 544, 17 Atl. Rep. 186,—cited by appellant's counsel, and which are decisions under the new provision of the constitution of Pennsylvania, referred to above. This provision, so far as it need be given now, is as follows: 'Municipal and other corporations, and individuals invested with the privilege of taking private ***576** property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction.' The first case was an action for damages done to plaintiff's buildings and land by negligent blasting and the reckless and careless construction of the road by the contractors. The company had been given the right to enter and construct, and did not enter or construct under the right of eminent domain. It was held, upon the facts of the case, that the company was not liable for the negligence of its contractor, who was exercising an independent employment, and to whom the maxim, *respondeat superior*, applied; and that a railroad company to which one grants the right to enter upon his land, and construct a road, is not liable for damages resulting as a consequence of the company's entering and constructing; and that the above provision of the constitution did not apply to damages resulting from carelessness or negligence in constructing a railroad. 'The words 'injured or destroyed,' as found in this section, as every one knows,' says the opinion, 'were not designed to change, alter, or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages from which they had been previously exempt. ***577** * * * To create a liability for injuries of this kind, and to make corporations responsible for such damages, was the object, and only object, of the section under discussion.' In the second of the above ****461** cases (Railroad Co. v. Lippincott) a railroad company erected on its own land a viaduct, and operated a railroad thereon; and it was held that there could be no recovery for damages resulting to plaintiff's property, lying on the opposite side of the street, from noise, smoke, and dust, the necessary consequence of a due operation of the railroad, no portion of his property having been taken or used in the construction of the viaduct; and that, except on proof of negligence, the lawful use by a railroad

company of a lawful erection, entirely upon its own property, was not the subject of damages under the above section of the constitution. It was said by the court that none of the plaintiff's property had been taken, nor any of his rights infringed, so that neither by the constitution, nor by the case quoted, was there warrant for his contention; that over and beyond the damage which arises from the taking of property, whether in the shape of land or a right, the constitution imposed on corporations a direct responsibility for every injury for which a natural person would be liable at common law; and that this was held in the preceding case, but that beyond this they could not go. The third of the above cases (Chester Co. v. Brower) is one in which the county ***578** erected a bridge, with stone abutments and piers, on a street over a creek in a borough. The approach or abutment of the bridge was of solid masonry, and extended in front of Brower's lot and house. It is stated that the street could no longer be used except for travel on foot, the travel now passing over the approach and upon the bridge. The conclusion reached was that the county was liable in an action on the case for the consequential damages to the property; and this, though the legislature had not provided a remedy to enforce the right by the provision of the constitution. 'There was,' observes the opinion, 'no taking of the property of the plaintiff by the county for the purpose of constructing the bridge. * * * The claim was for consequential damages caused by the erection of the abutments of the bridge some fourteen feet above the grade of the street in front of the plaintiff's house. It follows that, under the law as it stood at and prior to the adoption of the constitution, he would have been without remedy. Struthers v. Railroad Co., 87 Pa. St. 282, and cases there cited. The constitution of 1874 made a radical change in the law as regards consequential damages.' In the fourth case, (Railroad Co. v. Marchant,) in which the facts were quite similar to those in the second case, the decision was that the mischief which the constitutional convention had before it in adopting the above section was the want of a remedy under ***579** previous constitutions to obtain compensation when property was injured or destroyed in the construction or enlargement of corporate works, though no portion of it was actually taken by the corporation; and that the remedy provided thereby to secure just compensation by corporations for property 'injured or destroyed' has relation to injuries which, though properly termed 'consequential,' are yet to be understood as confined to such injuries to one's property as are actual, positive, and visible, and are the natural and necessary results of the original construction or enlargement of its works by a corporation, and of such certain character that compensation therefor may be ascertained at the time the works are being constructed or enlarged, and paid or secured, as provided in the constitution in advance; that a railroad corporation which has constructed its railroad on its own property in a city, without taking any portion of another's property, is not liable for those indirect injuries which are the result merely of the operation of its road in a lawful manner, and without negligence, unskill-fulness, or malice; that the provision was not intended to impose on corporations a liability in the operation of their works which has never been imposed on individuals. The remaining case (Railroad Co. v. Walsb) decides that where a railroad is laid down upon a public street, and, though at grade, is so constructed with reference to the property of an abutting owner that by its operation in a lawful manner access to the property, ***580** if not cut off, is rendered dangerous, the company is liable for consequential damages under the constitution. The distinction between this case and those of Lippincott and Marchant is that in the latter there was no injury by reason of the construction of the road, whereas here it was the direct result of the construction; the track being laid close to the curb-stone on the side of the street next to plaintiff's property, with the effect indicated. See, also, Railroad Co. v. Ziemer, 124 Pa. St. 560, 17 Atl. Rep. 187. The case cited from Alabama (City Council v. Maddox, 89 Ala. 181, 7 South. Rep. 433) holds, under a constitutional provision similar to that of Pennsylvania, omitting the words 'or secured,' that the liability of a municipal corporation extends to all cases of injury caused by grading or cutting down streets or sidewalks, without regard to the original dedication or condemnation, or to damages paid on former occasions; the measure of damages in every case being the difference in the market value of the property before and after grading.

There is in these Pennsylvania and Alabama decisions nothing, considering the provisions of our constitution, that aids appellants.

We are unable to find in either or all of the three sections of our constitution a justification for the theory of appellant's counsel that the use of the term 'right of way,' in the last of the three sections, was intended as an adoption of the rule allowing indirect or consequential ***581** damages. We do not doubt that the abutting owner's right of access, or of ingress and egress, from and to the street, and of light and air from the open space above or over the surface of the street, are easements and private property incidental to the ownership of the abutting lot, nor that these easements cannot be 'taken' or 'appropriated' without just compensation being made for them as such property. This is fully demonstrated by the ****462** New York Elevated Railroad cases: Story v. Railroad

Co., 90 N. Y. 122, (decided in 1882;) Lahr v. Railroad Co., 104 N. Y. 268, 10 N. E. Rep. 528; and Abendroth v. Railroad Co., 122 N. Y. 1, 25 N. E. Rep. 496,—hereafter to be noticed; and by other authorities, as indicated both above and hereafter.

Whatever meaning we give to the expression 'right of way,' we still find nothing in the constitution that places it within the protection or inhibition of that instrument, unless such right of way is 'taken' or 'appropriated.' These words 'taken' and 'appropriated,' it seems to us, were used in their well-defined sense, and in no other. There is nothing in the proceedings of the constitutional convention which justifies an inference that these words were used in any other sense, or that the framers of that instrument intended to give compensation for damages or injury other than such as should result from a taking or appropriation, as distinguished from consequential damages.

An examination of these proceedings proves that ***582** the clause of the bill of rights was adopted on the 3d day of July, and without anything to distinguish its consideration. Journal Const. Conv. 1885, pp. 229, 230.

The first time anything like the twenty-ninth section of article 16, 'Miscellaneous Provisions,' appears to have been brought to the attention of the convention, was the 11th day of the same month, and in the seventh section of an article reported by the minority of the committee on private corporations. The majority had recommended two sections to constitute an article to be entitled 'Private Corporations,' and substantially the same as those finally adopted July 21st, and now constituting sections 30 and 31 of article 16; they being intended to prevent unjust discrimination and unjust charges by common carriers and others performing services of a public nature, and prohibiting common carriers from granting free passes or discounting fares of members of the legislature and salaried officers of the state. The seventh section of the article reported by the minority of the committee as an article to be entitled 'Private Corporations' uses the words 'no property,' instead of 'no private property nor right of way,' and does not use the word 'individual.' This minority report was indefinitely postponed on the 18th of July, notice of motion for a reconsideration of the note being given.

On the 21st of July, the sixteenth article being under consideration, the following were offered as additional ***583** sections, and were referred to the committee on miscellaneous provisions:

'The right of drainage, and the means to secure it, shall be promoted and protected, and the right of way through inferior lands for the drainage of superior by the direct, as well as by the natural, course shall be provided for and enforced: provided, that the cost and damage of such easement may be assessed in proportion to benefit upon the lands of the parties applying for the same: and provided, further, that the owners of lands bearing the servitude shall be entitled to just compensation from the parties so applying.'

'The right to collect rates or compensation for the use of water supplies to any county, city, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.'

The committee, on the 24th of July, reported these sections back to the convention, recommending the former to the favorable consideration of the convention, but the latter 'without recommendation,' and on the next day they were referred to the judiciary committee. On the 29th of the month this committee reported, as a substitute for the same, what is now the twenty-eighth section of article 16, as it is given above, it having been adopted by the convention on the last day of July.

On the 24th of July, the sixteenth article being under consideration, there was offered a section to be entitled 'Private property, how taken for public use,' the ***584** first paragraph of it being: 'No private property or persons or corporations shall be taken or damaged for public use, in the construction of railroads, canals, or if taken for other purposes, under chartered rights, without just compensation to be paid for the same.' This proposed section was also referred to the committee on miscellaneous provisions, and on the 28th day of that month it reported as a substitute for the same what is now the twenty-ninth section of the sixteenth article, as given at the outset of this opinion, it having been adopted on the last day of July.

These proceedings, if they indicate anything, tend to the conviction that the purpose of the convention was, as shown by its final action, to exclude from the constitution any provisions for compensation for damage other than where there was a taking or appropriation of property. If such was not the intention, the word 'damaged,' or its equivalent, would have been put in the twenty-ninth section; such word being in the proposed provision for which it was a substitute.

It is not to be assumed that the judges and lawyers who sat in the convention did not understand what the meaning of the words 'taken' or 'appropriated' was then what it is now, or did not know that the abutting owner's right of access and other easements indicated were private property. The expression 'private property,' in so far as we can see, certainly includes

any right of way which is the subject of private property, and, unless the words 'right of way' mean a public right of way, we can find in them nothing ***585** that adds to the effect which the expression 'private property,' or the entire section, would have without them. We, however, do not mean to intimate that the expression 'right of way' includes or applies to a mere public right of way; and we may remark that it does not occur to us that the purpose of the section in which these words are to be found was so much to specify what should never be taken without just compensation as it was to declare the cases in ****463** which there shall be no taking without either previous payment, or a security by deposit of money, of the compensation for such taking, ascertained in the manner indicated. It is entirely clear that the state, acting for itself, is not, even if a municipal corporation is, within the terms or spirit of this section, in so far as it prescribes anything not implied by the more general provision of the twelfth section of the declaration of rights. We state these views not as committing ourselves finally to the meaning of the words 'right of way,' in connection with any future case distinguishable from this, nor as precluding the recognition of any now undiscovered legal effect they may have been intended to establish. Giesy v. Railroad Co., 4 Ohio St. 308, 328, et seq.

The New York Elevated Railroad cases, mentioned above, and decided under a constitutional provision similar to that in our declaration of rights, are relied upon as sustaining the appellants' cause In the second of these cases, that of Lahr, 104 N. Y. 268, 10 N. E. Rep. 528, the conclusions of the Story Case are stated to be, in ***586** effect, as follows: (1) That an elevated railroad in the streets of a city operated by steam, and constructed as there described, (about 15 feet above the surface of the street, supported on columns placed along and partly inside of the outer edge of the sidewalk, and about 11 feet from Story's building, a warehouse, and extending across the whole traveled track of the street, the structure and passing trains to some extent, as found by the trial court, obscuring the light and impairing the usefulness of the premises, and the line of columns abridging the sidewalk and interfering with the street as a thoroughfare,) was a perversion of the use of the street from the purposes for which it was originally designed, and a use which neither the city authorities nor the legislature could legalize or sanction without providing compensation for the injury inflicted upon abutting owners. (2) That abutters upon a public street, claiming title to their premises by grant from the municipality, it convenanting that a street to be laid out in front of the premises should forever continue for the free and common passage and as the public streets and ways for all persons passing or returning through or by the same, in like manner as the existing streets in the city are or ought to be, acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street, for the benefit of property situated thereon. (3) That the ownership of such easement is an interest in the real ***587** estate, constituting 'property,' within the meaning of that term as used in the constitution, and for which compensation must be made before it can be lawfully taken. (4) That the erection of an elevated railroad, the use of which was intended to be permanent, in a public street, and upon which cars are propelled by steam-engines generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easement, and its appropriation by the railroad corporation, rendering it liable to the abutters by the damage occasioned by such taking.

It was further held in Lahr's Case that no legal difference exists, with reference to the interest acquired by abutting owners in a public street, where the title is like that held by Story, and where it is one acquired through mesne conveyances from the original owner, whose property has been taken by proceedings *in invitum*, instituted by the municipality under a public statute for acquiring land for street purposes; such statute providing that the land thus taken shall be held 'in trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street * * * forever, in like manner as the other public streets * * * in said city are and of right ought to be.' In Abendroth's Case, 122 N. Y. 1, 25 N. E. Rep. 496, the decision was that though the title of the owner of the abutting lot extends only to the side of the street, and the owner ***588** thereof has no interest in the street except as the owner of such abutting lot, he has incorporeal private rights in the street which are incident to his lot, and are private property, within the meaning of the constitutional provision forbidding their being taken for public use without just compensation; and that it is no justification to their impairment that the act complained of is done pursuant to legislative authority.

It is apparent from the above statement of these decisions, and no one giving a careful and fair consideration to the opinions can fail to be so impressed, that the appropriation of the streets to the use of such railroads is held to be a diversion of the streets from highway purposes to the new and inconsistent purpose of an elevated railroad, and that this diversion is what, in the judgment of the court, constitutes

the legal invasion and unlawful taking or appropriation of the easements incident to the abutting lot; and it is equally apparent upon the face of the opinions that the doctrine they sustain does not and was not intended to conflict with the views announced in the previous portions of this opinion, as to the power of a municipality over streets, so long as it does not divert the street from the original purposes for which it was established, or seek to apply it to other than street uses. The importance of the principle and interests involved, justify proofs of this assertion by extracts from the opinions. Answering the argument of the railroad company made upon the basis of Transportion Co. v. Chicago, 99 U. S. 635, where the claim against the city was for ***589** damages for an obstruction to the plaintiff's docks by the deposit of materials, the construction of a coffer-dam, and other work necessary to the building of a tunnel for the extension of a street, it is said in Story's Case: 'The work was a necessary city improvement, and the interruption and obstruction was temporary, ceasing with the completion ****464** of the work. It was held that the plaintiff could not recover; and this, upon the principle applied and practiced upon in all our cities, that the municipality, whether owners of the fee of the street or vested with an easement only, may repair or improve it, 'to adopt it to easy and safe passage.' It permits the leveling of a street by filling up or digging away, and, if intersected by a stream, the erection of a bridge or tunnel. If, in doing either of these things, materials are necessarily collected, or an excavation made, to the present and temporary detriment of a lotowner, he cannot complain. His ownership is subject to the exercise of this public right, and he must submit to the inconvenience in order that the street may be preserved. So, in placing a pavement or excavating for a sewer, the stone for the one, or the dirt from the other, may for a time inconvenience the lot-owner. To this in like manner he must submit, as to a burden provided for in his grant, or as one of the terms implied by his location upon a public avenue.' Again, it is observed: 'It is no doubt true that the grade of a street or highway may be altered by raising it or lowering it, without liability on the part of the municipality to the abutter; but this is on the ground that ***590** the public had already paid a full compensation for all damage to be done by them to the adjacent owners by any reasonable or convenient mode of grading the way. But the principle applicable to such a case does not aid the defendant. There is no change in the street surface intended, but the elevation of a structure useless for general street purposes, and as foreign thereto as the house in Vesey street, (Corning v. Lowerre, 6 Johns. Ch. 439,) or the freight depot, (Barney v. Keokuk, 94 U. S. 324.)' And speaking of the surface railway cases, (People v. Kerr, 27 N. Y. 188, and Kellinger v. Railway Co., 50 N. Y. 206,) it is said: 'The use of the streets permitted was not inconsistent with the purposes of the trust.' It is also remarked in the opinion delivered by Judge TRACY (90 N. Y. 170) that, while the legislature may regulate the uses of the street as a street, it has no power to authorize a structure thereon which is subversive of and repugnant to the uses of a street as an open public street; and that whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of a street, as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized. In Lahr's Case it is observed that an abutting owner necessarily enjoys certain advantages from the open street, which belong to him by reason of the location of his property, and are not enjoyed by the general public, such as the easements referred to above; and that they are not only valuable to him for sanitary purposes, but indispensable ***591** to the proper and beneficial enjoyment of his property, and are legitimate subjects of estimate by the public authorities in raising a fund necessary to defray the cost of constructing the street; and that he is compelled to pay for these advantages and rights at their full value; and if, in the next instant, they may by legislative authority be taken away and diverted to inconsistent uses, a system has been inaugurated which resembles more nearly legalized robbery than any other form of acquiring property. And it is also further said that the right which the municipality acquires is limited by the public necessity, and, in the case before the court, could not extend beyond its use for street purposes; and all other uses which might be enjoyed therein, consistent with its use as a street, must, from necessity, have remained in and resided with the person from whom it was taken, even after the transfer of the fee to the municipality. Afterwards it is declared that 'the logical effect of the decision in the Story Case is to so construe the constitution as to operate as a restriction upon the legislative power over the public streets opened under the act of 1813, and confine its exercise to such legislation as shall authorize their use for street purposes alone. Whenever any other use is attempted to be authorized, it exceeds its constitutional authority. Statutes relating to public streets, which attempt to authorize their use for additional street uses, are obviously within the power of the legislature to enact; but questions arising under such legislation are inappliable to the questions here involved. Such ***592** are the cases in respect to the changes of grade; the use of a street for a surface horse railroad; the laying of sewers, gas, and water-pipes beneath the soil; the erection of street-lamps and hitching-posts, and of poles for electric lights used for street lighting. All of these relate to street uses, sanctioned as such by their obvious purpose and long-

continued usage, and authorized by the appropriation of land for a public street.' 104 N. Y. 291–293, 10 N. E. Rep. 528.

These extracts clearly sustain the assertion in behalf of which they are invoked.

The practical deduction to be made from the preceding discussing is that, if what is sought to be enjoined is only an application of the street to additional street purposes, there is, in the absence of any physical invasion of the abutting lots, no taking or appropriation of any property or right of way of complainants, within the meaning of the prohibition of the constitution. Without intimating what effect allegations charging malice, negligence, or unskillfulness would have in an equitable suit of this character, it is clear that there are no such allegations in the record.

The theory of the bill is that the viaduct is being erected by the four railroad companies, and the county of Duval and city of Jacksonville, under and in accordance with the agreement there set out, and that the purpose of the agreement was to erect the viaduct over and above the numerous railroad tracks crossing said street, and to put the street railway on the viaduct, and make the surface of the viaduct, instead of the ***593** original surface of the street, the grade for the passage of the public as they should come and go. It would be idle to contend that the complainants are not damaged, at least consequentially, ****465** independent of any benefits which may accrue from the improvement. In so far as we can understand the facts, they are to be completely shut in and cut off from any communication with the other portions of Jacksonville and the rest of the world, except by the St. Johns river, unless they shall, at their own expense, construct some way to reach the surface of the viaduct from their lots or improvements on the same, and there will be also an abridgment of light and air. The appellant's case, however, presented by the record before us, is not that the necessity of constructing the viaduct was produced by the laying of railroad tracks across Commercial street, and that, as a result of such railroad construction, that portion of said street was converted by the municipal agency into other than street purposes, and the object of the viaduct was to accomplish this end. We express no opinion on such a case, as it is not presented. If it be that the construction of this viaduct under and pursuant to the agreement is a diversion of the street from its highway purposes, there can be no doubt or question that there has been a taking of complainants' easements without compensation, and in violation of the provision of the bill of rights, and of the twenty-ninth section of the sixteenth article of our organic law; but under the state of the pleadings, and the manner of the submission of the cause before us, we cannot consider this ***594** question, but are confined to a judgment of the case as one in which the municipal government of Jacksonville is erecting the viaduct, not as a joint party with the others to the agreement, and acting under it, to meet a result necessitated by the existence of the railway track, but in the exercise of its chartered powers to change the grade of the street, though under an agreement with the several parties named as co-defendants, by which they are to contribute to the expense of the construction of the viaduct, by which the grade will be so changed. It is not contended that if the conditions exist which will justify the city, in the exercise of its powers, as such, to change the grade of the street, the change cannot be made by means of a viaduct; nor that the street conditions are not such as authorize the city to erect a viaduct for the purpose of changing the grade, if it has power to do so without first compensating complainants for the alleged taking of or damage to their property. The city, appearing alone, has tendered issue upon the theory that it is doing the work of itself, and under and by virtue solely of its own organic powers to grade streets, with, it is true, pecuniary aid from the parties named as co-defendants; and complainants have accepted the issue, and contend that the city has not, under its charter and the constitution of the state, power to change a grade of a street without first making compensation for damages resulting from an interference with the complainants' easement of access, light, and air, although ***595** there is no encroachment upon or invasion of complainants' premises.

The charter act, (chapter 3775 of the Statutes,) approved May 31, 1887, provides, in section 4 of article 3, that the mayor and city council shall have power, by ordinance, to make appropriations to alter, widen, extend, grade, or otherwise improve, clean, and keep in repair, streets, alleys, and sidewalks; and also enacts that it shall have power, in like manner, to take and appropriate grounds for widening streets, or parts thereof, when the public convenience may require it, provided the owner or owners thereof shall receive compensation for the same. The act further provides (section 8, art. 5) that the board of public works shall have exclusive power and control over the construction, supervision, cleaning, repairing, grading, and improving of all streets, and to fix and establish the grades of all streets and alleys, avenues and thoroughfares. These provisions give full power to fix and change the grade of streets, and they do not provide that any compensation shall be made by the city to abutting owners for any taking of or damage to their property, in fixing or changing the grade, and hence none can be required of the city against its will, or in the absence of

a binding stipulation, unless there is a diversion of the street from street purposes, or other appropriation of the abutter's property, within the meaning of the constitutional provision heretofore mentioned.

The fact that a street railway may be put on a viaduct ***596** which a city lawfully erects, as a means of duly grading a street, will not render the viaduct otherwise or alone a diversion of the street from highway purposes, or be a ground for enjoining the erection of the viaduct for street purposes, even if the erection of the viaduct for the purpose of such a railway would be a diversion of the street, and the subject for an injunction. The construction of a viaduct for street purposes should not be interfered with, although the subsequent erection thereon of a street railway should, when about to be begun, be the subject of an injunction.

If the viaduct is being erected under the agreement among other purposes for that of a street railroad, or if it is being erected under the agreement for the purposes of carrying the street over the railroad tracks, which railroad companies are authorized under certain circumstances to do,—but whether independent of or subject to the constitutional provision as to making compensation for taking the easements of abutting owners we do not say,—the railroad companies were entitled to be heard. No such case has, however, been made before us. We have discussed and decided the only case presented, and our judgment is that the order refusing the injunction was proper, and should be affirmed.

It will be ordered accordingly.

All Citations

28 Fla. 558, 10 So. 457, 14 L.R.A. 370, 29 Am.St.Rep. 278

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481 So.2d 1223
District Court of Appeal of Florida,
First District.

EXCHANGE INVESTMENTS, INC., et al., Appellant,
v.
ALACHUA COUNTY, etc., et al., Appellees.

No. BF–104.
|
Nov. 27, 1985.

Synopsis

Owners of property in county sought to void a rezoning decision of county commission as procedurally irregular and as being arbitrary, unreasonable and unlawful. The Circuit Court, Alachua County, Elzie S. Sanders, J., dismissed both counts of complaint on basis of standing, and owners appealed. The District Court of Appeal, Barfield, J., held that: (1) standing to challenge rezoning decision was vested in owners of property within one mile of seven-acre parcel approved for rezoning as a planned unit development, and (2) a cause of action for voiding rezoning decision as arbitrary, unreasonable, and unlawful was stated since off-street parking was a legally recognizable interest and owners alleged that they were close enough to development to be adversely affected by a parking overflow.

Reversed.

Ervin, J., concurred in part and dissented in part and filed opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1224** Herbert T. Schwartz of Schwartz & Wilson, Gainesville, for appellant.

Thomas A. Bustin, Gainesville, and Dennis R. Long of Wilson, Wilson & Long, Palm Harbor, for appellee Alachua County.

Frederick D. Smith of McGalliard, Mills, deMontmollin, Smith & Monaco, Gainesville, for appellee Interstate.

Opinion

BARFIELD, Judge.

Appellants, plaintiffs below, appeal from an order granting a motion to dismiss. The complaint challenges Alachua County's rezoning of property owned by Interstate Management Corporation. The issues presented on appeal are whether the trial court erred in dismissing Count I of the complaint, which alleged that the rezoning decision was void due to procedural irregularities, on grounds that plaintiffs' lacked standing; and, whether the trial court erred in dismissing Count II of the complaint, which alleged that the rezoning decision was arbitrary, unreasonable, and unlawful, also on standing grounds. We hold that the trial court erred and reverse.

Appellants are owners of real property in Alachua County located on South West Archer Road. According to the complaint, their properties are "located within one mile of the parcel owned by defendant [appellee] Interstate...." This is the area where Shands and the VA hospitals and the University of Florida health colleges are located. There are severe traffic and parking problems in the area.

Alachua County had long adhered to zoning which prohibited commercial development in the area. In September, 1983, however, the county approved rezoning of Interstate's seven acre parcel as a Planned Unit Development (P.U.D.). According to the complaint, Interstate plans to construct a hotel and convention facility on the site.

Later in 1983, the appellants challenged the rezoning decision in circuit court. The complaint was dismissed on grounds that plaintiffs lacked standing. This court affirmed, per curiam, without opinion. *Exchange Investments, Inc. v. Alachua County,* 472 So.2d 1184 (Fla. 1st DCA 1985). The record in that case indicates that the appellants had appeared at the hearing and had not pled that a "legally recognizable interest" was being adversely affected.

In September of 1984, Interstate went back to the county and asked for several changes to its approved plan. Of primary interest is the request to reduce the number of parking places from 392 (as required by the Alachua County zoning ordinance) to 304. The county approved the changes ***1225** and the appellants sought relief in circuit court. The essence of their complaint was similar to that of the previous suit: that the action was procedurally defective (Count I) and

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that it was "arbitrary unreasonable and unlawful" because it violated the parking requirements of the zoning ordinance. Plaintiffs alleged that they would suffer special injuries in the form of "severely aggravated traffic congestion and parking overflow." [1] The county sought to dismiss the complaint on standing grounds. The court granted the motion with leave to amend. The plaintiffs chose not to amend but instead undertook an appeal to this court.

In their first count, the plaintiffs alleged that the rezoning decision "was adopted without due notice as required by section 20 of Alachua County Ordinance 80–3 and other applicable law, or otherwise violated procedural requirements for the adoption of such zoning decisions." According to *Renard v. Dade County,* 261 So.2d 832, 838 (Fla.1972), "[a]ny affected resident, citizen, or property owner of the governmental unit in question has standing to challenge such an ordinance." The only reason these same plaintiffs were found not to have standing on these grounds in the previous action was because their attorney had attended the hearing. No such allegation is made in this instance, and we therefore conclude the plaintiffs have standing as to Count I.

The dismissal of Count II on the basis of lack of standing presents a closer and more complex question.

Because of the three standards announced in *Renard,* the first step in the analysis is to determine in which category a particular complaint or count falls. *Skaggs-Albertson's v. ABC Liquors, Inc.,* 363 So.2d 1082, 1087 (Fla.1978). The appellants have argued to the court that the action is "illegal" (because the commission approved fewer parking spaces than required by the ordinance) and asks that we apply the same standing test as that in Count I. The complaint describes the action as "arbitrary, unreasonable, and unlawful." The critical question is whether the commission had legal authority to grant a variance. The Alachua County Zoning Ordinance provides that "minor changes and/or deviations from the preliminary Planned Unit Development master plan which do not affect the intent or character of the development shall be reviewed and may be approved by the county commission in the manner set forth in subsection 8.3d [which provides for notice]." *Id.* subsection 8.3f. Thus, the commission has authority to approve the change and the action is not illegal. Therefore, the second test from *Renard* should apply: appellants must demonstrate a legally recognizable interest which is adversely affected by the proposed zoning action. 261 So.2d at 838.

There is no controlling precedent, but Florida cases suggest that appellants have properly pled standing. Appellees heavily rely on *Skaggs-Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc.,* 332 So.2d 113 (Fla. 2d DCA 1976). The court there found that a competitor across the street lacked standing because of alleged increases in traffic and parking problems. This case is distinguishable, however, because it was a suit for injunction and therefore a different standard of standing was being applied (special injury). Additionally, while the authorities generally agree that traffic is a matter of general concern and does not grant standing in zoning matters, property owners do have a legal interest in their own off-street parking facilities. *Skaggs* relied on an older Georgia case, *Victoria Corp. v. Atlanta Merchandise Mart,* 101 Ga.App. 163, 112 S.E.2d 793 (1960). The recitation of facts in that case indicate that "the only objection advanced by officers of the Victoria Corporation to the erection of the building was the increased traffic and congestion *of the streets* which would be generated...." ***1226** *Id.* at 165, 112 S.E.2d at 794 (emphasis added). Thus, the Georgia opinion did not reach the question of off-street parking and reliance on the opinion for that proposition is incorrect, not to mention illogical.

In *Thompson v. Planning Commission,* 464 So.2d 1231 (Fla. 1st DCA 1985) nearby property owners were found to meet the requisites for injunctive relief. There, neighboring landowners claimed that a variance, which permitted construction of a building with fewer than the required number of parking spaces, was invalid. Although standing was not discussed as a discrete issue, *Thompson* can certainly be read for the proposition that parties' interests in their off-street parking facilities are sufficient to grant standing to contest a zoning variance to a nearby landowner.

Inasmuch as we find no Florida precedent to control our disposition of this appeal, we have examined other authorities for guidance. We find that these authorities suggest the trial court erred in dismissing the complaint.

In reality, two questions are presented: (1) is off-street parking a legally recognizable interest and, if so, (2) are appellants close enough to appellee's development that their own parking interests could be adversely affected by any overflow caused by a "shortage" of spaces in the development.

Thompson suggests that off-street parking is a legally-recognizable interest. It is not difficult to understand how the interests of commercial and residential property owners in an

urban environment are closely tied to the parking available to those who intend to use the property. Overflow from a nearby landowner can obviously have an adverse effect. Other jurisdictions have permitted neighbors to challenge off-street parking variances without even discussing the standing issue. *Siller v. Board of Supervisors,* 58 Cal.2d 479, 375 P.2d 41, 25 Cal.Rptr. 73 (1962); *Russell v. Zoning Board of Appeals,* 349 Mass. 532, 209 N.E.2d 337 (1965); *Brush v. Zoning Board of Appeals,* 57 Misc.2d 751, 293 N.Y.S.2d 387 (Sup.Ct.1968).

The more difficult question is whether appellants are close enough to the development to be adversely affected by a parking overflow. Professor Anderson states: "While the essential element of standing is the special damage which will be suffered, the ease with which this can be established appears to vary with the distance between the property subject to the decision and the land of the plaintiff.... The factual problem of whether the decision affects certain land becomes more difficult as the distance between the land subject to the decision and the land of the petitioner increases." 4 *Anderson, American Law of Zoning* § 25.18 (2d ed. 1977). *See Dillon Cos. v. City of Boulder,* 183 Colo. 117, 515 P.2d 627 (1973) (homeowners 1 ½–3 ½ blocks from proposed shopping cneter having standing); *Brechner v. Incorporated Village of Lake Success,* 23 Misc.2d 159, 201 N.Y.S.2d 254 (Sup.Ct.1960) (plaintiffs residing from 1050 to 1200 feet from rezoned property pled standing). [2]

The only case located where the distance question was an issue in the off-street parking context is *Gaona v. Town of Huntington Zoning Board of Appeals,* 106 App.Div.2d 638, 483 N.Y.S.2d 430 (N.Y.1984). The court found that plaintiffs, who owned property within 700 feet of the property affected, had standing "as a matter of law." The rationale for the holding is not clear from an examination of the authorities cited.

We conclude that there is ample authority that off-street parking is a legally recognizable interest. The issue of distance is more difficult, but it is not impossible to imagine a situation where parking is so scarce that overflow could affect properties as much as a mile distant. People might park a mile away and walk if that was the closest place available, or there ***1227** could be a "domino effect" where the overflow from one lot goes into the next lot, creating shortage and overflow there and so on, until it reached plaintiffs' property. Since, for purpose of a motion to dismiss for failure to state a cause of action, the allegations of the complaint are assumed to be true and all reasonable inferences are allowed in plaintiff's favor, *Orlando Sports Stadium, Inc. v. State ex rel. Powell,* 262 So.2d 881 (Fla.1972), we hold that the trial court erred in dismissing the complaint. Plaintiffs may not be able to prove standing, but they have pled it.

REVERSED.

JOANOS, J., concurs.

ERVIN, J., concurs in part and dissents in part, with written opinion.

ERVIN, Judge, Concurring in part and dissenting in part.
Were it not for this court's prior per curiam affirmance (PCA), without opinion, involving the same parties, I could agree without hesitation to all of Judge Barfield's fine opinion for the court. My difficulty in doing so, however, is that a portion of one of the issues now raised on appeal was previously considered and disposed of by our prior PCA. In that an appellate court can take judicial notice of its own records, *Department of Legal Affairs v. District Court of Appeal, 5th District,* 434 So.2d 310, 313 (Fla.1983), I examined the record in our prior case (*Exchange I*) and found that the appellants had there alleged that the rezoning of the property to a PUD was arbitrary, unreasonable and capricious. Specifically, they alleged that the values of their properties were "immediately threatened" by the county's zoning decisions "in that the commercial development permitted by the COUNTY'S action will aggravate traffic and congestion and create an environment of economic blight along Archer Road." In *Exchange I,* this court's PCA of appellants' issue on appeal in effect determined that appellants' issue on appeal in effect determined that appellants' "traffic and congestion" allegations did not meet the "legally recognizable interest" test necessary for standing. *See Renard v. Dade County,* 261 So.2d 832, 838 (Fla.1972). Consequently, because appellants' injuries due to traffic congestion were alleged in both cases, the "legally recognizable interest" standard applies to both, and, in that the parties are the same, the principle of estoppel by judgment bars appellants from raising the traffic congestion claim again. *See Red Carpet Corp. v. Roberts,* 443 So.2d 377, 379 (Fla. 1st DCA 1983).

The doctrines of estoppel by judgment or res judicata are not undermined by reason of the fact that our prior affirmance was without opinion. While a PCA has no precedential value, it becomes the law of the case as to the same parties and can be used for res judicata purposes. *Department of Legal Affairs v.*

District Court of Appeal, 5th District; State Commission on Ethics v. Sullivan, 430 So.2d 928, 932 (Fla. 1st DCA 1983). I would therefore uphold the lower court's order of dismissal on the ground of appellants' lack of standing to challenge the county's rezoning decision insofar as appellants' complaint alleges that such decision will cause injury due to traffic congestion.

The remaining allegations in count II of appellants' complaint now on review essentially allege that the county's decision will cause "parking overflow". Since parking overflow was neither alleged nor considered on appeal in *Exchange I,* appellants are not now barred from using it to allege a "legally recognizable interest". I therefore concur with the majority's opinion as it relates to such allegations.

I also agree with the majority in reversing the lower court's order of dismissal of count I. Count I alleges that the county's decision to decrease the number of parking spaces in the subject PUD was adopted without due notice as required by ordinance, and "otherwise violated procedural requirements for the adoption of such zoning decisions." While the complaint in *Exchange I* had also alleged that the county's decisions were made without due notice, those decisions concerned the *initial* rezoning ***1228** of the parcel to PUD status. Because the decisions contested in the two cases are different, and, unlike *Exchange I,* there is no allegation in *Exchange II* that appellants waived their right to raise the notice issue, the PCA in *Exchange I* does not bar appellants' theory espoused under count I in the complaint before us. Under *Renard v. Dade County,* appellants clearly have standing as to that count.

All Citations

481 So.2d 1223, 10 Fla. L. Weekly 2656

Footnotes

1 The appellants' complaint in their first action alleged the values of their properties were threatened by economic development that would aggravate traffic congestion and create an area of economic blight.

2 On appeal after remand, 25 Misc.2d 920, 208 N.Y.S.2d 365 (Sup.Ct.1960), the court found that while the complaint could withstand a motion to dismiss, plaintiffs failed to prove the requisite standing at trial.

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85 So.2d 865
Supreme Court of Florida, Special Division A.

Mrs. Grace WEIR, Appellant,
v.
PALM BEACH COUNTY, and the State Road Department of the State of Florida, Appellees.

March 7, 1956.

Synopsis

Suit in equity by landowner against county and state road department for damages for alleged taking of plaintiff's property without payment of compensation, within constitutional prohibition, consequent upon widening of highway. The Circuit Court for Palm Beach County, C. E. Chillingworth, J., sustained motion to dismiss amended complaint and plaintiff appealed from the decree. The Supreme Court, Thornal, J., held that though widening of highway in front of premises on which plaintiff had constructed building resulted in destruction of lateral support of land, causing building to settle and crack, damage was not a 'taking', within constitutional prohibition against taking of private property without payment of compensation, and was damnum absque injuria.

Decree affirmed.

Attorneys and Law Firms

***866** Anderson, Scott, McCarthy & Preston and Dwight Sullivan, Miami, for appellant.

Harry A. Johnston and Henry F. Lilienthal, West Palm Beach, for Palm Beach County.

Bryan W. Henry, Miami, for State Road Department of Florida.

Opinion

THORNAL, Justice.

Appellant Weir who was plaintiff below appeals from a decree of the Chancellor sustaining a motion to dismiss her amended complaint.

The complaint in equity consisted of five 'counts'. It alleges that plaintiff owned certain realty in Delray Beach bounded on the north by Atlantic Avenue and on the east by Canal Avenue, which is paralleled on the east by the Intracoastal Waterway. A building facing Atlantic Avenue was located on the property and a parking lot to the rear of the building was accessible from Atlantic Avenue via Canal Avenue. The two streets intersected.

Beginning on October, 1951, and continuing until early 1953 it is alleged that the defendants engaged in a highway construction program which included the resurfacing and widening of Atlantic Avenue and replacement of a bridge over the Intracoastal Waterway. In count 1 appellant alleged that in the course of the construction program the defendants removed part of the public sidewalk; took part of plaintiff's land and destroyed the lateral support for plaintiff's land thereby causing the building to settle and crack. Count 2 claims damages for loss of business due to the prolonged period of construction. Count 3 claims damages for destroying the access to plaintiff's parking lot from Atlantic Avenue via Canal Avenue which resulted from the building of a retaining wall across the north end of Canal Avenue where it intersects Atlantic Avenue thereby eliminating entrance into Canal Avenue from Atlantic Avenue, except by a circuitous route running west and south of plaintiff's property. Count 4 claims loss of business and damages through enforce reduced rentals resulting from the construction of the retaining wall along the south boundary of Atlantic Avenue and in front of plaintiff's building forcing prospective customers to descend one of several flights of stairs in order to enter plaintiff's building and also destroying the view from the building. Count 5 was a composite claim that by committing the acts alleged the defendants have taken part of plaintiff's property for the benefit of the public without compensation to the plaintiffs thereby resulting in unjust enrichment of the defendants to the damage of the plaintiff. The complaint prays for restitution of the benefits acquired at plaintiff's expense or in the alternative a decree compensating plaintiff for loss of such benefits. Motions to dismiss the complaint were sustained and final decree entered for the defendants.

Although count 1 contains the bald allegation that the 'defendants took part of plaintiff's land,' it is not shown what part or how much of plaintiff's land was taken and in actuality it is conceded that the defendants did not in fact physically appropriate any part of the land itself. The complaint is grounded on the theory that the damages suffered by the plaintiff as a result of the improvement of the public way are tantamount to a 'taking' of plaintiff's property without compensation in contravention of our constitutional requirements. The relief sought is to compel restitution by compelling the defendants to exercise the power of eminent

domain whereby the damages suffered by the plaintiff might be *867 assessed and restitution accordingly made. We are confronted with the question whether removal of lateral support from real estate upon which a building has been constructed or interference with ingress, egress and view or interference with convenient accessibility all resulting from improvement of a public way and not involving any actual taking or physical invasion of the land of the complaining property owner is compensable as a 'taking' under the Florida Constitution.

Section 12 of the Declaration of Rights of the Florida Constitution, F.S.A., reads:
'No person shall be subject to be twice put in jeopardy for the same offence, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation.' (Emphasis ours.)

Section 29 of Article XVI of Florida Constitution reads:

> 'No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall be first made to the owner, or first secured to him by deposit of money; which compensation, irrespective of any benefit from any improvement proposed by such corporation or individual, shall be ascertained by a jury of twelve men in a court of competent jurisdiction, as shall be prescribed by law.'

If the damage suffered by the plaintiff is the equivalent of a 'taking' or an appropriation of plaintiff's property for public use, then our Constitution itself recognizes the plaintiff's right to compel compensation. On the other hand, if the damage suffered is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque injuria and compensation therefor by the defendants cannot be compelled.

Appellant relies on State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868, wherein the owner of a wateroperated sawmill was allowed compensation for the raising of the water level in his millrace thereby reducing capacity of the mill as the result of the filling in of a swamp by the State Road Department. There is a difference which should be pointed out. In the Tharp case, the fill constructed by the Road Department actually resulted in physical invasion of the property owner's millrace by causing an additional three feet of water to back up into the millrace itself. We had no such physical invasion in the case at bar. Here the government neither directly nor indirectly entered upon the actual property of the appellant.
With reference to the alleged destruction of lateral support, the appellant apparently overlooked the proposition that the right to lateral support from adjoining land applies only to the land in its natural state and does not extend to lands burdened by a building. Some authorities make an exception that damages can be recovered if the excavation destroying the lateral support is negligently made. We are not concerned with this exception for the reason that the complaint does not allege negligence in the excavation work in the case before us. See Crum v. Sumter County, 68 Fla. 122, 66 So. 723.

We find no Florida case directly on this point. However, the Supreme Court of Alabama in H. H. Parker & Bro v. Hodgson, 172 Ala. 632, 55 So. 818, 819, held:

> 'It is a settled principle of law that the right to lateral support applies to the land in its natural condition, and an adjoining landowner cannot by erecting buildings on the margin of his own land deprive the owner of the attingent lot of the right to excavate his own lot up to the line of his neighbor's property, though on account of the additional burden placed upon the land, by the erection of the house thereon, said house may fall, by reason of the withdrawal of the lateral support.'

The rule is well stated in 1 Am.Jur., Adjoining Landowners, Sec. 21, p. 519, as follows:
*868 'The easement of natural support of the land of one by the land of the adjoining owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have support for his increased burden resulting in increased

lateral pressure. One landowner cannot, by altering the natural condition of his land, deprive the adjoining proprietor of the privilege of using his own land as he might have done before; and consequently, he cannot, by building a house near the margin of his land, prevent his neighbor from excavating his own soil, even though it may endanger the house.' (Emphasis ours.)

See also Annotation to Prete v. Cray, 49 R.I. 209, 141 A. 609, 59 A.L.R. 1241.

The rule is also announced in Vol. 1 of Elliott on Roads and Streets, Sec. 229, as follows:
'It has been held that an owner whose land adjoins a public street is entitled to have the lateral support of his land remain undisturbed, and that a wrongful destruction of it is a taking within the meaning of the constitution. Lateral support is the right which soil in its natural state has to support from land adjoining it. One of the old principles of the law is that soil in its natural state is entitled to this support, but the rule does not go farther than this, for the right to support extends only to the soil, and not to structures placed upon it. There is, therefore, much reason for holding that the destruction of the right of lateral support, giving to the term its true legal signification, is a taking of property, but when we undertake to extend the doctrine so far as to embrace a right to support for the soil burdened with structures there is difficulty. The general rule is that, after the right to a street has been acquired, the municipal corporation may use it as a private owner may do his own property, and, as a private owner is not bound to leave support for soil burdened with buildings, it would follow that a public corporation is under no greater obligation.' (Emphasis ours.)

In applying a constitutional provision similar to our own, the Supreme Court of Indiana in Freigy v. Gargaro Co., 1945, 223 Ind. 342, 60 N.E.2d 288, 290, held:
'Public work resulting in withdrawal of lateral support does not constitute a taking within our constitutional provision that 'No man's property shall be taken by law, without just compensation * * *.' * * * As said in Brown v. State (211 Ind. 62, 2 N.E.2d 527), this is settled in Indiana, although in other states and under varying constitutional provisions the rule is otherwise. See notes 7 A.L.R. 806, 38 A.L. R. 19 and 44 A.L.R. 1494.'

Any contrary view would enable an abutting property owner to construct a building on his land in such fashion that in many cases it would completely stultify the improvement of the public way in the public interest. For a helpful discussion on the question of damages to private property caused by negligence of government agents as a 'taking' for public purposes see Annotation 2 A.L.R.2d 677.
As to 'count 1' of the complaint in this case, therefore, we hold that under the language of the Florida Constitution, the alleged destruction of lateral support to the property of the plaintiff upon which a building had been established is not a taking or appropriation for which compensation must be paid.

The other counts of the complaint deal with alleged impairment of ingress and egress as well as previously existing view. The complaint does not allege that the plaintiff was totally deprived of ingress of egress to her property. It does allege that she has been deprived of the view of the Intracoastal Waterway.

The owner of property abutting a public was has a right of ingress to and egress ***869** from the property as well as a right to enjoy the view therefrom. However, these are rights which are subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the way improved to meet the demands of public convenience and necessity. If the improvement for the benefit of the public interferes with the pre-existing means of ingress and egress and view enjoyed by the individual property owner, without an actual physical invasion of the land of the property owner, then again we have a situation where the individual right is subordinate to the public good and any alleged damage suffered is damnum absque injuria. This is so for the simple reason that one who acquires property abutting a public way acquires it subject and subordinate to the right of the public to have the way improved to meet the public need. See Bowden v. City of Jacksonville, 52 Fla. 216,52 So. 394;Selden v. City of Jacksonville, 28 Fla. 558, 1*o* So. 457, 14 L.R.S. 370; Dorman v. City of Jacksonville, 13 Fla. 538. Supporting authorities are cited in the able dissenting opinion of the late Chief Justice Mathews in State Road Dept. of Florida v. Lewis, Fla.1955, 79 So.2d 699, where the majority view was grounded on a question of pleading and not on the merits of controversy.
We, therefore, hold that the interference with the so-called consequential rights of the plaintiff under the facts alleged in this complaint are not tantamount to the 'taking' or appropriation of plaintiff's property for which the Florida Constitution requires compensation.

We have not heretofore commented on the problem of whether the claims of the plaintiff are grounded upon a tort against which both defendants are immunized from liability. Section 341.25, Florida Statutes, F.S.A., reads in part as follows:

'Suits at law and in equity may be brought and maintained by and against the state road department of the State of Florida on any claim under contract for work done; provided, that no suit sounding in tort shall be maintained against the said state road department.' (Emphasis ours.)

It has long been the rule that counties are not liable for torts. See Keggin v. Hillsborough County, 71 Fla. 356, 71 So. 372.

Although no negligence is alleged, at the same time the plaintiff fails to base her cause 'on any claim under contract for work done' which is stipulated as a condition to suit against the State Road Department. Actually, the concluding prayer is 'for restitution of the benefits which defendants have tortiously acquired at plaintiff's expense'. Certainly, the alleged wrongful acts sound in tort and having heretofore determined that the alleged acts of defendants are not the equivalent of a taking or an appropriation of the plaintiff's property that would enable the plaintiff to invoke the self-executing provisions of the Constitution in her behalf, we now also hold that the claims asserted sound in tort and that suit against both defendants upon such claims is barred by the immunity of the sovereign, absent statutory consent. No such consent is here present.

Other errors assigned have been carefully considered but have been found to be without merit.

Finding no error, the decree of the Chancellor is

Affirmed.

DREW, C. J., HOBSON, J., and MILLEDGE, Associate Justice, concur.

All Citations

85 So.2d 865

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400 So.2d 513
District Court of Appeal of Florida, Fifth District.

The CITY OF ORLANDO, etc., Appellants,
v.
Charles J. CULLOM, et al., Appellees.

No. 80-1305.
|
June 10, 1981.
|
Rehearing Denied July 7, 1981.

Synopsis

Landowners brought action objecting to city's decision to close street abutting landowners' property without compensating landowners. The Circuit Court, Orange County, B. C. Myszynski, J., entered final order enjoining city from obstructing street and requiring city to either compensate landowners for past obstructions or restore street to its prior configuration, and city appealed. The District Court of Appeal, Dauksch, C. J., held that where city closed street abutting landowners' property to make pedestrian mall and plaza, mall effectively blocked the free flow of vehicular traffic, permitted no vehicular parking, and allowed landowners and all others no right to vehicular access without special permit, but landowners still had access to their property and it had not been seriously diminished, landowners were not deprived of a property right for which they were entitled to compensation.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***513** Eli H. Subin, City Atty., and Michael S. Webb, Asst. City Atty., Orlando, for appellants.

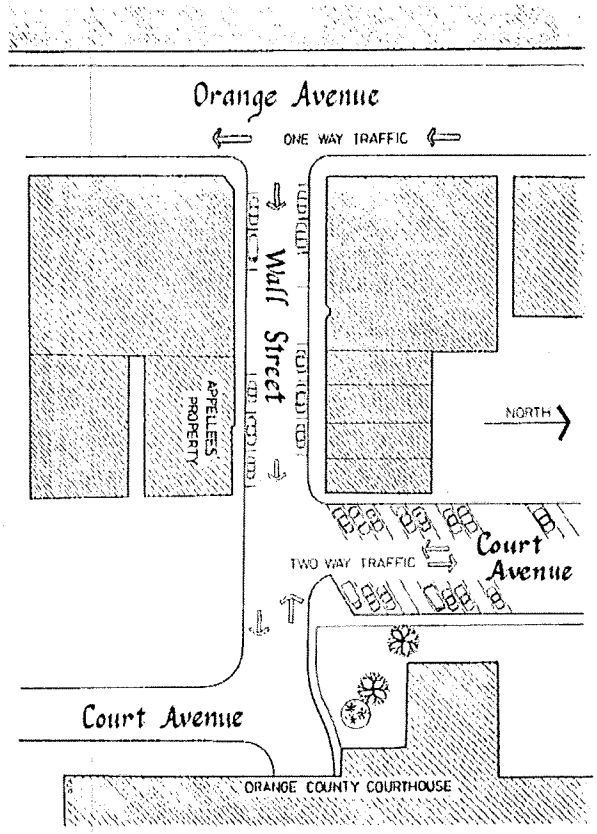
C. J. Cullom of Cullom & Cullom, Orlando, for appellees.

Opinion

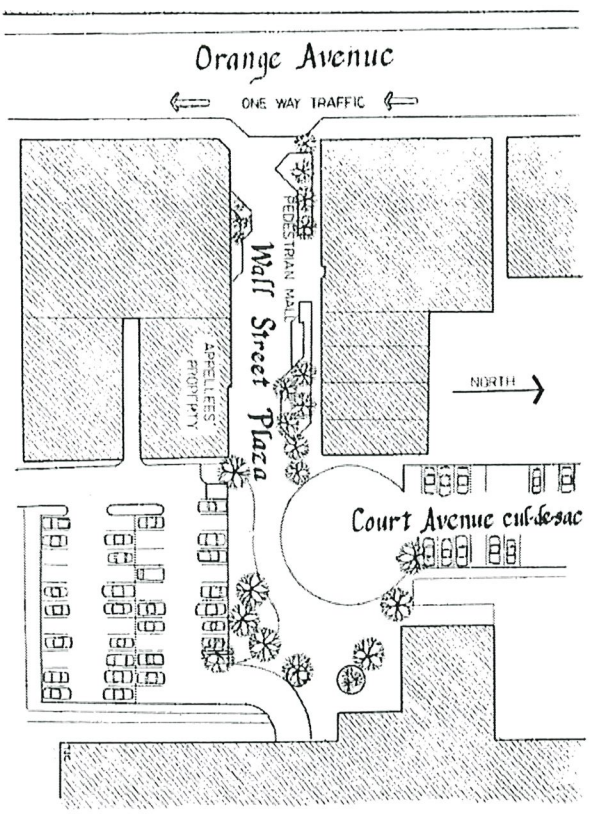
DAUKSCH, Chief Judge.

This is an appeal from a final order enjoining appellant from obstructing a street in Orlando and requiring the appellant to either compensate appellees for the past obstructions or restore the street to its prior configuration.

The city closed a street known as Wall Street and made a pedestrian mall and plaza of the area. The street before its demise looked like this and was a one-way street ***514** headed westerly and was approximately 300 feet long. Parking was available to vehicles and traffic flowed from Orange Avenue to Court Avenue.



The plan for the mall which was constructed looked like this and as can be seen, effectively blocks the free flow of vehicular traffic, permits no vehicular parking and ***515** allows appellees and all others no right to vehicular access without special permit. [1]



The question on appeal is whether the governmental authority took from these individual ***516** citizens a valuable property right for which the citizens are entitled to compensation. More succinctly, the question is whether the restriction of vehicular traffic past the point of appellees' building is such a taking.

In answering the question, we consider the general proposition that the right of access to one's property is a valuable right which cannot be taken without compensation. Even a serious diminishment is a taking and must be paid for. State v. Stubbs, 285 So.2d 1 (Fla.1973); Anhoco v. Dade, 144 So.2d 793 (Fla.1962); Pinellas County v. Austin, 323 So.2d 6 (Fla. 2d DCA 1975). However, before a landowner can be compensated for such a loss it must be shown he suffered damages peculiar to him and not common to the general public. Pinellas County, id. at 9.

As can be seen from the diagrams, appellees have lost some right to free flow of vehicular travel past their building and parking has been eliminated along this stretch of Wall Street but they still have access to their property and it has not been seriously diminished, as in Stubbs, Anhoco and Pinellas County. It was said in Pinellas County : "The fact that a person loses his most convenient method of access is not such damage which is different in kind from damages sustained by the community at large where his property has suitable access from another street even though the alternate route is longer." 323 So.2d at 8.

We can find no statute or case law which says abutting property owners have a valuable right to parking spaces in the street they abut. This restriction on parking in a particular street is not a deprivation of a property right for which appellees are entitled to compensation. Rather, as noted in numerous other jurisdictions, a municipality may prohibit parking on its street as an exercise of its police power. City of Phoenix v. Wade, 5 Ariz.App. 505, 428 P.2d 450 (1967); Snyder v. State, 92 Idaho 175, 438 P.2d 920 (1968); Triplett v. City of Corbin, 269 S.W.2d 188 (Ky.1954); Thomas & Warner, Inc. v. City of New Orleans, 230 La. 1024, 89 So.2d 885 (1956); Farnsworth v. City of Roswell, 63 N.M. 195, 315 P.2d 839 (1957).

Our Supreme Court has just answered the question as to whether a landowner has a compensable interest in traffic flow. Division of Administration v. Capital Plaza, 397 So.2d 682 (Fla.1981). In that case, the government had prevented northbound traffic from entering the landowner's service station by the construction of a solid median down the center of the highway. In that case the court held "that landowners have no compensable interest in traffic flow and that, in order to receive severance damages, any complained-of impairment must result directly from a taking."

In the face of that decision we have no choice but to reverse the order.

REVERSED.

ORFINGER and FRANK D. UPCHURCH, Jr., JJ., concur.

All Citations

400 So.2d 513

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Footnotes

1 By city ordinance a special permit is available to appellees and others if a need is demonstrated.

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741 So.2d 619
District Court of Appeal of Florida,
Fifth District.

Timothy L. MESSETT, Appellant,
v.
Cynthia J. COHEN, a/k/
a Cynthia Cohen, et al., Appellees.

No. 98–3389.
|
Sept. 24, 1999.

Synopsis

Landowner brought action against neighbors and county for declaratory judgment to prevent construction of house on vacant lot. The Circuit Court, Volusia County, Joseph G. Will, J., dismissed complaint. Landowner appealed. The District Court of Appeal, Mihok, A.T., Associate Judge, held that: (1) landowner lacked standing to claim that neighbor's quitclaim deed of vacant lot was invalid, and (2) the landowner had no legally recognizable interest in an unobstructed view and, therefore, lacked standing to challenge the county's decision to permit construction.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss.

Attorneys and Law Firms

***620** Daniel J. Webster, Daytona Beach, for appellant.

Douglas M. Weaver, Assistant County Attorney, Deland, for appellee County of Volusia.

Mary D. Hansen of Storch, Hansen & Morris, P.A., Daytona Beach, for appellee Cohen.

Opinion

MIHOK, A.T., Associate Judge.

Timothy L. Messett appeals the trial court's order dismissing his declaratory judgment action against Cynthia Cohen, Marsha Cohen, and Volusia County. The trial court dismissed Mr. Messett's amended complaint with prejudice finding that he lacked standing to maintain this declaratory judgment action. For the reasons set forth below, we affirm.

By way of amended complaint, Mr. Messett, a landowner at Bethune Beach, filed suit against Cynthia Cohen, Marsha Cohen, and Volusia County. The complaint explained that in 1986 Cynthia Cohen owned two adjoining pieces of property at Bethune Beach. One property was a vacant lot (Cohen lot) and the other property had been developed with a single family residence (Cohen residence). The Cohen property is apparently beachfront. Mr. Messett alleged that before he purchased his property, he investigated the ownership of the Cohen property. [1] He found that Cynthia Cohen held record title to the Cohen residence and Cohen lot and that she had paid the taxes on these properties. He also found that, in May 1992, Cynthia Cohen, as owner, made application to Volusia County for a variance which would have permitted the construction of a stand alone residence on the vacant lot. This application, which drew opposition from adjoining landowners including Mr. Messett's predecessor in title, was withdrawn prior to hearing. Based on his investigation of the ownership of the Cohen properties as well as Volusia County zoning regulations, Messett determined that the Cohen lot was not buildable for a stand alone residence. [2]

***621** The complaint goes on to explain that, in May 1997, Cynthia Cohen, through her attorney, submitted a letter to the County regarding the ownership of the Cohen lot. This letter, for the first time, made public reference to a quit claim deed from Cynthia Cohen to Marsha Cohen regarding the Cohen lot. The quit claim deed evidences an execution date of July 9, 1986, but the deed was not recorded until July 8, 1997. By letter dated June 25, 1997, the County acknowledged that it would recognize the legal opinion set forth in the May 20 letter from Cynthia Cohen's attorney that the Cohen residence and the Cohen lot comply with section 600 of the Volusia County Zoning Ordinance.

The complaint alleged that as a result of the County's June 25 determination, the Cohen lot is likely buildable for a stand alone residence and that the construction of such a residence would "obstruct the view of the Messett property and substantially damage and irreparably harm Messett." In its prayer for relief, the complaint requested the trial court to adjudicate and declare (1) whether Cynthia Cohen's quit claim deed conveying the vacant lot to Marsha Cohen was invalid, and (2) whether the action of the County authorizing Marsha Cohen to develop the vacant lot was improper. [3] The Cohens and Volusia County filed motions to dismiss the amended complaint, arguing that Mr. Messett lacked standing to pursue his claims for relief. The trial court granted the motions and dismissed the amended complaint with prejudice.

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A motion to dismiss a pleading seeking affirmative relief tests the legal sufficiency of the pleading. *See Augustine v. Southern Bell Tel. & Tel. Co.*, 91 So.2d 320 (Fla.1956). It admits all well-pleaded allegations of the pleading to which it is directed and asserts that the pleading does not state a cause of action on the grounds specified. *See Connolly v. Sebeco, Inc.*, 89 So.2d 482 (Fla.1956). More specifically, as related to the instant case, the "test of the sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining such a declaratory decree of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all." *Florida State Board of Dispensing Opticians v. Bayne,* 204 So.2d 34, 36 (Fla. 2d DCA 1967).

Mr. Messett sought a declaration from the trial court as to whether the quit claim deed which purported to transfer ownership of the vacant lot from Cynthia Cohen to Marsha Cohen in July 1986 was valid. The trial court determined that the allegations set forth in the complaint failed to demonstrate that Mr. Messett possessed standing to challenge the validity of the deed. The trial court was correct.

Section 86.021 of the Florida Statutes (1997) pertains to actions filed for declaratory relief relating to a deed:

> **86.021 Power to construe.—**
>
> Any person claiming to be interested or who may be in doubt about his rights under a deed ... or whose rights, status, or other equitable or legal relations are affected by a ... deed ... may have determined any question or construction or validity arising under such ... deed ... and obtain a declaration of rights, status or other equitable or legal relations thereunder.

§ 86.021, Fla.Sta. (1997). In construing the meaning of this provision, the second district has ruled that "before a party can bring suit under this statute he must claim some rights under the deed which he seeks to have construed." *City of Pinellas Park v. Matthews*, 355 So.2d 475, 476 (Fla. 2d DCA 1978). *See also Bowden v. Seaboard* ***622** *Air Line R. Co.*, 47 So.2d 786 (Fla.1950); *Winters v. Alanco, Inc.*, 435 So.2d 326 (Fla. 2d DCA 1983). Here, Mr. Messett does not claim to be a party to the Cohen deed, nor is he claiming any right under the deed. He merely claims that he possesses an interest which derives from his status as being the owner of the property which is apparently located across the road from the Cohen properties. Based upon the facts alleged in the amended complaint, the trial court properly concluded that Mr. Messett lacked standing to pursue his claim for declaratory relief against the Cohens because the complaint fails to assert a claim of any right "under the deed which he seeks to have construed." *City of Pinellas Park v. Matthews*, 355 So.2d at 476.

Mr. Messett's amended complaint also set forth a claim for declaratory relief against the County. The allegations of the complaint focus solely upon the County's June 25, 1997 determination that the Cohen properties do not fall within the parameters of section 600.01 of the County's land development code for purposes of development. In its prayer for relief, the complaint requests the trial court to adjudicate and declare that the County's action violated Mr. Messett's due process rights to receive notice and a hearing.

The relevant issue here is whether Mr. Messett possesses the requisite standing to challenge the due process provisions of the County's land development code. Mr. Messett claims that, as a neighboring property owner, he should have been given notice and an opportunity to be heard before the County issued its opinion, in letter form, concluding that the Cohen properties do not fall within the parameters of section 600.01 of the County's development code for purposes of development. In asserting his claim, Mr. Messett defines his injury as being that, if the Cohen lot is developed, such development would "obstruct the view of the Messett property and substantially damage and irreparably harm Messett."

"A private citizen can seek redress for a violation of a municipal ordinance where he or she proves special damages differing in kind from the damages suffered by the community as a whole." *See Kagan v. West,* 677 So.2d 905, 908 (Fla. 4th DCA 1996). In explaining this "special damages" exception, our supreme court has stated:

> An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can,

> as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good shared in common with all citizens.

Renard v. Dade County, 261 So.2d 832 (Fla.1972). *See also Citizens Growth Management Coalition of West Palm Beach, Inc. v. City of West Palm Beach, Inc.*, 450 So.2d 204 (Fla.1984). Thus, in order for Mr. Messett to demonstrate that he possesses standing to pursue a declaratory judgment action against the County, he is required to articulate a legally recognizable interest which is or will be affected by the action of the zoning authority.

As noted above, Mr. Messett's only asserted injury was his claim that if the Cohen lot is developed such development would "obstruct the view of the Messett property and substantially damage and irreparably harm Messett." However, a claim of "obstructed view" does not constitute a "legally recognizable interest." *See Town of Indialantic v. Nance*, 400 So.2d 37, 41 (Fla. 5th DCA 1981), *app'd*, 419 So.2d 1041 (Fla.1982) (holding that in the absence of some contractual or statutory obligation, a landowner has no absolute legal right to unobstructed air and light from the adjoining land.); *Fontainebleau* ***623** *Hotel Corp. v. Forty–Five Twenty–Five, Inc.*, 114 So.2d 357 (Fla. 3d DCA 1959) (holding that even at common law, the landowner had no legal right in the absence of an easement to unobstructed light and air from the adjoining land). Accordingly, since the only injury alleged in the amended complaint was the obstruction of his view, the trial court was correct in dismissing Mr. Messett's claim against the County for lack of standing.

AFFIRMED.

DAUKSCH and PETERSON, JJ., concur.

All Citations

741 So.2d 619, 24 Fla. L. Weekly D2222

Footnotes

1 The complaint avers that Mr. Messett owns two lots also located on Bethune Beach, but the complaint does not establish where the lots are located with regard to the Cohen lots or whether the lots are developed. Since Mr. Messett has characterized his injury as one of "obstructed view," we assume that at least a portion of the Messett property lies across the road from the Cohen property.

2 Mr. Messett's conclusion was based on the concept of "unity of title." He determined that under County zoning regulations, if Cynthia Cohen held title to both the Cohen lot and Cohen residence throughout 1986, she could not build on the Cohen lot without first obtaining a variance.

3 Mr. Messett is obviously concerned that the quit claim deed which purports to negate "unity of title" in Cynthia Cohen may not be legitimate. After the deed was accepted by the County, Messett asserts that Marsha Cohen can develop the lot without obtaining a variance.

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400 So.2d 37
District Court of Appeal of Florida, Fifth District.

TOWN OF INDIALANTIC, Brevard County, Florida, a Municipal Corporation, and Clayton Test, Jr., Mayor-Chairman, Gus Carey, Kay Kovac, Barbara Willey, and Charles Settgast, as Members of the Town Council, Town of Indialantic, Florida, Appellants,

v.

James H. NANCE, as Trustee, Appellee.

No. 80-389.
|
May 20, 1981.
|
Rehearing Denied June 23, 1981.

Synopsis

City appealed from decision of the Circuit Court, Brevard County, A. J. Hosemann, Jr., Roger F. Dykes, and Joe A. Cowart, Jr., JJ., which granted property owner's petition for certiorari and ordered city to grant property owner's requested variance. The District Court of Appeal, Cobb, J., held that: (1) evidence supported conclusion by city that property owner, who desired to construct a six-story building in violation of city's zoning restrictions, did not suffer the requisite hardship to entitle him to a zoning variance, and (2) facts that nonconforming motel north of property owner's land materially blocked his view to the north, and that the possibility of a motel to the south threatened his view in that direction did not entitle property owner to a height variance in construction of a building on his property, as such fact did not constitute the hardship required to support such a variance.

Reversed and remanded with instructions.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***37** Edward J. Silberhorn of Reinman, Harrell, Silberhorn, Moule & Boyd, P. A., Melbourne, for appellants.

Joseph S. Gillin, Jr. of Storms, Krasny, Normile, Dettmer & Gillin, P. A., Melbourne, for appellee.

Opinion

***38** COBB, Judge.

The Town of Indialantic (Indialantic) denied appellee Nance's request for a zoning variance based on hardship. A three-judge circuit court panel sitting in review of Indialantic's decision granted Nance's petition for certiorari and ordered Indialantic to grant the requested variance. Indialantic appeals the final judgment of the circuit court, and we reverse.

In July, 1978, Nance purchased Lots 8 and 9 of Indialantic-By-The-Sea, the two contiguous lots in question. The property was oceanfront property, bounded to the north by an existing three-story motel and to the south by six contiguous lots owed in whole or in part by Nance. The motel to the north, built before mean high-water and dune set-backs were required, is nonconforming to the extent that a portion of it lies east of the dune line. Over three hundred feet to the south on Lots 14 and 15, a contractual restriction required a motel to be built, if anything.

In August, 1978, Nance submitted a plan with Indialantic's Zoning Board, proposing construction of dual, three-story buildings. The two buildings were to provide a total of twenty-four dwelling units. Because of the plan's vagueness and also because it lacked the requisite number of off-street parking units, the Zoning Board rejected the plan suggesting that Nance file for a variance with Indialantic's Board of Adjustment.

Other than the parking deficiency, the dual three-story plan met all other Indialantic zoning requirements, including a thirty-five-foot height restriction. The Zoning Board was required to deny the site plan, however, because it lacked the authority to grant a variance as to the parking deficiency.

Instead of filing an application for a parking variance on the dual three-story proposal, Nance applied to the Board of Adjustment for a height and parking variance for a single six-story building. Though containing twenty-four dwelling units, the same as the original plan, the six-story proposal provided four less parking units than the already parking-deficient original plan. The Board of Adjustment rejected Nance's six-story plan, finding, among other things, that Nance had not demonstrated hardship, nor had he demonstrated the property at issue to be of an unusual nature. [1]

Nance appealed the Board's decision to Indialantic's Town Council. [2] During the Town Council hearing, Nance argued that Indialantic's set-back, breeze-way parking, and landscape requirements, the state coastal, set-back restriction, [3] the

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narrow shape of the subject property, the existence of the three-story motel to the north, and the requirement that a motel be built, if anything, three hundred feet to the south (on land also owned by Nance), combined to create such a hardship that he should be granted a height and parking variance. When questioned by council members, Nance admitted being aware of the thirty-five-foot height restriction at the time he purchased Lots 8 and 9. Nance's architect admitted that the single six-story building would be less expensive to construct than the dual, three-story version. The council unanimously rejected Nance's hardship contention, and denied the requested height and parking variances. [4]

Subsequent to the Town Council's rejection, Nance petitioned the Circuit Court of Brevard County for review of the council's decision. [5] The circuit court found that the height restriction combined with other Indialantic ***39** zoning requirements to create an unusual and unnecessary hardship to Nance, and that the hardship was not self-created. Finding additionally that the variance requested did not violate any conditions or limitations to the granting of the variance, [6] the court reversed Indialantic's rejection of the six-story plan, and ordered Indialantic to grant Nance's application for variance. Indialantic petitioned this court for writ of certiorari to review the circuit court's decision; we treat the petition for certiorari as a timely notice of appeal. [7]

On appeal, Indialantic argues four points. Because of our holding today, it is unnecessary to consider the final three. Indialantic first argues that the Town Council's rejection of Nance's plan was "fairly debatable," requiring the circuit court below to affirm the Council's decision. Nance agrees that the "fairly debatable" standard is the correct test where an appellant seeks a zoning change or a change in use, but maintains the "fairly debatable" test does not apply when one seeks a variance from a zoning ordinance. Nance contends that the correct standard of review in this case is whether he, as variance seeker, established "unique or unnecessary hardship."

The "fairly debatable" rule is a rule of reasonableness; it answers the question of whether, upon the evidence presented to the municipal body, the municipality's action is reasonably based. Wolff v. Dade County, 370 So.2d 839 (Fla.3d DCA 1979), cert. denied, 379 So.2d 211 (Fla.1979); Central Bank & Trust Co. v. Board of County Commissioners of Dade County, 340 So.2d 503 (Fla.3d DCA 1976), cert. denied, 354 So.2d 979 (Fla.1977). The primary purpose of the "fairly debatable" test is to allocate decision-making authority over zoning matters between the legislative municipal body and the judiciary. J. Juergensmeyer and J. Wadley, Florida Zoning Attacks and Defenses, s 4.2 (1980). See: Broward County v. Capeletti Brothers, Inc., 375 So.2d 313, 316 (Fla.4th DCA 1979), cert. denied, 385 So.2d 754 (Fla.1980). The test purports to prevent the court from substituting its judgment with regard to zoning ordinance enactments for that of the zoning authority. 375 So.2d at 316; 370 So.2d at 842. In other words, the "fairly debatable" test was created to review the legislative-type enactments of zoning ordinances. Under the "fairly debatable" test, the reviewing court must uphold the ordinance so long as a reasonable basis exists to support the zoning ordinance (assuming no constitutional violations).

In a strict sense, then, Nance correctly argues that the "fairly debatable" test is limited to the review of a municipality's "legislative" zoning decisions. However, we do not agree with Nance's contention that the proper standard of review in zoning variance cases is "unique and unnecessary hardship." [8] Unique and unnecessary hardship cannot be a standard of review. It is the category, the end-result, in which the variance seeker attempts to place himself in order to qualify for the variance. A standard of review must supply the reviewing court with guidelines it can use to determine the propriety of the municipality's decision that classified the variance seeker as either a hardship or non-hardship. The propriety of the municipality's decision must be determined by examining the evidence presented to it; the standard of review establishes the quantum and quality of evidence that will make a zoning variance determination irreversible by the reviewing court. Utilizing unique and unnecessary hardship as a standard of review simply begs the question of whether the evidence presented to the municipal body reasonably demonstrated unique and unnecessary hardship. We decline to follow the majority holding in ***40** Allstate Mortgage Corp. of Florida v. City of Miami Beach, 308 So.2d 629 (Fla.3d DCA 1975), cert. denied, 317 So.2d 763 (Fla.1975), and agree with Judge Pearson's dissent in that case, which maintained that the proper standard of review in a zoning variance case is whether the lower tribunal had before it competent substantial evidence to support its findings. DeGroot v. Sheffield, 95 So.2d 912 (Fla.1957). [9]

At issue in DeGroot was the proper method and scope of review of a quasi-judicial county board determination. 95 So.2d at 914. The DeGroot court held that where, as in the present case, notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing,

the action is judicial or quasi-judicial. Id. at 916. The DeGroot court further held that the proper method of review in such cases is by certiorari, and that the scope of review was limited:

> The (reviewing) 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 must also accord with the essential requirements of the law.

Id. at 916. The court then explained that "competent substantial evidence" was evidence a reasonable mind would accept as adequate to support a conclusion. Id. at 916.

The DeGroot "competent substantial evidence" standard of review of quasi-judicial action effectively provides the same standard the "fairly debatable" test provides for review of legislative municipal zoning action: For the action to be sustained, it must be reasonably based in the evidence presented. The two concepts have been blurred; for example, in Bell v. City of Sarasota, 371 So.2d 525 (Fla.2d DCA 1979), the court utilized both the competent substantial evidence standard and the "fairly debatable" standard to decide a zoning variance issue. In Bell, the city's board of adjustment granted the requested minimum land variance and the city sought review in the circuit court, alleging a lack of substantial competent evidence to sustain the board's finding; the circuit court reversed the grant. The Second District reversed the circuit court and reinstated the board's decision, finding substantial competent evidence to justify the board's action and finding the conflicting evidence also made the board's decision fairly debatable. 371 So.2d at 527.

By whatever name it is called, the task of the court reviewing a zoning variance decision is to insure that the authority's decision is based on evidence a reasonable mind would accept to support a conclusion. Compare DeGroot, 95 So.2d at 916, with Wolff v. Dade County, 370 So.2d at 841-842. If there was such evidence presented, the authority's determination must stand. Martin v. First Apostolic Church, 321 So.2d 471 (Fla.4th DCA 1975). A prerequisite to the granting of a hardship zoning variance is the presence of an exceptional and unique hardship to the individual landowner, unique to that parcel and not shared by other property owners in the area. City of Miami v. Franklin Leslie, Inc., 179 So.2d 622 (Fla.3d DCA 1965). In the instant case, the evidence reasonably supports Indialantic's conclusion that Nance did not suffer the requisite hardship. The lots at issue are typical of Indialantic oceanfront lots in size, shape and topography; the town's height, set-back, breezeway, parking, and landscape requirements, as well as the state coastal construction set-back restriction, apply equally to all beachfront property situated in Indialantic. Indialantic's zoning restrictions are common difficulties shared by all other oceanfront lot owners in the area, and are therefore not the unique hardship required to support a variance.

Additionally, Nance possessed a viable, dual, three-story plan that, with the exception of the parking deficiency, met all Indialantic ***41** zoning requirements, including the height restriction. Nance never presented this plan to the Board of Adjustment, the body vested with the authority to grant such variance. The viability of this dual three-story plan itself illustrates a lack of hardship.

Nance, however, maintains that the motel to the north and the possibility of a motel being built three hundred feet to the south make his land unique. He contends that the non-conforming motel materially blocks the view to the north, and the possibility of a motel to the south threatens his view in that direction, and that this entitles him to a height variance. In ordering the variance to be granted, the circuit court placed central emphasis on the uniqueness of Nance's asserted lack of view.[10] We find the circuit court erred by considering the impaired view to be such a hardship that reversal of the determination by the Town Council was mandated as a matter of law. In the absence of some contractual or statutory obligation, a landowner has no absolute legal right to unobstructed air and light from the adjoining land. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla.3d DCA 1959), cert. denied, 117 So.2d 842 (Fla.1960).

The evidence before the Town Council reasonably supported its conclusion that Nance does not suffer the unique and unnecessary hardship required for the issuance of a variance. The circuit court erroneously substituted Indialantic's reasonable finding that Nance suffers no legal hardship with its own finding that he does. Absent an abuse of discretion or a clearly erroneous decision, Indialantic's decision should not have been set aside by the circuit court. Bell v. City of Sarasota, 371 So.2d 525 (Fla.2d DCA 1979); Alachua County v. Reddick, 368 So.2d 653 (Fla.1st DCA 1979); City of Naples v. Central Plaza of Naples, Inc., 303 So.2d 423

(Fla.2d DCA 1974). Such did not exist in the present case. We reverse the circuit court below and remand the case to it with directions to reinstate Indialantic's decision.

REVERSED and REMANDED with instructions.

DAUKSCH, C. J., and ORFINGER, J., concur.

All Citations

400 So.2d 37

Footnotes

1 Indialantic, Fla., Zoning Code s 28-102 (1977), gives the Board of Adjustment the authority to grant a variance in such cases where additional requirements are met.

2 Appeal of Board decisions to the Town Council is provided by section 28-107, Indialantic Zoning Code (1977).

3 s 161.053, Fla.Stat. (1977).

4 Indialantic acted consistent with past beachfront height-variance denials: The Town had never previously granted a variance from the thirty-five-foot height restriction on beachfront property.

5 Such review by certiorari is authorized by Article V, Section 5, of the Florida Constitution.

6 Indialantic, Fla., Zoning Code s 28-102(2), (4) (1977).

7 Fla.R.App.P. 9.040(b).

8 In support of this position, Nance cites, Allstate Mortgage Corp. of Florida v. City of Miami Beach, 308 So.2d 629 (Fla.3d DCA 1975), cert. denied, 317 So.2d 763 (Fla.1975). For the reasons discussed hereinafter, we reject this view.

9 We note that the Allstate court failed to cite its own precedent of Shaughnessy v. Metropolitan Dade County, 238 So.2d 466 (Fla.3d DCA 1970), which used a combination "fairly debatable"/"competent substantial evidence" test to leave undisturbed the action of a county board that granted a special use. 238 So.2d at 468-469.

10 In its decision, the circuit court stated:

> The plight of (Nance) is due to unique circumstances and conditions in that he will be deprived of a view of the ocean because of the three-story structure extending to the dune line on the north and the motel restriction imposed on the property to the south. The difficulty or hardship of (Nance) is special or unique and perculiar (sic) to the application of the height restriction to his property and not general in character.

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518 So.2d 311
District Court of Appeal of Florida,
Fifth District.

FLORIDA MINING & MATERIALS CORPORATION, etc., Petitioner,
v.
CITY OF PORT ORANGE, etc., et al., Respondents.

No. 87-919.
|
Dec. 3, 1987.
|
Rehearing Denied Jan. 14, 1988.

Synopsis

Certiorari review was sought of a circuit court order upholding denial of application for special exception to construct a cement batch plant in a district zoned for light industry. The District Court of Appeal, Cobb, J., held that denial, on ground that cement trucks would have to use residential streets, was arbitrary in light of large trucks from other businesses in the district which were permitted to use the residential streets.

Certiorari granted.

Sharp, J., filed dissenting opinion.

Attorneys and Law Firms

***311** James S. Morris of Coble, Barkin, Rothert, Gordon, Morris, Lewis & Reynolds, P.A., Daytona Beach, for petitioner.

Christopher W. Wickersham, Sr., of Becks, Becks & Wickersham, Daytona Beach, for respondents.

Opinion

COBB, Judge.

The petitioner, Florida Mining and Materials Corporation, seeks certiorari review of a circuit court order upholding a determination by the City of Port Orange to deny its application for a special exception to construct a cement batch plant in a city district zoned for light industry. The relevant zoning ordinance in effect at the time of petitioner's application provided:

SECTION 720.00: LIGHT INDUSTRIAL (LI) DISTRICT.

720.01 *PURPOSE AND INTENT:* The purpose and intent of the Light Industrial district is to provide sufficient space in appropriate locations for limited industrial operations engaged in the fabricating, repair, or storage of manufactured goods of such value that no objectionable by-products of the activity (such as odors, smoke, dust, refuse, electro-magnetic interference, noise in excess of that customary to loading, unloading and handling of goods and materials) are noticeable beyond the lot on which the facility is located.

720.02 *PERMITTED USES:* Manufacturing, processing, storage and distribution of goods and materials using processes and practices that do not involve hazardous materials, as defined by the Port Orange Fire Department, or result in impacts on adjoining properties as defined above. Also:

Airport and related activities

Bus garage and repair shop

Contractor's shop

Greenhouses, commercial, wholesale, retail

Laundries and linen services

Lumber yard

Motor vehicle towing and impoundment

Public utility station

***312** Truck and freight transfer terminal

Truck repair

Warehouse

Yacht repair

720.03 *ACCESSORY USES:* Accessory uses customarily incidental to the permitted principal uses.

720.04 *SPECIAL EXCEPTIONS:*

Flea Market (See Section 902.13)

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> Any manufacturing, processing, storage, or distribution of goods and materials not specifically allowed under Section 720.02 may be allowed by Special Exception.

Because a cement plant was not specifically designated a permitted use in the light industrial district under this zoning ordinance, petitioner applied for a special exception. The city's planning director was concerned about a potential traffic problem that might be caused by the cement trucks leaving the plant; petitioner's property is located more than ¾ of a mile from an arterial roadway, Dunlawton Boulevard, and the cement trucks leaving petitioner's property would have to travel on residential streets to reach Dunlawton. The city's planning director recommended denial of the special exception, and also listed certain conditions that would have to be met by petitioner before the special exception would be minimally acceptable. As to the traffic problem, the planning director recommended that petitioner provide intersection improvements at Dunlawton Boulevard and the access road to it, Spruce Creek Road.

Following the planning director's recommendations, petitioner agreed to pay $15,000 to the city for installation of improvements at the intersection of Dunlawton Boulevard and Spruce Creek Road. At the hearing before the planning commission, the planning director stated that the noise factor and most other concerns had been sufficiently addressed by petitioner, but the traffic problem still remained. The planning commission recommended denial of the special exception request and the city council subsequently voted unanimously to follow the planning commission's recommendation. The circuit court denied the initial petition for writ of certiorari, stating that the council's decision was supported by competent and substantial evidence.

Petitioner argues that the circuit court did not apply the correct law because its application for the special exception met all of the applicable criteria of the relevant zoning ordinance. Petitioner cites cases which hold that once the requirements for a special exception have been met, the zoning authority must grant the special exception unless it finds that such would adversely affect the public interest. *See Odham v. Petersen,* 398 So.2d 875 (Fla. 5th DCA 1981), *approved,* 428 So.2d 241 (Fla.1983); *Rural New Town, Inc. v. Palm Beach County,* 315 So.2d 478 (Fla. 4th DCA 1975).

The city argues that the potential traffic problem was the major reason it determined that the cement plant would adversely affect the public interest. The city council apparently concluded that the proposed road improvements would not neutralize the adverse impact on the nearby residential neighborhood.

In *Irvine v. Duval County Planning Commission,* 495 So.2d 167 (Fla.1986), the Supreme Court of Florida held that once the burden shifts to the zoning authority to prove that the special exception request adversely affects the public interest, the zoning authority must meet its burden by presenting competent, substantial evidence at a hearing, and such evidence must be made part of the record. Since petitioner was willing to follow the planning director's recommendations to make the special exception request acceptable, the burden shifted to the city to prove that the special exception would adversely affect the residential neighborhood. Although the city referred to the increased traffic on the nearby residential streets that would occur if the special exception were granted, the record shows that there are presently businesses in the light industrial district using large trucks which travel ***313** on the nearby residential streets. For example, there is a beer distributor (Daytona Budweiser) and a battery company (Polychem) which use large tractor-trailer trucks with a licensed gross vehicle weight of 80,000 pounds. The licensed gross vehicle weight of petitioner's cement trucks is 64,000 pounds.

The significant fact is that the zoning district where petitioner's property is located is zoned for light industry. The city has created its own problem by zoning a light industrial district so near a residential area, with residential streets providing the only means of access to the main arterial road network. The city's decision to deny the special exception request was arbitrary in light of the large trucks from the other businesses which are permitted to use the nearby residential streets.

The granting or withholding of a permit to engage in a legitimate business should not depend on the whim or caprice of the permitting authority. *See Effie, Inc. v. City of Ocala,* 438 So.2d 506 (Fla. 5th DCA 1983), *review denied,* 444 So.2d 416 (Fla.1984). One of the findings that the city must make before granting a special exception, according to its own zoning ordinance, is that the "traffic generated and its access and flow to the proposed use shall not adversely impact adjoining properties and the general public's safety." These criteria are vague, and can be used in a discriminating fashion to grant some special exception requests and deny others. In *Drexel v. City of Miami Beach,* 64 So.2d 317 (Fla.1953), the Supreme Court held that an ordinance was void for insufficiency of

standards upon which the city could exercise its discretionary authority. In that case, permits for parking garages could only be issued after a public hearing at which "due consideration" was to be given to the "effect upon traffic." The Supreme Court stated:

> The present ordinance could easily become such an instrument of discrimination by a majority of the concilmen giving what each might think "due consideration" to traffic problems and thereafter denying a permit in one instance while granting a permit in a less meritorious case, though acting conscientiously in both. This would be possible because no uniform rules or regulations are defined to remove the sphere of action from the influences of whim or caprice.

64 So.2d at 319.

Unlike the appellants in *Drexel* and *Effie,* the petitioner in the instant case did not challenge the constitutionality of the city's zoning ordinance. However, the ordinances in all three cases can lead to an inequitable exercise of governmental zoning power due to the vague standards contained therein.

There was not any substantial, competent evidence in the instant case to distinguish petitioner's cement trucks from the other large trucks which use the residential streets; the planning director at the hearing before the planning commission merely stated, "We're still not convinced that the cement trucks don't have a special effect on traffic, compared to other trucks." The attorney for petitioner suggested that the cement trucks might not accelerate as quickly as the tractor-trailer trucks, but indicated that it would be easier for the cement trucks to turn at the main intersection.

The evidence in the record indicates that the proposed cement plant would be a satellite operation; there would be no overnight parking of cement trucks, but there would be a maximum of 18 round trips a day by petitioner's trucks. Normal hours of operation would be from 7:00 a.m. to 4:00 p.m. Petitioner's engineer stated that by using the Institute of Transportation Engineers' trip generation data, it is calculated that a truck terminal, which is a permitted light industrial use under the city's zoning ordinance, would generate ten times the traffic that a cement plant would generate.

***314** We find that the circuit court departed from the essential requirements of law in holding that substantial, competent evidence supported the city's decision to deny the special exception. Certainly there will be an increase in truck traffic on the nearby residential streets if the cement plant is allowed to be built. However, if the city wants to limit the use of large trucks on the nearby residential streets, it must utilize some uniform restriction applicable to all businesses whose large trucks travel on those residential streets.

Accordingly, we grant certiorari, quash the order of the circuit court, and remand for further proceedings consistent with this opinion.

CERTIORARI GRANTED.

DAUKSCH, J., concurs.

SHARP, J., dissents with opinion.

SHARP, Judge, dissenting.
I would deny the petition for writ of certiorari. Sufficient evidence in the record supports the zoning authority's refusal to grant the special permit. Its denial was based on the adverse impact of cement trucks making a maximum of eighteen round-trips (or 36 trips) per day through a residential neighborhood.

Thus, in my view, the circuit court's order upholding the City's determination that granting the special exception would be contrary to the public interest does not represent a substantial departure from the essential requirements of law in this case, [1] and it should not be overturned. Certiorari should not be "used as a vehicle to obtain a second appeal." [2]

Petitioner concedes that the cement trucks are large vehicles that will be heavily loaded on at least half of the trips to and from the cement plant through the neighborhood. Noise and safety hazards will necessarily result from such traffic. In addition, the City established adverse effects from the projected wear and tear on Oak Street and Oak Place, which were designed to carry light residential traffic. It could also infer potential danger from the incompatibility of such traffic

with pedestrians and bicyclists. Finally, the intersection with the arterial road at Spruce Creek and Dunlawton, where the trucks will exit the neighborhood, was described as "overburdened." Even with modification of the intersection, the city council found sufficient adverse impact to deny the permit.

The main thrust of petitioner's argument is that there are tractor trailers operating out of the industrial district where the cement plant will be located which are slower and heavier than the proposed cement trucks, and that they already have adversely impacted the residential neighborhood. Petitioner argues it would be unfair and arbitrary not to allow its trucks to add to the traffic congestion. However, the record shows there are presently only *three* tractor trailers operating out of the park, and there is no record basis to conclude the additional cement trucks will not have a substantial adverse impact due to their size and number.

Perhaps the City's location of the industrial district without adequate arterial access roads was bad judgment. However, having made one mistake, it should not be judicially barred from recognizing it and attempting to prevent considerable aggravation of the traffic problem. To hold that ***315** nothing now can be done to limit traffic, completely removes "traffic generated and its access and flow" as a consideration for denying a special exception, despite the wording of the ordinance.[3] That is an extraordinary view and one at odds with the body of zoning law.[4]

All Citations

518 So.2d 311, 12 Fla. L. Weekly 2736

Footnotes

1 *City of Ormond Beach v. State ex. rel. Del Marco,* 426 So.2d 1029 (Fla. 5th DCA 1983); *The Florida Companies v. Orange County, Florida,* 411 So.2d 1008 (Fla. 5th DCA 1982).

2 *Combs v. State,* 436 So.2d 93, 96 (Fla.1983); *Henshaw v. Kelly,* 440 So.2d 2 (Fla. 5th DCA 1983); rev. denied, 450 So.2d 486 (Fla.1984).

3 § 901.02 *REVIEW CRITERIA AND REQUIREMENTS:* When reviewing an application for special exception, the Planning Commission and City Council shall consider the following requirements and criteria:

> 1. Traffic generated and its access and flow to the proposed use shall not adversely impact adjoining properties and the general public safety.

4 Anderson, 1 *American Law of Zoning,* § 7.09 (1986).

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114 So.2d 357
District Court of Appeal of Florida,
Third District.

FONTAINEBLEAU HOTEL CORP.,
a Florida corporation, and Charnofree
Corporation, a Florida corporation, Appellants,
v.
FORTY-FIVE TWENTY-FIVE,
INC., a Florida corporation, Appellee.

No. 59–450.
|
Aug. 27, 1959.
|
Rehearing Denied Sept. 23, 1959.

Synopsis

Action to enjoin owners from continuing with construction of fourteen-story addition to their hotel on a beach facing the Atlantic Ocean. The Circuit Court, Dade County, Robert H. Anderson, J., entered an order temporarily enjoining owners from continuing with the construction and they appealed. The District Court of Appeal held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim sic utere tuo ut alienum non laedas, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite.

Reversed with directions.

Attorneys and Law Firms

***358** Sibley, Grusmark, Barkdull & King, Miami Beach, for appellants.

Anderson & Nadeau, Miami, for appellee.

Opinion

PER CURIAM.

This is an interlocuory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the Fontainebleau Hotel, owned and operated by the appellants. Appellee, plaintiff below, owns the Eden Roc Hotel, which was constructed in 1955, about a year after the Fontainebleau, and adjoins the Fontainebleau on the north. Both are luxury hotels, facing the Atlantic Ocean. The proposed addition to to Fontainebleau is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-story tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the Fontainebleau (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; further, that the construction of such addition on the north side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president; and that the construction was in violation of a building ordinance requiring a 100-foot setback from the ocean. It was also alleged that the construction would interfere with the easements of light and air enjoyed by plaintiff and its predecessors in title for more than twenty years and 'impliedly granted by virtue of the acts of the plaintiff's predecessors in title, as well as under the common law and the express recognition of such rights by virtue of Chapter 9837, Laws of Florida 1923 * * *.' Some attempt was also made to allege an easement by implication in favor of the plaintiff's property, as the dominant, and against the defendants' property, as the servient, tenement.

***359** The defendants' answer denied the material allegations of the complaint, pleaded laches and estopped by judgment.

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him, in a memorandum opinion, as follows:

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'In granting the temporary injunction in this case the Court wishes to make several things very clear. The ruling is not based on any alleged presumptive title nor prescriptive right of the plaintiff to light and air nor is it based on any deed restrictions nor recorded plats in the title of the plaintiff nor of the defendant nor of any plat of record. It is not based on any zoning ordinance nor on any provision of the building code of the City of Miami Beach nor on the decision of any court, nisi prius or appellate. It is based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the Fontainebleau will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the Fontainebleau is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief.'

This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. Beckman v. Marshall, Fla.1956, 85 So.2d 552. It means only that one must use his property so as not to injure the lawful *rights* of another. Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034. In Reaver v. Martin Theatres, Fla.1951, 52 So.2d 682, 683, 25 A.L.R.2d 1451, under this maxim, it was stated that 'it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance*.' [Emphasis supplied.]

No American decision has been cited, and independent research has revealed none, in which it has been held that —in the absence of some contractual or statutory obligation —a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land. Blumberg v. Weiss, 1941, 129 N.J.Eq. 34, 17 A.2d 823; 1 Am.Jur., Adjoining Landowners, § 51. And the English doctrine of 'ancient lights' has been unanimously repudiated in this country. 1 Am.Jur., Adjoining Landowners, § 49, p. 533; Lynch v. Hill, 1939, 24 Del.Ch. 86, 6 A.2d 614, overruling Clawson v. Primrose, 4 Del.Ch. 643.

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite. See the cases collected in the annotation in 133 A.L.R. at pp. 701 et seq.; 1 Am.Jur., Adjoining Landowners, § 54, p. 536; ***360** Taliaferro v. Salyer, 1958, 162 Cal.App.2d 685, 328 P.2d 799; Musumeci v. Leonardo, 1950, 77 R.I. 255, 75 A.2d 175; Harrison v. Langlinais, Tex.Civ.App.1958, 312 S.W.2d 286; Granberry v. Jones, 1949, 188 Tenn. 51, 216 S.W.2d 721; Letts v. Kessler, 1896, 54 Ohio St. 73, 42 N.E. 765; Kulbitsky v. Zimnoch, 1950, 196 Md. 504, 77 A.2d 14; Southern Advertising Co. v. Sherman, Tenn.App.1957, 308 S.W.2d 491.

We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. (No opinion is expressed here as to the validity of such an ordinance, if one should be enacted pursuant to the requirements of law. Cf. City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp., Fla.App.1959, 108 So.2d 614, 619; certiorari denied, Fla.1959, 111 So.2d 437.) But to change the universal rule—and the custom followed in this state since its inception—that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in Musumeci v. Leonardo, supra [77 R.I. 255, 75 A.2d 177], 'So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction.'

We have also considered whether the order here reviewed may be sustained upon any other reasoning, conformable to and consistent with the pleadings, regardless of the erroneous reasoning upon which the order was actually based. See

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McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323. We have concluded that it cannot.

The record affirmatively shows that no statutory basis for the right sought to be enforced by plaintiff exists. The so-called Shadow Ordinance enacted by the City of Miami Beach at plaintiff's behest was held invalid in City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp., supra. It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied, across defendants' property, nor any prescriptive right thereto—even if it be assumed, arguendo, that the common-law right of prescription as to 'ancient lights' is in effect in this state. And from what we have said heretofore in this opinion, it is perhaps superfluous to add that we have no desire to dissent from the unanimous holding in this country repudiating the English doctrine of ancient lights.

The only other possible basis—and, in fact, the only one insisted upon by plaintiff in its brief filed here, other than its reliance upon the law of private nuisance as expressed in the maxim *sic utere tuo ut alienum non laedas*—for the order here reviewed is the alleged violation by defendants of the setback line prescribed by ordinance. The plaintiff argues that the ordinance applicable to the Use District in which plaintiff's and defendants' properties are located, prescribing 'a front yard having a depth of not less than one hundred (100) feet, measured from the ocean, * * *,' should be and has been interpreted by the City's zoning inspector as requiring a setback of 100 feet from an established ocean bulkhead line. As noted above, the addition to the Fontainebleau is set back only 76 feet 8 inches from the ocean bulkhead line, although it is 130 feet from the ocean measured from the mean high water mark.

***361** While the chancellor did not decide the question of whether the setback ordinance had been violated, it is our view that, even if there was such a violation, the plaintiff would have no cause of action against the defendants based on such violation. The application of simple mathematics to the sun studies filed in evidence by plaintiff in support of its claim demonstrates conclusively that to move the existing structure back some 23 feet from the ocean would make no appreciable difference in the problem which is the subject of this controversy. Cf. Taliaferro v. Salyer, supra. The construction of the 14-story addition is proceeding under a permit issued by the city pursuant to the mandate of this court in City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp., supra, which permit authorizes completion of the 14-story addition according to a plan showing a 76-foot setback from the ocean bulkhead line. Moreover, the plaintiff's objection to the distance of the structure from the ocean appears to have been made for the first time in the instant suit, which was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, representing the expenditure by defendants of several million dollars. In these circumstances, it is our view that the plaintiff has stated no cause of action for equitable relief based on the violation of the ordinance—assuming, arguendo, that there has been a violation.

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

Reversed with directions.

HORTON, C. J., and CARROLL, CHAS., J., and CABOT, TED, Associate Judge concur.

All Citations

114 So.2d 357

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241 So.3d 181
District Court of Appeal of Florida, Fourth District.

OCEAN CONCRETE, INC.
and George Maib, Appellants,
v.
INDIAN RIVER COUNTY, BOARD OF COUNTY COMMISSIONERS, Appellee.

No. 4D16–3210
|
[March 14, 2018]

Synopsis

Background: Landowner and his concrete company brought action against county for a violation of the Bert J. Harris, Jr. Property Rights Protection Act, regulatory taking, and violation of their due process rights after county denied their application to develop and run a concrete batch plant following a change to the zoning code from a light industrial zone to a general industrial zone. After a joint jury and bench trial, the 19th Judicial Circuit Court, Indian River County, No. 312007CA011589, Cynthia L. Cox, J., entered judgment for county. Plaintiffs appealed.

Holdings: The District Court of Appeal, Damoorgian, J., held that:

the planned concrete plant was an existing use under the Act;

use of property as a concrete plant was per se compatible with the surrounding land uses; and

plaintiffs' investment-backed expectations were reasonable.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Judgment.

***183** Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Indian River County; Cynthia L. Cox, Judge; L.T. Case No. 312007CA011589.

Attorneys and Law Firms

Stephen B. Burch, Geoffrey D. Smith and Susan C. Smith of Smith & Associates, Melbourne, for appellants.

Paul R. Berg of Vocelle & Berg, L.L.P., and Dylan Reingold, Vero Beach, for appellee.

Opinion

Damoorgian, J.

Appellants, Ocean Concrete, Inc. and its principal, George Maib, appeal a final judgment entered in favor of Indian River County (the "County") in Appellants' property rights related lawsuit against the County. The substance of this appeal is comprised of the following issues: (1) whether the court erred in its conclusion that Appellants failed to prove entitlement to relief under the Bert J. Harris, Jr. Property Rights Protection Act;[1] (2) whether the court considered irrelevant factors in reaching its conclusion that the County did not effectuate a regulatory taking of Appellants' property interests; and (3) whether the court made certain evidentiary rulings which require a retrial on Appellants' procedural due process violation claim. We affirm the second and third issues without further comment. As for the first issue, we conclude that the trial court reversibly erred and remand for further proceedings.

Factual Background

In 2002, Mr. Maib began formulating a plan to develop and run a concrete batch plant in the Treasure Coast area. A key element of the plan was acquiring a parcel of land with railway access which would ***184** allow him to keep costs down by importing raw material in bulk via freight train. With this is mind, Mr. Maib scouted the subject land, an 8.5+ acre parcel located near the city limits of the City of Sebastian in Indian River County. The parcel was zoned light industrial ("IL") under the County's zoning code which, at that time, provided that concrete batch plans were an allowed use in IL zoned districts. The lands surrounding the parcel, however, were primarily zoned for residential and limited commercial use. An aerial view of the parcel showed that the surrounding land was undeveloped.

In 2004, Mr. Maib entered into a contract to purchase the property for $575,000 with a 120 day inspection period. Mr. Maib retained an engineer to ascertain the feasibility of developing a concrete batch plant on the property. The engineer testified that after reviewing all relevant documents, he had no concerns about the feasibility of the project from either an engineering or development standpoint. The engineer drafted a conceptual, pre-application site plan for

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County review. Mr. Maib and his engineer attended a meeting with County planning staff where the staff represented that a concrete batch plant was a permitted use as a matter of right under the zoning code and provided feedback about the project. Mr. Maib and his engineer left the meeting believing that the development of the plant was feasible and that none of the feedback from the planning staff would prohibit the development. Based on the foregoing, Mr. Maib purchased the property.

In 2005, Mr. Maib filed a site plan application for review by the County's Technical Review Committee ("TRC"). The TRC responded to the application in writing by listing out several "discrepancies" which needed to be addressed before moving forward with the application. The TRC's discrepancy letter also noted that a concrete batch plant was a permissible use of the property as a matter of right, the discrepancies were not significant, and that no second TRC meeting would be required for reconsideration of the application. Mr. Maib then underwent efforts to remedy those discrepancies and also began improving the property. Specifically, Mr. Maib obtained permits to install storm water systems, installed wells, cleared and graded the property, planted a landscape buffer, and began to install a rail spur. He also formed Ocean Concrete, Inc., began developing a detailed business plan, and sought out financing for the project. During this process, Mr. Maib realized that it was going to take an additional two years to meet all of the technical requirements for approval of the site plan. Therefore, he let the site plan application expire in November of 2006 with the intent of filing a new site plan application and requesting a one year extension. Mr. Maib filed a new site plan application on December 6, 2006.

Thereafter, the TRC issued another discrepancy letter identifying the discrepancies in the site plan application which Mr. Maib was required to address, in writing, before proceeding. This discrepancy letter again noted that the "site is zoned IL, Light Industrial. Concrete batch plants are a use permitted by right in the IL district" and that "the discrepancies do not appear to be significant, therefore, no second TRC meeting will be required for reconsideration of the proposal." Mr. Maib continued to address the discrepancies but, as he did, the project began garnering public and governmental opposition.

The nearby City of Sebastian issued a resolution imploring the County to deny approval for the proposed Ocean Concrete project. Around this same time, a group of citizens formed an organization called "Stop Ocean Concrete." The leader of this ***185** organization appeared at a Board of County Commissioners ("BCC") meeting and asked the BCC to amend the zoning code to eliminate heavy process uses from the IL zoning district. The BCC then directed the planning staff to analyze the issue and shortly thereafter, the County's planning director issued a memo recommending that the BCC change the zoning code to "restrict industrial uses such as concrete plants and paper mills that process large quantities of materials, produce dust and noise, and have outdoor activities to the IG (General Industrial) district." At its next meeting, the BCC voted to have the staff change the zoning code as recommended.

Following the BCC's vote, County staff began the process of amending the zoning code. Inevitably, the impact of any changes on Mr. Maib's existing site plan application was a point of heavy discussion. A May 8, 2007 memo written by a senior planner noted:

> The Ocean Concrete project is opposed by many residents of Sebastian and the north county, as evidenced by petitions and letters of objection submitted to staff. That project's application will expire on December 6, 2007 if it is not approved by that date. Because that site plan application is active, changes to the IL district regulations will not affect that application unless special effective date provisions are added to the amendment ordinance. At this time, the County Attorney has not issued an opinion as to whether or not the county can legally apply the proposed amendment to an existing application. The proposed changes will certainly affect applications to develop IL zoned sites submitted after the changes are adopted.

During this time and unbeknownst to Mr. Maib, the county attorney and the planning director were engaged in a discussion about whether the proposed change to the zoning code would apply to the Ocean Concrete project. After the attorney opined that the change would apply to the project, the Planning and Zoning Commission voted to recommend

approval of the changes to the zoning code. Thereafter, the BCC unanimously voted to adopt the amendments to the zoning code "void of any exception or merit for grandfathering of vested rights."

Appellants filed a declaratory action in the circuit court seeking clarification of their rights to proceed under the site plan application. They also filed a request for a one year extension with the County on their pending application. The County denied the extension and based on the expiration of the application, denied Appellants' application. Appellants administratively appealed and amended their declaratory action complaint to add a cause of action for violation of the Harris Act. Appellants' administrative appeals were denied, causing Appellants to file a petition for writ of certiorari with the circuit court sitting in an appellate capacity. The circuit court determined that the County must either grant the extension, state a valid reason for denial, or deny the site plan on its merits. The BCC voted to grant Appellants a one year extension under the "old code" provisions.

Following the reinstatement of Appellants' application, the County staff approved the site plan application under the old zoning code conditioned on a finding by the Community Planning Director of a vested right of development under the old code. The Community Planning Director, found that there was no vested right and denied Appellants' site plan application under the new code. Mr. Maib appealed the denial to the Planning and Zoning Commission but, while his appeal was pending, lost the property to foreclosure. The Planning and Zoning Commission then dismissed ***186** Appellants' appeal as moot. At this point, Appellants added a cause of action for a regulatory taking and violation of their due process rights to the declaratory action.

The matter proceeded to a simultaneous bench/jury trial with the court considering Appellants' regulatory taking, Harris Act, and substantive due process claims and a jury considering the procedural due process claim. At trial, Appellants presented expert testimony from a real property appraiser and construction business valuators. Appellant's experts valued the property with a completed concrete batch plant at $10 million. In turn, the County presented its own experts who opined that market value of the property before the zoning amendment was $1 million and that the change in the zoning amendment only reduced the property's value by 3.5%. The County also presented evidence to support its contention that operating a concrete batch plant on the property was not economically feasible.

At the conclusion of the trial, the jury found that the County did not violate Appellants' procedural due process rights. The trial court found that Appellants did not prove that the County effectuated a regulatory taking, violated the Harris Act, or violated Appellants' substantive due process rights. Holding that the court erred in finding no violation of the Harris Act, we reverse and remand.

Analysis

The Harris Act was enacted by the Florida Legislature in 1995 as a mechanism to protect and compensate any landowner whose property is affected by government action not rising to the level of a taking. §°70.001(1), Fla. Stat. (1995). To prevail under the Harris Act, the property owner must prove that "a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property." § 70.001(2), Fla. Stat. (2008). Accordingly, when a claim under the Harris Act is presented for judicial review, the court must first consider whether a claimed "existing use of the real property" or a claimed "vested right to a specific use of the real property" actually existed. If it finds either, it must next determine whether the government action inordinately burdened the property. § 70.001(6)(a), Fla. Stat. If the court also finds that that there was an inordinate burden, then it must impanel a jury to determine the total amount of compensation to the property owner for the loss caused by the inordinate burden to the property. § 70.001(6)(b), Fla. Stat. The party seeking relief under the Harris Act bears the burden of proof. *See Town of Ponce Inlet v. Pacetta, LLC*, 120 So.3d 27, 29 (Fla. 5th DCA 2013).

In this case, the court found Appellants did not establish that the use of the property as a concrete batch plant was an existing use. Alternatively, it found that the County's actions did not inordinately burden the property. We review these determinations de novo. *City of Jacksonville v. Coffield*, 18 So.3d 589, 594 (Fla. 1st DCA 2009).

a) Existing Use

The term "existing use" is defined by the Harris Act as:

> [1] an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or

> [2] such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the ***187** property greater than the fair market value of the actual, present use or activity on the real property.

§ 70.001(3)(b), Fla. Stat. (2008) (spacing and numbers added).

Because a concrete batch plant did not exist on the property, the court applied the second part of the "existing use" definition. Neither of the parties contend that this was improper. With this parameter in mind, the court then found that because a concrete batch plant was a permitted use as a matter of right under the County's old zoning code, it was a reasonably foreseeable use of Appellants' property. However, the court went on to find that a concrete batch plant was not a non-speculative use. This finding was rooted in economics, and more particularly, the court's determination that the project was not financially viable. The court also concluded that the use was not compatible with adjacent lands. For the reasons set forth below, we hold that the court's non-speculative use and compatibility analysis was legally incorrect.

i) Reasonably Foreseeable, Nonspeculative Use

Applying a plain language reading analysis to the statute leads us to conclude that the term relates to whether the actual **land use** is nonspeculative without concern to economics. The phrase "nonspeculative" appears in the definition of "existing use" as follows:

> "reasonably foreseeable, nonspeculative land uses ..."

§ 70.001(3)(b), Fla. Stat. (2008).

The noun in the above phrase is "land uses." The terms "reasonably foreseeable" and "nonspeculative" are adjectives modifying the noun "land use." Thus, based on the grammatical structure, the key inquiry for the court is whether a concrete batch plant, as a **land use**, was foreseeable and nonspeculative at the time the County amended its zoning code. Notably, at least one appellate judge has arrived at the same conclusion. In his dissent in *City of Jacksonville v. Smith*, 159 So.3d 888, 913 (Fla. 1st DCA 2015),[2] Judge Makar wrote:

> The point of subsection 2 [within the existing use definition] is not to preclude "speculation" in the financial sense; if that were the case, no privately-held real property would qualify because land ownership always involves an element of financial risk. Instead [the definition] is designed to limit possible future land uses to only those that are within reason, i.e., "reasonably foreseeable" and "nonspeculative." Stated differently, future uses that are merely theoretical or hypothetical do not qualify; they are speculative in the sense of these two terms.

The plain language of the Harris Act is clear: the term "nonspeculative" refers to the land use and, therefore, a "nonspeculative use" analysis really only comes into play when a party is arguing that it may have been able to use its land in the future for a purpose not expressly provided for by the zoning code at the time of the government action. Conversely, when the use was expressly provided for, as it was here, there is no need for a speculation analysis. Accordingly, based on the plain language of the Act, the court erred ***188** in concluding that a concrete batch plant was not a nonspeculative land use when making its "existing use" determination.[3]

ii) Compatible with Adjacent Land Uses

In addition to finding that Appellants did not meet the "nonspeculative land use" prong of the "existing use" definition under the Harris Act, the court also found that Appellants failed to establish that a concrete batch plant was compatible with adjacent land uses at the time the code was amended. The court's conclusion was based on the fact that the land west of the property and half of the land south of the property was zoned for residential use. Although much of that land remained vacant, the court concluded that based on east to west wind patterns, the residential areas would experience noise and dust pollution from the property if it was developed into a concrete batch plant. The court also gave weight to the County's determinations during the code amendment process that "heavy process uses such as concrete

plants which involve outdoor storage and handling of large quantities of material that result in noise and dust impacts are more compatible with and appropriately located in IG [General Industrial] districts, removed from concentrations of residential areas and separated from commercial uses and light 'clean' industry."

It is axiomatic that if an area is zoned for a particular use, that use is deemed compatible with surrounding uses. *See Nostimo, Inc. v. City of Clearwater*, 594 So.2d 779, 781 (Fla. 2d DCA 1992) (holding that use of property was compatible with surrounding or adjacent uses because it was a permitted use under the zoning code). Before the County amended the code, concrete batch plants were a permitted use on Appellants' property. Therefore, the use of the property as a concrete batch plant was *per se* compatible with the surrounding land uses. With this in mind, none of the County's evidence established that anything about the adjacent land uses changed between the time the old IL zoning description was created and the time it was amended. Accordingly, the court erred when it concluded that a concrete batch plant was not an "existing use" for the property because a concrete batch plant was not compatible with adjacent land uses at the time the code was amended.

b) Inordinate Burden

The Harris Act provides that the terms "inordinate burden" or "inordinately burdened" mean:

> ***189** [T]hat an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large....

§ 70.001(3)(e), Fla. Stat. (2008).

Here, although the court denied Appellants relief under the Harris Act based on its existing use analysis, it also cursorily addressed the inordinate burden prong of a claim under the Act, ruling that Appellants could not demonstrate a "reasonable, investment-backed expectation." The court's ruling on this point referenced its takings ruling, wherein the court found that Appellants did not establish that they had a reasonable, investment-backed expectation in developing a concrete batch plant because the "property contained site-specific conditions that entailed significant practical and financial impediments to its development as a concrete batch plant."

There are only two reported cases interpreting the phrase "reasonable, investment-backed expectations" in the specific context of the Harris Act. This Court's opinion in *Palm Beach Polo, Inc. v. Village of Wellington*, 918 So.2d 988 (Fla. 4th DCA 2006), provides the most guidance. In that case, a developer made a Harris Act claim with respect to a wetland nature preserve which a local government required the developer to "restore, enhance, and preserve" as part of a Planned Unit Development. *Id.* at 990. On appeal, we held that the developer's claim under the Act was "frivolous" because, based on the physical characteristics and regulatory history of the preserve, there could be no reasonable expectation that the preserve would be used for anything other than conservation. *Id.* at 995. Citing our holding in *Palm Beach Polo, Inc.*, the First District later found that a landowner did not have a "reasonable, investment-backed expectation" of developing a parcel of land into a multi-family development after he learned that the only road leading to and from the property was being permanently closed. *Coffield*, 18 So.3d at 595, 599. These cases establish that whether a landowners expectations for development are "reasonable" and "investment-backed" depends on the physical and regulatory aspects of the property.

Despite the foregoing authority, the court relied on case law from the takings context when analyzing whether Appellants had a "reasonable, investment-backed expectation" of developing the property as a concrete batch plant. The court did so because the term "investment-backed expectations" is found in the test articulated by the United States Supreme

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Court for regulatory takings. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Although, based on the foregoing, it would seem reasonable to rely on takings cases, the Harris Act itself proclaims that it is "separate and distinct ... from the law of takings" and, to that end, also provides that "[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking." §§ 70.001(1); 70.001(9), Fla. Stat. (2008). Thus, we hold that the court's reliance on federal takings cases as opposed to Florida law interpreting the Harris Act was misplaced.

***190** Applying the applicable law, nothing about the physical or regulatory aspects of the property at the time of the government regulation made Appellants' expectations for the development of a concrete batch plant unreasonable. A concrete batch plant was a permitted use under the zoning code as a matter of right and throughout the site-plan approval process, Mr. Maib was led to believe that approval was inevitable. Further, Mr. Maib obtained the services of an expert engineer who told him that the development was feasible. Finally, the property abutted a railroad and Mr. Maib was able to install a spur to facilitate the importation and exportation of materials. That the overall undertaking may have been expensive and a significant task does not invalidate the fact that, based on the property itself, Appellants' investment-backed expectations were reasonable.

Based upon the foregoing, we reverse and remand this matter for a trial on damages suffered by Appellants under the Harris Act.

Affirmed in part, reversed in part and remanded.

Taylor and May, JJ., concur.

All Citations

241 So.3d 181, 43 Fla. L. Weekly D577

Footnotes

1 The Bert J. Harris, Jr. Property Rights Protection Act is codified in section 70.001 of the Florida Statutes (2008). For purposes of this opinion, it will be referenced to as the "Harris Act."

2 Our citation to the dissent in *Smith* is in no way meant to distinguish the majority holding as it is not applicable to the instant case. In *Smith*, the majority held that a landowner whose property abutted a vacant lot rezoned to allow a fire station was not entitled to relief under the Harris Act because the landowner's property "was not itself subject to any governmental regulatory action." 159 So.3d at 889. Based on this holding, the court did proceed to engage in an existing use or inordinate burden analysis under the Harris Act.

3 *See* David L. Powell, Robert M. Rhodes & Dan R. Stengle, *A Measured Step to Protect Private Property Rights*, 23 Fla. St. U. L. Rev. 255 (1995). Discussing the definition of the term "existing use" at play in the Harris Act the authors (who happened to work on the legislation), stated:

> As a legal concept for an existing land use, the alternative definition is well-grounded in the law of eminent domain. In a condemnation proceeding, valuation of the property is based upon the highest and best use. The highest and best use is not limited to those uses authorized under the existing land development regulations. If on the date of taking there is a reasonable probability of a land use change, that probability may be taken into account in determining valuation. An important factor in determining the highest and best use of property is whether the property is suitable for that proposed future use. However, such a future use may not be wholly speculative....

> The proof necessary to establish that a future land use is reasonably foreseeable could come from such authorities as an adopted local comprehensive plan, local land development regulations, or a credible appraisal which relies at least in part on nonexisting but reasonably expected future uses.

Id. at 267–68 (footnotes omitted).

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Chapter 33 - MINOR AND MAJOR SITE DEVELOPMENT REGULATIONS

Any person aggrieved by the department responsible for land development services' interpretation may appeal to the Zoning Board of Appeals. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the interpretation renders the property without reasonable use. The granting of any appeal shall not be in conflict with State Statutes and City Codes. The Zoning Board of Appeals' decision may be appealed to the Circuit Court of Sarasota County within thirty (30) days of such decision.

Applications for an appeal shall be filed pursuant to Sec. 1-10.

ARTICLE III. BOARDS AND DUTIES

Sec. 1-28. Zoning Board of Appeals (ZBA).

F. Filing of appeals; hearing; stay of proceeding; assistance. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) Filing of appeals. Appeals to the Zoning Board of Appeals concerning interpretation or administration of these zoning regulations or for variance under these zoning regulations may be taken by any person aggrieved or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the department responsible for land development services.

(a) Such appeals shall be taken within a reasonable time not to exceed fifteen (15) days or such lesser period as may be provided by the rules of the Board, by filing with the Director of the department responsible for land development services and with the Board a notice of appeal specifying the grounds thereof.

(b) The Director shall forthwith transmit to the Zoning Board of Appeals all papers constituting the record upon which the action appealed from was taken.

(2) Withdrawal of appeal.

(a) The application may be withdrawn at any time prior to the publication of Notice of Hearing.

(b) The withdrawal of an application that has been placed on an agenda for public hearing may be requested to be withdrawn no later than five (5) days prior to any official meeting of the Zoning Board of Appeals. Such request for withdrawal of an application for hearing must be delivered in writing to the Board liaison.

(3) Continuance.

(a) A continuance may be requested by an applicant or staff demonstrating that the continuance is necessary to provide rebuttal testimony or to provide time to review documentary evidence.

(i) The applicant may seek a continuance administratively, with consent of the Chair, prior to the distribution of the meeting agenda for petitions that do not require legal advertisement.

(ii) A maximum of three (3) applicant initiated continuances may be granted for any one (1) petition whether granted administratively or by the Board.

(iii) Any petition that requires publication in a newspaper of general circulation, must be filed in writing twenty-one (21) days prior to the public hearing.

(b) The Board may continue the public hearing on its own initiative, upon finding that any testimony, documentary evidence, or other evidence presented at the quasi-judicial hearing justifies allowing time for additional research or review for the benefit of the Board, to assist in an appropriate resolution of the matter being presented.

(i) A continuance initiated by the Board will not be charged against the allowable continuances permitted under these regulations.

(c) The Board shall order a continuance at any time the Board determines the scheduling or timing of the pending application warrants a continuance to another date or time, but is not obligated to grant a continuance.

(4) Hearing. The Zoning Board of Appeals shall fix a reasonable time for the hearing of the appeal, give public notice thereof as well as due notice of the parties in interest and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

(a) If the applicant does not appear, refuses to proceed, or cannot proceed, the application shall be deemed denied.

(i) An applicant may seek relief by sending a third party to request continuance at the published meeting.

[1] If the applicant seeks to request relief by a third party, the Applicant shall submit a signed affidavit specifying the person's name, address with a copy of the petition prior to the meeting.

(b) If an application is deemed denied, no further application for a variance of any type for the subject property shall be filed within one (1) year of such denial.

(c) If an application for an administrative appeal is denied, it shall be deemed denied with prejudice.

(5) Financial and staff assistance. The Zoning Board of Appeals may be provided by the City Commission with such professional and financial assistance as may be deemed necessary to enable the Zoning Board of Appeals to perform the functions assigned to it by these zoning regulations.

(6) The cancellation of any meeting of the Zoning Board of Appeals is at the Chair's discretion.

G. Powers and duties. The Zoning Board of Appeals shall have the following powers and duties: [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) Administrative review. To hear and decide appeals where it is alleged there is error in any order, decision or determination of the Director responsible for land development services in the enforcement of these zoning regulations.

H. Reversal of decision of Department responsible for Land Development Services Directors. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) In exercising the above-mentioned powers, the Zoning Board of Appeals may, so long as such action is in conformity with the terms of these zoning regulations, reverse or affirm, wholly or partly, or may

modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as sought to be made, and to that end shall have the powers of the Department responsible for land development services from whom the appeal is taken.

(2) In matters of review, the concurring votes of a majority of the members of the Zoning Board of Appeals present at a meeting shall be necessary to reverse any order, requirement, decision or determination of the Director responsible for land development services, or to decide in favor of the applicant on any matter upon which it is required to pass under these regulations. The final determination of the Zoning Board of Appeals shall be made in writing and shall be made available to the applicant, the City Attorney and the City Manager.

I. Appeals from decisions of Zoning Board of Appeals. Any person or persons, jointly or severally, including any officer, department, board or commission of the City, aggrieved by any decision of the Zoning Board of Appeals may apply to the Circuit Court having jurisdiction in the City of North Port for judicial relief within thirty (30) days after the rendition of the decision by the Zoning Board of Appeals. The proceedings in the Circuit Court shall be by petition for writ of certiorari, which shall be governed by the Florida Rules of Appellate Procedure. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

Sec. 1-30. Zoning hearing officer.

A. *Creation.*

(1) There is hereby established the position of Zoning Hearing Officer (Hearing Officer). One (1) or more Hearing Officers shall be appointed by the City Commission as its Hearing Officer for zoning appeals and variance matters. Should more than one (1) Hearing Officer be appointed the terms of office shall be appropriately staggered and applications shall be equally assigned to Hearing Officers by a rotation system.

B. *Jurisdiction.* In the absence of there being sufficient appointed members of the Zoning Board of Appeals to constitute a quorum, the Hearing Officer shall have the same jurisdiction and authority as the ZBA and shall exercise all powers of the ZBA. Except where the context does not permit, and Section 1-28, references in this ULDC to the ZBA shall also include the Hearing Officer.

D. *Filing of appeals; hearing; stay of proceeding; assistance.*

(1) *Filing of appeals.* Appeals to the Hearing Officer concerning interpretation or administration of these zoning regulations or for variance under these zoning regulations may be taken by any person aggrieved, or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the department responsible for land development services.

(a) Such appeals shall be taken within a reasonable time not to exceed fifteen (15) days or such lesser period as may be provided by the rules of the Hearing Officer, by filing with the Director of the department responsible for land development services and with the Hearing Officer a notice of appeal specifying the grounds thereof.

(b) The Director shall forthwith transmit to the Hearing Officer all papers constituting the record upon which the action appealed from was taken.

(2) *Withdrawal of appeal.*

(a) The application may be withdrawn at any time prior to the publication of notice of hearing.

(b) The withdrawal of an application that has been placed on an agenda for public hearing may be requested to be withdrawn no later than five (5) days prior to any official meeting of the Hearing

Officer. Such request for withdrawal of an application for hearing must be delivered in writing to the Hearing Officer liaison.

(3) *Continuance*.

(a) A continuance may be requested by an applicant or staff demonstrating that the continuance is necessary to provide rebuttal testimony or to provide time to review documentary evidence.

(i) The applicant may seek a continuance administratively, with consent of the Hearing Officer, prior to the distribution of the meeting agenda for petitions that do not require legal advertisement.

(ii) A maximum of three (3) applicant initiated continuances may be granted for any one (1) petition.

(iii) Any petition that requires publication in a newspaper of general circulation, must be filed in writing twenty-one (21) days prior to the public hearing.

(b) The Hearing Officer may continue the public hearing on his/her own initiative, upon finding that any testimony, documentary evidence, or other evidence presented at the quasi-judicial hearing justifies allowing time for additional research or review for the benefit of the Hearing Officer, to assist in an appropriate resolution of the matter being presented. A continuance initiated by the Hearing Officer will not be charged against the allowable continuances permitted under these regulations.

(c) The Hearing Officer shall order a continuance at any time the Hearing Officer determines the scheduling or timing of the pending application warrants a continuance to another date or time, but is not obligated to grant a continuance.

(4) *Hearing*. The Hearing Officer shall fix a reasonable time for the hearing of the appeal, give public notice thereof as well as due notice of the parties in interest, and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

(a) If the applicant does not appear, refuses to proceed, or cannot proceed, the application shall be deemed denied. An applicant may seek relief by sending a third party to request continuance at the published meeting. If the applicant seeks to request relief by a third party, the applicant shall submit a signed affidavit specifying the person's name, address with a copy of the petition prior to the meeting.

(b) If an application is deemed denied, no further application for a variance of any type for the subject property shall be filed within one (1) year of such denial.

(c) If an application for an administrative appeal is denied, it shall be deemed denied with prejudice.

(5) *Financial and staff assistance*. The Hearing Officer may be provided by the City Commission with such professional and financial assistance as may be deemed necessary to enable the Hearing Officer to perform the functions assigned to it by these zoning regulations.

(6) The cancellation of any meeting of the Hearing Officer is at the officer's discretion.

E. *Powers and duties*. The Hearing Officer shall have the following powers and duties:

(1) *Administrative review*. To hear and decide appeals where it is alleged there is error in any order, decision or determination of the Director responsible for land development services in the enforcement of these zoning regulations.

F. *Reversal of decision of department responsible for Land Development Services Director.*

(1) In exercising the above-mentioned powers, the Hearing Officer may, so long as such action is in conformity with the terms of these zoning regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as sought to be made, and to that end shall have the powers of the department responsible for land development services from whom the appeal is taken.

(2) The final determination of the Hearing Officer shall be made in writing and shall be made available to the applicant, the City Attorney and the City Manager.

G. *Appeals from decisions of Hearing Officer*. Any person or persons, jointly or severally, including any officer, department, board or commission of the City, aggrieved by any decision of the Hearing Officer may apply to the Circuit Court having jurisdiction in the City of North Port for judicial relief within thirty (30) days after the rendition of the decision by the Hearing Officer. The proceedings in the Circuit Court shall be by petition for writ of certiorari, which shall be governed by the Florida Rules of Appellate Procedure.

Sec. 1-31. Staff review.

A. Intent. The intent of the Staff review is to ensure all commercial, multi-family, and subdivision developments conform to the provisions of the City of North Port Comprehensive Plan, the standards set forth in the City of North Port Unified Land Development Code, and set forth in the Urban Design Standards Pattern Book and other applicable City codes, policies, and standards to ensure the best possible project for the City and its residents.

B. Establishment. The Staff review is established administratively to review and approve all commercial, multi-family, and subdivision developments applications within the City of North Port.

I. Appeals.

(1) Filing of appeals. Any applicant aggrieved by any decision, determination or requirement of the City staff relating to any actions shall file a written notice of appeal with the appropriate fees with the department responsible for land development services within thirty (30) business days of the written findings and comments in which the petition was addressed specifying, in detail, the error alleged and the factual and legal basis for the appeal. The Department responsible for land development services shall transmit to the Zoning Board of Appeals all papers constituting the record of the findings, determination or requirement that is the subject of the appeal. In the event that the person aggrieved fails to comply with the provisions of this subsection, such failure shall be jurisdictional and the appeal shall be dismissed.

(2) Hearing. The Zoning Board of Appeals shall fix a reasonable time for a meeting to discuss the appeal. After such meeting, the Board shall decide the appeal within a reasonable time. At the appeals meeting, any party may appear in person or by agent or attorney.

(3) Reversal of decision of City Staff.

(a) After an appeal's meeting with the aggrieved person, the Zoning Board of Appeals may, so long as such action is in conformity with the terms of this chapter, reverse or affirm, wholly or partly, or may modify the order, decision or determination appealed from and may make such order, decision or determination as sought to be made, and to that end shall have the powers of the City staff from which that appeal was taken.

(b) The final determination of the Zoning Board of Appeals to which the appeal was heard shall be made in writing and shall be made available to the person aggrieved, all staff reviewers, Administrative Staff, the City Attorney and the City Manager.

(4) Any person aggrieved by the Zoning Board of Appeals' decision may appeal to the Circuit Court may be appealed to the Circuit Court of Sarasota County within 30 days of such decision. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the decision renders the property unbuildable. The granting of any appeal shall not be in conflict with State Statutes and City Codes and Ordinances.

(a) Applications for an appeal shall be filed pursuant to Sec. 1-10.

Sec. 1-10. Appeals. [Amended 11-24-2003 by Ord. No. 2002-56]

A. Types of appeals.

(1) Appeals of interpretation and enforcement.

(a) All appeals for interpretation or enforcement of the Unified Land Development Code will be provided by the department responsible for land development services.

(b) The interpretation of the department responsible for land development services may be appealed to the Zoning Board of Appeals.

(c) The decision of the Zoning Board of Appeals may be appealed to the Sarasota County Circuit Court.

(2) Appeals of administration.

(a) All appeals for administration of the Unified Land Development Code will be provided by the appropriate departments.

(b) The administration decision may be heard first by the Planning and Zoning Advisory Board. After consideration, the Planning and Zoning Advisory Board will give an advisory recommendation to the City Commission.

(c) After review of the Planning and Zoning Advisory Board's recommendation, the City Commission will make a decision on the administrative appeal. The decision of the City Commission may be appealed to the Sarasota County Circuit Court.

B. Filing of appeals. All appeals are to be filed with the department responsible for land development services for processing and procedure.

(1) Interpretation:

(a) Unified Land Development Code. Any person aggrieved by the Director of the department responsible for land development services interpretation of this Unified Land Development Code may appeal to the Zoning Board of Appeals. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the interpretation removes all reasonable uses of the property. The granting of any appeal shall not be in conflict with State Statutes and City Codes. The Zoning Board of Appeals' decision, may be appealed to the Circuit Court of Sarasota County within thirty (30) days of such decision.

(b) Comprehensive Plan. Appeals to the Planning and Zoning Advisory Board concerning interpretation of the Comprehensive Plan may be taken by any person aggrieved or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the Department responsible for land development services. Such appeals shall be taken within a reasonable time not to exceed thirty (30) days or such lesser period as may be provided by the rules of the Board, by filing with the Department and with the Board a notice of appeal specifying the grounds thereof. The Director of the department responsible for land development services shall forthwith transmit to the Planning and Zoning Advisory Board all papers constituting the record upon which the action appealed from was taken. The appeal with all evidence presented to the Board, staff report, and recommendation from the Planning and Zoning Advisory Board shall be forwarded to the Commission for review and action. [Amended 11-24-2003 by Ord. No. 2002-56]

C. Criteria. The criteria for filing an appeal shall be as follows:

(1) Completed appeals application.

(2) A statement of "show of good cause" and alleged error.

(a) This statement shall give a complete explanation and description of the cause of the appeal and the alleged error.

(3) A copy of the interpretation or decision being appealed.

(4) Code reference of what is being appealed.

(5) Address, PID and photos of property affected (if applicable).

D. Hearing.

(1) The Zoning Board of Appeals or City Commission shall fix a reasonable time for the hearing of the appeal, give notice of the hearing to the public and all the parties in interest.

(2) At the hearing, any party may appear in person or by agent or attorney.

(3) After such hearing, the Zoning Board of Appeals or City Commission shall decide the appeal within a reasonable time. So long as such action is in conformity with the terms of this Unified Land Development Code, the Zoning Board of Appeals or City Commission may reverse or affirm, wholly or partly, or may modify the order, decision or determination appealed from and may make such order, decision or determination as sought to be made, and to that end shall have the powers of the department responsible for land development services from which the appeal was taken.

(4) In an appeal, the concurring votes of a majority of the members of the Zoning Board of Appeals or City Commission present at a meeting shall be necessary to reverse any order, decision or determination of the department responsible for land development services or Directors responsible for administration.

(5) The final determination of the Zoning Board of Appeals or City Commission shall be made in writing and shall be made available to the person aggrieved or the officer, board or department affected, the department responsible for land development services, the City Attorney and the City Manager.

E. Stay of proceedings. An appeal stays all proceedings in furtherance of the action from which the appeal was taken; provided, however, that in the event the Director responsible for land development services from whom the appeal is taken and after receipt of the notice of appeal, certifies in writing to the Zoning Board of Appeals or City Commission that a stay would, in the opinion of the Director supported by facts, cause an immediate risk of harm to a person or to property, then the proceedings shall not be stayed; provided, further, however, that in the event that the person aggrieved or any officer, board or department may request, in writing, based on detailed facts, and shows good cause, the Zoning Board of Appeals or City Commission may issue a restraining order staying such proceedings. The Zoning Board of Appeals or City Commission may condition such restraining order on such safeguards and time limits as the Board or Commission may deem appropriate to protect any person or property at risk of harm. [Amended 11-24-2003 by Ord. No. 2002-56]

F. In the interpretation and application of these regulations all provisions shall be considered as minimum requirements, shall be liberally construed in favor of the governing body and shall be deemed neither to limit nor repeal any other powers granted under State statutes.

Sec. 1-29. Planning and Zoning Advisory Board (PZAB).

G. Functions, powers and duties. [Amended 1-22-19 by Ord. 2018-37, § 2.02]

(1) The Planning and Zoning Advisory Board serves as the Local Planning Agency as required by the 1985 Florida Growth Management Act as set forth in the Florida Statutes, Chapter 163, and serving as a Planning and Zoning Advisory Board to the City Commission. The function, powers and duties of the Planning and Zoning Advisory Board in general shall be to:

(e) Determine whether specific proposed developments conform to the principles and requirements of the Comprehensive Plan.

52 So.3d 19
District Court of Appeal of Florida, First District.

KATHERINE'S BAY, LLC, Intervenor, Appellant,
v.
Ronald J. FAGAN and Citrus County, Appellees.

No. 1D10–939
|
Dec. 14, 2010.

Synopsis

Background: Developer sought review of Department of Administration decision approving ALJ's ruling that rezoning of its property from low intensity coastal lakes (CL) to Recreational Vehicle Park/Campground (RVP) was invalid because it rendered the county's comprehensive plan internally inconsistent. Neighboring landowner intervened.

Holdings: The District Court of Appeal, Lewis, J., held that:

assertion that recommendation of the county staff was not given sufficient weight was unreviewable;

ALJ's finding that property had severe environmental limitations was thoroughly supported by the county staff's report;

ALJ's finding of severe environmental limitations was insufficient to justify overriding county's determination that amendment to plan was proper;

ALJ erred by relying on neighboring landowner's testimony concerning impact of rezoning; and

reliance by ALJ on definitions provided in Administrative Code was proper.

Reversed and remanded.

Attorneys and Law Firms

***21** Clark A. Stillwell, Inverness, for Appellant.

Shaw P. Stiller, General Counsel, Department of Community Affairs, Tallahassee, and Denise A. Lyn, Inverness, for Appellees.

Opinion

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 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.

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The subject property is located in a geographic 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:

> **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 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:

> **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%) 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 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:

> 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.
>
> 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 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 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 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:

> 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 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 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 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 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 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 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:

> "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 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 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). Section 163.3187(3)(a) provides for review of amendments adopted under section 163.3187(1)(c) under the following terms:

> 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 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).

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:

> The court shall remand a case to the agency for further proceedings 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 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 "[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 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.

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 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). Another rule of construction relevant to this issue is that all provisions on related subjects be read in pari materia 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, "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:

> 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.
>
> Policy 17.6.12 Recreational vehicle (RV) parks and 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 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:

> 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:

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> 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 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 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 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).

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); *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

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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 the mere fact that property is in close proximity to another property with a less restrictive classification does not require reclassification). Additionally, 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 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.

All Citations

52 So.3d 19, 35 Fla. L. Weekly D2759

Footnotes

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."

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 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 the preservation rule in administrative proceedings).

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560 So.2d 1358
District Court of Appeal of Florida,
Fourth District.

Patricia POLLARD, Petitioner,
v.
PALM BEACH COUNTY, a political subdivision of the State of Florida, Respondent.

No. 88-1827.
|
May 9, 1990.

Synopsis

Owner of residential property applied for special exception to use property as adult congregate living facility for elderly. The Circuit Court for Palm Beach County, William C. Williams, III, J., denied owner's petition for writ of certiorari to review denial of application, and owner petitioned for review. The District Court of Appeal held that opinions of neighbors that proposed use would cause traffic problems, would cause light and noise pollution, and would generally have unfavorable impact on area provided no competent substantial evidence to support denial of petition.

Certiorari granted, order quashed, and matter remanded with instructions.

Stone, J., dissented with opinion.

Attorneys and Law Firms

***1359** Bruce G. Kaleita, West Palm Beach, for petitioner.

Richard W. Carlson, Jr. and Thomas P. Callan, Asst. County Attys., West Palm Beach, for respondent.

Opinion

PER CURIAM.

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 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:

> 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.)

The supreme court, in *De Groot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957), explained in the following language what is

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meant by the term "competent substantial evidence" in the context of certiorari review:

> 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 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 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 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

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> 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.

HERSEY, C.J., and ANSTEAD, J., concur.

STONE, J., dissents with opinion.

***1361** STONE, Judge, 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.

All Citations

560 So.2d 1358, 15 Fla. L. Weekly D1272

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537 So.2d 1040
District Court of Appeal of Florida,
Fifth District.

FLOWERS BAKING CO., etc., Petitioner,
v.
CITY OF MELBOURNE, Respondent.

No. 88-1391.
|
Jan. 5, 1989.
|
Rehearing Denied Feb. 3, 1989.

Synopsis

Applicant petitioned for writ of certiorari, challenging city council's denial of conditional use permit for gasoline pumps and gasoline sales ancillary to proposed convenience store. The District Court of Appeal, Cowart, J., held that objections of local residents to conditional use permit based on fears as to increased traffic did not constitute substantial, competent evidence required to deny application for permit.

Writ granted.

Sharp, C.J., concurred in result only.

Attorneys and Law Firms

***1041** Patricia K. Olney of Spielvogel and Goldman, P.A., Merritt Island, for petitioner.

Andrew A. Graham and Maureen M. Matheson of Reinman, Harrell, Silberhorn & Graham, Melbourne, for respondent.

Opinion

COWART, Judge.

Petitioner applied for a conditional use permit for gasoline pumps and gasoline sales ancillary to a proposed convenience store in the City of Melbourne. Although the applicant agreed to meet the city zoning code's conditional use requirements for service stations, and also agreed to all of the Planning and Zoning Board's stipulations, local residents objected and the city council denied the permit. The applicant's petition to the circuit court for a writ of certiorari was denied.

Once the applicant met the initial burden of showing that his application met the criteria of the city zoning code for granting such a permit, the burden was on the zoning authority to demonstrate, by substantial, competent evidence presented at a public hearing and made part of the record, that petitioner's application did not meet the zoning code requirements and that the requested permit was, in fact, adverse to the public interest. *See Irvine v. Duval County Planning Commission,* 495 So.2d 167 (Fla.1986), *affirming the dissent* of Judge Zehmer in *Irvine v. Duval County Planning Commission,* 466 So.2d 357 at 362 (Fla. 1st DCA 1985). Objections of local residents to the conditional use permit based on fears as to increased traffic do not constitute such substantial, competent evidence. *See BML Investments v. City of Casselberry,* 476 So.2d 713 (Fla. 5th DCA 1985), *rev. denied,* 486 So.2d 595 (Fla.1986).

WRIT GRANTED. REMANDED to the circuit court with instructions to direct the issuance of the conditional use permit.

DAUKSCH, J., concurs.

SHARP, C.J., concurs in result only.

All Citations

537 So.2d 1040, 14 Fla. L. Weekly 141

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675 So.2d 598
District Court of Appeal of Florida,
Third District.

METROPOLITAN DADE COUNTY, etc., Petitioners,
v.
Martin BLUMENTHAL, Trustee, Respondent.

Nos. 94–52, 94–137.
|
June 21, 1995.
|
Order Granting Certiorari on Rehearing En Banc Feb. 21, 1996 and Adopting Judge Cope's Dissent to the Panel Opinion As the Opinion of the Court.
|
Rehearing Denied June 5, 1996.

Synopsis

After county commission denied developer's rezoning application, developer petitioned for writ of certiorari. The Circuit Court, Dade County, Appellate Division, Melvia B. Green, Celeste H. Muir and Judith L. Kreeger, JJ., granted writ. Further review by certiorari was sought. After initially denying petition, the District Court of Appeal, granted certiorari on rehearing en banc and, adopting dissenting opinion of Cope, J., held that Circuit Court applied correct standard of review and committed legal error that failing to limit its determination to whether there was substantial, competent evidence in record to support county commission's decision.

Certiorari granted; judgment quashed, and cause remanded with directions.

Hubbart, J., filed dissenting opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***599** Robert A. Ginsburg, Dade County Atty., Daniel A. Weiss, Asst. County Atty., John G. Fletcher, Miami and Joni Armstrong Coffey and Craig H. Coller, Assistant County Attorneys, for petitioners.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Clifford A. Schulman, Elliot H. Scherker and Reginald L. Bouthillier, Jr., Miami, for respondent.

Shubin & Bass, Miami, for Redlands Citizens Association, Inc. and Bird–Kendall Homeowners' Association, Inc., as amicus curiae.

Before HUBBART, COPE and GODERICH, JJ.

PER CURIAM.

The petitioners, Metropolitan Dade County, West Dade Federation of Homeowner Associations, Inc., Morgan I. Levy, Russell Geyer, and John H. Bechamps, petition for a writ of certiorari to review the decision of the Dade County Circuit Court, Appellate Division, which granted a petition for writ of certiorari on behalf of the respondent, Martin Blumenthal, Trustee [Blumenthal]. We deny the petition.

Blumenthal applied to Metropolitan Dade County to rezone a twenty-acre parcel in West Dade in order to develop a 360 unit apartment complex. The rezoning application requested that the property be rezoned from GU (an interim zoning designation) to RU–4L (Residential Limited Apartment House with a maximum of twenty-three units per acre). Under Dade County's Comprehensive Development Master Plan (CDMP), the parcel is located within an area designated as medium density residential use which permits twenty-five dwelling units per acre. Blumenthal's proposed project, Devon Lakes, would have eighteen units per acre.

The rezoning application was submitted to the county's Developmental Impact Committee (DIC).[1] The DIC's detailed report addressed the impact the project would have on the environment, the economy, transportation, and essential services such as potable water supply, sewer service, police, fire, parks, schools, and solid waste management. ***600** In addition, the DIC's report stated that there is a need for this type of affordable housing in the area.[2] After a thorough review, the DIC found that the requested zoning was consistent with the CDMP and recommended that the property be rezoned as requested.

At the Metropolitan Dade County Commission hearing, Blumenthal's counsel presented evidence and experts in support of the rezoning application. Mr. Martin Tabor, the developer, introduced a map of the area. The map showed that many nearby developments were also zoned as RU–4L. Mr. Tabor also explained that the proposed project meets or exceeds every planning and zoning requirement. In addition to Mr. Tabor's testimony, other experts also testified in favor of the proposed project.

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Counsel for the West Dade Federation of Homeowner Association [Federation] stated that his client objected to an eighteen-unit per acre density, but that it would agree to thirteen units per acre.[3] Morgan Levy, the president of the Federation, explained to the Commission that although nearby developments were zoned RU–4L, the average density for Doral Park, which is located east of the subject parcel, is six units per acre. Levy also explained that the Commission, through prior zoning decisions in favor of the Federation, had established a "trend" of limiting the area east of N.W. 114th Court, where the subject parcel is located, to a density of thirteen units per acre. In order to explain this "trend," Mr. Levy introduced a map of Section 19, the section containing the subject parcels. Section 19 runs from N.W. 117 Avenue to N.W. 107 Avenue, and from N.W. 41 Street to N.W. 58 Street. The subject property borders N.W. 107th Avenue at approximately N.W. 43 Street. The only project within Section 19 is the Mag–Landea project which runs from approximately N.W. 117th Avenue to N.W. 112 Avenue and from N.W. 48 Street to N.W. 51 Street. The Mag–Landea project is approximately eighty acres with an average density of approximately eighteen units per acre; the western forty acres have a density of twenty-three units per acre, while the eastern forty acres (east of N.W. 114th Court) have a density of thirteen units per acre. Mr. Levy argued that the "trend" was to limit the density of any project east of N.W. 114th Court to a density of thirteen units per acre. Therefore, Mr. Levy's evaluation of the zoning "trend" for Section 19 was based only on the Mag–Landea project since the remainder of Section 19 is undeveloped. In addition to Mr. Levy's testimony, Dorothy Posada, a member of the board of directors of the Doral Woods Homeowners Association, stated that the existence of an apartment complex near her development with a density of twenty-three units per acre, has depressed the value of homes in the area.[4]

The Commission denied Blumenthal's rezoning application stating at the hearing that thirteen units per acre was an emerging trend in the area. The Commission's resolution stated that the rezoning "would be incompatible with the neighborhood and area concerned and would be in conflict with the principles and intent of the plan for the development of Dade County."

Thereafter, Blumenthal filed a petition for writ of certiorari to review the Commission's decision. The circuit court, appellate division, ***601** granted the writ finding that the Commission's decision was "arbitrary and not based on substantial competent evidence, as the neighbors' testimony in opposition was conclusionary and without adequate support." This petition for writ of certiorari follows.

As explained in *City of Deerfield Beach v. Vaillant,* 419 So.2d 624 (Fla.1982), this court's scope of review in the instant case is very narrow.

> [W]here full review of administrative action is given in the circuit court as a matter of right, one appealing 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.

Vaillant, 419 So.2d at 626; *see Board of County Comm'rs of Brevard County v. Snyder,* 627 So.2d 469, 476 (Fla.1993). Since the petitioners have not raised the issue of whether the circuit court afforded them procedural due process, the only issue presented is whether the circuit court applied the correct law.

In the instant case, the circuit court applied the correct law when it found that the Commission's decision was not supported by competent substantial evidence. The petitioners argue that this court should reevaluate the circuit court's finding that the Commission's decision was not supported by competent substantial evidence. Under the parameters set forth in *Vaillant,* this court would be exceeding its scope of review if it did.

Although not necessary for our decision, we, nonetheless, are of the opinion that the Commission's decision was not

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based on competent substantial evidence. The Commission's decision was based mainly on the testimony of an objecting neighbor, Morgan Levy. In essence, Mr. Levy testified that a zoning "trend" had been established to limit the density in the subject area to thirteen units per acre. However, Mr. Levy is not an expert on zoning matters and is, therefore, unqualified to testify as to zoning trends. There are instances in which lay persons are just as qualified as expert witnesses to offer their views on certain matters. For example, a lay person is just as qualified as an "expert witness" to testify as to natural beauty. *See Board of County Comm'rs of Pinellas County v. City of Clearwater,* 440 So.2d 497 (Fla. 2d DCA 1983); *see Grefkowicz v. Metropolitan Dade County,* 389 So.2d 1041 (Fla. 3d DCA 1980) (finding that neighboring property owners' testimony that zoning applicants intended to use strictly residential property for commercial use constitutes competent substantial evidence). But lay persons are not just as qualified as expert witnesses to offer their conclusions or predictions as to zoning trends. [5] Moreover, even if Mr. Levy were just as qualified as an expert to testify as to zoning trends, the construction of one or two projects with densities of thirteen units per acre is not sufficient to establish a "trend."

Accordingly, we deny the petition for writ of certiorari because to make a determination as to competency and sufficiency of the evidence presented at the hearing would be an impermissible reevaluation of the evidence and outside the scope of our review.

HUBBART and GODERICH, JJ., concur.

COPE, Judge (dissenting). *

I respectfully dissent. It is clear from the face of the circuit court's opinion that the court applied the incorrect law. Certiorari should be granted. In denying relief, the majority ruling is in conflict with applicable ***602** precedents of this court and other Florida courts.

I.

Respondent Martin Blumenthal, Trustee ("developer") desires to build a 360–unit apartment complex on vacant land in the western area of Dade County, Florida. He applied for a zoning change from its existing GU (Interim) classification to RU–4L (Limited Apartment House). His requested density of 18 units per acre was objected to by homeowners in the general area. After taking testimony pro and con, the County Commission denied the rezoning application without prejudice. The evident consensus of the County Commission was that the density should not exceed 13 units per acre.

The developer petitioned for certiorari in the circuit court. A circuit court panel heard the case and issued a written opinion finding the County Commission decision to be "arbitrary and not based on substantial competent evidence." Circuit court opinion at 3.

Dade County and certain homeowners who participated in the proceedings below ("the homeowners") [1] have petitioned in this court for certiorari. They contend that the circuit court failed to apply the correct law. Their position is well taken.

II.

The proposed apartment site is located in Section 19, a tract of vacant land lying between Doral Park and the Florida Turnpike. Section 19 is an exact square containing one square mile of undeveloped land. Section 19 is bounded on the east by northwest 107th Avenue, on the west by northwest 117th Avenue, on the south by northwest 41st Street, and on the north by northwest 58th Street. The proposed apartment complex, Devon Woods, would be located on 20 acres near the southeast corner of Section 19.

No one opposed the building of an apartment complex on the developer's 20–acre site. The question was whether the requested density of 18 units per acre was appropriate for this location, as the developer contended, or whether the density at this location should be restricted to 13 units per acre, as desired by the homeowners in the area.

III.

To state the obvious, the County Commission in making a zoning decision may legitimately take into consideration the consistency of the proposed project with the adjacent properties and the actual development of the area. *Dade County v. Inversiones Rafamar, S.A.,* 360 So.2d 1130, 1132 (Fla. 3d DCA 1978); Code of Metropolitan Dade County, § 33–311.

The facts of this case are essentially undisputed. In Section 19 the County Commission had already approved a 1,440–

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unit residential subdivision called Mag Landea. Mag Landea faces northwest 117th Avenue and extends inward one-half mile to the middle of Section 19. The average density for Mag Landea is 18 units per acre.

However, the Mag Landea property has two distinct segments. The westernmost segment of Mag Landea ("Mag Landea West") has an authorized density of 23 units per acre and extends into the interior of Section 19 one-quarter mile. The eastern segment of Mag Landea ("Mag Landea East") has an authorized density of 13 units per acre. It extends eastward another quarter mile, to the center of Section 19. Proceeding eastward from Mag Landea, there is a gap of about one-quarter mile of vacant land, following which is the site of the developer's proposed apartment complex.

Thus, in looking at Section 19, these properties can be visualized loosely as a belt, or chain, stretching west-to-east across the middle of Section 19. Moving left to right (west to east), the properties are (1) Mag Landea West, (2) Mag Landea East, (3) vacant land, (4) developer's site (Devon Woods).

The entrance to the proposed apartment complex would be on northwest 107th Avenue. Across the street to the east of the ***603** proposed apartment site is the Doral Golf Course. East of the golf course are low-density golf course homes. [2]

Consequently, the proposed apartment complex is sandwiched between Mag Landea on one side and a low density area of Doral Park on the other. The County Commission had to decide what density was appropriate for the site, considering the other authorized densities in the area.

No one argued that the apartment site should have the low densities prevalent in Doral Park, which were separated from Section 19 by the golf course. The focus instead was on Mag Landea, the nearest neighbor to the west.

The developer's analysis was that Mag Landea should be viewed as having an average density of 18 units per acre. He argued that he was simply seeking the same density that Mag Landea already had. He also argued that a higher density is appropriate on the major transportation arteries. Mag Landea has 23 units per acre fronting on such an artery, northwest 117th Avenue. Since northwest 107th Avenue would also be a major corridor, the developer argued that his 18–unit requested density on northwest 107th Avenue was reasonable and conservative compared to Mag Landea's 23–unit density on 117th Avenue. Somewhat inconsistently, the developer also argued that the Commission should disregard or discount Mag Landea as a precedent, because Mag Landea had agreed to the 23–unit/13–unit split density in order to settle litigation.

The homeowners argued that 13 units per acre was the appropriate figure, rather than 18 units per acre. They pointed out that it is misleading to treat the Mag Landea project as containing 18 units per acre, because that figure is obtained by averaging two very different density levels. The homeowners argued that the density should be the same as the nearest neighbor, Mag Landea East, at 13 units per acre. Mag Landea East was only a quarter mile away from the proposed apartment complex. Counsel for the homeowners pointed out that there had been other applications brought before the Commission for RU–4L zoning in this area, which the County Commission had defeated. [3]

Petitioner Levy introduced without objection a diagram of Section 19 which showed the relationship of Mag Landea to the proposed apartment complex. Petitioner Levy testified:

> This Commission has voted twice on our behalf on the 13 units per acre. As you see over here, the Mag Landea area is in yellow and green. And you voted twice to give them 23 units per acre on the Western 40 acres and 13 units in the green area, green section on the Eastern 40 acres.
>
> I'll take the liberty of drawing a wavy red line down 114th, called 114th Court. It is not built, but that is the center line between those two [tracts] and that is the boundary that you have set. *We hope you maintain 13 units per acre for the rest of this area.*
>
> *Now, we ask you to maintain that [13 units per acre] east of 114th Court.*

(Emphasis added).

After other testimony and closing arguments, the County Commission voted to deny the rezoning. The County Commission's resolution states, "it is the opinion of this Board that the requested district boundary change to RU–4L *would be incompatible with the neighborhood and area concerned* and would be in conflict with the principles and intent of the Plan for the Development of Dade County, Florida, and should be denied without prejudice." (Emphasis added).

***604** IV.

On petition by the developer the circuit court granted certiorari and disapproved the County Commission resolution. The circuit court's reasons for granting certiorari were as follows:

> Although the Commission indicated in rejecting the developer's application that 13 units per acre was an emerging trend in the area, there was no competent substantial evidence to support the Commission's decision to reject the developers amended application. A recent compromise of zoning litigation resulted in approval of a project nearby of 13 units per acre but the maps in evidence failed to show such a trend. The maps in evidence supported the developer's argument that the rezoning was consistent with and required by land uses previously permitted.
>
> ....
>
> From the record, it appears that the decision below is arbitrary and not based on substantial competent evidence, as the neighbors' testimony in opposition was conclusionary and without adequate support.
>
> We grant the petition for writ of certiorari and remand for further proceedings for determination of the proper zoning classification for the developer's property consistent with this opinion.

The circuit court opinion reflects several errors of law. The circuit court's first legal error was in deciding to review the remarks of an individual commissioner, rather than reviewing the written Resolution passed by the Commission.

It is axiomatic that the County Commission speaks through its written Resolution. In this case eight County Commission members participated in the meeting and voted on this Resolution. It is the collective ruling of the Board, as expressed in the County Commission Resolution, which is at issue here. *See Penn v. Pensacola–Escambia Governmental Ctr. Auth.*, 311 So.2d 97, 101 (Fla.1975); *Beck v. Littlefield*, 68 So.2d 889, 892 (Fla.1953).

The County Commission's resolution in this case states in part, "it is the opinion of this Board that the requested district boundary change to RU–4L *would be incompatible with the neighborhood and area concerned....*" (Emphasis added). The legal issue which should have been determined below is whether there was substantial competent evidence to support that finding.

The circuit court opinion incorrectly characterized the County Commission ruling. The court stated in part that "the Commission indicated in rejecting the developer's application that 13 units per acre was an emerging trend in the area...." Circuit Court opinion at 2. The circuit court goes on to say that the evidence "failed to show such a trend."

The Commission made no finding that there was a "trend" emerging in this area. The reference to a "trend" in the area comes from a comment by one of the Commissioners, who seconded the motion to deny the application. The Commissioner stated:

> COMMISSIONER PENELAS: I'm going to second the motion. If I may speak.
>
> I'm not—Jeff, I'm not totally convinced that the rental argument is really the correct argument. I mean that is a [choice] that the developers made to have rental units there. That's not something that necessarily needs to be in the neighborhood. If he chooses to do that he has the right, but that decision should not necessarily become the reason why we should deny 13 units an acre because he won't be able to rent them.
>
> As you know at 13 units an acre he can do anything and everything. That's 13 units or less, including building homes if he wishes to do so.
>
> I also think that we established a very reasonable trend in the area by our previous decisions and I think that we should live up to that and send a very clear message to future developers. That's what we are looking for in the area and that is why I am happy to second the motion.

The Commissioner was certainly entitled to express the view that prior zoning decisions had, in fact, established a trend in that particular area. However, the decision whether to rezone here did not hinge on ***605** establishing the existence or nonexistence of a "trend." What the County Commission actually adopted as its Resolution was a statement that the requested rezoning "would be incompatible with the neighborhood and area concerned."

The legal issue for the circuit court to consider was whether or not there was substantial competent evidence to support

the Commission's resolution. By reviewing the comment of an individual County Commissioner, rather than the Commission's actual written Resolution, the circuit court panel applied the incorrect law. *Penn; Beck.*

V.

The circuit court's next legal error was in misapprehending the legal standard applicable to the rezoning application. The Dade County Code provides that in considering zoning applications, the purposes to be accomplished are, in part, "to provide a comprehensive plan and design to lessen the congestion in the highways; ... to provide adequate light and air; to prevent the overcrowding of land and water; to avoid undue concentration of population; ... with the view of giving reasonable consideration among other things to the character of the district or area and its peculiar suitability for particular uses and with a view to conserving the value of buildings and property and encouraging the most appropriate use of land and water throughout the County." Code of Metropolitan Dade County, § 33–311.[4]

This court has said that in a zoning matter, it is appropriate to consider whether the proposed zoning "is consistent with the properties adjacent to [the to-be-rezoned] property and is consistent with the actual development of the area." *Dade County v. Inversiones Rafamar, S.A.*, 360 So.2d 1130, 1132 (Fla. 3d DCA 1978).

With those considerations in mind, the facts must be reviewed regarding the neighboring properties. It is undisputed that the Mag Landea project had already been rezoned for actual development. The County Commission approved a density of 23 units per acre for the western section located along southwest 117th Avenue and a density of 13 units per acre for the eastern section of Mag Landea. The 13–unit per acre segment of Mag Landea is the closest residential project to the proposed apartment complex, one-quarter mile away. Directly east of the proposed apartment complex is a low-density area of Doral Park, which has a large amount of green space associated with the golf course.

Thus, there was an eminently reasonable basis on which the County Commission could conclude that it had already set a precedent for Section 19 when it approved the Mag Landea project. The County Commission could reasonably decide that the density for the proposed apartment complex should be the same as for the closest approved subdivision, namely, the Mag Landea East 13 units per acre. The County Commission could also reasonably decide that densities should descend from west to east on Section 19, beginning with 23 units per acre along northwest 117th Avenue (Mag Landea West); then drop down to 13 units per acre in the center and east part of Section 19 (Mag Landea and proposed apartment site); then drop down again on the east side of 107th Avenue in the already developed low density area of Doral Park.

That is, in fact, the argument accepted by the County Commission. Obviously, there is substantial competent evidence to support that determination. All of the relevant facts appear without material dispute in the record which was before the County Commission.

Is it permissible to say that there was a "trend" in this area? One can debate whether the approval of the two levels of density in Mag Landea, coupled with the County Commission's turn-down of other high density projects, amounted to a trend. However, there is no legal requirement that there be, or that the County Commission make a finding on, a "trend." What is clear is that the County Commission was attempting to arrive ***606** at a policy for density in this area, and that it ultimately decided to set the density at exactly the same density it had approved for the nearest neighbor, the eastern segment of Mag Landea: 13 units per acre. There is simply no reasonable basis on which to overturn the County Commission's determination.

Could the County Commission have made a different determination on these same facts? Of course it could. The developer made a very respectable argument that his project could be distinguished from the remainder of this area. He contended that his higher proposed density on 107th Avenue was the functional equivalent of Mag Landea's 23–unit density on 117th Avenue. He urged that the apartment complex would blend with a commercial and office area along northwest 41st Street. The developer also argued that the golf course on the east side of northwest 107th Avenue provided a proper buffer between the proposed apartment complex and the residential areas of Doral Park. These are all perfectly reasonable arguments, and if the County Commission had chosen to accept those arguments, there was a factual basis in the record to support such a decision.

The point is that when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice—not the circuit court. *See City of Ft. Lauderdale v. Multidyne Medical Waste*

Management, Inc., 567 So.2d 955, 957–58 (Fla. 4th DCA 1990), *review denied*, 581 So.2d 165 (Fla.1991); *see also City of South Miami v. Meenan*, 581 So.2d 228, 228 (Fla. 3d DCA 1991). The circuit court's role is restricted to ascertaining whether there is substantial competent evidence to support the decision actually made here—the disapproval of the developer's application. *City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.*, 567 So.2d at 957–58.

Once it is recognized that the beginning point is the text of the County Commission Resolution, and once the correct legal standard is applied, it is seen that the County Commission decision is, in fact, supported by substantial competent evidence.

VI.

The circuit panel's next legal error was in saying that "the neighbors' testimony in opposition [to the zoning application] was conclusionary and without adequate support." Circuit court opinion at 3.

To begin with, this is not a case in which the material facts are in dispute. The question in this case boils down to whether the County Commission can hold this proposed apartment complex to 13 units per acre, given that the nearest neighboring tract, Mag Landea East, was also limited to 13 units per acre. The facts—the density at Mag Landea, the requested density on this site, and the densities at Doral Park —were not matters of material dispute. The proximity of the proposed apartment complex to Mag Landea and Doral Park comes directly out of the County staff report which is of record in this case. The density at Mag Landea was first discussed by the developer's counsel in his initial presentation to the County Commission. As the parties went through their respective presentations, no one objected to, or disputed, the testimony of the various witnesses regarding the approved density levels of the various sites in this area. [5]

The circuit court's view is even more remarkable given the fact that the homeowners in this case had retained very experienced zoning counsel, John Fletcher, who regularly practices in this field. The homeowners' counsel was very well qualified to give an analysis of the prior zoning approvals and applications in this area, and did so. Counsel and the President of the Homeowners' Association both presented essentially the same arguments on the zoning in the area.

Leaving all of that aside, it is clear that in rejecting the citizens' testimony the circuit court was laboring under a misinterpretation of Judge Downey's much-cited opinion in *City of Apopka v. Orange County*, 299 So.2d 657 (Fla. 4th DCA 1974). In *City of Apopka* ***607** the Orange County Commission turned down a zoning request for an airport, based on public input which was "in the main laymen's opinions *unsubstantiated by any competent facts.*" 299 So.2d at 660 (emphasis added). The court explained that the purpose of the public hearing is not to conduct an opinion poll, but instead to allow the public to present facts from which the Board may make a decision. *Id.* at 659. " '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 of the application.' " *Id.* (citation omitted).

Under the correct legal standard, citizen testimony in a zoning matter is perfectly permissible and constitutes substantial competent evidence, so long as it is fact-based. *Id.; see also Grefkowicz v. Metropolitan Dade County*, 389 So.2d 1041, 1042 (Fla. 3d DCA 1980). Mere generalized statements of opposition are to be disregarded, but fact-based testimony is not. "[T]he facts disclosed by objecting neighbors should be considered...." 3 Robert M. Anderson, *American Law of Zoning 3d* § 21.28, at 745 (1986). In deciding that the citizen testimony in this case had to be ignored, the circuit court clearly misunderstood *City of Apopka v. Orange County.*

The fact—not opinion—highlighted by petitioner Levy in this case was that the boundary between the east part and west part of Mag Landea falls at 114th Court. No one disputes the accuracy of that fact. Petitioner Levy offered an unobjected-to diagram into evidence which showed the west part of Mag Landea, the east part of Mag Landea, and, further to the east, the proposed apartment complex. No one disputes the fact that the closest approved density to the apartment complex was the eastern segment of Mag Landea at 13 units per acre. Petitioner Levy urged the County Commission to use that density as the relevant benchmark, and to adhere to that density level east of 114th Court.

The citizen testimony in this case was fact-based, and perfectly proper. In reality, there was no dispute as to the material facts of the case in any event. The circuit court misapprehended the law on this point.

VII.

The majority opinion in this court says that the petition for certiorari to this court cannot be entertained because of the limitation on this court's scope of review imposed by *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982). That decision indicates that it is a circuit court function to determine "whether the administrative findings and judgment are supported by competent substantial evidence." *Id.* at 626; *see also Board of County Comm'rs v. Snyder,* 627 So.2d 469, 476 (Fla.1993).

While the majority has correctly stated our scope of review under *City of Deerfield Beach v. Vaillant,* the inquiry does not stop there. This court's scope of review includes the determination of whether the circuit court applied the correct law. 419 So.2d at 626. Here, it is very clear that the circuit court applied the incorrect law.

Furthermore, this court has previously ruled that we may entertain a petition for writ of certiorari where the circuit court has incorrectly applied the law to the facts of the case. *Maturo v. City of Coral Gables,* 619 So.2d 455, 457 (Fla. 3d DCA 1993); *Herrera v. City of Miami,* 600 So.2d 561, 563 (Fla. 3d DCA), *review denied,* 613 So.2d 2 (Fla.1992). "Neither is it sufficient, for the purpose of placing this case beyond review by certiorari, that the circuit court incanted principles of law generally governing cases of this type. We must next determine whether that law has been correctly applied to the facts as they appear in the record." *Herrera,* 600 So.2d at 563.

> It is our responsibility, as part of the judicial review process, to ensure that the Circuit Court has properly applied the law in order to maintain the integrity of the legal system and legal processes. We cannot, and should not, turn a blind eye to an incorrect application of the law. To allow a decision to stand where the correct law was wrongly utilized, simply because that particular law itself was applicable, does ***608** not provide a valid or just reason sufficient to support a legal decision.

Maturo, 619 So.2d at 457.

In a well-reasoned opinion, the Fourth District Court of Appeal granted certiorari review in a case similar to this one, where the issue was whether the trial court applied an incorrect legal standard in deciding that a city commission decision was not supported by substantial competent evidence. *City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.,* 567 So.2d 955 (Fla. 4th DCA 1990), *review denied,* 581 So.2d 165 (Fla.1991). The opinion is worthy of quotation at length because, among other things, the author is Judge Downey—who also wrote the decision in *City of Apopka v. Orange County.* The *City of Fort Lauderdale v. Multidyne* opinion states:

> [The circuit] court in a very thorough, analytical order "reversed" the order of the City Commission, essentially holding that there was not substantial competent evidence adduced before the commission to justify denial of the permit application.
>
> This appears to be a very close case. Nevertheless, following the most recent appellate pronouncements which finetune the respective standards of review in such matters, we are compelled to hold that the wrong standard of review was utilized and resulted in the circuit judge doing what the supreme court charged this court with doing in *Education Development Center, Inc. v. West Palm Beach Zoning Board of Appeals,* 541 So.2d 106 (Fla.1989); that is, he "simply disagreed with the [City Commission's] evaluation of the evidence." *Id.* at 108–109.
>
> In its order the circuit court was careful to acknowledge the teachings of *City of Deerfield v. Vaillant,* 419 So.2d 624 (Fla.1982), delineating the respective standards of review in the circuit and district courts, and *Campbell v. Vetter,* 392 So.2d 6 (Fla. 4th DCA 1980), *rev. denied,* 399 So.2d 1140 (Fla.1981), enjoining the circuit court from reweighing the evidence. Nevertheless, we believe the judge fell into error in his application of the rules set out in those cases. And we hasten to add, that's not hard to do in these cases.
>
> The parties agree that the real issue here is whether there was substantial competent evidence in the record before the City Commission to support its denial of the application.
>
> ....
>
> In all candor, if we were to weigh the professional expertise of one side against the other, Multidyne might well come

> out on top. However, the test is not whether one side produced more experts than the other, but rather whether there was any substantial competent evidence upon which to base the commission's conclusion. Substantial evidence is such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred, *i.e.,* such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *DeGroot v. Sheffield,* 95 So.2d 912 (Fla.1957). To be competent the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. *Id.*
>
> The circuit court frankly stated that it viewed the evidence opposing the permit as incompetent to carry the day against the testimony of Multidyne's experts. However, the opposing witnesses whom Multidyne denigrates were no group of "*Apopka* Witnesses," *i.e.,* local residents who simply wished the facility to be established elsewhere. *See City of Apopka v. Orange County,* 299 So.2d 657 (Fla. 4th DCA 1974). To say that there was no substantial competent evidence to support the commission's determination is to ignore the record. We must therefore conclude that the circuit judge substituted his judgment as to the weight of the evidence for that of the commission, which is contrary to law.

567 So.2d at 957–58. The same reasoning applies to the present case.

All the district courts that have addressed this scope of review issue are in accord that where the circuit court applies an incorrect legal standard and erroneously determines that a zoning decision is not supported by substantial competent evidence, or ***609** where the record is clear that the court has impermissibly reweighed the evidence, then the lower court has departed from the essential requirements of law and certiorari is available to the aggrieved party. *City of Ft. Lauderdale v. Multidyne Waste Management, Inc.,* 567 So.2d at 958; *Maturo v. City of Coral Gables,* 619 So.2d at 457; *Herrera v. City of Miami,* 600 So.2d at 563; *City of Deland v. Benline Process Color Co.,* 493 So.2d 26, 28 (Fla. 5th DCA 1986); *Board of County Comm'rs v. City of Clearwater,* 440 So.2d 497, 499 (Fla. 2d DCA 1983); *Town of Mangonia Park v. Palm Beach Oil, Inc.,* 436 So.2d 1138, 1139 (Fla. 4th DCA 1983), *review denied,* 450 So.2d 487 (Fla.1984); *see also Orange County v. Lust,* 602 So.2d 568, 572 (Fla. 5th DCA) (en banc) (plurality opinion), *review denied,* 613 So.2d 6 (Fla.1992).

In the present case the circuit court applied incorrect legal standards. The legal issues raised by the County and homeowners are well within this court's scope of certiorari review. [6]

VIII.

The majority opinion also says that although the issue is beyond the scope of this court's review, there was no substantial competent evidence to support the County Commission action.

The majority opinion on this point is based on a factual error. The majority opinion states:

> The Commission's decision was based mainly on the testimony of an objecting neighbor, Morgan Levy. In essence, *Mr. Levy testified that a zoning "trend" had been established* to limit the density in the subject area to thirteen units per acre. However, *Mr. Levy is not an expert on zoning matters and is therefore unqualified to testify as to zoning trends.*

Majority opinion at 601 (emphasis added); see also majority opinion at 600.

The problem is that petitioner Levy never used the word "trend" at all. Neither did the homeowners' counsel or the homeowners' other witnesses. The word "trend" appears once in the record before us: in the remarks by Commissioner Penelas at the conclusion of the County Commission hearing.

The majority opinion falls into the same error as that committed by the circuit court: it charges the homeowners with saying something they did not say; charges the County Commission with making a finding it did not make; implies that a finding of "trend" is an essential requirement for this zoning decision; and then overturns the County Commission's resolution on the basis of testimony that was never given, and a finding that was never made. [7]

The majority also suggests that citizens cannot testify about zoning without hiring an expert. That is simply not the law. [8]

IX.

The County Commission resolution in this case stated, quite simply, that "the requested district boundary change ... would be incompatible with the neighborhood and area concerned." The County Commission took the position that this applicant's project should not exceed the same density allowed to the nearest neighbor, Mag Landea East. That is a simple and unassailable determination by the County Commission for which there is ample substantial competent evidence.

For the reasons stated, the circuit court panel applied the incorrect law. Certiorari should be granted. The circuit court order should be quashed and the matter remanded ***610** with directions to reinstate the County Commission Resolution.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, COPE, LEVY, GERSTEN and GODERICH, JJ.

ON REHEARING EN BANC

PER CURIAM.

Upon consideration of this matter en banc, the court grants the petitions for writs of certiorari filed by Metropolitan Dade County, the West Dade Federation of Homeowner Associations, Inc., Morgan I. Levy, Russell Geyer, and John H. Bechamps. We adopt Judge Cope's dissent to the panel opinion as the opinion of the court. We conclude that the issues presented by these petitions are substantial ones and fall within this court's scope of discretionary review as outlined in the Florida Supreme Court's recent opinion in *Haines City Community Development v. Heggs,* 658 So.2d 523, 530–31 (Fla.1995). The judgment of the circuit court is quashed and the cause is remanded with directions to reinstate the county commission resolution.

Certiorari granted.

SCHWARTZ, C.J., and BARKDULL, NESBITT, COPE, LEVY and GERSTEN, JJ., concur.

HUBBART, Judge (dissenting).

I must respectfully dissent. I would deny the petition for a writ of certiorari because, in my view, the circuit court in its appellate decision below did not depart from those requirements of law which are deemed essential to the administration of justice. That is, (1) the circuit court did not deny the petitioner procedural due process, (2) the circuit court did not exceed its jurisdiction in entertaining the cause below, and (3) the circuit court did not commit an error so fundamental in character as to fatally infect the judgment below and render it void as a miscarriage of justice [even assuming *arguendo* that the court was wrong in its decision that there was no substantial competent evidence to support the denial of the respondent's re-zoning application].

I

The Florida Supreme Court in the leading case of *Haines City Community Development v. Heggs,* 658 So.2d 523 (Fla.1995), comprehensively analyzes the standard of review to be employed by district courts of appeal when presented with a petition for a writ of certiorari seeking review of an appellate court decision of the circuit court. Speaking through Mr. Justice Anstead, the Court concludes that the standard of review in cases of this nature is not mere legal error as would be recognized upon the original appeal before the circuit court because the petitioner is not entitled to a second appeal before the district court; consequently, the district court may not determine whether the final judgment or order reviewed by the circuit court was supported by substantial competent evidence, as that issue is solely for the circuit court to determine. *Instead, the Court held that the standard of review before the district court is much higher than upon the original appeal, namely, whether the circuit court departed from the essential requirements of the law. Departure from the essential requirements of the law, in turn, means a departure from those requirements of the law which are deemed essential to the administration of justice, namely, (a) a denial of procedural due process of law by the circuit court, or (b) an improper exercise of jurisdiction in the cause by the circuit court, or (c) the commission of an error by the circuit court, such as applying an incorrect rule of law, which is so fundamental in character as to fatally infect the judgment and render it void as being a miscarriage of justice.*

In support of this holding, the Court in *Heggs* historically reviews its prior decisions on the proper scope of certiorari

review of a circuit court appellate decision. The Court first quotes with approval from *Basnet v. City of Jacksonville,* 18 Fla. 523, 526–27 (1882), as a case "which retains its currency and whose clarity remains a hallmark":

> "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 irregular in his proceeding ***611** 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 applied to facts, is not an illegal or irregular act or proceeding remedial by certiorari.*"
>
> "[Certiorari jurisdiction] 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 appeal at law or writ of error."

658 So.2d at 525 (emphasis added) (quoting *Basnet*).

The Court next quotes with approval from *Mernaugh v. City of Orlando,* 41 Fla. 433, 442, 27 So. 34 (1899), as the first case that explicitly incorporated the "essential requirements of law" language into the certiorari 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."

658 So.2d at 526 (quoting *Mernaugh*).

The Court then notes that the standard of review was often not honored in practice, but that beginning in the early 1960's a more consistent practice seemed to emerge restricting the scope of certiorari review in accord with the announced rule. In particular, the Court quotes with approval Judge Wigginton's opinion in *State v. Smith,* 118 So.2d 792 (Fla. 1st DCA 1960), as an example of an opinion "noted for [its] tight and lucid language in capturing the essence of the appropriate use of the writ [of certiorari],":

> "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.* ..."

658 So.2d at 527 (emphasis supplied by the Court in *Heggs*) (quoting *Smith*).

The Court also quotes with approval from Chief Justice Boyd's concurring opinion in *Jones v. State,* 477 So.2d 566, 569 (Fla.1985), as having "captured the essence of the standard" for departure from essential requirements of the law:

> "The required 'departure from the essential requirements of the 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."

658 So.2d at 527 (emphasis added) (quoting *Jones*).

The Court then considers and reconciles its prior decisions in *Combs v. State,* 436 So.2d 93 (Fla.1983), and *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals,* 541 So.2d 106 (Fla.1989):

> "In *Combs* we held that a district court's [certiorari] review of an appellate circuit court decision should determine whether there was a 'departure from the essential requirements 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 [certiorari] review of an appellate circuit court's decision which reviewed an administrative ***612** agency decision should consider whether the 'circuit court afforded procedural due process and applied the correct law.'
>
> ....
>
> When the above two standards are juxtaposed, we conclude that 'applied the correct law' is synonymous with 'observing the essential requirements of law.' Therefore, when the *Combs* and *EDC* standards are reduced to their core, they appear to be the same."

658 So.2d at 527–30 (emphasis added) (citations omitted).

The Court in *Heggs* further held that in reviewing a circuit court appellate decision, the district court may not determine whether the final judgment or order reviewed by the circuit court was based on substantial, competent evidence, as this is solely for the circuit court to determine. The Court stated:

> "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.*"

658 So.2d at 530 (emphasis added).

Finally, the Court approved the decision of the second district court of appeal which was under review "as an excellent example of the correct application of the limited standard of review [on certiorari] available to litigants after they have had the benefit of an appeal in the circuit court" and quoted from the decision as follows:

> "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. 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.' "

658 So.2d at 531 (emphasis added) (citations omitted).

II

Applying the above standard of certiorari review to the instant case, I have no trouble in concluding that the appellate court decision of the circuit court herein did not depart from the essential requirements of the law and that the petition for a writ of certiorari should be denied. Clearly, the circuit court both afforded the petitioners procedural due process of law below, and acted well within its jurisdiction, when it reversed on appeal the denial by the Dade County Commission of a re-zoning application; indeed, the petitioners make no argument to the contrary. Moreover, I am unable to discover in the circuit court's opinion the commission of an error so fundamental in character as to fatally infect the judgment and render it void as being a miscarriage of justice—even if one assumes that the circuit court was in error in its decision below.

The sole basis for the circuit court's decision was that the Dade County Commission's denial of the respondent's rezoning

application was not supported by substantial, competent evidence. We clearly have no authority to quash this decision on the ground that we disagree with this determination and feel that the subject denial was supported by substantial, competent evidence. Moreover, the circuit court in its opinion correctly states the standard of review which it must apply in reviewing the denial of the re-zoning application, and does not in any sense state or apply an incorrect rule of law.

More to the point, however, is the fact that no injustice was done to the petitioners in this case—an absolute prerequisite for invoking certiorari in this case. Without dispute, the respondent's re-zoning application was consistent with Dade County's Master Plan ***613** in that it would permit 360 rental units on a 20 acre tract or 18 units per acre—well within the 25 units per acre for medium density residential use set by the Master Plan. Moreover, Dade County's Planning Department, Building and Zoning Department, and Public Works Department approved the respondent's application after it was scaled back; the site plan, in addition, passed consistency review and concurrency standards under the Master Plan. Finally, at the Commission hearing, a number of land use experts testified to the reasonableness and amenities of the respondent's plan.

The only evidence adduced against the re-zoning application was a number of homeowners in the area who wanted the project scaled back to 13 units per acre; the circuit court decided that the homeowner's testimony was "conclusory and without adequate support," that there was no "emerging trend in the area" for 13 units per acre as urged, and that consequently "the decision below [was] arbitrary and not based on substantial competent evidence"—a determination which, as previously stated, we have no authority to review. Moreover, even if the circuit court got it wrong in this analysis as the court concludes in adopting Judge Cope's dissent to the panel opinion, I am unable to say that a miscarriage of justice occurred. The professional staff, the neighborhood study process, the Master Plan analysis, and several land experts fully supported the re-zoning application; the only disagreement came from several landowners in the area and they were willing to accept the plan if it were scaled back by only five units per acre, hardly a drastic disagreement. Plainly, no injustice has been done to the petitioners in this case and consequently, I would deny the petition for a writ of certiorari.

GODERICH, J., concurs.

BASKIN, JORGENSON and GREEN, JJ., recused.

All Citations

675 So.2d 598, 20 Fla. L. Weekly D1445

Footnotes

1 The DIC is comprised of various departments and agencies, including the following:

(1) Public Works Department, consisting of a representative of the Highway Planning Division and a representative of the Subdivision Control Division;

(2) Planning Department, consisting of a representative of the Development Planning Division and a representative of the Research Division;

(3) Building and Zoning Department;

(4) Park and Recreation Department;

(5) Environmental Resources Management Department;

(6) Miami–Dade Water and Sewer Authority;

(7) Miami–Dade Police Department;

(8) Fire Department;

(9) Dade County Transportation Administration;

(10) Capital Improvements Division;

(11) Department of Solid Waste Management;

(12) School Board of Dade County; and,

(13) South Florida Water Management District.

33–1303.1(A), Code of Metropolitan Dade County, Florida.

2 The DIC's report states, in part, as follows:

> This residential proposal is well conceived with respect both to the subject property's proximity to significant centers of employment in the West Dade area, and with respect to accessibility to other major employment centers surrounding Miami International Airport. The need for additional affordable housing in this area is apparent and has been documented in the Comprehensive Development Master Plan. Higher density residential development should be encouraged in those areas planned to accommodate such higher density, thus taking advantage of existing and planned infrastructure. Underuse [sic] of such areas promotes urban sprawl.

3 Blumenthal's attorney explained at the hearing that it would not be economically feasible to build only thirteen dwelling units per acre due to land costs, infrastructure costs, and construction costs.

4 "[L]aymen's opinions unsubstantiated by any competent facts" do not constitute substantial competent evidence in zoning proceedings. *City of Apopka v. Orange County,* 299 So.2d 657, 660 (Fla. 4th DCA 1974).

5 It is not our intention to discourage objecting neighbors from voicing their opinions at Commission hearings.

* Editor's Note: Adopted as the opinion of the court on rehearing en banc Feb. 21, 1996.

1 The participating homeowners are the West Dade Federation of Homeowners Associations, Inc.; Morgan I. Levy, President of the West Dade Federation of Homeowners Associations, Inc.; Russell Geyer; and John H. Bechamps.

2 According to Exhibit 8–K–L, the segment of Doral Park lying immediately to the east of the proposed apartment site is low density residential, up to 6 units per acre. Exhibit 8–K–L is a Dade County Planning Department map of the West Dade Study Area.

That exhibit shows varying densities at various places in Doral Park, all of which are separated by golf courses or other green space. The Doral Park segment closest to the proposed apartment site is low density.

3 Counsel mentioned applications by the Gasser Family Trust and by Southeast Bank Corporation. Mag Landea had also been disapproved in its original form, and had later been approved in its 23–unit/13–unit form.

4 This section of the Dade County Code was read at the County Commission hearing by petitioner Levy.

5 The only minor factual dispute came with one homeowner's testimony regarding property values in the area. The developer's counsel raised a question about that. The claimed diminution of property values in the area is not, however, material to any issue in this case.

6 Where the circuit court sitting in an appellate capacity applies the incorrect law, it is proper for the reviewing court to examine the facts in light of the correct legal standard. *See Scott v. Anderson,* 405 So.2d 228, 237 (Fla. 1st DCA 1981), *review denied,* 415 So.2d 1359, 1361 (Fla.1982).

7 Although it did not happen in this case, a citizen can testify about a zoning trend so long as the citizen states the facts on which the citizen relies.

8 This portion of the majority opinion is, as the majority itself recognizes, dictum. The dictum will, however, cause much mischief in other cases because it suggests, incorrectly, that citizen testimony in zoning matters should simply be disregarded.

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74 Fla. 336
Supreme Court of Florida.

BOZEMAN et al.
v.
CITY OF ST. PETERSBURG et al.

Nov. 15, 1917.

Synopsis
Appeal from Circuit Court, Pinellas County; O. K. Reaves, Judge.

Suit by J. W. Bozeman and R. E. Bozeman, copartners doing business as Bozeman Bros., and others, against the City of St. Petersburg and the Atlantic Coast Line Railroad Company. Demurrer to bill sustained, and bill dismissed, and plaintiffs appeal. Order affirmed.

Syllabus by the Court

When the property rights of an individual are specially injured by an unlawful obstruction in a public street or highway, and no adequate remedy at law is afforded, he may have the aid of a court of equity in removing such unlawful obstruction.

If such obstruction merely interferes with the right of passage, common to all citizens, and no individual rights are specially or peculiarly injured, the remedy is through the proper public authorities.

An individual cannot enjoin the obstruction of a public street, unless some special damage to his property or injury to him different not only in degree but in kind from the damage sustained by the community at large is threatened.

Held, upon the case stated in the bill of complaint in this case that the complainants may not maintain this suit, the injury alleged to have been sustained by them being different in degree and not in kind from that sustained by the community at large, and that the remedy for the alleged unlawful obstruction is therefore through the proper public authorities.

Attorneys and Law Firms

***337** ****895** H. S. Hampton and H. S. Phillips, both of Tampa, for appellants.

Sparkman & Carter, of Tampa, for appellees.

Opinion

WEST, J.

By the suit the appellants, complainants below, challenge the validity of an ordinance of the city of St. Petersburg, one of the appellees, whereby certain streets of said city were vacated and closed as public streets, and the land upon which the streets so vacated and closed was located, was granted to the appellee Atlantic Coast Line Railroad Company for depot purposes, and the right of said railroad company to occupy said location with its freight depot pursuant to the provisions of said ordinance.

The material averments of the bill of complaint are briefly stated in substance as follows: That the locus in quo was duly dedicated as public streets of said city of St. Petersburg; that the dedication was accepted by the city and said streets were used by the complainants and the public generally as public streets; that the said city by its city council on August 4, 1904, passed and adopted ordinance numbered 73, whereby the following portions of Eighth street and First avenue were vacated and closed as public streets, and the area so vacated was granted to the Atlantic Coast Line Railroad ***338** Company for private uses:

> 'Beginning at the southeast corner of the intersection of said First Avenue South with said Eighth street, and running thence north across said First avenue and along the eastern boundary of said Eighth street to the southeast corner of the intersection of said Eighth street with the alley 100 feet north from the northeast corner of the intersection of said First avenue and Eighth street; thence in a westerly direction across said Eighth street to a point 100 feet north from said First avenue where an alley intersects with said Eighth street; thence in a southerly direction along the western boundary of said Eighth street

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> to said First Avenue South; Eighth street to said across said First avenue to the southwest corner of the intersection of said Eighth street with said First avenue; thence east across said Eighth street to point of beginning.'

That said city had no power, right, or authority to make said grant, or to convey said portions of said streets to said railroad company, and that said attempted conveyance was ultra vires and a fraud upon complainants and all others similarly situated.

It is further averred that at the time of the passage of said ordinance the said railroad company owned in fee simple lots 75 and 76 of Ward & Baum's addition to St. Petersburg abutting on the east and west sides of said Eighth street at the point so vacated and closed, and that said railroad company in the early part of the year 1905 erected its freight depot across said Eighth street between said lots 75 and 76, completely closing said street; that it used said depot continuously until the year 1913, when it moved said depot which was a wooden structure, west on to the property owned by it, with the declared intention of erecting upon the same ***339** site a brick depot, and immediately commenced the erection of said brick depot; that said building is partially constructed, the walls being completed to a height of about three feet; 'that no part of said brick depot extends into First or Railroad avenue, but will be entirely in Eighth street, but not beyond the boundary of said lots 75 and 76, when completed;' that if said depot is completed said Eighth street will be closed and the complainants and the public generally will be prevented from entering said First avenue by way of said Eighth street; and that said freight depot constitutes not only a public nuisance, but also a private nuisance to complainants.

It is then averred that the complainants Bozeman Bros. own lots 7, 8, and 9 of block 42, according to the map of said city, and have had located thereon since the year 1910 a retail grocery store, a retail electric supply business and warehouse, and an ice cream factory; that at the time they purchased said lots they knew that a wooden freight depot was located in said Eighth street, and that it closed said street; that as a result of said street's being closed the said Bozeman Bros. suffer injuries and damages unlike those suffered by the general public in that, in order to reach a large percentage of their customers, the post office and other public buildings, they must 'surround said depot either by going out to Ninth street and around to Seventh street, by way of Second Avenue South, as shown on said map of said city hereto attached, or by going to Ninth street and thence to Central avenue, as shown on said map, thereby forcing said Bozeman Bros. to go to a circuitous and inconvenient way, as well as a much longer way, in delivering their goods,' etc.; that the bulk of the population and business center of said city is to the northeast of said place of business of said ***340** Bozeman Bros.; that the closing of said street makes it impossible for ****896** their customers and others who would become their customers to reach their places of business by way of said street; that the closing of said street prevents their customers and others who would become customers from driving in front of their said places of business for the reason that said First Avenue South is so monopolized by the tracks of said railroad company that vehicles cannot turn round in front of said places of business, all of which results in a loss of business to said complainants, and causes a great depreciation in the value of their property.

Other averments are contained in said bill to the effect that said complainants wish to improve their property and lay a sidewalk in front of it so that it may be of easier access, thereby increasing their business and enhancing the value of their property, but that it is useless to do so as long as said streets are closed as aforesaid.

The allegations of the bill as to the other complainants are to like effect, and present no question different in principle from that presented by the case of these complainants.

The prayer is that the ordinance be canceled and declared to be null and void; that the deed of conveyance, if any had been executed pursuant to the provisions of said ordinance, be canceled and declared to be null and void; and that the said railroad company be enjoined and restrained from erecting and maintaining a freight depot upon the portions of said streets described in said ordinance.

To the bill of complaint the following demurrer was filed by the defendant Atlantic Coast Line Railroad Company:

***341** 'This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows that:

'(1) There is no equity in said bill.

'(2) The city of St. Petersburg, under its charter, had a right to pass Ordinance No. 73, and the railroad company had the right to erect the building complained of under and by virtue of the said Ordinance No. 73.

'(3) The bill of complaint shows on its face that the complainants in said cause acquired the lands owned by them long subsequent to the passage of the Ordinance No. 73, and long subsequent to the time that Eighth street had been entirely closed by the freight depot of the defendant company.

'(4) The bill of complaint fails to show on its face that the complaints, or either of them, will suffer any damage different from that suffered by the general public of St. Petersburg, by reason of the passage of Ordinance No. 73, or by reason of the erection of the building by the defendant.

'(5) It is apparent upon the face of the bill that the complainants are not entitled to an injunction by reason of their gross laches.

'(6) It appears by the bill of complaint that the defendant was the owner of the lands on each side of that portion of Eighth street which was closed by the city of St. Petersburg by Ordinance No. 73, on August 4, 1904, and by the closing of said street between said lands, the legal title thereof vested in the defendant.

'(7) It appears by the bill of complaint that the complainants have an adequate and complete remedy at law.'

***342** Upon a hearing before the circuit judge the demurrer was sustained and the bill of complaint was dismissed, and this appeal is from the order sustaining the demurrer and dismissing the bill.

The only error assigned is this order of the circuit judge.

Two questions are presented by this appeal, which may be stated as follows: (1) Has the city of St. Petersburg the power and authority to adopt a valid ordinance of this kind? And, if so, (2) is it made to appear from the averments of their bill that the complainants are in position to raise this question and present it so that it may be passed upon and determined in a suit of this kind?

We will consider these questions in the inverse order, because if it is found that the complainants are not in position to question in a suit of this character, the exercise of this power by the city of St. Petersburg, it follows necessarily that the question of whether or not the city possesses such power is not before us.

The controlling principles of law in cases of this kind are well established. The difficulty is in applying these principles to the facts of the case presented to the court for adjudication.

This court has held that when the property rights of an individual are specially injured by an unlawful obstruction in a public street or highway, and no adequate remedy at law is afforded, he may have the aid of a court of equity in removing such unlawful obstruction (Brown v. Florida Chautauqua Ass'n, 59 Fla. 447, 52 South. 802); but if such obstruction merely interferes with the right of passage common to all citizens, and no individual rights are specially or peculiarly injured, the relief from such unlawful obstruction should ***343** be through the proper public authorities. Garnett v. Jacksonville, St. A. & H. R. R. Co., 20 Fla. 889; Jacksonville, T. & K. W. Ry. Co. v. Thompson, 34 Fla. 346, 16 South, 282, 26 L. R. A. 410; Thomas v. Wade, 48 Fla. 311, 37 South. 743.

In the case of Robbins v. White, 52 Fla. 613, 42 South. 841, this court in a case similar to this laid down the rule as follows:

> 'If the alley or street is a public highway which cannot be, or has not been, lawfully abolished, and the complainant is an abutting property owner, she may enjoin the obstruction of the alley or street if some damage to her property differing in kind from that of the public is threatened by the obstruction. The obstruction of a public street is a public nuisance, but it may also constitute a private nuisance. An individual cannot enjoin the obstruction of a public street unless some special damage to his property or injury to him differing not only in degree but in kind from the damage sustained by the community at large is threatened.'

****897** In the case of Jacksonville, T. & K. W. Ry. Co. v. Thompson, supra, this court said:

> 'The allegation that the plaintiff's property abuts upon the public road which, at some portion of the same, is obstructed, does not change the rule. If by proximity to the road he has occasion to use the same oftener than other citizens, he only suffers damages to a greater degree, but not of a different kind, to that sustained by all others who have occasion to travel the road.'

And in the case of Garnett v. Jacksonville, St. A. & H. R. R. Co., supra, the court, speaking through Mr. Justice Westcott, stated the rule as follows:
'We will not stop to discuss the question, that will simply say that it is the settled law here and elsewhere that an individual cannot recover damages at law, or have relief in equity, against even ***344** an admitted public nuisance unless he makes a case of special and particular injury to himself. He must sustain an injury not common to the public.

'The gist of the action, the gravamen of the complaint, is the special and particular injury. For the common injury there can be no redress, save by some authorized action in behalf of the people.'

Now, applying these principles, can it be said that the allegations of the bill, which are well pleaded and admitted by the demurrer to be true, make out a case showing such special injury to the complainants, different not only in degree, but in kind, from that sustained by the public generally, as to warrant the interposition of a court of equity in a suit brought in the name and on behalf of such complainants? The streets authorized by the city ordinance complained of to be closed are First Avenue South, running east and west, and Eighth street, running north and south, where the avenue and street intersect and cross, and 100 feet of said Eighth street north of said First Avenue South, where said street extends north between lot 75 on the east side of said street and lot 76 on the west side of said street. It does not appear that First Avenue South has been obstructed, and it is distinctly averred, as we have seen, that the depot in process of construction 'will be entirely in Eighth street, but not beyond the boundary of said lots 75 and 76 when completed,' and that said lots are owned by the defendant railroad company.

The property of the complainants Bozeman Bros., as it appears from the maps of said city attached as exhibits to the bill of complaint, is lots 7, 8, and 9 of block 42, facing and abutting First Avenue South lying west of the point where said avenue and said Eighth street cross and where said obstruction in said street ***345** is located. The property of the complainant W. E. Bozeman is lot 6 in block 42 adjoining the property of Bozeman Bros., while the property of the other complainant T. S. Bissey is lot 132 located at the southeast corner of the intersection of Eighth street and Central avenue. It appears from the maps that this lot abuts Central avenue (which is the avenue north of and parallel to First Avenue South) from the south and Eighth street from the west, and that there is an alley between this lot and lot 75 owned by the appellee railroad company.

That the location of numerous other lots, with reference to said obstruction, is similar to the location of the lots of these complainants with reference to such obstruction is apparent, and it is clear we think that the damage sustained by the complainants because of such obstruction is not different in kind from the damage sustained by the community at large. It is true that complainants are denied the use of the street so obstructed, but their properties are accessible from other streets. It is likewise true that the public generally are denied the use of such street. If, therefore, there is a difference in the damage sustained, it is in degree. In such a case, as we have seen, the remedy is through the proper public authorities.

In the case of Brown v. Florida Chautauqua Association, supra, it was held that the averments of the bill showed 'special, peculiar, particular, and substantial injury to the complainants,' because of the natural relationship of the hotel business in which they were engaged, to the passenger depot, and the inconvenience and increased risk, in being forced, because of the unlawful obstruction there complained of, to use a more dangerous and longer route which crossed the railroad track ***346** twice, or else to use a still more circuitous route to the depot from the hotel, and upon that ground the jurisdiction in equity at the suit of the complainants was upheld. But that case is clearly distinguishable from this, because here special and peculiar injury to complainants different in kind from that sustained by the general public is not made to appear by the averments of the bill.

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Having reached this conclusion, it follows that the power of the city to adopt the ordinance complained of cannot be tested in a suit at the instance of these complainants, and that no reversible error was committed by the court below in sustaining the demurrer, and dismissing the bill of complaint.

Order affirmed.

BROWNE, C. J., and TAYLOR, WHITFIELD, and ELLIS, JJ., concur.

All Citations

74 Fla. 336, 76 So. 894

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159 Fla. 629
Supreme Court of Florida, en Banc.

SHAMHART
v.
MORRISON CAFETERIA CO.

Oct. 28, 1947.
|
Rehearing Denied Dec. 15, 1947.

Synopsis
Suit in equity by R. W. Shamhart, doing business under the firm name and style of Pearson Pharmacy, against the Morrison Cafeteria Company of West Palm Beach, a corporation, to enjoin a nuisance and recover damages for loss of business. From a decree dismissing the bill, complaint appeals.

Reversed.

BARNS, and BUFORD, JJ., and PARKS, A. J., dissenting.

***629** ****727** Appeal from Circuit Court, Palm Beach County; Jos. S. White, judge.

Attorneys and Law Firms

Newman T. Miller & Wareing T. Miller, of West Palm Beach, and Bezoni & McCord, Frank Bezoni and Guyte P. McCord, Jr., all of Tallahassee, for appellant.

Chillingworth & Simon and Loren D. Simon, all of West Palm Beach, for appellee.

Opinion

ADAMS, Justice.

Morrison's Cafeteria in West Palm Beach fronts west on Olive Street with an alley on the north side. One hundred eight feet to the south is appellant's corner drug store with entrances on Olive Street and also on Datura Street. During the noon and evening meals, customers of the cafeteria form ***630** lines on the sidewalk which frequently result in most of the entrances to appellant's drug store being virtually closed to its customers for long periods of time. Appellant sued the cafeteria to enjoin the nuisance and sought damages for loss of business. The cause was referred to a master who recommended a decree for appellant and found the damage to date amounted to $2896.57. Exceptions were filed to the report.

On consideration of the master's report, the chancellor found no basis for injunctive relief; dismissed the bill and therefore did not pass on the amount or the question of damages.

The rule has long been settled at common law that no man shall use his property as to injure another. The general rule is settled by good authority to the effect that abutting property owners may not use the sidewalk in an unreasonable manner and where such unreasonable use is made it is both a public and private nuisance. Where another suffers a special injury as a result thereof he may have appropriate relief. Jacksonville, Tampa & Key West Railway Co. v. Thompson, 34 Fla. 346, 16 So. 282, 26 L.R.A. 410; 25 Am.Jur., pages 606, 607; 39 Am.Jur., page 280 et seq.; McQuillin Municipal Corporations, Revised Vol. 4, 2d. Ed., § 1489.

****728** A late case somewhat analogous to this is that of Tushbant v. Greenfield's, Inc., 308 Mich. 626, 14 N.W.2d 520, 521, wherein it was held that: 'If a nuisance is private, infringes on the rights of others, and arises out of the manner of conducting a legitimate business, equity will point out the nuisance and decree the adoption of methods calculated to eliminate or minimize the injurious features.' The same rule is generally approved by the English authorities.

This case presents a clear case where appellee has utilized the sidewalk as a waiting room for its customers rather than provide a place upon its own premises.

The nature of the use employed, surrounding appellant's entrances, is such as to cause appellant an injury different in kind and degree from the public in general. It is not incumbent on the appellant to solve appellee's problem of how or ***631** where to place the customers. Neither will the court devise a plan or suggest a method. The appellee created his problem by utilizing the entire space of his premises for cooking food and seating customers, therefore he cannot constantly make use of the public sidewalk as a waiting room to the special injury of appellant.

As to the amount of damages, we will not pass upon that because the chancellor naturally did not get to that question. Upon the mandate going down, the chancellor will ascertain what damages the appellant has sustained.

The decree is reversed.

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From: Dan Lobeck
To: Heather Faust; Jim Toale
Cc: Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject: [EXTERNAL] RE: AZB-24-122/ Petitioner to Continue to Present Count 1
Date: Monday, December 16, 2024 1:30:54 AM

This is notice that although the Petitioner indicated in its Reply filed herein an intention not to present on Count 1 of the Appeal, Petitioner will do so, on the basis of Section 53-6 and 53-7.D(4) of the ULDC.

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Sarasota, FL 34237

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Facsimile: (941) 951-1469
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From: Dan Lobeck
To: Heather Faust; Jim Toale
Cc: Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject: [EXTERNAL] AZB-24-122/ Petitioner to Continue to Present Count 2
Date: Monday, December 16, 2024 1:07:56 AM

This is notice that although the Petitioner indicated in its Reply filed herein an intention not to present on Count 2 of the Appeal, Petitioner will do so, on the basis of Section 53-6 53-7.D(4) of the ULDC.

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From:	Dan Lobeck
To:	Heather Faust; Jim Toale
Cc:	Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject:	[EXTERNAL] RE: AZB-24-122/ Petitioner"s Reply to Developer"s Response
Date:	Sunday, December 15, 2024 10:29:27 PM
Attachments:	Response to Standing Memo.docx Deed of Common Areas to HOA.pdf Heron Creek Developer - No High Density.pdf Motion - No Residential on D,E and F.pdf

Please accept for filing and consideration the attached Response to the Developer's Memo and Standing, and three Exhibits independent of that Response, for tomorrow's hearing.

I will bring multiple copies for distribution.

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From: Dan Lobeck
Sent: Friday, December 13, 2024 6:18 PM
To: Heather Faust <hfaust@northportfl.gov>; Jim Toale <jimtoale@gmail.com>
Cc: Ellie Neiberger <eneiberger@bmolaw.com>; Morgan Bentley <mbentley@bgk.law>; Caroleen Brej <cbrej@bgk.law>; Margaret Roberts <mtroberts@northportfl.gov>
Subject: RE: AZB-24-122/ Petitioner's Reply to Developer's Response

Please accept the attached Reply of Petitioner to the December 6 Response of the Developer, for filing and consideration.

Thank you.

Dan Lobeck, Esq.

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Cc: Ellie Neiberger <eneiberger@bmolaw.com>; Morgan Bentley <mbentley@bgk.law>; Caroleen Brej <cbrej@bgk.law>; Margaret Roberts <mtroberts@northportfl.gov>
Subject: AZB-24-122/ Heron Creek Appeal/Exhibit to Motion to Transfer

Attached is the Exhibit which was inadvertently omitted from today's Motion to Transfer.

Thank you.

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Cc: Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject: [EXTERNAL] AZB-24-122/ Exhibits to Petitioner"s Reply
Date: Sunday, December 15, 2024 1:53:02 PM
Attachments: Fletcher - Prior Parcel K Approval a Mistake.pdf
Developer Affdvt - 39 Units Can Be On Parcel K.pdf
Ferguson Case - Disapprove for Study Lack.pdf
ALF Director - We"re Not Office.pdf

Madame Clerk and Magistrate Toale:

Please accept the attached as the Exhibits to Petitioner's Reply which was filed on Friday, as referenced therein.

I will also bring multiple copies to the hearing on Monday (tomorrow).

Thank you.

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Subject: RE: AZB-24-122/ Petitioner's Reply to Developer's Response

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Subject: AZB-24-122/ Heron Creek Appeal/Exhibit to Motion to Transfer

Attached is the Exhibit which was inadvertently omitted from today's Motion to Transfer.

Thank you.

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To: Heather Faust; Jim Toale
Cc: Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject: [EXTERNAL] RE: AZB-24-122/ Petitioner"s Reply to Developer"s Response
Date: Friday, December 13, 2024 6:18:02 PM
Attachments: Heron Creek Appeal - Petitioner"s Reply.docx

Please accept the attached Reply of Petitioner to the December 6 Response of the Developer, for filing and consideration.

Thank you.

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Cc: Ellie Neiberger <eneiberger@bmolaw.com>; Morgan Bentley <mbentley@bgk.law>; Caroleen Brej <cbrej@bgk.law>; Margaret Roberts <mtroberts@northportfl.gov>
Subject: AZB-24-122/ Heron Creek Appeal/Exhibit to Motion to Transfer

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Thank you.

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From:	Caroleen Brej
To:	Jim Toale; Dan Lobeck; Ellie Neiberger
Cc:	Heather Faust; Morgan Bentley; Margaret Roberts; Amber Slayton
Subject:	[EXTERNAL] AZB-24-122 - Heron Creek Appeal
Date:	Friday, December 13, 2024 4:53:49 PM
Attachments:	image002.png image003.png Memorandum on Aggrieved Party Status_Heron Creek Assoc LTD.pdf

All:

Please see attached the Developer's Memorandum Regarding Standing Requirements for Monday's hearing.

Caroleen B. Brej, Esq.
Bentley Goodrich Kison, P.A.
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Fax: (941) 312-5316
cbrej@bgk.law
783 South Orange Ave.
Third Floor
Sarasota, Florida 34236
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From: Morgan Bentley
To: Dan Lobeck; Heather Faust; Jim Toale
Cc: Ellie Neiberger; Caroleen Brej; Margaret Roberts
Subject: [EXTERNAL] RE: AZB-24-122/ Heron Creek Appeal/Exhibit to Motion to Transfer
Date: Friday, December 13, 2024 4:49:06 PM
Attachments: image002.png
image003.png

Thanks!

Morgan R. Bentley, Esq.
Bentley Goodrich Kison, P.A.
Board Certified
Business Litigation
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From: Dan Lobeck <dlobeck@lobeckrowe.com>
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From: Jim Toale
To: Dan Lobeck
Cc: Heather Faust; Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts; Amber Slayton
Subject: [EXTERNAL] Re: AZB-24-122/ Heron Creek Appeal/ Motions
Date: Friday, December 13, 2024 4:47:08 PM

Regarding the Motion for Enlargement of Time, I will not hold to the timeframes set forth in the Code. As long as the testimony or argument is not repetitive it will come into the record. At the beginning of the morning I'll ask for time required by all parties so I can map out the day.

Since the other Motion is jurisdictional, it will now be heard first.

Jim

On Fri, Dec 13, 2024 at 1:05 PM Dan Lobeck <dlobeck@lobeckrowe.com> wrote:

> Madame Clerk and Magistrate Toale:
>
> Please accept the attached Motions for filing in the above-referenced action and for consideration of the Magistrate, with regard to the hearing scheduled for Monday, December 16, 2024. They are:
>
> A Motion to Transfer the Appeal to the Planning & Zoning Board and City Commission in accordance with the direction stated in the Appeal and applicable provisions of the Unified Development Code (as the Petitioner has been seeking from the City to date).
>
> A Motion for Enlargement of Time for adequate participation by the parties in the hearing, as the Magistrate determines to be reasonably appropriate for a full and fair hearing to sufficiently consider the issues and in order to accord due process, instead of the arbitrary and excessive time limits provided as "guidelines" in Section 2-83 of the City Code.
>
> Thank you very much for your considerations.
>
> Dan Lobeck, Esq.
>
> Florida Bar Board Certified in
>
> Condominium and Planned Development Law

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From:	Dan Lobeck
To:	Heather Faust; Jim Toale
Cc:	Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts
Subject:	[EXTERNAL] AZB-24-122/ Heron Creek Appeal/Exhibit to Motion to Transfer
Date:	Friday, December 13, 2024 4:16:16 PM
Attachments:	Motion to Transfer - Exhibit.docx

Attached is the Exhibit which was inadvertently omitted from today's Motion to Transfer.

Thank you.

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To:	Heather Faust; Jim Toale
Cc:	Ellie Neiberger; Morgan Bentley; Caroleen Brej; Margaret Roberts; Amber Slayton
Subject:	[EXTERNAL] AZB-24-122/ Heron Creek Appeal/ Motions
Date:	Friday, December 13, 2024 1:05:17 PM
Attachments:	Motion to Transfer.docx Motion for Enlargement of Time.docx
Importance:	High

Madame Clerk and Magistrate Toale:

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A Motion to Transfer the Appeal to the Planning & Zoning Board and City Commission in accordance with the direction stated in the Appeal and applicable provisions of the Unified Development Code (as the Petitioner has been seeking from the City to date).

A Motion for Enlargement of Time for adequate participation by the parties in the hearing, as the Magistrate determines to be reasonably appropriate for a full and fair hearing to sufficiently consider the issues and in order to accord due process, instead of the arbitrary and excessive time limits provided as "guidelines" in Section 2-83 of the City Code.

Thank you very much for your considerations.

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From: Caroleen Brej
To: jimtoale@gmail.com; Heather Faust
Cc: Dan Lobeck; eneiberger@bmolaw.com; Morgan Bentley
Subject: [EXTERNAL] RE: Zoning Board of Appeals; Appeal of MAS-23-160; AZB-24-122
Date: Friday, December 13, 2024 9:01:39 AM
Attachments: image002.png
image003.png

Good morning Ms. Faust,

This Firm represents the Developer, Heron Creek Associates, LTD., as it relates to the appeal of MAS-23-160 by Appellant, Heron Creek Community Association, Inc., in AZB-24-122.

As indicated in the below email to Magistrate Toale, the Developer challenges the aggrieved party status of Heron Creek Community Association, Inc. The challenge is pursuant to Sec. 2-81.

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cbrej@bgk.law
783 South Orange Ave.
Third Floor
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www.bgk.law

From: Caroleen Brej
Sent: Thursday, December 12, 2024 5:03 PM
To: 'jimtoale@gmail.com' <jimtoale@gmail.com>
Cc: Dan Lobeck <dlobeck@lobeckhanson.com>; eneiberger@bmolaw.com
Subject: Zoning Board of Appeals; Appeal of MAS-23-160; AZB-24-122

Dear Jim,

The Developer challenges the aggrieved party status of the Heron Creek Community Association, Inc., the Appellant in AZB-24-122.

Caroleen B. Brej, Esq.
Bentley Goodrich Kison, P.A.
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Sec. 1-10. Appeals. [Amended 11-24-2003 by Ord. No. 2002-56]

A. Types of appeals.

(1) Appeals of interpretation and enforcement.

(a) All appeals for interpretation or enforcement of the Unified Land Development Code will be provided by the department responsible for land development services.

(b) The interpretation of the department responsible for land development services may be appealed to the Zoning Board of Appeals.

(c) The decision of the Zoning Board of Appeals may be appealed to the Sarasota County Circuit Court.

(2) Appeals of administration.

(a) All appeals for administration of the Unified Land Development Code will be provided by the appropriate departments.

(b) The administration decision may be heard first by the Planning and Zoning Advisory Board. After consideration, the Planning and Zoning Advisory Board will give an advisory recommendation to the City Commission.

(c) After review of the Planning and Zoning Advisory Board's recommendation, the City Commission will make a decision on the administrative appeal. The decision of the City Commission may be appealed to the Sarasota County Circuit Court.

B. Filing of appeals. All appeals are to be filed with the department responsible for land development services for processing and procedure.

(1) Interpretation:

(a) Unified Land Development Code. Any person aggrieved by the Director of the department responsible for land development services interpretation of this Unified Land Development Code may appeal to the Zoning Board of Appeals. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the interpretation removes all reasonable uses of the property. The granting of any appeal shall not be in conflict with State Statutes and City Codes. The Zoning Board of Appeals' decision, may be appealed to the Circuit Court of Sarasota County within thirty (30) days of such decision.

(b) Comprehensive Plan. Appeals to the Planning and Zoning Advisory Board concerning interpretation of the Comprehensive Plan may be taken by any person aggrieved or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the Department responsible for land development services. Such appeals shall be taken within a reasonable time not to exceed thirty (30) days or such lesser period as may be provided by the rules of the Board, by filing with the Department and with the Board a notice of appeal specifying the grounds thereof. The Director of the department responsible for land development services shall forthwith transmit to the Planning and Zoning Advisory Board all papers constituting the record upon which the action appealed from was taken. The appeal with all evidence presented to the Board, staff report, and recommendation from the Planning and Zoning Advisory Board shall be forwarded to the Commission for review and action. [Amended 11-24-2003 by Ord. No. 2002-56]

C. Criteria. The criteria for filing an appeal shall be as follows:

(1) Completed appeals application.

(2) A statement of "show of good cause" and alleged error.

(a) This statement shall give a complete explanation and description of the cause of the appeal and the alleged error.

(3) A copy of the interpretation or decision being appealed.

(4) Code reference of what is being appealed.

(5) Address, PID and photos of property affected (if applicable).

D. Hearing.

(1) The Zoning Board of Appeals or City Commission shall fix a reasonable time for the hearing of the appeal, give notice of the hearing to the public and all the parties in interest.

(2) At the hearing, any party may appear in person or by agent or attorney.

(3) After such hearing, the Zoning Board of Appeals or City Commission shall decide the appeal within a reasonable time. So long as such action is in conformity with the terms of this Unified Land Development Code, the Zoning Board of Appeals or City Commission may reverse or affirm, wholly or partly, or may modify the order, decision or determination appealed from and may make such order, decision or determination as sought to be made, and to that end shall have the powers of the department responsible for land development services from which the appeal was taken.

(4) In an appeal, the concurring votes of a majority of the members of the Zoning Board of Appeals or City Commission present at a meeting shall be necessary to reverse any order, decision or determination of the department responsible for land development services or Directors responsible for administration.

(5) The final determination of the Zoning Board of Appeals or City Commission shall be made in writing and shall be made available to the person aggrieved or the officer, board or department affected, the department responsible for land development services, the City Attorney and the City Manager.

E. Stay of proceedings. An appeal stays all proceedings in furtherance of the action from which the appeal was taken; provided, however, that in the event the Director responsible for land development services from whom the appeal is taken and after receipt of the notice of appeal, certifies in writing to the Zoning Board of Appeals or City Commission that a stay would, in the opinion of the Director supported by facts, cause an immediate risk of harm to a person or to property, then the proceedings shall not be stayed; provided, further, however, that in the event that the person aggrieved or any officer, board or department may request, in writing, based on detailed facts, and shows good cause, the Zoning Board of Appeals or City Commission may issue a restraining order staying such proceedings. The Zoning Board of Appeals or City Commission may condition such restraining order on such safeguards and time limits as the Board or Commission may deem appropriate to protect any person or property at risk of harm. [Amended 11-24-2003 by Ord. No. 2002-56]

F. In the interpretation and application of these regulations all provisions shall be considered as minimum requirements, shall be liberally construed in favor of the governing body and shall be deemed neither to limit nor repeal any other powers granted under State statutes.

Sec. 1-29. Planning and Zoning Advisory Board (PZAB).

G. Functions, powers and duties. [Amended 1-22-19 by Ord. 2018-37, § 2.02]

(1) The Planning and Zoning Advisory Board serves as the Local Planning Agency as required by the 1985 Florida Growth Management Act as set forth in the Florida Statutes, Chapter 163, and serving as a Planning and Zoning Advisory Board to the City Commission. The function, powers and duties of the Planning and Zoning Advisory Board in general shall be to:

(e) Determine whether specific proposed developments conform to the principles and requirements of the Comprehensive Plan.

Chapter 33 - MINOR AND MAJOR SITE DEVELOPMENT REGULATIONS

Any person aggrieved by the department responsible for land development services' interpretation may appeal to the Zoning Board of Appeals. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the interpretation renders the property without reasonable use. The granting of any appeal shall not be in conflict with State Statutes and City Codes. The Zoning Board of Appeals' decision may be appealed to the Circuit Court of Sarasota County within thirty (30) days of such decision.

Applications for an appeal shall be filed pursuant to Sec. 1-10.

ARTICLE III. BOARDS AND DUTIES

Sec. 1-28. Zoning Board of Appeals (ZBA).

F. Filing of appeals; hearing; stay of proceeding; assistance. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) Filing of appeals. Appeals to the Zoning Board of Appeals concerning interpretation or administration of these zoning regulations or for variance under these zoning regulations may be taken by any person aggrieved or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the department responsible for land development services.

(a) Such appeals shall be taken within a reasonable time not to exceed fifteen (15) days or such lesser period as may be provided by the rules of the Board, by filing with the Director of the department responsible for land development services and with the Board a notice of appeal specifying the grounds thereof.

(b) The Director shall forthwith transmit to the Zoning Board of Appeals all papers constituting the record upon which the action appealed from was taken.

(2) Withdrawal of appeal.

(a) The application may be withdrawn at any time prior to the publication of Notice of Hearing.

(b) The withdrawal of an application that has been placed on an agenda for public hearing may be requested to be withdrawn no later than five (5) days prior to any official meeting of the Zoning Board of Appeals. Such request for withdrawal of an application for hearing must be delivered in writing to the Board liaison.

(3) Continuance.

(a) A continuance may be requested by an applicant or staff demonstrating that the continuance is necessary to provide rebuttal testimony or to provide time to review documentary evidence.

(i) The applicant may seek a continuance administratively, with consent of the Chair, prior to the distribution of the meeting agenda for petitions that do not require legal advertisement.

(ii) A maximum of three (3) applicant initiated continuances may be granted for any one (1) petition whether granted administratively or by the Board.

(iii) Any petition that requires publication in a newspaper of general circulation, must be filed in writing twenty-one (21) days prior to the public hearing.

(b) The Board may continue the public hearing on its own initiative, upon finding that any testimony, documentary evidence, or other evidence presented at the quasi-judicial hearing justifies allowing time for additional research or review for the benefit of the Board, to assist in an appropriate resolution of the matter being presented.

(i) A continuance initiated by the Board will not be charged against the allowable continuances permitted under these regulations.

(c) The Board shall order a continuance at any time the Board determines the scheduling or timing of the pending application warrants a continuance to another date or time, but is not obligated to grant a continuance.

(4) Hearing. The Zoning Board of Appeals shall fix a reasonable time for the hearing of the appeal, give public notice thereof as well as due notice of the parties in interest and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

(a) If the applicant does not appear, refuses to proceed, or cannot proceed, the application shall be deemed denied.

(i) An applicant may seek relief by sending a third party to request continuance at the published meeting.

[1] If the applicant seeks to request relief by a third party, the Applicant shall submit a signed affidavit specifying the person's name, address with a copy of the petition prior to the meeting.

(b) If an application is deemed denied, no further application for a variance of any type for the subject property shall be filed within one (1) year of such denial.

(c) If an application for an administrative appeal is denied, it shall be deemed denied with prejudice.

(5) Financial and staff assistance. The Zoning Board of Appeals may be provided by the City Commission with such professional and financial assistance as may be deemed necessary to enable the Zoning Board of Appeals to perform the functions assigned to it by these zoning regulations.

(6) The cancellation of any meeting of the Zoning Board of Appeals is at the Chair's discretion.

G. Powers and duties. The Zoning Board of Appeals shall have the following powers and duties: [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) Administrative review. To hear and decide appeals where it is alleged there is error in any order, decision or determination of the Director responsible for land development services in the enforcement of these zoning regulations.

H. Reversal of decision of Department responsible for Land Development Services Directors. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

(1) In exercising the above-mentioned powers, the Zoning Board of Appeals may, so long as such action is in conformity with the terms of these zoning regulations, reverse or affirm, wholly or partly, or may

modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as sought to be made, and to that end shall have the powers of the Department responsible for land development services from whom the appeal is taken.

(2) In matters of review, the concurring votes of a majority of the members of the Zoning Board of Appeals present at a meeting shall be necessary to reverse any order, requirement, decision or determination of the Director responsible for land development services, or to decide in favor of the applicant on any matter upon which it is required to pass under these regulations. The final determination of the Zoning Board of Appeals shall be made in writing and shall be made available to the applicant, the City Attorney and the City Manager.

I. Appeals from decisions of Zoning Board of Appeals. Any person or persons, jointly or severally, including any officer, department, board or commission of the City, aggrieved by any decision of the Zoning Board of Appeals may apply to the Circuit Court having jurisdiction in the City of North Port for judicial relief within thirty (30) days after the rendition of the decision by the Zoning Board of Appeals. The proceedings in the Circuit Court shall be by petition for writ of certiorari, which shall be governed by the Florida Rules of Appellate Procedure. [Amended 1-22-19 by Ord. 2018-37, § 2.01]

Sec. 1-30. Zoning hearing officer.

A. *Creation.*

(1) There is hereby established the position of Zoning Hearing Officer (Hearing Officer). One (1) or more Hearing Officers shall be appointed by the City Commission as its Hearing Officer for zoning appeals and variance matters. Should more than one (1) Hearing Officer be appointed the terms of office shall be appropriately staggered and applications shall be equally assigned to Hearing Officers by a rotation system.

B. *Jurisdiction.* In the absence of there being sufficient appointed members of the Zoning Board of Appeals to constitute a quorum, the Hearing Officer shall have the same jurisdiction and authority as the ZBA and shall exercise all powers of the ZBA. Except where the context does not permit, and Section 1-28, references in this ULDC to the ZBA shall also include the Hearing Officer.

D. *Filing of appeals; hearing; stay of proceeding; assistance.*

(1) *Filing of appeals.* Appeals to the Hearing Officer concerning interpretation or administration of these zoning regulations or for variance under these zoning regulations may be taken by any person aggrieved, or by any officer, board or department of the City of North Port affected by any decision, determination or requirement of the department responsible for land development services.

(a) Such appeals shall be taken within a reasonable time not to exceed fifteen (15) days or such lesser period as may be provided by the rules of the Hearing Officer, by filing with the Director of the department responsible for land development services and with the Hearing Officer a notice of appeal specifying the grounds thereof.

(b) The Director shall forthwith transmit to the Hearing Officer all papers constituting the record upon which the action appealed from was taken.

(2) *Withdrawal of appeal.*

(a) The application may be withdrawn at any time prior to the publication of notice of hearing.

(b) The withdrawal of an application that has been placed on an agenda for public hearing may be requested to be withdrawn no later than five (5) days prior to any official meeting of the Hearing

Officer. Such request for withdrawal of an application for hearing must be delivered in writing to the Hearing Officer liaison.

(3) *Continuance.*

(a) A continuance may be requested by an applicant or staff demonstrating that the continuance is necessary to provide rebuttal testimony or to provide time to review documentary evidence.

(i) The applicant may seek a continuance administratively, with consent of the Hearing Officer, prior to the distribution of the meeting agenda for petitions that do not require legal advertisement.

(ii) A maximum of three (3) applicant initiated continuances may be granted for any one (1) petition.

(iii) Any petition that requires publication in a newspaper of general circulation, must be filed in writing twenty-one (21) days prior to the public hearing.

(b) The Hearing Officer may continue the public hearing on his/her own initiative, upon finding that any testimony, documentary evidence, or other evidence presented at the quasi-judicial hearing justifies allowing time for additional research or review for the benefit of the Hearing Officer, to assist in an appropriate resolution of the matter being presented. A continuance initiated by the Hearing Officer will not be charged against the allowable continuances permitted under these regulations.

(c) The Hearing Officer shall order a continuance at any time the Hearing Officer determines the scheduling or timing of the pending application warrants a continuance to another date or time, but is not obligated to grant a continuance.

(4) *Hearing.* The Hearing Officer shall fix a reasonable time for the hearing of the appeal, give public notice thereof as well as due notice of the parties in interest, and decide the same within a reasonable time. At the hearing, any party may appear in person or by agent or attorney.

(a) If the applicant does not appear, refuses to proceed, or cannot proceed, the application shall be deemed denied. An applicant may seek relief by sending a third party to request continuance at the published meeting. If the applicant seeks to request relief by a third party, the applicant shall submit a signed affidavit specifying the person's name, address with a copy of the petition prior to the meeting.

(b) If an application is deemed denied, no further application for a variance of any type for the subject property shall be filed within one (1) year of such denial.

(c) If an application for an administrative appeal is denied, it shall be deemed denied with prejudice.

(5) *Financial and staff assistance.* The Hearing Officer may be provided by the City Commission with such professional and financial assistance as may be deemed necessary to enable the Hearing Officer to perform the functions assigned to it by these zoning regulations.

(6) The cancellation of any meeting of the Hearing Officer is at the officer's discretion.

E. *Powers and duties.* The Hearing Officer shall have the following powers and duties:

(1) *Administrative review.* To hear and decide appeals where it is alleged there is error in any order, decision or determination of the Director responsible for land development services in the enforcement of these zoning regulations.

F. *Reversal of decision of department responsible for Land Development Services Director.*

(1) In exercising the above-mentioned powers, the Hearing Officer may, so long as such action is in conformity with the terms of these zoning regulations, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as sought to be made, and to that end shall have the powers of the department responsible for land development services from whom the appeal is taken.

(2) The final determination of the Hearing Officer shall be made in writing and shall be made available to the applicant, the City Attorney and the City Manager.

G. *Appeals from decisions of Hearing Officer*. Any person or persons, jointly or severally, including any officer, department, board or commission of the City, aggrieved by any decision of the Hearing Officer may apply to the Circuit Court having jurisdiction in the City of North Port for judicial relief within thirty (30) days after the rendition of the decision by the Hearing Officer. The proceedings in the Circuit Court shall be by petition for writ of certiorari, which shall be governed by the Florida Rules of Appellate Procedure.

Sec. 1-31. Staff review.

A. Intent. The intent of the Staff review is to ensure all commercial, multi-family, and subdivision developments conform to the provisions of the City of North Port Comprehensive Plan, the standards set forth in the City of North Port Unified Land Development Code, and set forth in the Urban Design Standards Pattern Book and other applicable City codes, policies, and standards to ensure the best possible project for the City and its residents.

B. Establishment. The Staff review is established administratively to review and approve all commercial, multi-family, and subdivision developments applications within the City of North Port.

I. Appeals.

(1) Filing of appeals. Any applicant aggrieved by any decision, determination or requirement of the City staff relating to any actions shall file a written notice of appeal with the appropriate fees with the department responsible for land development services within thirty (30) business days of the written findings and comments in which the petition was addressed specifying, in detail, the error alleged and the factual and legal basis for the appeal. The Department responsible for land development services shall transmit to the Zoning Board of Appeals all papers constituting the record of the findings, determination or requirement that is the subject of the appeal. In the event that the person aggrieved fails to comply with the provisions of this subsection, such failure shall be jurisdictional and the appeal shall be dismissed.

(2) Hearing. The Zoning Board of Appeals shall fix a reasonable time for a meeting to discuss the appeal. After such meeting, the Board shall decide the appeal within a reasonable time. At the appeals meeting, any party may appear in person or by agent or attorney.

(3) Reversal of decision of City Staff.

(a) After an appeal's meeting with the aggrieved person, the Zoning Board of Appeals may, so long as such action is in conformity with the terms of this chapter, reverse or affirm, wholly or partly, or may modify the order, decision or determination appealed from and may make such order, decision or determination as sought to be made, and to that end shall have the powers of the City staff from which that appeal was taken.

(b) The final determination of the Zoning Board of Appeals to which the appeal was heard shall be made in writing and shall be made available to the person aggrieved, all staff reviewers, Administrative Staff, the City Attorney and the City Manager.

(4) Any person aggrieved by the Zoning Board of Appeals' decision may appeal to the Circuit Court may be appealed to the Circuit Court of Sarasota County within 30 days of such decision. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the decision renders the property unbuildable. The granting of any appeal shall not be in conflict with State Statutes and City Codes and Ordinances.

(a) Applications for an appeal shall be filed pursuant to Sec. 1-10.

CITY OF NORTH PORT ADMINISTRATIVE APPEAL

IN RE: Appeal of MAS-23-160 by Heron Creek Community Association, Inc.

AZB-24-122

_____/

PETITIONER'S MOTION TO TRANSFER ACTION

Petitioner Heron Creek Community Association, Inc. ("the Association" or "the Petitioner") hereby moves the Magistrate to transfer this action to the North Port Planning & Zoning Advisory Board and City Commission, in accordance with the Appeal filed in this action and applicable provisions of the Unified Land Development Code (ULDC).

Attached are email exchanges between the undersigned counsel for the Petitioner and counsel for the City Development Services Department ("the Department") from July 30 through August 22, 2024, regarding the issue herein.

On July 18, 2024, the Petitioner filed its Appeal of the City's approval of MAS-23-160, for the development of 150 multifamily units on Parcel K of the Heron Creek Community at a density exceeding 5 units per acre, raising issues of violations of the North Port Comprehensive Plan and Zoning Code as well as Ordinance No. 2011-33, the Development Order for the Heron Creek Development of Regional Impact.

On July 30, 2024, legal counsel for the Department sent an email to the undersigned legal counsel for the Petitioner and others, stating, "Pursuant to Sections 33-15 and 1-28 of the Unified Land Development Code, the Department has transmitted your appeal applications to the Zoning Board of Appeals."

The Petitioner protested to no avail, on the grounds stated herein.

The City's form for filing an Appeal provides a choice of two boxes to check. The first states, "Appeal of Interpretation and Enforcement for the Unified Development Code (Zoning Board of Appeals).

The second box states, "Appeal of Administrative Process of Procedure (Planning & Zoning Advisory Board, Commission). That is the box which the Petitioner marked on the form.

Further, the Petitioner's Appeal begins with the following:

> This is an Appeal under Article II, Sections 1-10.A(2) and 1-10.C of the North Port Unified Development Code (ULDC), and any other applicable authority, of the approval by staff of the City's Development Services Department of City of North Port Development Order MAS-23-160, a Major Site and Development Plan for a 150-unit residential condominium development on 9.78 acres known as Heron Creek Parcel K.
>
> The location of the property is referenced in the City records as Section 28 Township 39S Range 18E. Its Parcel ID Number with the Sarasota County Property Appraiser is 0991002050. Parcel K is the reference given to the property on Map H of the Heron Creek Development of Regional Impact.
>
> A copy of Development Order MAS-23-160 is attached hereto.
>
> The Issue Date on the Development Order is June 18, 2024. As such, this Appeal, being filed within 30 days of that date on July 18, 2024, is timely.

The provisions of the ULDC under which the Petitioner filed the Appeal are for an Appeal of an "administration decision" of the Development Services Department ("the Department") under the ULDC to the Planning & Zoning Advisory Board and then in turn to the City Commission. It reads as follows:

> Sec. 1-10. – Appeals
>
> A. Types of Appeals.
>
> (2) Appeals of administration.
>
> (a) All appeals for administration of the Unified Land Development Code will be provided by the appropriate departments.
>
> (b) The administration decision may be heard first by the Planning and Zoning Advisory Board. After consideration, the Planning and Zoning Advisory Board will give an advisory recommendation to the City Commission.

(c) After review of the Planning and Zoning Advisory Board's recommendation, the City Commission will make a decision on the administrative appeal. The decision of the City Commission may be appealed to the Sarasota County Circuit Court.

C. Criteria. The criteria for filing an appeal shall be as follows:

(1) Completed appeals application.

(2) A statement of "show of good cause" and alleged error.

(a) This statement shall give a complete explanation and description of the cause of the appeal and the alleged error.

(3) A copy of the interpretation or decision being appealed.

(4) Code reference of what is being appealed.

(5) Address, PID and photos of property affected (if applicable).

By contrast, the first of the ULDC provisions which the Department's counsel seeks to apply to the Appeal, Section 33-15, although under Chapter 33 – Minor and Major Site Development Regulations, is obviously inapplicable to the Appeal. It states, in full:

Sec. 33-15. - Appeals.

Any person aggrieved by the department responsible for land development services' interpretation may appeal to the Zoning Board of Appeals. The criteria for granting an appeal shall be based upon substantial competent evidence proving that the interpretation renders the property without reasonable use. The granting of any appeal shall not be in conflict with State Statutes and City Codes. The Zoning Board of Appeals' decision may be appealed to the Circuit Court of Sarasota County within thirty (30) days of such decision.

Applications for an appeal shall be filed pursuant to Sec. 1-10.

Certainly, this is only for applicants who are aggrieved with the Department's interpretation of a provision of the ULDC because it requires evidence that shows that "the interpretation renders the property without reasonable use."

Comparably, Section 1-28 only applies to "Appeals to the Zoning Board of Appeals concerning interpretation or administration of these zoning regulations or

for variance under these zoning regulations ... ". On the face of it, this Appeal is not an Appeal to the Zoning Board of Appeals. It is an Appeal to the Planning & Zoning Advisory Board and City Commission. The "decision" being appealed is the administrative approval of Development Order MAS-23-160, and each "error" in that approval is cited and explained in the Appeal, all as required by Section 1.10(C).

Further, this Appeal is not only about an interpretation or administration of the "zoning regulations," as provided in Section 1-28. It also, in an appeal of the administrative decision to approve Development Order MAS-23-160, is based on violations of the North Port Comprehensive Plan and Ordinance No. 2011-33, the Development Order for the Heron Creek Development of Regional Impact. In that latter regard, it is important that Section 1.10(1)(b) of the ULDC provides for an appeal of an interpretation of the Comprehensive Plan, such as is inherent in the subject Development Order, within 30 days to the Planning & Zoning Advisory Board and then to the City Commission.

The Petitioner suspects that counsel for the Department, perhaps at the urging of one or more of her client's staff, is seeking to mischaracterize our Appeal as an Appeal to the Board of Zoning Appeals under Section 1-28 in order to invoke the requirement of Section 1-28.F(1) that the Appeal be filed within 15 days of the interpretation or administration at issue, and this Appeal was filed after that but within 30 days of the Development Order approval. (It might also be noted that Section 1.31 of the ULDC allows an applicant 30 days to appeal denial of a Development Order by staff, raising other legal issues). If that occurs, it will create substantial damages to the Petitioner by reason of the following violation of Florida's Public Records Act by the Department, and will provide a serious due process issue in a further appeal to the Circuit Court.

On June 27, 2024, undersigned counsel for the Petitioner filed a Public Records Request with the City through its online portal for "All records from January 1, 2024 to date regarding the Application of a Site and Development Plan for Parcel K in the Heron Creek DRI."

On July 2, 2024, said counsel received a response which provided numerous documents, including the Application for MAS-23-160 and other materials by and to the applicant and the City over the months. Said counsel downloaded all of them and took screenshots of the list of records provided, taken from the City's Public Records portal.

Astonishingly, that Public Records response omitted the June 18, 2024 Development Order approving MAS-23-160!!! In a subsequent records request, counsel for the Petitioners found that it was Carl Benge of the Development Services Department who compiled and provided to Public Records the records which in turn were provided to said counsel in purported response to his public records request. That is the same Carl Benge who signed the approval of that Development Order. Similarly, when on July 10, 2024 the Petitioner's counsel requested all emails regarding MAS-23-160 for a period which included the time frame for its approval, the City's response of July 16, 2024 omitted anything to indicate that the Development Order had been approved.

The exact same thing occurred in the City's response to a comparable records request by Heron Creek homeowner John Blazi, who filed his own individual appeal (since withdrawn) of MAS-23-160. The only reason Petitioner's counsel and Mr. Blazi both found out subsequently about the approval of the Development Order is that Mr. Blazi went around Public Records and found out from a lower-level employee of the Development Services Department that it had been approved, upon which he specifically requested and obtained it from Public Records.

By the time the Petitioner and Mr. Blazi overcame Mr. Benge's violation of the Public Records Act for the City, in order to otherwise discover the Development Order, neither would have had time to file within 15 days even if either thought that was necessary – which for the reasons explained herein, it is not. The Petitioner barely had a few days to draft and file its Appeal within 30 days of June 18.

For the reasons set forth herein, the Petitioner respectfully moves the Magistrate to transfer this Appeal to the Planning & Zoning Advisory Board and City Commission, in accordance with the Code provisions under which the Petitioner properly filed it.

/s/
DANIEL J. LOBECK, ESQUIRE
Florida Bar No. 291323
The Law Offices of Lobeck & Rowe, P.A.
2033 Main Street, Suite 403
Sarasota, FL 34237
Ph: (941) 955-5622
dlobeck@lobeckrowe.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished via email this December 13, 2024 to:

Attorney for City of North Port Development Services Department:

Ellie Neiberger, Esq. eneiberger@bmolaw.com

Attorneys for Intervenor/Developer Heron Creek Associates, Ltd.

Morgan Bentley, Esq. mbentley@bgk.law
Caroleen Brej, Esq. cbrej@bgk.law

RECORDED ELECTRONICALLY
Instrument # 202316518B
County: Sarasota
Date: 11/1/2023 Time: 11:21 AM

DOC TAX $ .70
RECORD $ 44.00
Return to and prepared by:

WILLIAMS PARKER
ATTORNEYS AT LAW • ESTABLISHED 1925

200 South Orange Avenue
Sarasota, Florida 34236
(941) 366-4800
Attention: Christa L. Folkers, Esq.

DEED

This Deed is made as of the 30th day of October 2023 by and between **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership, hereinafter referred to as Grantor, whose post office address is 1990 Main Street, Suite 801, Sarasota, FL 34236, and **HERON CREEK COMMUNITY ASSOCIATION, INC.**, a Florida corporation not for profit, hereinafter referred to as Grantee, whose post office address is C/O RealManage, 2477 Stickney Point Road, Suite 118-A, Sarasota, Florida 34231.

Grantor, in consideration of the sum of ten dollars and other valuable considerations to it in hand paid by Grantee, receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey to Grantee, its heirs and assigns forever, the following described property situate in Sarasota County, Florida (the "Property"):

ALL THAT PROPERTY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO

together with all appurtenances, privileges, rights, interests, dower, reversions, remainders, and easements thereunto appertaining.

Portions of the Property comprise the "Community Common Areas" pursuant to the Declaration of Covenants, Conditions, and Restrictions for Heron Creek recorded in the Official Records as Instrument No. 1999127212, Public Records of Sarasota County, Florida, as amended and supplemented (collectively, the "Declaration").

The portion of the Property described as Tract "B," HERON CREEK, UNIT 3, as per plat thereof recorded in Plat Book 42, Page 29, Public Records of Sarasota County, Florida, is part of the "Neighborhood Common Areas" for Osprey Cove pursuant to the Declaration of Restrictions for Osprey Cove at Heron Creek recorded in the Official Records as Instrument No. 2001126496, Public Records of Sarasota County, Florida, as amended.

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2023165188 5 PG(S)
11/1/2023 11:21 AM
KAREN E. RUSHING
CLERK OF THE CIRCUIT COURT
SARASOTA COUNTY, FLORIDA
SIMPLIFILE Receipt # 3103762

DOC TAX $ .70
RECORD $ 44.00
Return to and prepared by:

WILLIAMS PARKER
ATTORNEYS AT LAW • ESTABLISHED 1925

200 South Orange Avenue
Sarasota, Florida 34236
(941) 366-4800
Attention: Christa L. Folkers, Esq.

Doc Stamp-Deed: $0.70

DEED

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Conveyance of title to the Property is subject to the following exceptions, covenants, limitations, reservations, and conditions, to-wit:

1. Taxes for the year 2023 and subsequent years
2. Zoning and other governmental regulations
3. The Declaration
4. Easements, covenants, conditions, reservations, and restrictions of record
5. Grantor hereby reserves for itself and its successors and assigns, all rights and easements over and across the Property for access, drainage, and utility purposes and for all other purposes set forth in the Declaration or any other easement of record

The provisions hereof will bind and inure to the benefit of the parties hereto and their successors and assigns.

In witness whereof, Grantor has caused this Deed to be executed in its name by its undersigned duly authorized officer as of the date above written.

WITNESSES:

Signature of Witness

Print Name of Witness

Signature of Witness

Print Name of Witness

HERON CREEK ASSOCIATES, LTD.

By: Marsh Creek Communities, Inc., a Florida corporation, as its General Partner

By: _____

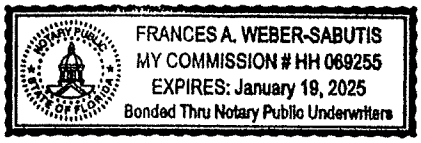
James L. Bevillard
As its Vice President

STATE OF FLORIDA
COUNTY OF SARASOTA

The foregoing instrument was acknowledged before me by means of [X] physical presence or [ ] online notarization, this 30th day of October 2023, by James L. Bevillard, as Vice President of Marsh Creek Communities, Inc., a Florida corporation, and General Partner of **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership, on behalf of the corporation and the partnership. The above-named person is personally known to me or has produced _____ as identification. If no type of identification is indicated, the above-named person is personally known to me.

Frances A. Weber-Sabutis
Signature of Notary Public

(Notary Seal)



Frances A. Weber-Sabutis
Print Name of Notary Public

I am a Notary Public of the State of Florida, and my commission expires on 01/19/2025.

EXHIBIT "A"

PID: 0991010012

Tracts CR1, CR2, CR3, CR4, CR5, CR6, 100, 101, 102, 103, 104, 105, and 106, HERON CREEK, UNIT I, as per plat thereof recorded in Plat Book 40, Page 47, Public Records of Sarasota County, Florida

PID: 0978092302

Tracts CR1, CR2, CR3, B, 100, and 101 HERON CREEK, UNIT 2, as per plat thereof recorded in Plat Book 41, Page 45, Public Records of Sarasota County, Florida

PID: 0978110100; 0994061399

Tracts "CR1," "CR2," "CR3," "CR4," "CR5," "B," and "L-1," HERON CREEK, UNIT 3, as per plat thereof recorded in Plat Book 42, Page 29, Public Records of Sarasota County, Florida

PID: 0991060427

Tracts "CR1," "C," and "D," HERON CREEK, UNIT 4, as per plat thereof recorded in Plat Book 42, Page 48, Public Records of Sarasota County, Florida

PID: 0993110426

Tracts "CR1," "CR2," and "CR3," HERON CREEK, UNIT 5, as per plat thereof recorded in Plat Book 43, Page 20, Public Records of Sarasota County, Florida

PID: 0993130578

Tracts "CR1," "CR2," "CR3," "CR4," and "W-1," HERON CREEK, UNIT 6, as per plat thereof recorded in Plat Book 43, Page 46, Public Records of Sarasota County, Florida

PID: 0993121590

Tracts "CR1," 100, and 101, HERON CREEK, UNIT 7, as per plat thereof recorded in Plat Book 43, Page 29, Public Records of Sarasota County, Florida

PID: 0978131630

Tracts "CR1," "CR2," "CR3," "CR4," 100, and 101, HERON CREEK, UNIT 8, as per plat thereof recorded in Plat Book 44, Page 3, Public Records of Sarasota County, Florida

PID: 0978141712

Tracts "CR1," 100, 101, and 102, HERON CREEK, UNIT 9, as per plat thereof recorded in Plat Book 44, Page 4, Public Records of Sarasota County, Florida

PID: 0977051828

Tracts "CR1," "CR2," "CR3," "CR4," "CR5," "CR-6," and "A," HERON CREEK, UNIT 10, as per plat thereof recorded in Plat Book 45, Page 2, Public Records of Sarasota County, Florida

PID: 0977061853

Tract "CR1," HERON CREEK, UNIT 11, as per plat thereof recorded in Plat Book 45, Page 3, Public Records of Sarasota County, Florida

RECORDED ELECTRONICALLY
Instrument # 202316518B
County: Sarasota
Date: 11/1/2023 Time: 11:21 AM

DOC TAX $ .70
RECORD $ 44.00
Return to and prepared by:

WILLIAMS PARKER
ATTORNEYS AT LAW • ESTABLISHED 1925

200 South Orange Avenue
Sarasota, Florida 34236
(941) 366-4800
Attention: Christa L. Folkers, Esq.

DEED

This Deed is made as of the 30th day of October 2023 by and between **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership, hereinafter referred to as Grantor, whose post office address is 1990 Main Street, Suite 801, Sarasota, FL 34236, and **HERON CREEK COMMUNITY ASSOCIATION, INC.**, a Florida corporation not for profit, hereinafter referred to as Grantee, whose post office address is C/O RealManage, 2477 Stickney Point Road, Suite 118-A, Sarasota, Florida 34231.

Grantor, in consideration of the sum of ten dollars and other valuable considerations to it in hand paid by Grantee, receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey to Grantee, its heirs and assigns forever, the following described property situate in Sarasota County, Florida (the "Property"):

ALL THAT PROPERTY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO

together with all appurtenances, privileges, rights, interests, dower, reversions, remainders, and easements thereunto appertaining.

Portions of the Property comprise the "Community Common Areas" pursuant to the Declaration of Covenants, Conditions, and Restrictions for Heron Creek recorded in the Official Records as Instrument No. 1999127212, Public Records of Sarasota County, Florida, as amended and supplemented (collectively, the "Declaration").

The portion of the Property described as Tract "B," HERON CREEK, UNIT 3, as per plat thereof recorded in Plat Book 42, Page 29, Public Records of Sarasota County, Florida, is part of the "Neighborhood Common Areas" for Osprey Cove pursuant to the Declaration of Restrictions for Osprey Cove at Heron Creek recorded in the Official Records as Instrument No. 2001126496, Public Records of Sarasota County, Florida, as amended.

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2023165188 5 PG(S)
11/1/2023 11:21 AM
KAREN E. RUSHING
CLERK OF THE CIRCUIT COURT
SARASOTA COUNTY, FLORIDA
SIMPLIFILE Receipt # 3103762

Doc Stamp-Deed: $0.70

DOC TAX $ .70
RECORD $ 44.00

Return to and prepared by:

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Conveyance of title to the Property is subject to the following exceptions, covenants, limitations, reservations, and conditions, to-wit:

1. Taxes for the year 2023 and subsequent years
2. Zoning and other governmental regulations
3. The Declaration
4. Easements, covenants, conditions, reservations, and restrictions of record
5. Grantor hereby reserves for itself and its successors and assigns, all rights and easements over and across the Property for access, drainage, and utility purposes and for all other purposes set forth in the Declaration or any other easement of record

The provisions hereof will bind and inure to the benefit of the parties hereto and their successors and assigns.

In witness whereof, Grantor has caused this Deed to be executed in its name by its undersigned duly authorized officer as of the date above written.

WITNESSES:

Signature of Witness

Print Name of Witness

Signature of Witness

Print Name of Witness

HERON CREEK ASSOCIATES, LTD.

By: Marsh Creek Communities, Inc., a Florida corporation, as its General Partner

By: _____

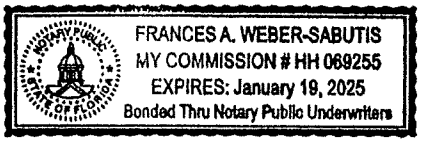
James L. Bevillard
As its Vice President

STATE OF FLORIDA
COUNTY OF SARASOTA

The foregoing instrument was acknowledged before me by means of [X] physical presence or [ ] online notarization, this 30th day of October 2023, by James L. Bevillard, as Vice President of Marsh Creek Communities, Inc., a Florida corporation, and General Partner of **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership, on behalf of the corporation and the partnership. The above-named person is personally known to me or has produced _____ as identification. If no type of identification is indicated, the above-named person is personally known to me.

Frances A. Weber-Sabutis
Signature of Notary Public

(Notary Seal)



Frances A. Weber-Sabutis
Print Name of Notary Public

I am a Notary Public of the State of Florida, and my commission expires on 01/19/2025.

EXHIBIT "A"

PID: 0991010012

Tracts CR1, CR2, CR3, CR4, CR5, CR6, 100, 101, 102, 103, 104, 105, and 106, HERON CREEK, UNIT I, as per plat thereof recorded in Plat Book 40, Page 47, Public Records of Sarasota County, Florida

PID: 0978092302

Tracts CR1, CR2, CR3, B, 100, and 101 HERON CREEK, UNIT 2, as per plat thereof recorded in Plat Book 41, Page 45, Public Records of Sarasota County, Florida

PID: 0978110100; 0994061399

Tracts "CR1," "CR2," "CR3," "CR4," "CR5," "B," and "L-1," HERON CREEK, UNIT 3, as per plat thereof recorded in Plat Book 42, Page 29, Public Records of Sarasota County, Florida

PID: 0991060427

Tracts "CR1," "C," and "D," HERON CREEK, UNIT 4, as per plat thereof recorded in Plat Book 42, Page 48, Public Records of Sarasota County, Florida

PID: 0993110426

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Sarasota Herald-Tribune

NEWS

New houses in North Port have an increasingly upscale appearance

Published 4:08 a.m. ET April 6, 2003/ Updated 9:29 a.m. ET April 6, 2003
DOROTHY STOCKBRIDGE-PRATT

The building boom envisioned more than 40 years ago has hit North Port. Planned in the late 1950s by General Development Corp., the south Sarasota County town has hit its stride, generating 48 percent of the residential building permits issued in Sarasota County in 2002.

General Development Corp. platted vast stretches of building lots in North Port Charlotte, a name that was shortened to North Port in 1974. Many people around the country who bought those lots either resold them cheaply or defaulted. In recent years, the reasonably priced but scattered lots have provided affordable homes for retirees and working people commuting to Sarasota.

Now North Port is going more upscale with three model-home packages priced at more than $500,000 at Heron Creek Golf & Country Club and several sales above the half-million dollar mark. Three things stand out in today's North Port picture:

"When we began acquiring the lands now known as Heron Creek, North Port had about 16,000 people and annual single-family permits of 300," said Heron Creek developer Dr. Hans Jurgen-Reichardt. "Today North Port's population has nearly doubled and the building permits projected for this year are approaching 2,000. We're encouraged by this dramatic transformation."

Reichardt insists that Heron Creek is unique in having both the gated country-club community with the town's only 27-hole golf course and a golf academy, as well as the 150-acre Heron Creek Towne Center at Price and Sumter Boulevards. Although Heron Creek was approved for 1,970 residential and multi-family units, it will have only 850 single-family homes (345 of them sold) and no multi-family.

"We took every measure to preserve and enhance the existing environment rather than destroy it," Reichardt added.

Arthur Hills designed the golf course to challenge every level of player and to take advantage of the natural beauty. Its seven builders offer home choices from the $140,000s to more than $800,000, and most sites are on either the golf course, lake or nature preserve. The 11 estate homes of The Enclave, opening next year, will start around $800,000 for home and half-acre site.

"We think North Port will be an extension of Sarasota, like Bonita Bay is an extension of Naples," said Anthony Farhat, marketing director for PGI Homes. "We just sold a home like our model at Heron Creek for $580,000. You can get a Sarasota lifestyle for $500,000 to $600,000 instead of $1 million."

PGI Homes has joined Whitehall Quality Homes and Nohl Crest Homes in the high-end areas of Heron Creek.

Pat Neal says, "North Port is very hot. I've never had as many people call me about any property."

Seven national builders and three local builders are vying for seven Panacea tracts, each with a market niche, such as single-family homes, villas, paired villas, condominiums or town houses. Benderson is developing the three commercial areas. The development won't have golf, but Neal says it will be highly amenitized, including an elongated park, interpretive nature features, exercise course and neighborhood features.

Neal never liked the Panacea name, which means "cure-all" or "remedy," and he's holding a naming contest. From 450 suggestions, three of the best names are now being tested with a focus group. Initial land development, including the regulatory phase of master improvement, is slated for 2004. Three commercial, light industrial or distribution areas will be in the master plan, along with sites for schools, health care and a university. The first homes, which Neal believes will range in price from $108,000 to the mid-$300,000s, will be seen in 2005.

Neal tips his hat to Reichardt: "He certainly made a beautiful community at Heron Creek and set a trend for improving lifestyle."

Carlos Beruff of Medallion Homes says he bought the 212 remaining lots at Bobcat Trail because he's enthusiastic about North Port.

"We like working with the City of North Port. The market is becoming more high-end," said Beruff, who has made seven home sales of more than $300,000 since Oct. 1. "Buyers get a whole lot more for their money. Sarasota has gotten so expensive that people are willing to drive 30 minutes."

Medallion has gotten off to a fast start with 42 sales between Oct. 1 through February, but he still gets the most volume in the $166,000 to $225,000 range. His garden homes are from $165,900 on 60- by 125-foot lots. His two models in The Gardens won several awards in the recent 2003 Parade of Homes. Models are five months away in his Estates neighborhood, with homes on 70- by 130-foot sites; and in the Sanctuary, on 90- by 140-foot lots.

Most of the buyers of his larger houses are empty-nesters who live here full-time; about 25 percent are buying second homes. It's a resort lifestyle with golf course (still owned by KEB), clubhouse, pool and gated security. Beruff says he'll invest $200,000 upgrading the landscape.

At Heron Creek, Reichardt says buyers want more features than they did in 2000, when his first sales ranged mostly from $250,000 to $275,000. Today

these homes would be $300,000 to $375,000, mostly because more features are included in response to market demand.

He says the buyers who have paid $500,000 and more are seasonal residents -- pre-retirees who expect to become full-time residents when they retire in a few years. Heron Creek markets to Europeans, but traveling concerns are hurting this market.

"Hopefully this will change, but the U.S. market is so strong at the moment, it may not happen before our buildout," Reichardt said.

Heron Creek's seven builders offer a wide selection of styles and sizes, from the $140,000s to more than $800,000. Each of the seven builders has a niche or two: villas on 37- or 45-foot lots, patio homes on 52-foot lots, executive homes on 62-foot lots, single-family homes on 72- and 80-foot lots, and estate homes on half an acre.

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Volume 32, Number 7
November 27, 2024
Cite as 32 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Counties—Land Development Code—Special exceptions—Sand mine—Notice—Where provisions of county code requiring that notice of public hearing be mailed by certified mail were not in effect when application for special exception to operate sand mine was filed, but they were adopted prior to final approval of application, procedural notice requirement operated retrospectively—Petitioners were not accorded procedural due process where notices of hearing were not mailed by certified mail, and public notices did not contain required language set forth in county code and statute—Approval was not supported by competent substantial evidence where traffic study required by county code was incomplete at time application was approved and required wildlife impact study had not yet been undertaken at that time

JEFFRY FERGUSON and KIMBERLY SWIFT, Petitioners, v. LEVY COUNTY, a political subdivision of the State of Florida, and RYAN THOMAS, 3RT SAND MINE, In Re: SPECIAL EXCEPTION SE 23-01, Respondents. Circuit Court, 8th Judicial Circuit (Appellate) in and for Levy County. Case No. 38-2024-CA-000075-CAAM. Circuit Civil Division. September 17, 2024. Counsel: Ralf Brookes, Cape Coral, for Petitioners. Gregory T. Stewart and Lisa B. Fountain, Nabors, Giblin & Nikerson, P.A., Tallahassee; and Nicholle M. Shalley, County Attorney, Bronson, for Respondents.

ORDER ON PETITION FOR WRIT OF CERTIORARI

(CRAIG C. DETHOMASIS, J.) THIS CAUSE having come before the court upon Petitioners Petition for Writ of Certiorari and this court having reviewed said Petition, the Respondents' Response in Opposition to Petition for Writ of Certiorari, the Petitioner's Reply, the relevant transcripts, exhibits, case history, and applicable law, finds as follows:

1. This Court has jurisdiction to issue writs of certiorari consistent with Article V, Section 5(b) Florida Constitution and Florida Rule Appellate Procedure 9.030(c)(3). Petitioner filed the Petition for Writ of Certiorari seeking judicial review of a quasi-judicial decision by Levy County Board of County Commissioners (e.g., the lower tribunal) pursuant to Florida Rules of Appellate Procedure 9.100(b), (c) and 9.190(b)(3).

2. The Respondents, after Order Directing Response issued on 5/16/24, and pursuant to Rule 9.100(j), filed a response on 6/12/24 to which the Petitioner then filed a Reply per Rule 9.100(k).

3. The subject of this review is the quasi-judicial decision of the Levy County Board of County Commissioners (hereafter referred to as "BOCC") rendered on 3/19/24, approving a 1,100-acre sand mine after Defendant, 3RT Sand Mine submitted a Petition seeking Special Exception (No. SE 23-01 hereafter referred to as "Application").

4. Petitioners allege in the Petition that the hearing of 3/19/24 was not properly advertised under the Levy County Code 50-3 "Notice" and they were not given proper certified mailing notice of the hearing and were therefore unaware of the hearing and did not attend, but desired to present testimony and evidence in opposition to the sand-mine special exception. The Petitioners also allege the published advertised notice was also not in conformity with the Levy County Code and/or applicable Florida Statutes.

5. The Petitioners further allege that the Applicant failed to meet their burden of proof that the application met the essential requirement of law contained in Levy County Land Development Code 50-719 "Special exceptions for major mining operations; criteria, standards and conditions" in addition to failing to meet the Code requirements for notice of the quasi-judicial hearings held by the BOCC and seek judicial review to quash and reverse the quasi-judicial approval.

6. A prior hearings was held before the BOCC on 5/1/23 and at said hearing the Application was continued to 7/10/23. A copy of the Notice for the 5/1/23 hearing and the mailing list for the Notice is included as part of the County's Appendix. (Cty. App. 6 at 98-104). Among the people that were mailed copies of the Notice were Petitioners, Kimberly Adair Swift at [Editor's note: Address redacted], Bronson, Florida 32621, and Jeffry L. Ferguson at [Editor's note: Address redacted], Williston, Florida 32696. (Cty. App. 6 at 98-104). Regarding the hearing of 7/10/23, On June 22, 2023, notice was published in the Levy Citizen, a weekly newspaper published within Levy County, notifying the public that the Planning Commission would consider the Application on July 10, 2023, and that the Board of County Commissioners (the "Board") would hear the matter on July 25, 2023. (Cty. App. 8 at 109-110). On July 25, 2023, the Application was removed from the agenda and rescheduled for quasi-judicial public hearing on the Application for December 5, 2023. After presentation of the Application, discussion, public comment and commencement of deliberation by the BOCC, the Board ultimately voted to continue the hearing to February 6, 2024, at which time the BOCC reconvened and reopened the public comment and deliberation stages. A vote to approve the Application passed and the Board directed the City Attorney to prepare a written Order to be considered at the March 19, 2024, meeting. On March 19, 2024, the BOCC met and voted to approve the Order which approved the Application and conditions governing the development of the subject property and authorized the Chairman to execute said Order. The Petition under review was then filed on April 18, 2024.

7. The Subject Property consists of approximately 1,100 acres (including the mine property and access to CR 337) located in Section 35, Township 12S, Range 17 E. Levy County Florida. (Cty. App. 2 at 18-20). The current land use and zoning of the Subject Property under the County's Land Development Code ("LDC") was A/RR (Agricultural/Rural Residential) and has historically been utilized for farming and crops. The Levy County Land Development Code allows a mine to be developed in agriculture-rural residential zoning if a special exception is granted by the county commission. Major mining excavation and fill activity operations are listed as a special exception within the land use/zoning district A/RR. (Cty. App. 2 at 18-20).

8. It is undisputed that, in its granting of Application for special exception, BOCC was acting in a quasi-judicial, rather than a legislative, capacity. As such, review of its decision is proper by way of certiorari. See *Hirt v. Polk County Board of County Commissioners*, 578 So. 2d 415, 416 (Fla. 2d DCA 1991) (Certiorari is the proper method to review the quasi-judicial actions of a Board of [the] County, whereas injunctive and declaratory suits are the proper way to attack a Board's legislative actions).

9. "In first tier certiorari proceedings as here, the circuit court is limited to a determination of the following: (1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence." See, *Broward County v. G.B.V. International, Ltd.*, 787 So.2d 838 at 843 (Fla. 2001) [26 Fla. L. Weekly S389a] quoting *Deerfield Beach v. Vaillant*, 419 So. 2d 624 at 626 (Fla. 1982) (emphasis added), see also *City of Dania*, 761 So. 2d at 1092; *Heqqs*, 658 So. 2d at 530.

10. In considering a petition for writ of certiorari, "a court has only two options—it may either deny the petition or grant it and quash the order at which the petition is directed. The court may not enter any judgment on the merits of the underlying controversy or direct the lower tribunal to enter any particular order." *Clay Cnty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) [32 Fla. L. Weekly D2870a] (citing *Broward Cnty. v. G.B.V. Intl*, 787 So. 2d 838, 843-44 (Fla. 2001) [26 Fla. L. Weekly S389a]).

11. In certiorari the reviewing court will not undertake to re-weigh

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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. See, *DeGroot v. Sheffield,* 95 So. 2d 912 (Fla. 1957).

12. While the Petition under review contains assertions and averments of the potential and practical impact of the approval of the application submitted by the respondent, this court limits its review as set forth in paragraphs 9, 10, and 11, above.

13. **NOTICE**: Levy County Code 50-3(a) which addresses requirements of Public Notice and specifies that notice by mail be sent via certified mail.

"Levy County Code Sec. 50-3 Types of public notice. *(a) Mailed notice. The applicant is responsible for sending supplemental mailed notice. The mailed notice must identify the property appraiser's parcel identification number(s) for the subject property, the physical address of the subject property (if no address is assigned, the general vicinity or nearest intersection); the date, time, and location of the public hearing; and a general description of the application. The* ***notice must be mailed by certified mail*** *at least 15 calendar days prior to the date of the hearing to all real property owners whose property lies within 300 feet, or 2,500 feet for a special exception for electric generating facilities, or 2,500 feet for a special exception for mining (without blasting and 49 or less one way truck trips per day), or two miles for a special exception for mining (that includes blasting or 50 or more one way truck trips per day) from any property line of the property that is the subject of the application. Addresses for mailed notice must be obtained from the county property appraiser's current ad valorem tax records.*

Subsection (b) of 50-3 also requires posted notice as follows:

(b) Posted notice. Notice signs (which can be obtained from the county planning and zoning office) must be posted by the applicant as follows: (2) Location of signs. a. Street frontage. One sign shall be placed along each road that fronts the property. Signs should be placed on the property (not within the road right-of-way) ***so as to be visible from the road.***

Subsection (c) of 50-3 addresses requirements of notice via published advertisement:

c) Published advertisement. The county will publish notice of each meeting at least ten calendar days prior to the date of the meeting and, at a minimum, ***the notice must contain the following information****: .....*

*(5) That "****In accordance with F.S. § 286.0105****, should any person decide to appeal any decision made with respect to any matter considered at this meeting, such person will need a record of the proceedings, and for such purpose, may need to ensure that a verbatim record of the proceeding is made, which record includes the testimony and evidence upon which the appeal is to be based"*

Florida Statute 286.0105 states as follows:

286.0105?Notices of meetings and hearings must advise that a record is required to appeal.—Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. The requirements of this section do not apply to the notice provided in s. 200.065 (3).

History.—s. 1, ch. 80-150; s. 14, ch. 88-216; s. 209, ch. 95-148.

The Petitioner alleges that procedural due process was not accorded as the notice mailed was not via certified mail, the posted notice was not visible from the road as the signage was left fallen to the ground, and the record evidence of the published advertisement notices did not contain the required language set forth in 50-3 or F.S. 286.0105.

Regarding the issue of notice, Respondents advance argument that the requirements of 50-3 are not controlling and that the provision of the Levy County Code establishing the requirements of notice for the Application which are relevant to this case are solely contained in Sections 50-719 and 50-798. The Respondent suggests that because Section 50-3 was adopted by the BOCC on December 5, 2023, and became effective on December 12, 2023, and the Application under review was filed prior to the effective date of this code provision, the notice requirements of 50-719 and 50-798 dictate the controlling notice requirements which are determinative in this case. Although the assertion regarding the effective date of 50-3 is not in dispute, the applicability of said section of the Code is.

Section 50-719(11)(d)(11) states, in relevant part:

(11) Public notice requirement. ***In addition to any other notice requirements*** *for a special exception contained within division 5of article XIII, the extent of the notice required to be provided to surrounding property owners for an application for a special exception for a major mining operation shall be extended from 300 feet to two miles in the event that the proposed major mining operation includes blasting or 50 or more one-way truck trips per day. The additional cost incurred by providing notice beyond 300 feet shall be calculated and paid for by the applicant prior to the public hearing on the special exception to be held before the planning commission.*

Significantly, it should be noted that the procedural notice provisions set forth in Section 50-3 were adopted prior to the final approval of the Application. Thus, this Section, being procedural in nature and not substantive, is controlling as to the Application made but not yet approved. See, *Patronis v. United Insurance Company of America*, 299 So. 3d 1152, 1157 (1st DCA, 2020) [45 Fla. L. Weekly D1359d] citing *State Farm Mutual Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995) [20 Fla. L. Weekly S173a]. Also, ("a procedural or remedial statute is to operate retrospectively"), while "substantive" laws may not be applied retroactively if they abolish or curtail protected rights or impose unconstitutional obligations. See, *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1272 (Fla. 2013) [38 Fla. L. Weekly S859a].

14. While the Respondent asserts notice was mailed, the record evidence and exhibits submitted do not establish the requirement of **certified mail** was adhered to. Further, the exhibits of record which represent the public notices advertised in the newspaper did not contain the required language set forth in F.S. 286.0105. This court finds that Section 50-3, in addition to Sections 50-719 and 50-798 and F.S. 286.0105, are controlling. Thus, procedural due process regarding notice was not accorded the Petitioner.

15. **BURDEN OF PROOF**: The Respondent correctly discusses the following as it relates to the issue of whether the Respondents failed to meet their burden of proof in obtaining the approval of the Application: under this Court's limited scope of review, it must be determined whether the record contains any competent substantial evidence to support the decision that was ultimately made. In evaluating the evidence presented, it matters not whether there is also

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evidence to support a conclusion different from that reached by the Board, for "[t]he point is that when the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice—not the circuit court." *Metro Dade County v. Blumenthal*, 675 So. 2d 598, 606 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D1445c]. It is not for the reviewing court to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. "The. . .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. . ." *DeGroot* v. *Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

16. In conformity with the foregoing, there remain two issues of the several raised by the Petitioner that warrant comment as it relates to presentation of record evidence at the time of approval of the Application and whether it meets the required showing necessary.

a. **Traffic Study**. Levy County Code Section 50-719(d)(3)(d) states, in relevant part: *d. "Hauling requirements. The applicant shall ensure that neither public nor private property will be damaged by the hauling of material, and that hazardous traffic conditions will not be created, as shown by* ***a traffic study*** *prepared by a traffic engineer licensed in the State of Florida,* ***which study shall be submitted by the applicant with the application."***

At hearing on February 6, 2024, the following discussion took place when the BOCC was reviewing the Application (at page 25, line 25 through page 27 line10 February 6, 2024, Transcript filed with the Clerk of Court, docket entry no. 8):

MS. HECTUS: Warrants for the installation of auxiliary lanes, acceleration and 2 deceleration, and left-turn lane shall be investigated.

COMMISSIONER BROOKS: Madam Chair?

CHAIRMAN MILLS: Yes, Commissioner Brooks.

COMMISSIONER BROOKS: Can you please clarify for us what "warrants for the installation" and "*shall be investigated*" specifically mean?

MS. HECTUS: So, per the planning commission, when they were talking about this, they weren't sure that the—based on what the traffic study said, *they were not sure that these—that there was a cause to have these acceleration and deceleration lanes, and they wanted us to look into it further by talking to the road department*, etc. I believe Alice is here from the road department, but they also—after the information was brought to them, also did not think it warranted it.

MR. VANDEURSEN: *We're planning to have the traffic engineer that did the traffic study evaluate it and submit the information to the road department and see what they all say.*

COMMISSIONER BROOKS: Alice, I know in the past that when we have looked at these types of lanes and different projects, a number of things have been taken into account, trips, things of that nature. Is that what we're talking about? here, is looking at—

MS. LALONDE: Yes, the vehicle trips per day. It did not warrant it at this time. We will re-evaluate the situation. Once it's open, we will do more traffic counts and go from there,but at this time, no, it does not warrant.

While the Code requires a traffic study to be submitted with the application, the above colloquy confirms continued study in the future which runs counter to the premise that the Code would require such a study to be in existence to *assure no degradation of road infrastructure* (as required by 50-719(6)) and/or assurance *that the mining operation would not be detrimental to the areas residents or businesses, or the public health, safety, or welfare of the community as a whole* (as required by 50-719(11)). Future plans to complete a traffic study is not what is contemplated by the applicable Code.

b. **Wildlife Impact Study:** An additional safeguard and requirement of the applicable Code contemplates a completed wildlife impact study prior to Application approval. In the record evidence submitted, transcripts of the following hearing reveal such a requirement was not met prior to approval (transcript Page 19 line 18 through page 20 line 4 of the February 6, 2024, transcript of proceedings before the BOCC filed with the Clerk of Court at docket entry no. 8):

MS. HECTUS: Number 12: Meet all FWC and DEP 19 threatened and endangered species guidelines and regulations for habitat protection and restoration.

MR. VANDEURSEN: That's not a problem Mr. Thomas has been in conversations with FWC, and ***we're kind of waiting to go forward with that*** because creatures or animals can come and go on the property. If we would have done this in May, 2 it's different today than what it was then. So we want to—***we want to be able to move forward, and we will comply with that.***

The position articulates a desire to move forward with approval prior to compliance with the requirement of having a wildlife impact study completed before any such approval. While a proffered hypothetical explanation is offered, without substantively ever being corroborated as being reasonable and/or in conformity with the Code, non-compliance with the Code's expectations and directives remains. A willingness to comply in the future does not equate to the requirement of actual compliance at the time of approval of Application.

17. The Florida Supreme Court in *DeGroot* 95 So. 2d 912, 916 described "competent substantial evidence" as follows:

We have used the term 'competent substantial evidence' advisedly. 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 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.

18. Given the foregoing examples of incomplete studies and/or those not yet performed, all of which which were necessarily required prior to approval of the Application, as well as there being clear indication that future study remains necessary, it cannot be said that there is competent substantial evidence supportive of the decision to approve the Application.

19. Given the foregoing findings that procedural due process regarding notice was not accorded to Petitioners, that the essential requirements of applicable law were not observed, and that the quasi-judicial judgment to approve the Application was not supported by competent, substantial, evidence, it is, therefore

ORDERED and ADJUDGED that the Petition for Writ of Certiorari is GRANTED and the approval of the Application to which it is directed is hereby QUASHED.

* * *

From: Jerome Fletcher
To: Ronald York
Cc: Jim Bevillard
Subject: RE: [EXTERNAL] FW: Heron Creek meeting
Date: Wednesday, November 10, 2021 3:38:00 PM

Hi Ron, thanks for reaching out, we have had multiple internal conversations since we met including some meetings this week:

- I spoke to staff and our legal team, we are struggling with how to move to forward without a comp plan amendment, which as you know is a longer and more public inclusive process. It appears a comp plan amendment should have been done prior to the approval given in the past and it was not done. That looks to be a mistake on the behalf of the staff in the past. Our attorney said yesterday they are available to speak to your attorney in case we are missing something that we all could agree on to make this process move forward without a comp plan amendment. Dan Tresscott's analysis that reference below may helpful if you can provide.
- My planning team said a preapplication date is not a problem for them to give you asap, Allison Christie can get for you, her contact information is below and she is awaiting your phone call.
- I am still working on the signage issue, but the conversation was positive. I should have more clarity on this one next week.

If we need to chat, I will be available all day tomorrow after 9am, just call me on my cell phone, thanks.

A. Jerome Fletcher II, MPA
City Manager of North Port
4790 City Hall Boulevard
North Port, FL 34286
Office: 941.429.7076
Cell: 941.224.5402
www.cityofnorthport.com

From: Ronald York <ron@nationallandgroup.net>
Sent: Wednesday, November 10, 2021 3:27 PM
To: Jerome Fletcher <jfletcher@cityofnorthport.com>
Cc: Jim Bevillard <jim@nationallandgroup.net>
Subject: [EXTERNAL] FW: Heron Creek meeting

ALERT

Dear Mr. Fletcher,

Thank you again for the time last week to meet and discuss the Heron Creek master planned community along with some pending projects we have going. Jim & I thoroughly enjoyed our discussion with you.

I also wanted to follow up on a few items we discussed with you regarding the parcel K staff comments, the sign locations for our ALF & medical user, as well the pre-application date for our multi-family project partner Ventures Development. We would appreciate you letting us know the result of your interactions following our meeting with staff. I have received Mr. Dan Trescott's analysis as it pertains to parcel K and the comprehensive plan if you would like me to provide that for your review.

Thank you in advance, and we look forward to a fruitful relationship with you and your staff.

Sincerely,

Ron York
Heron Creek Development Manager

Exhibit "A"

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Plaintiff,

vs.

CLASS REPRESENTATION
Case No. 2020 CA 004364 NC

STEVE DSUPIN, et al.,
Defendants,

And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Nominal Defendant.
_____/

STEVE DSUPIN, et al.,
Counterclaim-Plaintiffs,

vs.

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Counterclaim-Defendant,

And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Cross-claim Defendant.
_____/

AFFIDAVIT OF JAMES L. BEVILLARD IN SUPPORT OF PLAINTIFF/COUNTERCLAIM DEFENDANT'S RESPONSE IN OPPOSITION TO DEFENDANTS/COUNTERCLAIM PLAINTIFFS' MOTION FOR PARTIAL FINAL SUMMARY JUDGMENT ON COUNTER-CLAIM AND CROSS-CLAIM

STATE OF FLORIDA
COUNTY OF SARASOTA

1. I am over the age of 18 years, qualified to make this Affidavit, and otherwise competent to give the statements and testimony contained in this Affidavit.

2. I have personal knowledge of the facts contained in this Affidavit and they are true and correct.

3. I, James L. Bevillard, am a Vice President of Marsh Creek Communities, Inc., which is a General Partner of the Plaintiff/Counterclaim Defendant, Heron Creek Associates, Ltd. ("Developer"), and am authorized to make this Affidavit on the behalf of the Developer.

4. The Developer is a Florida limited partnership that owns real property in Sarasota County, Florida.

5. Since 1997, the Developer has been in the process of developing the property into a mixed-use neighborhood community ("Heron Creek Community" or "Heron Creek").

6. The Heron Creek Community is a four-phase, mixed use community containing single-family units, multi-family dwellings, and commercial and other uses.

7. In the original design and concept, the Developer planned out the four phases of the Heron Creek Community as:

a. Phase I was to contain single-family units, multi-family units and other uses;

b. Phase II was to contain single- family units and other uses;

c. Phase III was to contain single family units, multi-family units, and other uses; and

d. Phase IV was to contain commercial uses.

8. However, the phases included flexibility to move different types of uses between phases.

9. The foregoing four-phased development program is reflected in a Land Use Table in Section 3.01 of the Heron Creek DRI Development Order (the "Development Order"), which lists approved land types, the number of approved units for each type, and the phase within which those units were proposed for development.

10. The Development Order permits the shifting of land uses among the phases of the Land Use Table.

11. Over the years as the phases were developed, the Developer carefully monitored the market to determine the appropriate mix of development types and intensities.

12. Based upon the market trends, the Developer made modifications to the phases, which included shifting the multi-family units from Phase I and Phase III into later phases (as of now, into Phase of IV).

13. By virtue of extensions pursuant to Section 252.363(1)(a), Fla. Stat., and multiple Executive Orders issued in response to COVID-19, the current buildout date of Phase IV has been extended to November 8, 2024.

14. In October 2020, the Developer modified the Land Use Table in Section 3.01 to conform the table to the actual developed uses and to shift the remaining undeveloped land uses to Phase IV as shown below:

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ~~('12-2017)~~ ('09-2021)
Residential Single Family (LUC 210)	~~376~~ DU 376	~~372~~ DU 457	~~251 DU~~	70 DU
Residential Multi-Family (LUC 220)	~~125 DU~~		~~175 DU~~	300 DU
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)			~~43,000 GLA~~	43,000 GLA
Office General (LUC 710)			~~40,000 GLA~~	40,000 GLA
Retail Shopping Center (LUC 820)	~~90,000~~ GLA 68,075	~~90,000~~ GLA 34,240	~~488,000~~ GLA 3,820	~~137,500~~ GLA 699,295

15. In May 2022, the Developer further modified the Land Use Table in Section 3.01 as follows:

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ~~('09-2021)~~ ('21-2024)
Residential Single Family (LUC 210)	376 DU	457 DU		70 DU
Residential Multi-Family (LUC 220)				~~300 DU~~ 320
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)				43,000 GLA
Office General (LUC 710)				40,000 GLA
Retail Shopping Center (LUC 820)	68,075 GLA	34,240 GLA	3,890 GLA	~~639,295 GLA~~ 634,533

16. The total land use constructed is 833 Single Family Residential Units and 0 Multi-family units, among other non-residential uses.

17. In Phase IV, the Developer is still entitled to build 70 Single Family Residential Units and 320 Multi-Family units, among other non-residential uses.

18. Phase IV is continuing and not yet expired.

19. The Developer owns Parcel K in the Heron Creek Community.

20. Pursuant to the Declaration, the Developer has the right in its sole discretion from time to time to expand the Heron Creek Community to include Parcel D, Parcel E, and Parcel F, which have always been included in and subject to the Development Order.

21. The Declaration, in Article 2.3, expressly provides for the inclusion of Parcel D, Parcel E, and Parcel F in the Heron Creek Community.

22. The map attached hereto as Exhibit "1" and incorporated herein depicts the land which is subject to and included in the Development Order, and includes Parcels D, E, and F.

23. The map attached hereto as Exhibit "2" and incorporated herein depicts the location of Tract "C" as described in Exhibit "B" to the Declaration as part of the Additional Property.

24. Tract "C" on the map attached as Exhibit "2" includes Parcels D, E, and F.

25. Tract "C" on the map attached as Exhibit "2" is the same as the Tract "C" described within Exhibit "B" in the Declaration.

26. On Parcel K, the Developer can build 39 multi-family residential units; based on prior approvals, the Developer had believed it could build 180 multi-family residential units on Parcel K.

27. On Parcels D, E, and F, the Developer can build at least 59 multi-family residential units.

28. The Developer has intended to build multifamily units on Parcels D, E, and F, and in 2013 had prepared a site plan for Parcels D, E, and F on which 120 multi-family residential units would be built.

29. The site plan from 2013 for Parcels D, E, and F, attached as Exhibit "3" and incorporated herein, depicts the intended 120 multi-family residential development on Parcels D, E, and F that would be included in the Heron Creek Community.

30. The Developer also owns two vacant lots in the Heron Creek Community which can be developed as single-family residential units.

31. On Parcels K, D, E, and F, the Developer can build a total of at least 100 residential units.

32. The Developer is moving forward with the development of 100 residential units on Parcel K, D, E, and F.

33. At 100% build out, the Heron Creek Community will have a total of at least 933 developed residential units or parcels (39 on Parcel K + 2 vacant lots + 59 on Parcels D, E, and F = 933 residential units or parcels).

34. At present, only 831 developed homes have been conveyed.

35. At present, only 89.067% of the parcels in the Heron Creek Community which will ultimately be operated by and included in the Association have been conveyed to Association members other than the Developer.

36. The Developer is continuing to develop the Heron Creek Community pursuant to its rights and entitlements under the Development Order and the governing documents.

37. The Developer controls the Heron Creek Community Association, Inc. (the "Association") via its right to appoint a majority of the Association's board of directors.

FURTHER AFFIANT SAYETH NAUGHT.

HERON CREEK ASSOCIATES, LTD.

By: J. L. B.

Print: James L. Bevillard

JAMES L. BEVILLARD
Vice President of Marsh Creek Communities, Inc.,
General Partner of Heron Creek Associates, Ltd.

SWORN TO AND SUBSCRIBED before me, by means of ☐ physical presence or ☒ online notarization, this 10th day of June, 2022, by JAMES L. BEVILLARD as Vice President of Marsh

Creek Communities, Inc., General Partner of Heron Creek Associates, Ltd., who is personally known to me or produced _____ as identification. If no type of identification is indicated, the above-named person is personally known to me.

FRANCES A. WEBER-SABUTIS
MY COMMISSION # HH 069255
EXPIRES: January 19, 2025
Bonded Thru Notary Public Underwriters

(Notary Seal)

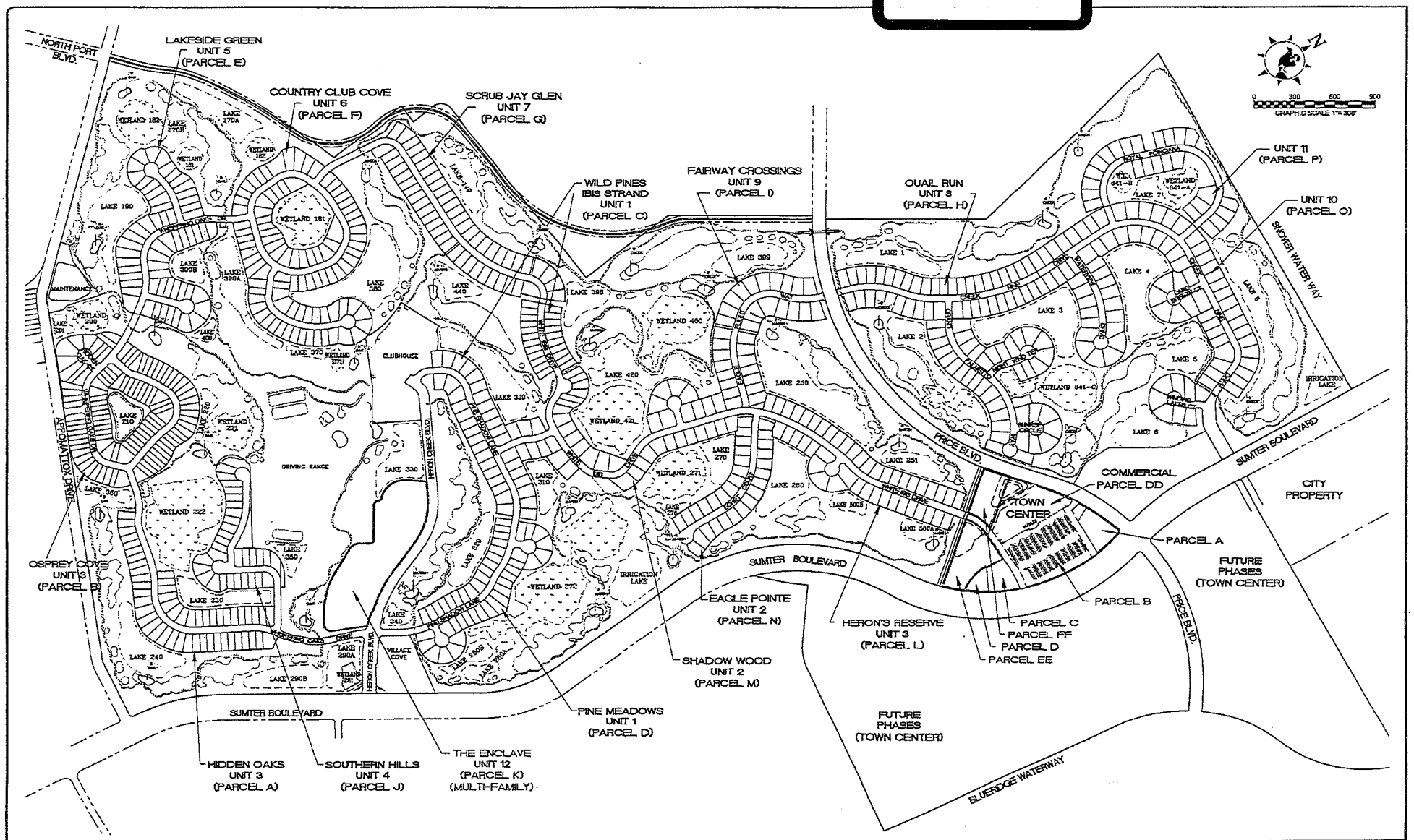
Frances A. Weber-Sabutis
Signature of Notary Public

Frances A. Weber-Sabutis
Print Name of Notary Public

EXHIBIT

tabbies

1



MORRIS ENGINEERING AND CONSULTING, LLC
Civil Engineering and Land Development Consulting

MASTER PLAN

HERON CREEK

SARASOTA COUNTY, FLORIDA

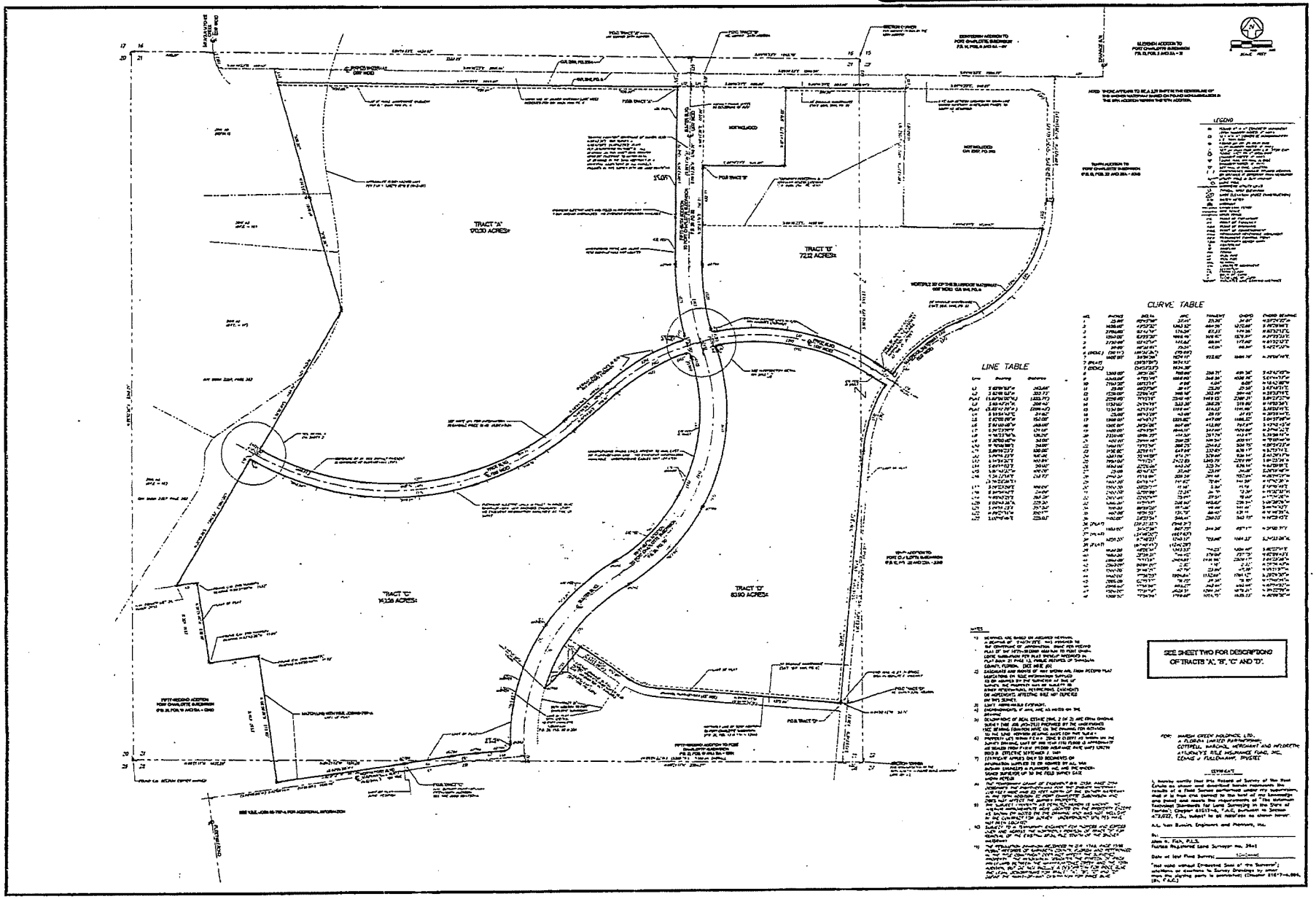
MATTHEW J. MORRIS
FL LICENSE NO. 49434

SHEET 1 OF 1

EXHIBIT

tabbies

2



RECORD OF BOUNDARY SURVEY OF
A PORTION OF SECTIONS 21, 22 & 28
TOWNSHIP 39 SOUTH, RANGE 21 EAST
CITY OF NORTH PORT, FLORIDA

REVISIONS: BY:

A.L. Van Buskirk, Inc.
Engineers and Planners, Inc.
Civil Engineers / Land Surveyors
14224 Tamiami Trail • North Port, FL 34287 • (813) 426-0581

DATE:
SCALE: 1" = 200'
DRAWN:
PROJECT NO.: 83-7714
SHEET 1 OF 2 SHEETS

DESCRIPTION OF REAL ESTATE:

TRACT "A": A portion of Section 21, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northwest corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Shaver Waterway (200' wide), as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00° 43'08"W. along the Westerly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision also being the Westerly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 100.00 feet to the POINT OF BEGINNING; at the intersection of said Right-of-Way Line with the South Line of said Shaver Waterway; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following two courses; S.00° 43'08"W., a distance of 1346.71 feet to the point of curvature of a 2100.00 foot radius curve to the left, with the center point bearing S.89°16'52"E.; thence Southerly along the arc of said curve, through a central angle of 15°18'04", a distance of 559.59 feet to an intersection with the Northerly Right-of-Way Line of Price Boulevard, with said point also being a point of reverse curvature of a 25.00 radius curve to the right, with the center point bearing S.75°27'04"W.; thence along the said Northerly Right-of-Way Line of Price Boulevard (100' wide) the following four courses; Southwesterly along the arc of said curve, through a central angle of 85°42'32", a distance of 37.40 feet to a point of reverse curvature of a 1650.00 foot radius curve to the left, with the center point bearing S.18°50'24"E.; thence Southwesterly along the arc of said curve, through a central angle of 22°20'06", a distance of 643.20 feet to a point of tangency; thence S.48°49'30"W., a distance of 408.66 feet to the point of curvature of a 1950.00 foot radius curve to the right, with the center point bearing N.41°10'30"W.; thence Westerly along the arc of said curve, through a central angle of 71°11'22", a distance of 2422.85 feet; thence leaving said Northerly Right-of-Way Line of Price Boulevard N.29°59'32"E., a distance of 1198.77 feet; thence N.15°00'00"W., a distance of 1800.00 feet to the South Line of the aforesaid Shaver Waterway (O.R. Book 1941, Page 6); thence along said South Line, S.89°16'51"E., a distance of 2933.00 feet to the Point of Beginning.

Containing 170.30 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

TRACT "B": A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northeast corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Shaver Waterway as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00°43'08"W., along the Easterly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision, also being the Easterly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 100.00 feet to the POINT OF BEGINNING; thence leaving the said Westerly Right-of-Way Line, S.89° 16'51"E., a distance of 506.00 feet, thence N.00°43'08"E., a distance of 600.00 feet to the Southerly Right-of-Way Line of the Shaver Waterway (O.R. Book 1941, Page 6); thence S.89°16'51"E. along said Southerly Right-of-Way Line, a distance of 880.95 feet to the Northwesterly corner of North Port Water Control District property (O.R. Book 2357, Page 382); thence leaving said Southerly Right-of-Way Line, and along the Westerly Boundary Line of the said North Port Water Control District Property, S.00°43'09"W., a measured distance of 1052.75 feet (Deed 1050.00') to the Southwest corner of said North Port Water Control District property; thence along the Southerly Boundary of said North Port Water Control District property S.89°16'51"E., a distance of 1028.67 feet to the Westerly Boundary Line of the Blueridge Waterway (100 feet wide) (O.R. Book 1941, Page 6), said point also being a point on the arc of a 1000.00 foot radius curve with the center point of said curve bearing N.77° 26'14"W.; thence along the Westerly Right-of-Way Line of said Blueridge Waterway the following two courses; Southwesterly along the arc of said curve, through a central angle of 55°49'01", a distance of 974.59 feet to a point of reverse curvature of a 1150.00 foot radius curve to the left, with the center point bearing S.21°37'14"E.; thence Southeasterly along the arc of said curve, through a central angle of 37°01'11", a distance of 667.69 feet to the intersection of said Westerly Right-of-Way Line with the Northerly Right-of-Way Line of Price Boulevard (100' wide); thence along the Northerly Right-of-Way Line of said Price Boulevard the following three courses; N.56°24'78"W., a distance of 1.31.21 feet to the point of curvature of a 1850.00 foot radius curve to the left, with the center point bearing S.33°35'42"W.,thence along the arc of said curve, through a central angle of 4.52°31", a distance of 1263.51 feet to a point of reverse curvature of a 25.00 foot radius curve to the right with the center point bearing N.10°16'49"W.; thence along the arc of said curve through a central angle of 85°43'53", a distance of 37.41 feet to a point in the aforesaid Easterly Right-of-Way Line of Sumter Boulevard and the Easterly Boundary Line of the aforesaid Fifty-Sixth Addition to Port Charlotte Subdivision, said point is also the point of compound curvature of a 1900.00 foot radius curve to the right, with the center point bearing N.75°27'05"E.; thence along the said Easterly Right-of-Way Line for the following two courses; Northerly along the arc of said curve through a central angle of 15°16'06", a distance of 506.28 feet to the point of tangency; thence N.00°43'08"E., a distance of 746.71 feet to the Point of Beginning.

Containing 72.12 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

TRACT "C": A portion of Sections 21 and 28, Township 39 South, Range 21 East, Sarasota County, Florida, more particulary described as follows:

Beginning at a concrete monument at the Northwest corner of the Right-of-Way of North Port Boulevard as shown on the Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof Recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, thence S.82°01'25"W. (S.82°00'00"W, Plat bearing) along the Northerly Right-of Way of said North Port Boulevard (Apalachatchee Boulevard) as shown on the Plat of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21 Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, a distance of 947.20 feet (946.95 feet plat distance) to a concrete monument at the Southeast corner of Block 2653 in said Fifty-Second Addition to Port Charlotte Subdivision; thence leaving said Northerly Right-of-Way Line and along the Northeasterly Boundary Line of said Block 2653 the following four courses; N.08°00'00"W., a distance of 955.00 feet; thence S.82°00'00"W., a distance of 365.00 feet; thence N.08°00'00"W., a distance of 630.90 feet; thence S.82°00'00"W., a distance of 150.00 feet; thence leaving said Boundary Line, N.29°59'32"E., a distance of 1982.80 feet to the Southerly Right-of-Way Line of Price Boulevard (100' Wide); thence along said Southerly Right-of-Way Line the following five courses; S.59°55'11"E., a distance of 23.99 feet to the point of curvature of a 2050.00 foot radius curve to the left with the center point bearing N.30°04'49"E.; thence Easterly along the arc of said curve, through a central angle of 7°15'19", a distance of 2549.46 feet to a point of tangency; thence N.48°49'30"E., a distance of 403.66 feet to the point of curvature of a 1550 foot radius curve to the right, with the center point bearing S.41°10'30"E.; thence Northeasterly along the arc of said curve, through a central angle of 22°06'43", a distance of 598.13 feet to a point of compound curvature of a 25 foot radius curve to the right with the center point bearing S.19°03'47"E., thence Easterly and Southerly along the arc of said curve through a central angle of 90° 27'50", a distance of 39.47 feet to a point on the Westerly Right-of-Way Line of Sumter Boulevard as shown on the aforesaid Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, said point also being a point of reverse curvature of a 2100.00 foot radius curve to the left, with the center point bearing N.71°24'03"E.; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following four courses; Southerly, along the arc of said curve through a central angle of 00°13'14", a distance of 8.09 feet to a point of reverse curvature of a 1300.00 foot radius curve to the right, with the center point bearing S.71°10'49"W.; thence Southerly along the arc of said curve, through a central angle of 77°57'00", a distance of 1768.63 feet to a point of reverse curvature of a 1600.00 foot radius curve to the left, with the center point bearing S.30°52'11"E. thence Southwesterly along the arc of said curve through a central angle of 59°57'21", a distance of 1674.30 feet to a point of reverse curvature of a 50.11 foot radius curve to the right, with the center point bearing S.89°10'26"W.; thence Southwesterly along the arc of said curve through a central angle of 85°32'36", a distance of 73.69 feet to the aforesaid Northerly Right-of-Way Line of North Port Boulevard; thence along the said Northerly Right-of Way Line the following three courses; S.85°43'11"W., a distance of 208.42 feet to the point of curvature of a 2730.00 foot radius curve to the left, with the center point bearing S.04°16'49"E.; thence Southwesterly along the arc of said curve, through a central angle of 03°42'20", a distance of 177.85 feet to a point of tangency; thence S.82°00'51"W., a distance of 355.73 feet to the Point of Beginning.

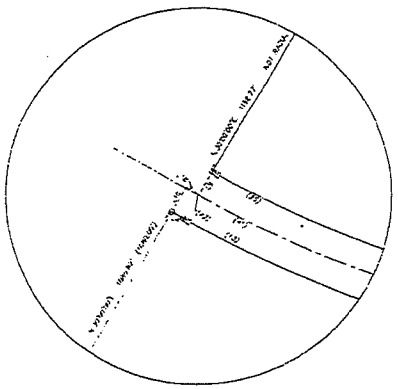
Containing 140.58 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

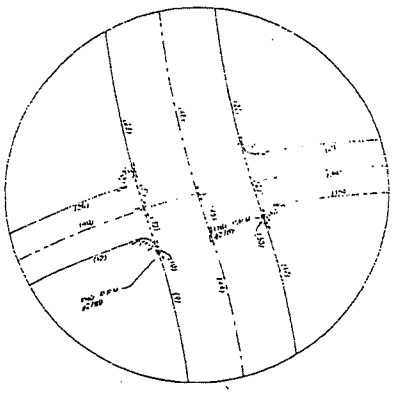
TRACT "D": A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particulary described as follows:

Commencing at the Northeasterly corner of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21, Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Blueridge Waterway (100' wide)(O.R. Book 1941, Page 6); thence leaving the said centerline and along the Northerly Boundary Line of the said Fifty-Second Addition to Port Charlotte Subdivision, N.84°56'11"W., a distance of 50.00 feet to the POINT OF BEGINNING, said point also being on the Westerly Right-of-Way Line of the said Blueridge Waterway; thence leaving said Westerly Right-of-Way Line and along the Northerly Boundary Line of said Fifty-Second Addition the following three courses; N.84°56'11"W., a distance of 1375.64 feet to the point of curvature of 400 foot radius curve to the right, with the center point bearing N.05°03'49"E., thence along the arc of said curve, through a central angle of 29°49'49", a distance of 208.26 feet to a point of tangency; thence N.55°06'22"W., a distance of 442.85 feet to a corner on the Boundary Line of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said point is also on the arc of a 2350.00 foot radius nontangent curve with the center point bearing N.55°05'20"W.; thence Southwesterly along the Westerly Boundary Line of Tract "D" as platted in said Fifty-Sixth Addition and the arc of said curve, through a central angle of 10°06'22", a distance of 414.31 feet to a point on the Easterly Right-of-way Line of Sumter Boulevard (200' wide) as platted in said Fifty-Sixth Addition with said point also being on the arc of a 1400.00 foot radius nontangent curve with the center point bearing S.73°36'02"E.; thence Northeasterly along said Easterly Right-of-Way Line, the following three courses; along the arc of said curve, through a central angle of 42°43'51" a distance of 1044.11 feet to a point of reverse curvature of a 1500.00 foot radius curve to the left, with the center point bearing N.30°52'11"W.; thence along the arc of said curve through a central angle of 77°31'57", a distance of 2028.49 feet to a point of reverse curvature of a 25.00 foot radius curve to the right, with the center point bearing N.71°36'54"E., thence along the arc of said curve through a central angle of 98°45'30", a distance of 43.08 feet along the Southerly Right-of-Way Line of Price Boulevard (100' wide), to a point of compound curvature of a 1550.00 foot radius curve to the right with the center point bearing S.09°37'36"E., thence along the said Southerly Right-of-Way Line for the following two courses; along the arc of said curve through a central angle of 43°13'39", a distance of 1169.42 feet to a point of tangency; thence S.36°24'15"E., a distance of 131.17 feet to a point on the aforesaid Westerly Right-of-Way Line of the Blueridge Waterway, said point also being on the arc of a 1150.00 foot radius curve, with the center point bearing S.36°32'26"E., thence along said Westerly Right-of-Way Line the following two courses; Southwesterly along the arc of said curve through a central angle of 26°04'14", a distance of 523.27 feet to a point of tangency; thence S.05°03'20"W. a distance of 1932.28 feet to the Point of Beginning.

Containing 83.90 Acres, more or less.



DETAIL 1
SEE SHEET 1



INTERSECTION DETAIL
SEE SHEET 1

LEGAL DESCRIPTIONS FOR TRACTS "A", "B", "C" AND "D"

REVISIONS:	BY:

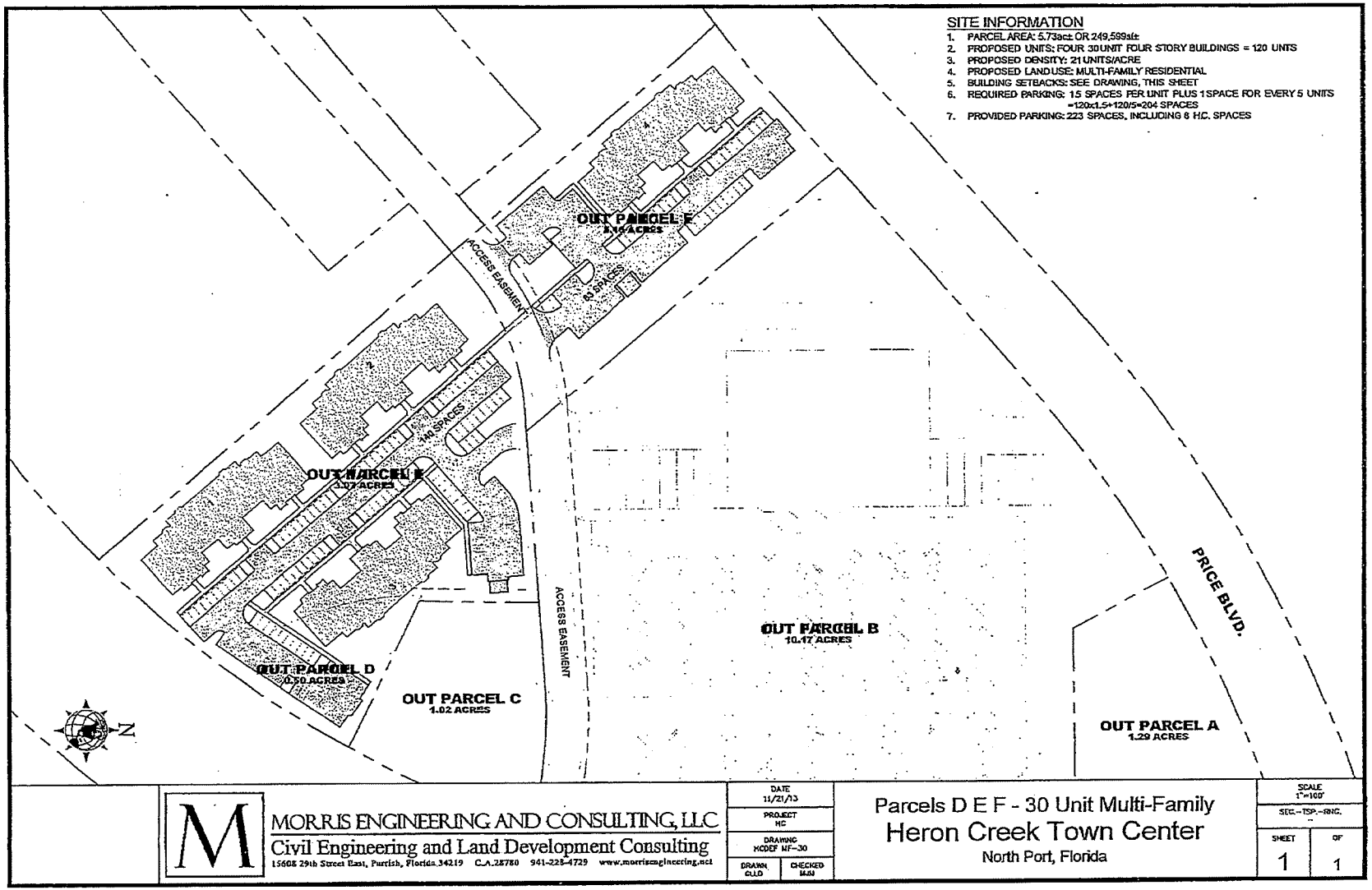
A. L. Van Buskirk VE
Engineers and Planners, Inc.
Civil Engineers / Land Surveyors
14224 Tanterni Trail • North Port, FL. 34287 • (813) 426-0881

DATE: 10-24-05
SCALE: AS SHOWN
DRAWN: mf / ALL
PROJECT NO. 10-787-NP
SHEET 2
OF 2 SHEETS

EXHIBIT

tabbies

3



MORRIS ENGINEERING AND CONSULTING, LLC
Civil Engineering and Land Development Consulting
15608 29th Street East, Parrish, Florida 34219 C.A.28780 941-228-4729 www.morrisengineering.net

DATE	11/21/13
PROJECT	HC
DRAWING	KODEF MF-30
DRAWN	CLD
CHECKED	MM

Parcels D E F - 30 Unit Multi-Family
Heron Creek Town Center
North Port, Florida

SCALE	1"=100'
SEC.-TSP.-RNG.	--
SHEET	1
OF	1

Exhibit "B"

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Plaintiff,

vs.

CLASS REPRESENTATION
Case No. 2020 CA 004364 NC

STEVE DSUPIN, et al.,
Defendants,

And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Nominal Defendant.
_____/

STEVE DSUPIN, et al.,
Counterclaim-Plaintiffs,

vs.

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Counterclaim-Defendant,

And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Cross-claim Defendant.
_____/

AFFIDAVIT OF RON YORK IN SUPPORT OF PLAINTIFF/COUNTERCLAIM DEFENDANT'S RESPONSE IN OPPOSITION TO DEFENDANTS/COUNTERCLAIM PLAINTIFFS' MOTION FOR PARTIAL FINAL SUMMARY JUDGMENT ON COUNTER-CLAIM AND CROSS-CLAIM

STATE OF FLORIDA
COUNTY OF SARASOTA

1. I am over the age of 18 years, qualified to make this Affidavit, and otherwise competent to give the statements and testimony contained in this Affidavit..

2. I have personal knowledge of the facts contained in this Affidavit and they are true and correct.

3. I, Ronald A. York, am a Vice President of Marsh Creek Communities, Inc., which is a General Partner of the Plaintiff/Counterclaim Defendant, Heron Creek Associates, Ltd. ("Developer"), and am authorized to make this Affidavit on the behalf of the Developer.

4. The Developer is a Florida limited partnership that owns real property in Sarasota County, Florida.

5. Since 1997, the Developer has been in the process of developing the property into a mixed-use neighborhood community ("Heron Creek Community" or "Heron Creek").

6. The Heron Creek Community is a four-phase, mixed use community containing single-family units, multi-family dwellings, and commercial and other uses.

7. In the original design and concept, the Developer planned out the four phases of the Heron Creek Community as:

a. Phase I was to contain single-family units, multi-family units and other uses;

b. Phase II was to contain single- family units and other uses;

c. Phase III was to contain single family units, multi-family units, and other uses; and

d. Phase IV was to contain commercial uses.

8. However, the phases included flexibility to move different types of uses between phases.

9. The foregoing four-phased development program is reflected in a Land Use Table in Section 3.01 of the Heron Creek DRI Development Order (the "Development Order"), which lists approved land types, the number of approved units for each type, and the phase within which those units were proposed for development.

10. The Development Order permits the shifting of land uses among the phases of the Land Use Table.

11. Over the years as the phases were developed, the Developer carefully monitored the market to determine the appropriate mix of development types and intensities.

12. Based upon the market trends, the Developer made modifications to the phases, which included shifting the multi-family units from Phase I and Phase III into later phases (as of now, into Phase of IV).

13. By virtue of extensions pursuant to Section 252.363(1)(a), Fla. Stat., and multiple Executive Orders issued in response to COVID-19, the current buildout date of Phase IV has been extended to November 8, 2024.

14. In October 2020, the Developer modified the Land Use Table in Section 3.01 to conform the table to the actual developed uses and to shift the remaining undeveloped land uses to Phase IV as shown below:

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ~~('12-2017)~~ ('09-2021)
Residential Single Family (LUC 210)	~~475~~ DU 376	~~372~~ DU 457	~~254 DU~~	70 DU
Residential Multi-Family (LUC 220)	~~125 DU~~		~~175 DU~~	300 DU
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)			~~43,000 GLA~~	43,000 GLA
Office General (LUC 710)			~~40,000 GLA~~	40,000 GLA
Retail Shopping Center (LUC 820)	~~90,000~~ GLA 68,075	~~30,000~~ GLA 34,240	~~438,000~~ GLA 3,590	~~137,500~~ GLA 639,295

15. In May 2022, the Developer further modified the Land Use Table in Section 3.01 as follows:

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ~~('09-2021)~~ ('21-2024)
Residential Single Family (LUC 210)	376 DU	457 DU		70 DU
Residential Multi-Family (LUC 220)				~~300 DU~~ 320
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)				43,000 GLA
Office General (LUC 710)				40,000 GLA
Retail Shopping Center (LUC 820)	68,075 GLA	34,240 GLA	3,890 GLA	~~639,295~~ GLA 634,533

16. The total land use constructed is 833 Single Family Residential Units and 0 Multi-family units, among other non-residential uses.

17. In Phase IV, the Developer is still entitled to build 70 Single Family Residential Units and 320 Multi-Family units, among other non-residential uses.

18. Phase IV is continuing and not yet expired.

19. The Developer owns Parcel K in the Heron Creek Community.

20. Pursuant to the Declaration, the Developer has the right in its sole discretion from time to time to expand the Heron Creek Community to include Parcel D, Parcel E, and Parcel F, which have always been included in and subject to the Development Order.

21. The Declaration, in Article 2.3, expressly provides for the inclusion of Parcel D, Parcel E, and Parcel F in the Heron Creek Community.

22. The map attached hereto as Exhibit "1" and incorporated herein depicts the land which is subject to and included in the Development Order, and includes Parcels D, E, and F.

23. The map attached hereto as Exhibit "2" and incorporated herein depicts the location of Tract "C" as described in Exhibit "B" to the Declaration as part of the Additional Property.

24. Tract "C" on the map attached as Exhibit "2" includes Parcels D, E, and F.

25. Tract "C" on the map attached as Exhibit "2" is the same as the Tract "C" described within Exhibit "B" in the Declaration.

26. On Parcel K, the Developer can build 39 multi-family residential units; based on prior approvals, the Developer had believed it could build 180 multi-family residential units on Parcel K.

27. On Parcels D, E, and F, the Developer can build at least 59 multi-family residential units.

28. The site plan from 2013 for Parcels D, E, and F, attached as Exhibit "3" and incorporated herein, depicts intended multi-family development on Parcels D, E, and F that would be included in the Heron Creek Community.

29. The Developer also owns two vacant lots in the Heron Creek Community which can be developed as single-family residential units.

30. On Parcels K, D, E, and F, the Developer can build a total of at least 100 residential units.

31. The Developer is moving forward with the development of 100 residential units on Parcel K, D, E, and F.

32. At 100% build out, the Heron Creek Community will have a total of at least 933 developed residential units or parcels (39 on Parcel K + 2 vacant lots + 59 on Parcels D, E, and F = 933 residential units or parcels).

33. At present, only 831 developed homes have been conveyed.

34. At present, only 89.067% of the parcels in the Heron Creek Community which will ultimately be operated by and included in the Association have been conveyed to Association members other than the Developer.

35. The Developer is continuing to develop the Heron Creek Community pursuant to its rights and entitlements under the Development Order and the governing documents.

36. The Developer controls the Heron Creek Community Association, Inc. (the "Association") via its right to appoint a majority of the Association's board of directors.

FURTHER AFFIANT SAYETH NAUGHT.

HERON CREEK ASSOCIATES, LTD.

By: _____

Print: Ronald A. York

RONALD A. YORK
Vice President of Marsh Creek Communities, Inc.,
General Partner of Heron Creek Associates, Ltd.

SWORN TO AND SUBSCRIBED before me, by means of ☐ physical presence or ☒ online notarization, this 9th day of June, 2022, by Ronald A. York as Vice President of Marsh Creek Communities, Inc., General Partner of Heron Creek Associates, Ltd., who is personally known to me or produced _____ as identification. If no type of identification is indicated, the above-named person is personally known to me.

FRANCES A. WEBER-SABUTIS
MY COMMISSION # HH 069265
EXPIRES: January 19, 2025
Bonded Thru Notary Public Underwriters
(Notary Seal)

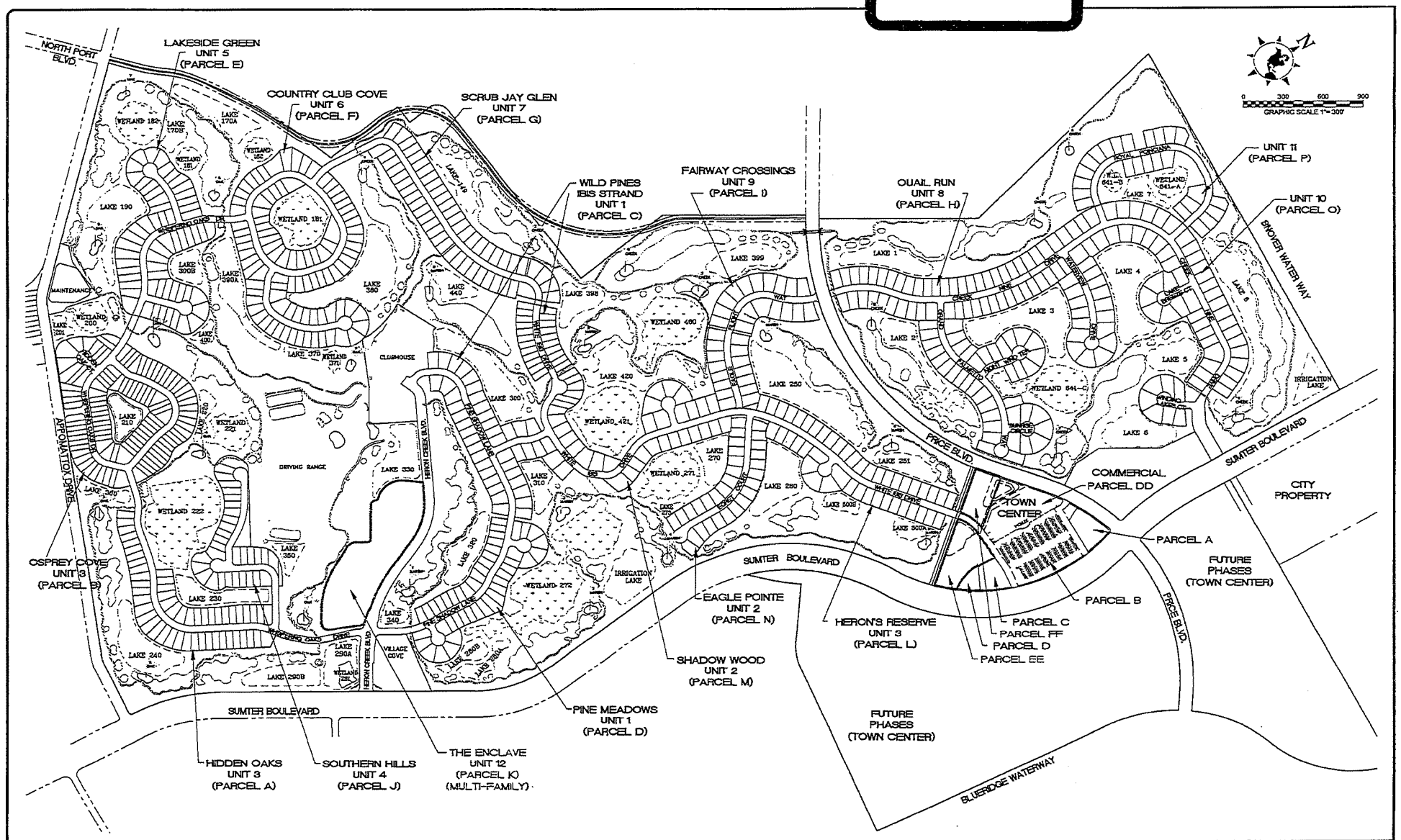
Frances A. Weber-Sabutis
Signature of Notary Public

Frances A. Weber-Sabutis
Print Name of Notary Public

EXHIBIT

tabbies

1



MORRIS ENGINEERING AND CONSULTING, LLC
Civil Engineering and Land Development Consulting

MASTER PLAN

HERON CREEK

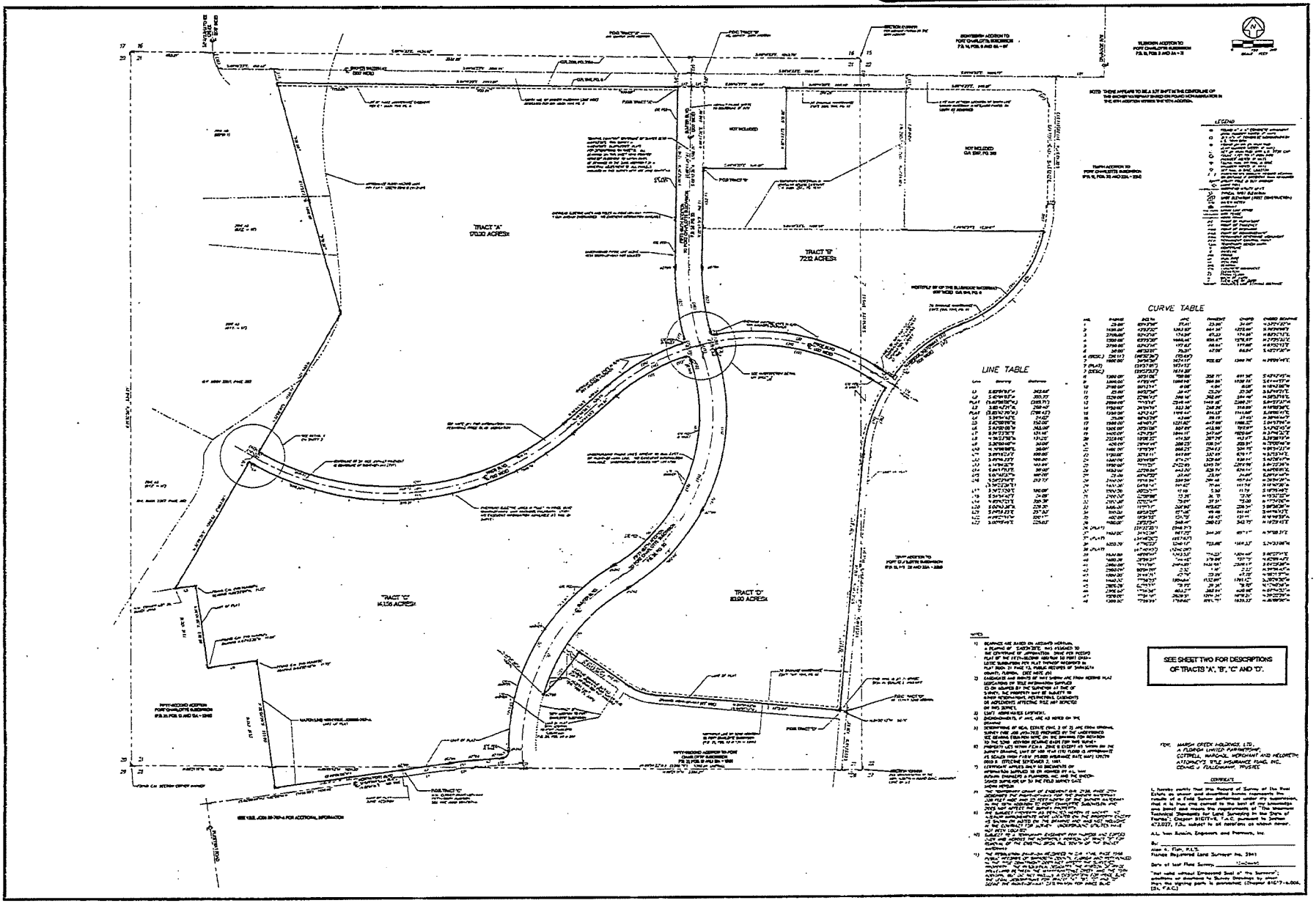
SARASOTA COUNTY, FLORIDA

MATTHEW J. MORRIS FL LICENSE NO. 69434

SHEET 1 OF 1

EXHIBIT

tabbies' 2



RECORD OF BOUNDARY SURVEY OF A PORTION OF SECTIONS 21, 22 & 28 TOWNSHIP 39 SOUTH, RANGE 21 EAST CITY OF NORTH PORT, FLORIDA

REVISIONS: BY:

A. L. Van Buskirk, Engineers and Planners, Inc.
Civil Engineers / Land Surveyors
14224 Tamiami Trail • North Port, FL. 34287 • (813) 426-0681

DATE: 12-24-98
SCALE: 1" = 300'
DRAWN: MM / AJH
PROJECT NO.: 92-787.0
SHEET: 1 OF 2 SHEETS

DESCRIPTION OF REAL ESTATE:

TRACT "A". A portion of Section 21, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northwest corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Snover Waterway (200' wide), as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00° 43'08"W. along the Westerly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision also being the Westerly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 100.00 feet to the POINT OF BEGINNING; at the intersection of said Right-of-Way Line with the South Line of said Snover Waterway; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following two courses: S.00° 43'08"W., a distance of 1346.71 feet to the point of curvature of a 2100.00 foot radius curve to the left, with the center point bearing S.89°16'52"E.; thence Southerly along the arc of said curve, through a central angle of 15°16'04", a distance of 559.59 feet to an intersection with the Northerly Right-of-Way Line of Price Boulevard, with said point also being a point of reverse curvature of a 25.00 radius curve to the right, with the center point bearing S.75°27'04"W.; thence along the said Northerly Right-of-Way Line of Price Boulevard (100' wide) the following four courses: Southwesterly along the arc of said curve, through a central angle of 85°43'12", a distance of 37.40 feet to a point of reverse curvature of a 1650.00 foot radius curve to the left, with the center point bearing S.18°50'24"E.; thence Southwesterly along the arc of said curve, through a central angle of 22°20'06", a distance of 643.20 feet to a point of tangency; thence S.48°49'30"W., a distance of 406.56 feet to the point of curvature of a 1950.00 foot radius curve to the right, with the center point bearing N.41°10'30"W.; thence Westerly along the arc of said curve, through a central angle of 71°11'22", a distance of 2422.85 feet; thence leaving said Northerly Right-of-Way Line of Price Boulevard N.20°59'32"E., a distance of 1198.77 feet; thence N.15°00'00"W., a distance of 1800.00 feet to the South Line of the aforesaid Snover Waterway (O.R. Book 1941, Page 6); thence along said South Line, S.89°16'51"E., a distance of 2953.00 feet to the Point of Beginning.

Containing 170.30 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

TRACT "B". A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northeast corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Snover Waterway as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00°43'08"W., along the Easterly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision, also being the Easterly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 700.00 feet to the POINT OF BEGINNING; thence leaving the said Westerly Right-of-Way Line, S.89° 16'51"E., a distance of 606.00 feet, thence N.00°43'09"E., a distance of 600.00 feet to the Southerly Right-of-Way Line of the Snover Waterway (O.R. Book 1941, Page 6); thence S.89°16'51"E. along said Southerly Right-of-Way Line, a distance of 880.95 feet to the Northwesterly corner of North Port Water Control District property (O.R. Book 2357, Page 382); thence leaving said Southerly Right-of-Way Line, and along the Westerly Boundary Line of the said North Port Water Control District Property, S.00°43'09"W., a measured distance of 1052.76 feet (Deed 1050.00') to the Southwest corner of said North Port Water Control District property; thence along the Southerly Boundary of said North Port Water Control District property S.89°16'51"E., a distance of 1028.67 feet to the Westerly Boundary Line of the Blueridge Waterway (100 feet wide) (O.R Book 1941, Page 6), said point also being a point on the arc of a 1000.00 foot radius curve with the center point of said curve bearing N.77° 28'14"W.; thence along the Westerly Right-of-Way Line of said Blueridge Waterway the following two courses: Southeasterly along the arc of said curve, through a central angle of 55°40'01", a distance of 974.19 feet to a point of reverse curvature of a 1150.00 foot radius curve to the left, with the center point bearing S.21°37'14"E.; thence Southwesterly along the arc of said curve, through a central angle of 32°16'11", a distance of 647.69 feet to the intersection of said Westerly Right-of-Way Line with the Northerly Right-of-Way Line of Price Boulevard (100' wide); thence along the Northerly Right-of-Way Line of said Price Boulevard the following three courses: N.56°24'19"W., a distance of 1,31.27 feet to the point of curvature of a 1650.00 foot radius curve to the left, with the center point bearing S.33°35'42"W.,thence along the arc of said curve, through a central angle of 4°52'31", a distance of 1263.57 feet to a point of reverse curvature of a 25.00 foot radius curve to the right with the center point bearing N.10°16'49"W.; thence along the arc of said curve through a central angle of 85°43'55", a distance of 37.41 feet to a point in the aforesaid Easterly Right-of-Way Line of Sumter Boulevard and the Easterly Boundary Line of the aforesaid Fifty-Sixth Addition to Port Charlotte Subdivision, said point is also the point of compound curvature of a 1500.00 foot radius curve to the right, with the center point bearing N.75°27'05"E.; thence along the said Easterly Right-of-Way Line for the following two courses; Northerly along the arc of said curve through a central angle of 15°16'02", a distance of 506.28 feet to the point of tangency; thence N.00°43'08"E., a distance of 746.71 feet to the Point of Beginning.

Containing 72.12 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

TRACT "C". A portion of Sections 21 and 28, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Beginning at a concrete monument at the Northwest corner of the Right-of-Way of North Port Boulevard as shown on the Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof Recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, thence S.82°01'05"W. (S.82°00'00"W. Plat bearing) along the Northerly Right-of Way of said North Port Boulevard (Myakkahatchee Boulevard) as shown on the Plat of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21 Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, a distance of 947.20 feet (946.95 feet plat distance) to a concrete monument at the Southeast corner of Block 2653 in said Fifty-Second Addition to Port Charlotte Subdivision; thence leaving said Northerly Right-of-Way Line and along the Northeasterly Boundary Line of said Block 2653 the following four courses: N.08°00'00"W., a distance of 955.00 feet; thence S.82°00'00"W., a distance of 365.00 feet; thence N.08°00'00"W., a distance of 630.90 feet; thence S.82°00'00"W., a distance of 150.00 feet; thence leaving said Boundary Line, N.29°03'32"E., a distance of 1080.80 feet to the Southerly Right-of-Way Line of Price Boulevard (100' Wide); thence along said Southerly Right-of-Way Line the following five courses: S.58°35'11"E., a distance of 23.39 feet to the point of curvature of a 2050.00 foot radius curve to the left with the center point bearing N.30°04'49"E.; thence Easterly along the arc of said curve, through a central angle of 7°15'19", a distance of 2549.46 feet to a point of tangency; thence N.48°49'30"E., a distance of 408.66 feet to the point of curvature of a 1550 foot radius curve to the right, with the center point bearing S.41°10'30"E.; thence Northeasterly along the arc of said curve, through a central angle of 22°06'43", a distance of 598.19 feet to a point of compound curvature of a 25 foot radius curve to the right with the center point bearing S.19°03'47"E., thence Easterly and Southerly along the arc of said curve through a central angle of 90° 27'50", a distance of 39.47 feet to a point on the Westerly Right-of-Way Line of Sumter Boulevard as shown on the aforesaid Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, said point also being a point of reverse curvature of a 2100.00 foot radius curve to the left, with the center point bearing N.71°24'03"E.; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following four courses; Southerly along the arc of said curve through a central angle of 0°13'14", a distance of 8.09 feet to a point of reverse curvature of a 1300.00 foot radius curve to the right, with the center point bearing S.71°10'49"W.; thence Southerly along the arc of said curve, through a central angle of 77°57'00", a distance of 1768.63 feet to a point of reverse curvature of a 1600.00 foot radius curve to the left, with the center point bearing S.13°53'11"E.; thence Southwesterly along the arc of said curve through a central angle of 59°57'23", a distance of 1674.30 feet to a point of reverse curvature of a 50.13 foot radius curve to the right, with the center point bearing S.89°10'26"W.; thence Southwesterly along the arc of said curve through a central angle of 85°32'36", a distance of 75.69 feet to the aforesaid Northerly Right-of-Way Line of North Port Boulevard; thence along the said Northerly Right-of Way Line the following three courses; S.85°43'11"W., a distance of 208.42 feet to the point of curvature of a 2750.00 foot radius curve to the left, with the center point bearing S.04°16'49"E.; thence Southwesterly along the arc of said curve, through a central angle of 03°42'20", a distance of 177.85 feet to a point of tangency; thence S.82°00'51"W., a distance of 353.73 feet to the Point of Beginning.

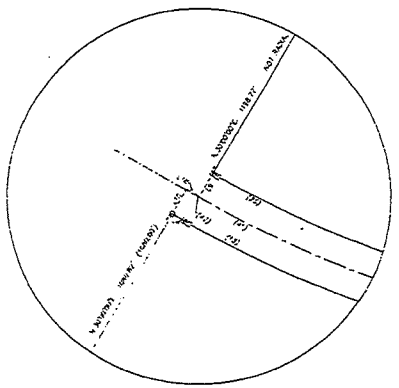
Containing 140.58 Acres, more or less.

DESCRIPTION OF REAL ESTATE:

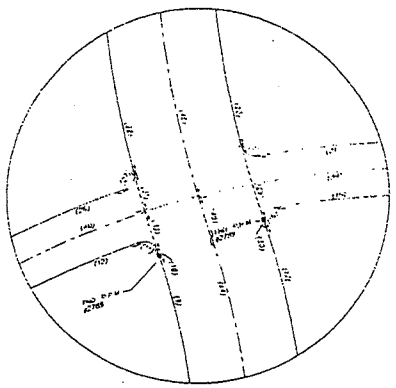
TRACT "D". A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northeasterly corner of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21, Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Blueridge Waterway (100' wide)(O.R. Book 1941, Page 6); thence leaving the said centerline and along the Northerly Boundary Line of the said Fifty-Second Addition to Port Charlotte Subdivision, N.84°56'11"W., a distance of 50.00 feet to the POINT OF BEGINNING, said point also being on the Westerly Right-of-Way Line of the said Blueridge Waterway; thence leaving said Westerly Right-of-Way Line and along the Northerly Boundary Line of said Fifty-Second Addition the following three courses; N.84°56'11"W., a distance of 1375.64 feet to the point of curvature of 400 foot radius curve to the right, with the center point bearing N.05°03'49"E., thence along the arc of said curve, through a central angle of 29°49'49", a distance of 208.26 feet to a point of tangency; thence N.55°06'22"W., a distance of 442.85 feet to a corner on the Boundary Line of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said point is also on the arc of a 2350.00 foot radius nontangent curve with the center point bearing N.55°05'20"W.; thence Southwesterly along the Westerly Boundary Line of Tract "B" as platted in said Fifty-Sixth Addition and the arc of said curve, through a central angle of 10°06'22", a distance of 414.37 feet to a point on the Easterly Right-of-Way Line of Sumter Boulevard (200' wide) as platted in said Fifty-Sixth Addition with said point also being on the arc of a 1400.00 foot radius nontangent curve with the center point bearing S.73°56'02"E.; thence Northeasterly along said Easterly Right-of-Way Line, the following three courses; along the arc of said curve, through a central angle of 42°43'51" a distance of 1044.11 feet to a point of reverse curvature of a 1500.00 foot radius curve to the left, with the center point bearing N.30°52'11"W.; thence along the arc of said curve through a central angle of 77°31'15", a distance of 2029.49 feet to a point of reverse curvature of a 25.00 foot radius curve to the right, with the center point bearing N.71°36'34"E., thence along the arc of said curve through a central angle of 38°45'30", a distance of 43.09 feet along the Southerly Right-of-Way Line of Price Boulevard (100' wide), to a point of compound curvature of a 1550.00 foot radius curve to the right with the center point bearing S.09°37'56"E., thence along the said Southerly Right-of-Way Line for the following two courses; along the arc of said curve through a central angle of 43°13'39", a distance of 1169.42 feet to a point of tangency, thence S.56°24'18"E., a distance of 131.17 feet to a point on the aforesaid Westerly Right-of-Way Line of the Blueridge Waterway, said point also being on the arc of a 1150.00 foot radius curve, with the center point bearing S.59°52'26"E., thence along said Westerly Right-of-Way Line the following two courses: Southwesterly along the arc of said curve through a central angle of 26°04'14", a distance of 523.27 feet to a point of tangency; thence S.05°03'20"W. a distance of 1932.28 feet to the Point of Beginning.

Containing 83.90 Acres, more or less.



DETAIL 1
SEE SHEET 1



INTERSECTION DETAIL
SEE SHEET 1

REVISIONS:	BY:

LEGAL DESCRIPTIONS FOR
TRACTS "A", "B", "C" AND "D"

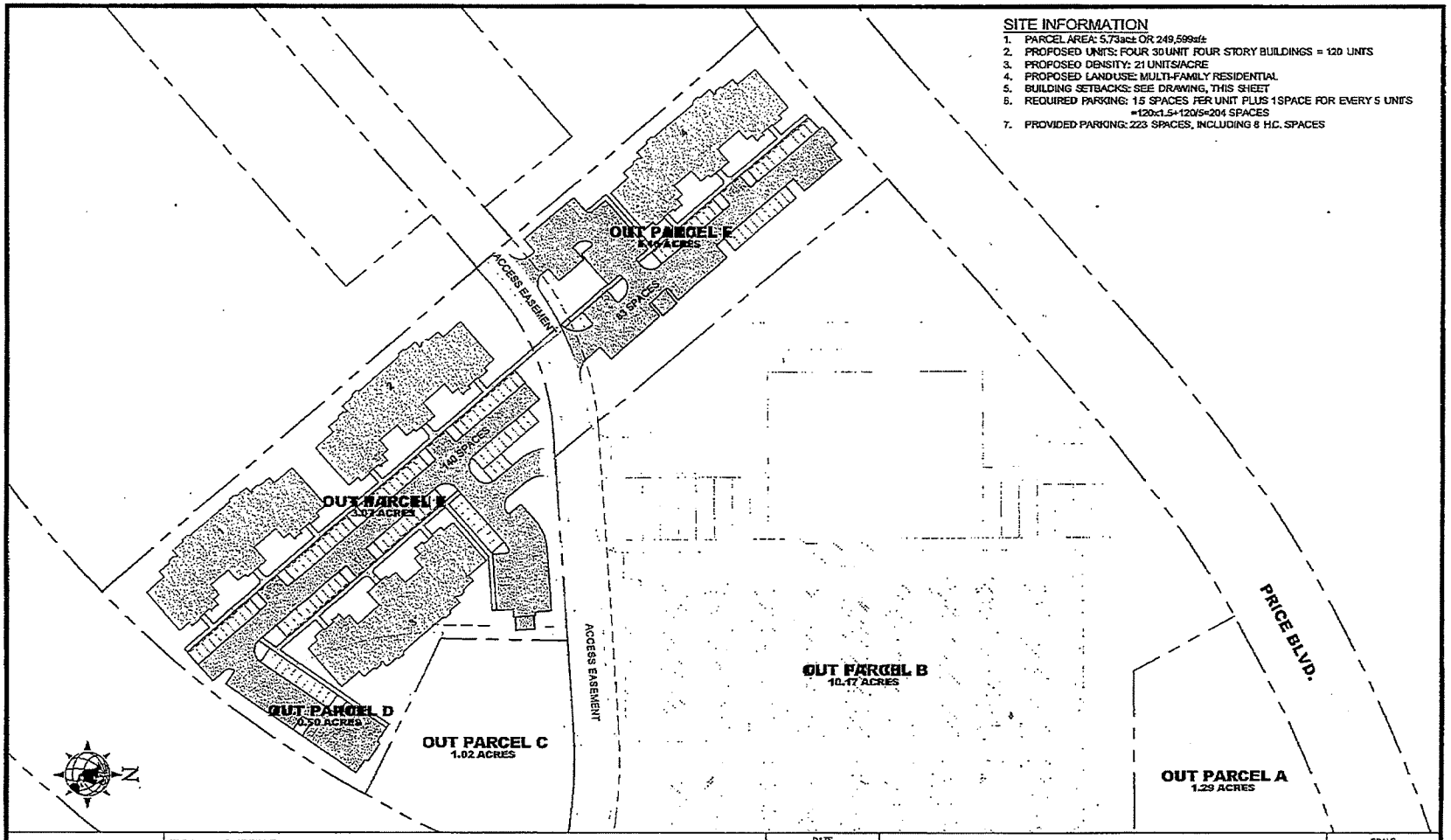
A. L. Vom Bruch Inc
Engineers and Planners, Inc
Civil Engineers / Land Surveyors
14224 Tamiami Trail • North Port, FL. 34287 • (813) 426-0681

DATE: 10-24-08
SCALE: AS SHOWN
DRAWN: MM / MM
PROJECT NO. 98-797-B
SHEET 2
OF 2 SHEETS

EXHIBIT

tabbies

3



MORRIS ENGINEERING AND CONSULTING, LLC
Civil Engineering and Land Development Consulting
15608 29th Street East, Parrish, Florida 34219 C.A.28780 941-228-4729 www.morrisengineering.net

DATE	11/23/13
PROJECT	HC
DRAWING	HCDEF MF-30
DRAWN	CLD
CHECKED	MJM

Parcels D E F - 30 Unit Multi-Family
Heron Creek Town Center
North Port, Florida

SCALE	1"=100'
SEC.-TSP.-RNG.	-
SHEET	1
OF	1

Filing # 151289867 E-Filed 06/10/2022 04:10:33 PM

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Plaintiff,
vs.

CLASS REPRESENTATION
Case No. 2020 CA 004364 NC

STEVE DSUPIN, et al.,
Defendants,
And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Nominal Defendant.
_____/

STEVE DSUPIN, et al.,
Counterclaim-Plaintiffs,
vs.

HERON CREEK ASSOCIATES, LTD.,
A Florida limited partnership,
Counterclaim-Defendant,
And

HERON CREEK COMMUNITY ASSOCIATION, INC.,
A Florida corporation not for profit,
Cross-claim Defendant.
_____/

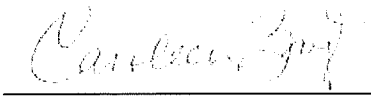
NOTICE OF FILING

Plaintiff/Counterclaim Defendant, HERON CREEK ASSOCIATES, LTD, hereby gives notice of filing the Affidavit of Jim Bevillard dated June 10, 2022, attached hereto as **Exhibit "A"** and the Affidavit of Ronald York dated June 10, 2022, attached hereto as **Exhibit "B"**, in opposition to Defendant/Counterclaim Plaintiffs' Motion for Partial Final Summary Judgment on Counter-Claim and Cross-Claim which is scheduled before the Court on July 18, 2022, and for use at trial and any other purposes in this action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed using the Florida Courts E-Filing Portal and served on ***Dan Lobeck, Esq., and Michelle A. Rowe, Esq., Law Offices of Lobeck & Hanson, P.A., 2033 Main Street, Suite 403, Sarasota, FL 34237,*** dlobeck@lobeckhanson.com, mrowe@lobeckhanson.com, and tlotsoff@lobeckhanson.com; and ***Telese L. Zuberer, Esq., Icard, Merrill, Cullis, Timm, Furen, & Ginsburg, P.A., 2033 Main Street, Suite 600, Sarasota, FL 34237***, tzuberer@icardmerrill.com on this 10th day of June, 2022.

BENTLEY GOODRICH KISON P.A.



MORGAN R. BENTLEY, ESQ.
Florida Bar No. 0962287
CAROLEEN B. BREJ, ESQ.
Florida Bar No. 0093188
783 S. Orange Avenue, 3rd Floor
Sarasota, Florida 34236
Telephone: (941) 556-9030
mbentley@bgk.law
cbrej@bgk.law
eserve@bgk.law

From: **Kathy Tyler** <ktyler@eslliving.com>
Date: Tue, Nov 26, 2024 at 6:11 PM
Subject: Re: For Kathy Tyler
To: Diane OConnor <dianeoconnor51@gmail.com>

Hi Diane,

We are a Senior Living Community & only office spaces are for our administration team.

Warm regards,
Kathy

Get Outlook for iOS

THE GALLERY at North Port
AN EXPERIENCE SENIOR LIVING COMMUNITY

KATHY TYLER
EXECUTIVE DIRECTOR
941.299.4352
ktyler@eslliving.com
galleryatnorthport.com

BEST OF SENIOR LIVING
aPlaceforMom
2024

From: Diane OConnor <dianeoconnor51@gmail.com>
Sent: Tuesday, November 26, 2024 5:03:53 PM
To: Kathy Tyler <ktyler@eslliving.com>
Subject: Re: For Kathy Tyler

[EXTERNAL]

Dear Kathy,
Thank you for answering my inquiry about office space at The Gallery. To clarify, is the unavailability of office space for rent (or sale) temporary or permanent? In other words, does any portion of your facilities consist of offices (other than your own administrative offices for your operations), or are you instead all multifamily apartments rented for Seniors?

Thank you very much.

Diane O'Connor

On Wed, Nov 13, 2024 at 9:56 AM Kathy Tyler <ktyler@eslliving.com> wrote:

Greetings Diane,

Thank you for reaching out but unfortunately, we do not have office space available. We only have apartments for rent for Seniors (Independent, Assisted Living & Memory Care). Our apartments start at $4500/month.

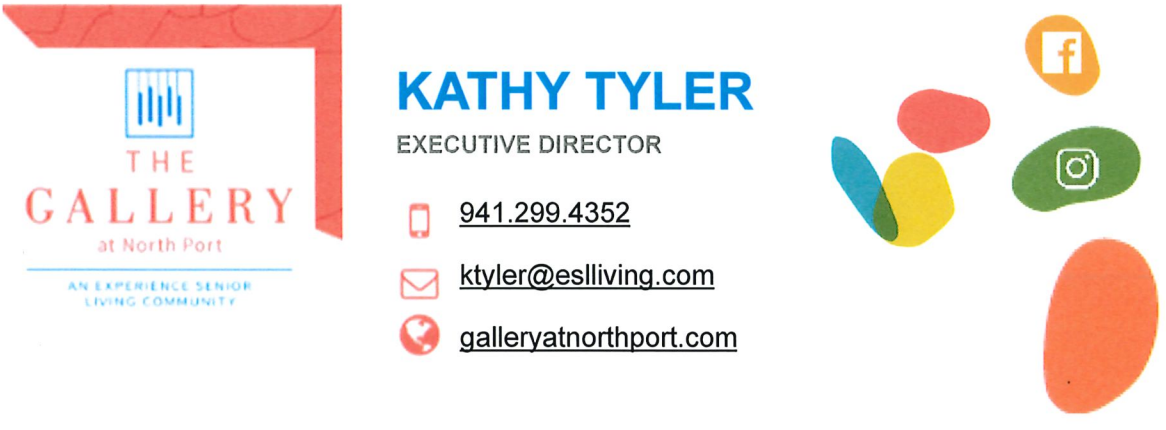
Happy to help if we can,

Kathy

THE GALLERY at North Port
AN EXPERIENCE SENIOR LIVING COMMUNITY

KATHY TYLER
EXECUTIVE DIRECTOR

941.299.4352
ktyler@eslliving.com
galleryatnorthport.com





From: Diane OConnor <dianeoconnor51@gmail.com>
Sent: Wednesday, November 13, 2024 9:50 AM
To: The Gallery at North Port <gallerynorthport@eslliving.com>
Subject: For Kathy Tyler

[EXTERNAL]

Kathy Tyler
Executive Director
The Gallery at North Port
1322 North Main Street
North Port, FL 34286
Dear Kathy:
My name is Diane O'Connor. I am a resident of North Port and live in the Heron Creek Community. I am also the Chair of the 16 Neighborhood Chairpersons in our Community.
Our Community recently retained the services of AMI Property Management, Inc. of Southwest Florida located in Venice, FL. One of the services that AMI provides to our Community is a dedicated, onsite, Community Association Manager (CAM). I am currently working with our
CAM, Tara Hinze, and Mary Jo Lobrutto (a real estate agent in North Port), to secure office space for Tara Hinze in North Port. Unfortunately, we have been unable to identify any available space to rent near our Community.
I recently discovered that The Gallery at North Port is zoned for both residential and office space. The purpose of this letter is to determine if you have any office space for rent in your facility.
I would very much appreciate it if you could let me know, at your earliest convenience, if you have office space to rent. Further, we would appreciate it if MJ Lobrutto could visit your site to determine if you have any office space that may be suitable for our needs.
Yours truly.

Diane O'Connor

1201 Creek Nine Dr.

North Port, Fl 34291
Chair of Neighborhood Chairs
Heron Creek Homeowners Association

Joint Exhibit 28

AZB-24-122
Appeal to Heron Creek – Parcel K Development Order

Zoning Board of Appeals
December 16, 2024

Presented by Lori Barnes, AICP, CPM, Assistant Development Services Director



150-Unit Multi-Family on 9.78
Development Order MAS-23-160
Issued on June 18, 2024

Count 1 - Lack of Staff Jurisdiction to Approve Major Site/Development Plan

Sec. 33-8. - Procedure for securing major site and development plan approval. D. Review of application. Upon a determination that the plans submitted are complete, the application shall be logged into the City's database and placed on the staff review schedule.

(1) **The City staff shall review the plans** within a timely manner of receipt of the application…

(3) Upon resolution of all outstanding issues and a unanimous decision of "Meets Requirements," "Meets Requirements with Conditions," or "No Objection" by the City staff, the applicant shall submit all required copies of the final plans showing all required corrections…

(4) Upon receipt of the final corrected plans, the plans shall be stamped approved **and a development order shall be issued to the applicant.**

Count 2 - Violation of Comprehensive Plan and ULDC as to Density

- Urban Infill Area at ADA
- Entitlements for 831 acre unsubdivided DRI
- 1,970 residential units (903 single-family units and 1,067 multifamily units), 500,000 gross square feet of commercial retail/ service space, and 250,000 gross square feet of office…
- Map H
- Density in low-density residential future land use 1.4 du/ac

Count 3 - Violation of Comprehensive Plan Policies as to Flood Zones

Policy 9.26: The City shall discourage the densification and intensification of land uses within Hurricane Evacuation Zones A and B (as depicted within the Coastal Management Element Map Series) the CHHA, and/or FEMA Flood Zones “A,” “AE,” and/or “VE.”

- The approval of the Heron Creek Parcel K development order does not change the maximum density of the portion of the DRI that is assigned a low-density residential future land use.

Count 4 - Violation of Comprehensive Plan Policies as to Compatibly

GOAL 1: Ensure that the character and location of land uses maximize the potential for economic benefit and the enjoyment of natural and man-made resources by citizens' while minimizing the threat to health, safety and welfare posed by hazards, nuisances, incompatible land uses, and environmental degradation.

Objective 1: Future development activities shall continue to be directed in appropriate areas as depicted on the Future Land Use Map, and shall encourage the use of innovative land development regulations, consistent with sound planning principles, minimal natural limitations, the goals, objectives and policies contained within this plan, and the community character.

Count 4 - Continued

Policy 1.2: Expansion, reclassification or replacement of land uses shall be compatible and consistent with the Future Land Use Map. Each land use type will be reviewed individually and for their impact on the remainder of the Plan. Land use types cumulatively will be evaluated based on:

1. Extent and provision of infrastructure systems;
2. Location and gateways;
3. Distribution;
4. Density;
5. Intensity;
6. Compatibility with existing and future neighborhoods or Activity Centers;
7. Suitability;
8. Functional relationship;
9. Land use combinations;
10. Demonstrated need over the planning period;
11. Financial Impact.

Count 4 - Continued

Policy 9.27: As reflected in City of North Port Zoning standards, potential incompatibilities between land uses due to the density, intensity, character or type of use proposed, shall be mitigated through site and architectural design techniques including but not limited to any or all of the following:

- provision and location of open space, perimeter buffers, landscaping and berms;
- the location and screening of sources of light, noise, mechanical equipment, refuse areas, delivery areas and storage areas; and,
- the location of road access to minimize adverse impacts, increased building setbacks, step downs in building heights.

Count 5 – Too Few Multi-Family Units left in DRI – ALF Dwellings are Not an Office

Land Use

Conversion Matrix

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ('21-2024)
Residential Single Family (LUC 210)	376 DU	457 DU		70 DU
Residential Multi-Family (LUC 220)				750 DU
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)				43,000 GLA
Office General (LUC 710)				40,000 CLA
Retail Shopping Center (LUC 820)	68,075 GLA	34,240 GLA	3,890 GLA	532,152 GLA

Count 5 – Continued

- **Heron Creek Pattern Book dated May 1, 2002, and amended December 14, 2015, and September 2022**

  2.1 Towne Center Land Use Categories - The following use categories are referenced for the parcels in the Towne Center:…

  2.1.2 Office, Professional & Institutional Use - designated space for professional and business offices, institutional uses, and very limited industrial uses.

Count 5 – Continued

2.1.2.1 Permitted, accessory, conditional and prohibited uses shall be as stated in zoning ordinance for "OPI Office, Professional, Institutional District" with the following exception:

Residential and Commercial uses, subject to Heron Creek Towne Center Pattern Book restrictions regarding their size and location within Office, Professional & Institutional buildings, shall be considered permitted accessory uses, **and nursing homes, adult congregate living facilities** and "High Tech," non-obtrusive, industrial uses **shall be considered permitted uses.**

Count 5 – Continued

Sec. 53-10. - Appeals.

A. Appeal procedure exclusively for developments governed by a previously adopted "Pattern Book." **Where such a "Pattern Book" exists, it** shall constitute an approved Development Master Plan (DMP)/Development Concept Plan (DCP) that shall not be subject to further review by the Planning and Zoning Advisory Board or the City Commission, and **shall take precedence over and be superior to the provisions of this Code to the extent of any conflict.**

(1) Where the Pattern Book is silent in any area, this Unified Land Development Code shall apply.

Count 6 – Failure to Provide and Record Declaration of Condominium

Section 33-9.A(22) Covenants and restrictions shall be submitted for review and approval by the City and shall be consistent with the major site and development plan and City Code.

Sec. 1-14.- Provisions declared to be minimum or maximum requirements.

In their interpretation and application, the provisions of these zoning regulations shall be held to be minimum or maximum requirements, as the case may be, adopted for the promotion of the public health, safety, or general welfare. **Whenever the requirements of these zoning regulations are at variance with the requirements of any other governmentally adopted statute, rule, regulation, ordinance or code, the most restrictive or that imposing the higher standards shall govern.**

Count 6 – Continued

- Florida Statutes Chapter 718 vs. 177

- Florida Statutes 166.033(5) For any development permit application filed with the municipality after July 1, 2012, **a municipality may not require as a condition of processing or issuing a development permit or development order that an applicant obtain a permit or approval from any state or federal agency** unless the agency has issued a final agency action that denies the federal or state permit before the municipal action on the local development permit.

Count 7 – Failure to Provide the Required Traffic Study

- Updated Traffic Study

- Offsite Transportation Impacts – Ord. No. 2000-13 & Ord. No. 2025-28

Count 8 – Failure to Comply with Water and Sewer Impact Requirements

- Unified Land Development Code Chapter 5
- Florida Statutes 163.3180(b)(2) Consistent with public health and safety, sanitary sewer, solid waste, drainage, adequate water supplies, and potable water facilities shall be in place and available to serve new development no later than the issuance by the local government of a certificate of occupancy or its functional equivalent. **Prior to approval of a building permit or its functional equivalent,** the local government shall consult with the applicable water supplier to determine whether adequate water supplies to serve the new development will be available no later than the anticipated date of issuance by the local government of a certificate of occupancy or its functional equivalent. A local government may meet the concurrency requirement for sanitary sewer through the use of onsite sewage treatment and disposal systems approved by the Department of Environmental Protection to serve new development.

Count 9 - The Developer's "Shift" of Land Use Rights to Get More Multifamily Units Exceeds the Substantial Deviation Limits Provided by Ordinance 2011-33

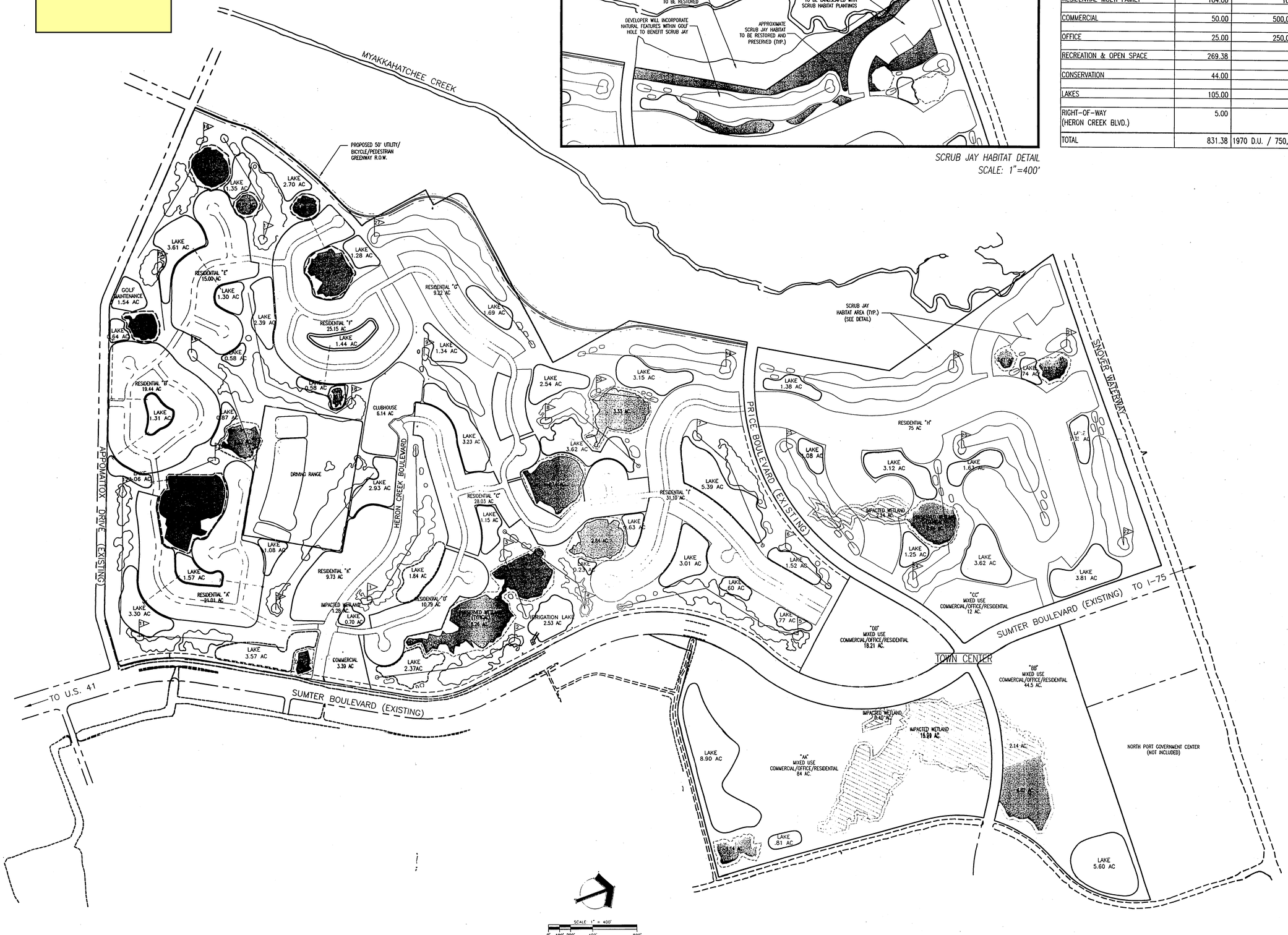
- The original entitlements included 1,970 residential units (903 single-family and 1,067 multifamily units).

- Any substantial deviation measurement, if still applicable due to changes in legislation regarding DRIs, it should be based on the number of units approved in 2000, which calculation results in a reduction of residential units.

NorthPort
FLORIDA

DRI-98-103 (2)

Joint Exhibit 30



NOTE: FINAL CONFIGURATION OF SCRUB JAY HABITAT TO BE VERIFIED IN FIELD WITH APPLICANT AND ENVIRONMENTAL AGENCIES TO OBTAIN THE OPTIMUM HABITAT FOR THE SCRUB JAY AND THE PROJECT.

NOTE: SCRUB JAY HABITAT ON CITY PROPERTY TO BE RESTORED

SINGLE FAMILY LOTS WITHIN SCRUB JAY HABITAT TO BE LANDSCAPED WITH SCRUB HABITAT PLANTINGS

DEVELOPER WILL INCORPORATE NATURAL FEATURES WITHIN GOLF HOLE TO BENEFIT SCRUB JAY

APPROXIMATE SCRUB JAY HABITAT TO BE RESTORED AND PRESERVED (TYP.)

SCRUB JAY HABITAT DETAIL
SCALE: 1"=400'

SITE DATA		
LAND USE	APPROXIMATE ACREAGE	DWELLING UNITS/ NON RES. SQ. FT.
RESIDENTIAL SINGLE FAMILY	224.00	903 D.U.
RESIDENTIAL MULTI FAMILY	104.00	1067 D.U.
COMMERCIAL	50.00	500,000 S.F.
OFFICE	25.00	250,000 S.F.
RECREATION & OPEN SPACE	269.38	
CONSERVATION	44.00	
LAKES	105.00	
RIGHT-OF-WAY (HERON CREEK BLVD.)	5.00	
TOTAL	831.38	1970 D.U. / 750,000 S.F.

WilsonMiller
Planners • Engineers • Ecologists • Surveyors
Landscape Architects • Transportation Consultants
WilsonMiller, Inc.
Naples • Fort Myers • Sarasota • Bradenton • Tampa
6900 Professional Parkway East, Suite 100 • Sarasota, Florida 34240-8414
Phone 941-907-6900 • Fax 941-907-6910
E-mail Sarasota@WilsonMiller.com Web-Site www.wilsonmiller.com

Land Development
JUL 14 2000
Division
CPA-00-117

MAP H
PRELIMINARY MASTER PLAN

HERON CREEK HOLDINGS, LTD.

HERON CREEK

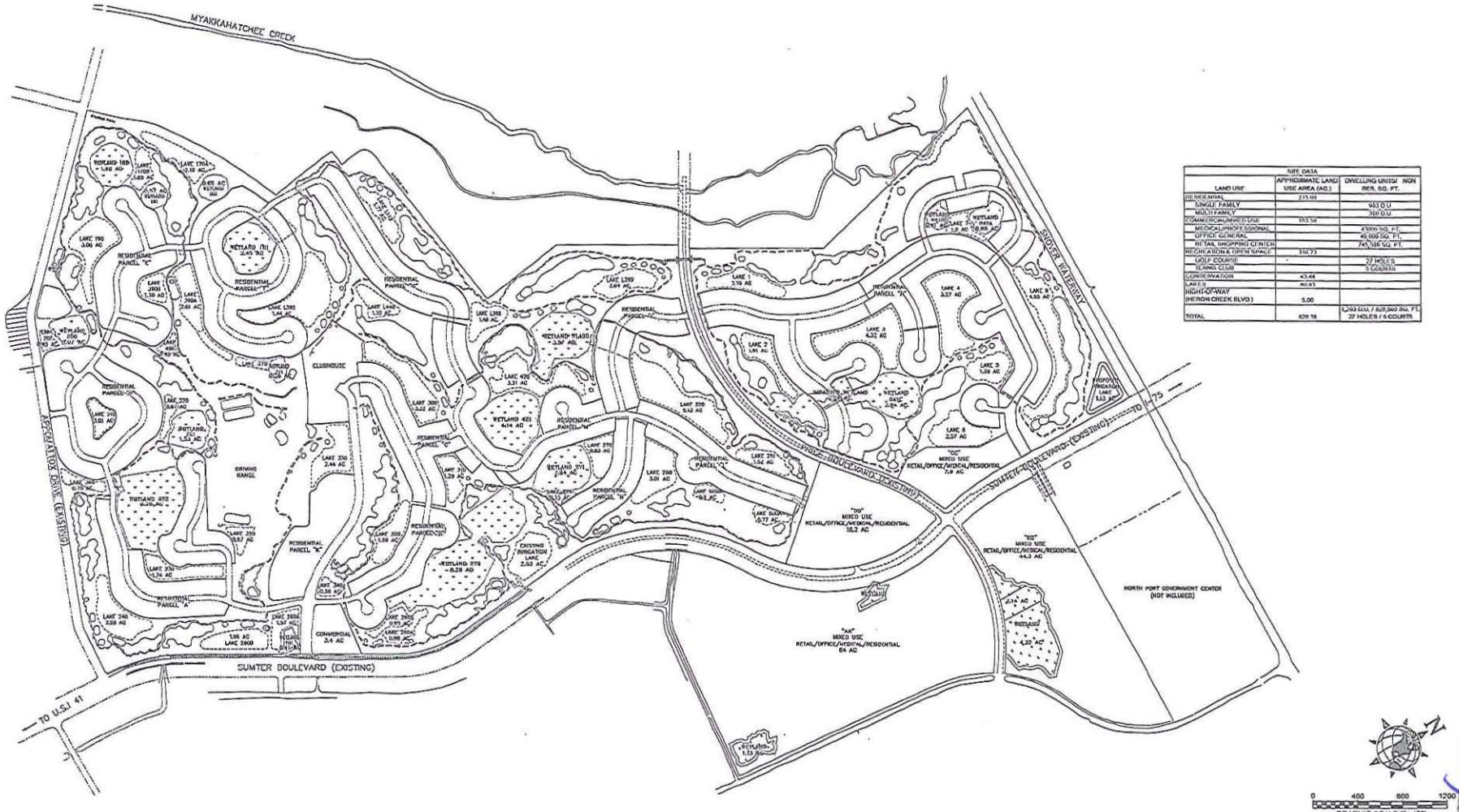
NORTH PORT, FLORIDA

PRINTED
JUL 14 2000
WilsonMiller, Inc.

WilsonMiller, Inc. - Ft. Lbd LD-000009

SEC 20,21,22, 28&29	TWP 39S RGE 21E
Designed by:	KJN/788
Drawn by:	SAB/1330
Checked by:	
Approved by:	
Date:	2/00
Scale:	1"=400'
PIN:	S2726-001-000
File #	:D-2726-001-000007
Sheet	1 of 1

Feb 23, 2000 - 09:15:54 S:\UTTARIK\PLA\2726\03\2726MAPH.dwg



SITE DATA		
LAND USE	APPROXIMATE LAND USE AREA (AC.)	DWELLING UNITS/ NON RES. SQ. FT.
RESIDENTIAL	231.68	
SINGLE FAMILY		963 D.U.
MULTI FAMILY		300 D.U.
COMMERCIAL/MIXED USE	153.58	
MEDICAL/PROFESSIONAL		47,000 SQ. FT.
OFFICE GENERAL		45,000 SQ. FT.
RETAIL SHOPPING CENTER		745,586 SQ. FT.
RECREATION & OPEN SPACE	310.73	
GOLF COURSE		27 HOLES
TENNIS CLUB		5 COURTS
CONSERVATION	43.44	
LAKES	40.83	
RIGHT-OF-WAY (HERON CREEK BLVD.)	5.00	
TOTAL	839.16	1,293 D.U. / 837,560 SQ. FT. 27 HOLES / 5 COURTS

MORRIS ENGINEERING AND CONSULTING, LLC
Civil Engineering and Land Development Consulting
13408 19th Street East, Parrish, Florida 34219 941-228-4729 www.morrisengineering.biz

NO.	DATE	REVISION DESCRIPTION	BY
01	06/07/2010	revise site data table	

MATTHEW J. MORRIS
FL LICENSE NO. 65434

DATE 12/01/09
PROJECT HCMAPH
DRAWING MAPH-MSTR
DRAWN TB
CHECKED MJM

MAP H - PRELIMINARY MASTER PLAN
HERON CREEK
CITY OF NORTH PORT, FLORIDA

SCALE 1"=400'
SCC-TSP-AMR-20-305-HRC
SHEET 1 OF

CERTIFIED
DATE: 12-16-09

Joint Exhibit 31

May 30, 2024

Mr. Charles D. (Dan) Bailey, Jr.
Williams Parker
200 South Orange Avenue
Sarasota, Florida 34236

Subject: Extension of Expiration Date for the Buildout of Phase IV of the Heron Creek Development of Regional Impact - Ordinance No. 2013-16

Dear Mr. Bailey:

Staff has received your notice of extension of the Phase IV Buildout for the Heron Creek Development of Regional Impact ("DRI") based on Executive Order 24-80 issued by Governor DeSantis on April 29, 2024. Executive Order 24-80 meets the requirements of Section 252.363, Florida Statutes.

The previous expiration date for the Phase IV Buildout of the DRI by the City of North, Florida ("City") was November 8, 2024. Per the notice of extension utilizing the tolling period of five-hundred and ninety-three (593) days plus twenty-four (24) months, the City's records will reflect that the new expiration date is June 23, 2028.

Sincerely,

Alaina Ray, AICP
Development Services Director

HERON CREEK
Golf & Country Club

Joint Exhibit 32

January 25, 2023

Lori Barnes, AICP, CPM
Planning and Zoning Manager
City of North Port, Florida
4970 City Hall Boulevard
North Port, Florida 34286

Re: Heron Creek Development Order
Revised Modification of Land Use Table

Dear Ms. Barnes:

In accordance with your conversation with our land use counsel on Friday, January, 20, 2023, we are hereby revising the letter we sent you on January 11, 2023, for the purpose of modifying the Land Use Table contained in Section 3.01 of Ordinance No. 2011-33 of the City of North Port, Florida, the "Development Order" for Heron Creek (formerly Marsh Creek) Development of Regional Impact (DRI). Specifically, Heron Creek Associates, Ltd., has modified the Land Use Table to increase the Residential Multifamily uses with a corresponding reduction in Retail Shopping Center uses as shown below:

Land Use	Phase I ('97-2001)	Phase II ('02-2006)	Phase III ('07-2011)	Phase IV ('21-2024)
Residential Single Family (LUC 210)	376 DU	457 DU		70 DU
Residential Multi-Family (LUC 220)				750 DU
Golf Course (LUC 430)	18 Holes	9 Holes		
Tennis Club (LUC 492)		5 Courts		
Medical/Professional (LUC 720)				43,000 GLA
Office General (LUC 710)				40,000 CLA
Retail Shopping Center (LUC 820)	68,075 GLA	34,240 GLA	3,890 GLA	532,152 GLA

The Land Use Table has been modified to reflect the extended buildout date for Phase IV, which, due to various declarations of emergency issued by the Governor, has been extended by the Developer to November 8, 2024, pursuant to Sec. 252.363(1)(a), Florida

Statutes. The additional 430 Multi-Family units were created by the conversion of 102,380 GLA of Retail Shopping Center at a ratio of 4.2 Residential Multi-Family units to 1,000 GLA of Retail Shopping Center. Section 301(b) of the Development Order allows for land use conversion provided that (1) the external trips approved for the DRI remain the same, and (2) no additional impact will occur to other public facilities such as water and sewer. The Technical Memorandum prepared by William E. Oliver, P.E. on September 6, 2006, which was utilized in creating the conversion table, indicates that it is tailored to ensure that its use in converting uses will result in no increase in external trips over those approved in the DRI. The DRI grants no guarantee of entitlement to water and sewer service going forward; so, use of the table to convert uses has no effect on utility entitlements. Each future development project, regardless of the use, will still have to seek written confirmation from the City that water and sewer service will be available. The Developer is currently working with the utility department on an agreement for service to a new proposed development within the Towne Center and has already received confirmation that the City does have capacity to serve the development.

We would ask that you kindly acknowledge receipt of this letter.

Sincerely,

Ronald A. York
Development Manager

cc: James Stansbury, Florida Department of Economic Opportunity
Margaret Wuerstle, Executive Director, Southwest Florida Regional Planning Council

Exhibit 33

1999127212

RECORDED IN OFFICIAL RECORDS
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1999 SEP 17 04:02 PM
KAREN E. RUSHING
CLERK OF CIRCUIT COURT
SARASOTA COUNTY,FLORIDA
JLITTLE Receipt#138489

DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR HERON CREEK

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Prepared By: J. Michael Hartenstine
Williams, Parker, Harrison, Dietz & Getzen
1550 Ringling Boulevard, P.O. Box 3258
Sarasota, Florida 34230

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DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR HERON CREEK

THIS DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS is made this 16th day of September 1999 by **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership ("Associates"), joined by **MARSH CREEK HOLDINGS, LTD.**, a Florida limited partnership ("Holdings"), and **RENEA M. GLENDINNING**, as Trustee under Trust Agreement dated April 30, 1998, and under deed recorded in Official Records Book 3107, page 264, Public Records of Sarasota County, Florida ("Glendinning").

RECITALS:

A. Associates is the owner of certain real property in Sarasota County, Florida, more particularly described in Exhibit "A" attached hereto.

B. Holdings is the owner of certain real property in Sarasota County, Florida, more particularly described in Exhibit "B" attached hereto.

C. Glendinning is the owner of certain real property in Sarasota County, Florida, more particularly described in Exhibit "C" attached hereto.

D. Associates is the owner of a leasehold interest in a portion of the lands described in Exhibits "B" and "C," which portion is referred to below as the "Country Club Parcel."

E. Associates intends to improve, develop, and convey portions of the property described in Exhibits "A," "B," and "C" for residential, recreational, commercial, and other uses and purposes as part of a community to be known as "Heron Creek."

F. Holdings intends to facilitate the development of the community by conveying to Associates and others from time to time portions of the property described in Exhibit "B."

G. By virtue of this Declaration, Associates intends to provide a flexible and reasonable procedure for the designation of lands that will be a part of the community, to impose upon such lands mutually beneficial restrictions under a general plan of improvement for the benefit of all owners thereof, and to establish a method for the administration, maintenance, preservation, use, and enjoyment of such lands.

NOW, THEREFORE, Associates, joined by Holdings and Glendinning, does hereby establish this Declaration and place upon those lands more particularly described herein the following covenants, conditions, and restrictions.

ARTICLE 1
DEFINITIONS

Unless prohibited by the context in which they are used, the following words, when used in this Declaration, shall have the following meanings:

1.1 "Additional Property" shall mean the real property described in Exhibits "B" and "C" attached to this Declaration.

1.2 "Administrative Fee" shall have the meaning set forth in Article 6.8.

1.3 "Architectural Committee" shall mean the committee constituted and empowered pursuant to Article 12 to control and regulate all Construction Work.

1.4 "Architectural Criteria" shall mean such restrictions and regulations as may be adopted from time to time by the Architectural Committee with respect to Construction Work affecting the Community or any portion thereof.

1.5 "Articles of Incorporation" shall mean the Articles of Incorporation of the Association, a copy of which is attached to this Declaration as Exhibit "D."

1.6 "Assessable Parcel" shall mean a Parcel to which one or more Assessment Shares have been allocated pursuant to Article 9.2.

1.7 "Assessments" shall mean assessments levied by the Board against the Parcels in accordance with the provisions of Article 9 for the payment of Association Expenses.

1.8 "Assessment Share" shall have the meaning set forth in Article 9.2.A.

1.9 "Association" shall mean Heron Creek Community Association, Inc., a Florida corporation not for profit.

1.10 "Association Expenses" shall mean all expenses incurred by the Association in the performance of its obligations or the exercise of its powers pursuant to this Declaration, any Supplemental Declaration, the Articles of Incorporation, or the Bylaws.

1.11 "Attorney's Fees" shall mean all reasonable attorney's fees incurred in connection with a matter, including fees for trial and appellate proceedings and fees for services not involving litigation.

1.12 "Board" shall mean the Board of Directors of the Association.

1.13 "Bylaws" shall mean the Bylaws of the Association, a copy of which is attached to this Declaration as Exhibit "E."

1.14 "Common Areas" shall mean the Community Common Areas and the Neighborhood Common Areas, collectively.

1.15 "Community" shall mean the Initial Property, together with such additional portions of the Properties as hereafter may be made subject to this Declaration by the terms of any Supplemental Declaration.

1.16 "Community Assessment" shall mean an assessment levied by the Board against an Assessable Parcel in accordance with the provisions of Article 9 for the payment of a portion of the Community Expenses.

1.17 "Community Common Areas" shall mean all real and personal property (or interest therein), other than the Neighborhood Common Areas, that is: (a) owned by the Association; (b)

identified as such in this Declaration or in any instrument executed by Declarant and recorded in the Public Records; (c) designated by Declarant in an instrument delivered to the Association as property intended for the common use and enjoyment of all Owners; or (d) maintained by the Association for the benefit of all Owners pursuant to written agreement entered into by the Association.

1.18 "Community Expenses" shall have the meaning set forth in Article 7.2.

1.19 "Community Roads" shall mean all nonpublic roads within the Community that are available for the common use and benefit of all Owners. Community Roads shall be identified as such on plats or other instruments executed by Declarant and recorded in the Public Records.

1.20 "Community Standards" shall mean the minimum standards of conduct, maintenance, or other activity applicable to the Community and the Owners that are established from time to time by the Board.

1.21 "Community Systems" shall mean all lines, conduits, mains, wires, amplifiers, towers, antennae, materials, pumps, equipment, apparatus, installations, and fixtures installed by Declarant, or pursuant to any grant of easement or authority by Declarant, within the Community by which any of the Community System Services are furnished to any of the Parcels.

1.22 "Community System Services" shall mean water, sewer, gas, cable television, telecommunications, security, and other similar services (including those based on, containing, or serving future technological advances).

1.23 "Community Working Capital Contribution" shall have the meaning set forth in Article 9.14.

1.24 "Construction Work" shall mean any installation, construction, restoration, replacement, alteration, addition, or demolition of Improvements on a Parcel or on the Common Areas.

1.25 "Contiguous Property" shall mean any Parcel of real estate located in Township 39 South, Range 21 East, Sarasota County, Florida, that is contiguous to some portion of the Additional Property or the Community. For the purpose of this definition, lands separated only by public rights-of-way shall be deemed contiguous.

1.26 "Controlling Entry Parcel Owners" shall mean such of the Owners of the Entry Parcel, or portions thereof, as are responsible pursuant to Article 9.7 for the payment of more than one-half of the Entry Parcel Assessment.

1.27 "Country Club" shall mean all Improvements and facilities constructed and maintained on the Properties by Declarant, or other Person designated by Declarant, as part of a private club known as "Heron Creek Golf & Country Club," which Improvements and facilities may include, by way of illustration and not as a limitation: a golf course; driving range; putting green; clubhouse; pro shop; landscaping; tennis courts and swimming pools; and restaurant, bar, maintenance, and parking facilities.

1.28 "Country Club Lease" shall have the meaning set forth in Article 17.1.

1.29 "Country Club Owner" shall mean the Persons who, at a given time, own the Country Club.

1.30 "Country Club Parcel" shall mean that portion of the Properties on which the Country Club is located.

1.31 "Declarant" shall mean Associates, any successor or legal representative of Associates, or any Person to whom all rights of Associates under this Declaration are hereafter assigned pursuant to written instrument duly recorded in the Public Records.

1.32 "Entry Area Expenses" shall have the meaning set forth in Article 7.4.

1.33 "Entry Common Areas" shall mean the tract of land bounded as follows: on the northeast, by the northeasterly boundary of Tract CR1; on the southeast, by the northwesterly pavement line of Sumter Boulevard; on the southwest, by the southwesterly boundary of Tract CR1; and on the northwest by a line running parallel to the southeasterly boundary of Tract CR1 and through the most westerly point of any entry drive leading to the Entry Parcel from Tract CR1.

1.34 "Entry Parcel" shall mean that portion of the Additional Property bounded as follows: on the southeast, by the northwesterly right-of-way line of Sumter Boulevard; on the southwest, by the northeasterly boundary of Tract CR1; on the northwest, by the southeasterly boundary of Tract CR2; and on the northeast, by the northerly line of that certain easement granted to the City of North Port by instrument recorded in the Public Records as Official Records Instrument #1999103300.

1.35 "Entry Parcel Assessment" shall mean an assessment levied by the Board against the Entry Parcel in accordance with the provisions of Article 9 for the payment of 10 percent of the amount of the Entry Area Expenses.

1.36 "Environmental Preservation Guidelines" shall mean those guidelines promulgated by Declarant from time to time relative to the maintenance, upkeep, and preservation of those portions of the Community or adjacent lands which are under the jurisdiction and control of any governmental authority or for which Declarant desires or requires environmental protection or controls in accordance with Article 6.10.

1.37 "Final Development Date" shall mean the earlier of the following two dates: (a) the date which is five years following the date of recording in the Public Records of a statement executed by Declarant to the effect that the last Supplemental Declaration has been recorded in the Public Records; or (b) January 1, 2030.

1.38 "Fine" shall mean an amount assessed by the Board against an Owner in accordance with the provisions of Article 18.3.

1.39 "Golf Course" shall mean that portion of the Country Club Parcel on which Declarant, or other Person designated by Declarant, constructs and maintains a golf course and related facilities, which facilities may include, by way of illustration and not as a limitation, driving ranges, putting greens, cart paths, lakes, and portions of the Surfacewater Management System.

1.40 "Improvements" shall mean all buildings, driveways, parking areas, walks, walls, fences, signs, structures, utility installations, site paving, grading, screen enclosures, pools, tennis courts, game structures, mailboxes, mechanical equipment, solar energy devices, antennae, satellite dishes, water and sewer lines, drains, wells, irrigation systems, lawns, landscaping, landscape devices and objects, exterior sculptures and fountains, and other improvements of any kind, together with any subsequent alterations, additions, or replacements.

1.41 "Individual Parcel Assessment" shall mean an assessment levied by the Board against a Parcel in accordance with the provisions of Article 9 for the payment of Individual Parcel Expenses attributable to such Parcel.

1.42 "Individual Parcel Expenses" shall have the meaning set forth in Article 7.5.

1.43 "Initial Property" shall mean the real property described in Exhibit "A" attached to this Declaration.

1.44 "Institutional Mortgagee" shall mean a savings and loan association, bank, credit union, mortgage banker, mortgage broker, insurance company, pension fund having assets in excess of $100 million, agency of any state government, or agency of the United States Government (including the Federal National Mortgage Association and Federal Home Loan Mortgage Corporation), and its subsidiaries, affiliates, successors, and assigns, holding a first mortgage lien upon any Parcel.

1.45 "Irrigation Lake" shall mean any existing or future lake, including the waters thereof, located on any portion of the Properties owned by Holdings and from which water is withdrawn for the irrigation of any portion of the Properties.

1.46 "Majority Owners" shall have the meaning set forth in Article 20.2.

1.47 "Neighborhood" shall mean any portion of the Community identified as such in a Supplemental Declaration.

1.48 "Neighborhood Assessment" shall mean an assessment levied by the Board against an Assessable Parcel in accordance with the provisions of Article 9 for the payment of a portion of the Neighborhood Expenses applicable to the Neighborhood in which such Assessable Parcel is located.

1.49 "Neighborhood Association" shall mean an incorporated association responsible for the management and maintenance of Neighborhood Common Areas pursuant to a Supplemental Declaration establishing the Neighborhood.

1.50 "Neighborhood Committee" shall have the meaning set forth in Article 3.3.

1.51 "Neighborhood Common Areas" shall mean all real and personal property (or interest therein) that is designated as such in any Supplemental Declaration for the common use and benefit of one or more Neighborhoods and their respective Neighborhood Owners.

1.52 "Neighborhood Developer" shall mean any Person, other than Declarant, who may subsequently execute and record a Supplemental Declaration affecting a portion of the Properties owned by such Person.

1.53 "Neighborhood District" shall mean a portion of the Community comprised of one or more Neighborhoods, as established by Declarant pursuant to Article 4.5.

1.54 "Neighborhood Expenses" shall have the meaning set forth in Article 7.3.

1.55 "Neighborhood Owners" shall mean the Owners of Parcels in a Neighborhood.

1.56 "Neighborhood Roads" shall mean all nonpublic roads within a Neighborhood that are available for the common use and benefit of the Neighborhood Owners and, if and to the extent the

Supplemental Declaration applicable to the Neighborhood so provides, the Owners of Parcels in one or more other Neighborhoods. Neighborhood Roads shall be identified as such in plats or other instruments executed by Declarant or a Neighborhood Developer and recorded in the Public Records; provided that if any portion of a Neighborhood is submitted to condominium ownership, all roads that are part of the condominium common elements shall be deemed Neighborhood Roads whether or not designated as such in the declaration of condominium or condominium plat.

1.57 "Neighborhood Working Capital Contribution" shall have the meaning set forth in Article 9.14.

1.58 "Owner" shall mean the record owner, whether one or more Persons, of the fee simple title to a Parcel.

1.59 "Parcel" shall mean any parcel of real property (including all appurtenances thereto) that is located within the Community, that is not part of the Common Areas, and that is: (a) a platted subdivision lot or tract; (b) a condominium unit; or (c) an unplatted tract of land.

1.60 "Parcel Improvements" shall mean all Improvements located on a Parcel.

1.61 "Person" shall mean a natural person, corporation, partnership, trustee, or other legal entity.

1.62 "Plans" shall have the meaning set forth in Article 12.1.

1.63 "Properties" shall mean the Initial Property, the Additional Property, and the Contiguous Property, collectively.

1.64 "Public Records" shall mean the Public Records of Sarasota County, Florida.

1.65 "Reclaimed Water" shall mean water that has received a degree of treatment and basic disinfection at a wastewater treatment facility but does not qualify as potable water under applicable governmental regulations.

1.66 "Residential Use" shall mean the use of any building or portion thereof as a dwelling or lodging for nontransient Persons. "Residential Use" shall not include the use of lodging facilities of any hotel or motel, but shall include the use of lodging facilities of any time-sharing or interval ownership condominium, cooperative, or other facility if the individual units or apartments in such condominium, cooperative, or other facility are principally used as a lodging for Persons, regardless of the duration of occupancy of the units or apartments by such Persons.

1.67 "Rules and Regulations" shall mean the rules and regulations of the Association adopted by the Board from time to time pursuant to the Bylaws.

1.68 "Special Assessment" shall mean an assessment levied by the Board against a Parcel in accordance with the provisions of Article 9 as a supplement to a Community Assessment for the payment of a portion of the Community Expenses or as a supplement to a Neighborhood Assessment for the payment of a portion of the Neighborhood Expenses applicable to the Neighborhood (if any) in which such Parcel is located.

1.69 "Supplemental Declaration" shall mean any instrument identified as such, executed by or consented to by Declarant and recorded in the Public Records, pursuant to which any portion of the

Additional Property or Contiguous Property is made subject to this Declaration or any portion of the Properties is identified as a Neighborhood, as such instrument may be amended from time to time.

1.70 "Surfacewater Management System" shall mean the waters of all lakes, ponds, swales, culverts, inlets, and outfalls used in connection with the retention, drainage, and control of surface waters within the Community, together with all drainage control devices and apparatus used in connection therewith and all easements therefor as may exist by virtue of this Declaration or other recorded instrument or plat.

1.71 "SWFWMD" shall mean the Southwest Florida Water Management District.

1.72 "Tract CR1" shall mean Tract CR1, Heron Creek, Unit I, as per plat thereof recorded in Plat Book 40, page 47, of the Public Records.

1.73 "Tract CR2" shall mean Tract CR2, Heron Creek, Unit I, as per plat thereof recorded in Plat Book 40, page 47, of the Public Records.

1.74 "Turnover" shall mean the date on which the Turnover Meeting described in Article 6.2 of the Articles of Incorporation occurs.

1.75 "Unimproved Parcel" shall mean an Assessable Parcel on which no bona fide construction of Improvements has commenced.

1.76 "Voting Member" shall have the meaning set forth in Article 4.4.

ARTICLE 2
THE COMMUNITY

2.1 Description. Declarant intends to develop the Community for residential, recreational, commercial, and other uses and purposes. In keeping with such intent, the Community may contain, by way of illustration and not as a limitation, single-family lots; attached or detached single-family housing (including zero-lot-line homes, duplexes, cluster homes, villas, and townhouses); multi-family housing (some or all of which may be in the form of condominiums, if approved by Declarant pursuant to Article 2.6); golf courses, open spaces, and parks; recreational facilities and clubhouses; commercial buildings and offices; hotels, motels, and resort facilities; and sites for utilities, schools, fire stations, and other public purposes. The manner in which, and the extent to which, portions of the Properties may be made a part of the Community shall be governed by the provisions of Articles 2.2 - 2.4. The Community will include both Neighborhoods, which will be established pursuant to Article 3, and Common Areas, which will be managed and maintained by the Association pursuant to Article 5. Each Owner will be a member of the Association pursuant to Article 4. Each Parcel will be subject to Assessments by the Association pursuant to Article 9.

2.2 Initial Property within the Community. The Community initially shall be comprised of the Initial Property, which is hereby made, and henceforth shall be held, transferred, sold, conveyed, and occupied, subject to this Declaration. Although Declarant contemplates expanding the Community by making portions of the Additional Property and Contiguous Property subject to this Declaration in the future, no portion of the Additional Property or the Contiguous Property shall be subject to this Declaration except pursuant to a Supplemental Declaration executed and recorded in accordance with the provisions of Article 2.3.

2.3 Expansion of the Community. Declarant shall have the right, but not the obligation, in its sole discretion from time to time, to expand the Community at any time by the execution and recording in the Public Records of a Supplemental Declaration making subject to the provisions of this Declaration any portion of the Additional Property or the Contiguous Property. Such Supplemental Declaration shall not require the consent of any Person other than Declarant and the owner of the fee simple record title of the property being made subject to this Declaration. Upon the addition of any portion of the Additional Property or the Contiguous Property, all the provisions of this Declaration shall apply to such portion to the same extent as they apply to the Initial Property. Declarant's right to expand the Community shall terminate on the earlier of the following two dates: (a) the date of recording in the Public Records of a statement executed by Declarant to the effect that the last Supplemental Declaration has been recorded in the Public Records; or (b) January 1, 2030.

2.4 Withdrawal of Property from the Community. Declarant reserves the right, in its sole discretion from time to time, to withdraw any property from the Community at any time prior to the Turnover by the execution and recording in the Public Records of an amendment to this Declaration providing for the removal of such property from the provisions of this Declaration. Such amendment shall not require the consent of any Person other than Declarant and the owner of the property being removed. Notwithstanding the foregoing:

A. No Assessable Parcel may be removed by Declarant from the provisions of this Declaration; and

B. If the removal of the property from the provisions of this Declaration would leave any remaining portion of the Community without reasonable access to either Sumter Boulevard or Price Boulevard or to utilities services, Declarant, concurrently with such removal, shall provide such easements as are necessary to provide such reasonable access.

2.5 Country Club. The Country Club Parcel is not presently part of the Community and will not become part of the Community unless and until it is made subject to the provisions of this Declaration pursuant to Article 2.3. Whether or not the Country Club Parcel is made part of the Community, due to the proximity of the Country Club Parcel to portions of the Properties that are, or are contemplated to be, part of the Community, special provisions applicable to the Country Club Parcel and the Country Club are set forth in Article 17.

2.6 Condominiums. No portion of the Community shall be submitted to condominium ownership without the consent of Declarant, which consent shall be evidenced by an instrument executed and recorded in the Public Records by Declarant. Any Declaration purporting to submit any portion of the Community to condominium ownership without such consent of Declarant shall be voidable at the election of Declarant.

ARTICLE 3
NEIGHBORHOODS

3.1 Establishment. Every Parcel intended for, or restricted to, Residential Use shall be located within a Neighborhood. The establishment, size, location, and boundaries of a Neighborhood shall be set forth in the Supplemental Declaration by which the Neighborhood is identified. The total number of Neighborhoods will be established by the various Supplemental Declarations and will depend upon the size of the Community and the number and variety of developments within the Community that are appropriate for classification as Neighborhoods. Because the Community will contain development tracts separated from one another by the Community Common Areas, the Country Club Parcel, and natural features and because the types of housing on the development tracts may vary, Declarant

recognizes that the Owners of Parcels within the separate development tracts will have some common interests that are different from the interests common to all Owners, such as a common development theme, entry feature, development name, and common areas and facilities which are not available for use by all Owners. By identifying these development tracts as separate Neighborhoods, Declarant intends to promote the interests of Neighborhood Owners with respect to matters that are common to their Neighborhood. Each Supplemental Declaration establishing a Neighborhood shall set forth specific restrictions and other provisions applicable to the Neighborhood.

3.2 Neighborhood Organization. In accordance with Article 4.2, every Neighborhood Owner shall be a member of the Association. In addition, the Supplemental Declaration establishing a Neighborhood may require the Neighborhood Owners to be members of a Neighborhood Association. No Neighborhood Association shall be created or operated, however, except pursuant to a Supplemental Declaration to which Declarant has consented or as otherwise may be required by law. If a Neighborhood Association is established for a Neighborhood, the functions and organization of, and Neighborhood Owner participation in, the Neighborhood Association shall be as prescribed in the Supplemental Declaration establishing the Neighborhood or as otherwise required by law. Each Neighborhood Association, through its president, shall represent the interests of the Neighborhood Owners in matters involving the Association, as set forth in Article 4.4. In any Neighborhood that does not have a Neighborhood Association, matters of interest common to the Neighborhood shall be administered by the Association to the extent set forth in this Declaration and the Supplemental Declaration establishing the Neighborhood.

3.3 Neighborhood Committee. In each Neighborhood that does not have a Neighborhood Association, the Neighborhood Owners shall elect a committee (the "Neighborhood Committee") to advise the Board on matters affecting the interests of the Neighborhood Owners. Each Neighborhood Committee shall consist initially of three members. The number of members on a Neighborhood Committee may be increased to five at any time by the terms of the Supplemental Declaration applicable to the Neighborhood or by vote of Neighborhood Owners owning a majority of the Parcels within the Neighborhood. All members of a Neighborhood Committee shall be elected by the Neighborhood Owners at an annual meeting of the Neighborhood Owners. All elections of members of a Neighborhood Committee shall be by plurality vote. All Neighborhood Committee members shall serve for terms of one year. Any vacancy occurring on a Neighborhood Committee due to a member's death or resignation shall be filled by majority vote of the remaining members of the Neighborhood Committee. A majority of the members of the Neighborhood Committee shall constitute a quorum at any meeting of the Neighborhood Committee, and the action of a majority present at a meeting at which a quorum is present shall constitute the action of the Neighborhood Committee. Each Neighborhood Committee shall elect a chairman from among its members. The chairman shall preside at meetings of the Neighborhood Committee and Neighborhood Owners. The chairman shall be responsible for transmitting communications to the Board, shall be authorized to execute documents on behalf of the Neighborhood Committee, and shall have such other duties as may be assigned to him by this Declaration or the Supplemental Declaration applicable to the Neighborhood.

3.4 Neighborhood Committee Responsibilities. Each Neighborhood Committee shall have the following responsibilities:

A. Advise the Board each year on the proposed budget for Neighborhood Expenses;

B. Recommend to the Board, to the extent deemed appropriate by the Neighborhood Committee, additional services or changes in levels of service provided by the Association to the Neighborhood;

C. Review and make recommendations on applications referred to it by the Architectural Committee;

D. Advise the Board, upon request, as to the consensus of Neighborhood Owners on Association matters; and

E. Perform such other duties as may be assigned by the Board.

3.5 Meetings of Neighborhood Owners. In each Neighborhood that does not have a Neighborhood Association, meetings of the Neighborhood Owners shall be governed by the provisions of this Article 3.5. An annual meeting of Neighborhood Owners shall be held each year. The first annual meeting of Neighborhood Owners shall be held at a time and place designated by the Board within one year following the creation of the first Assessable Parcel within the Neighborhood. Subsequent annual meetings of the Neighborhood Owners shall be held at such time and place as is established by the Board. Special meetings of Neighborhood Owners may be called at any time by the Board. The Board shall call a special meeting of Neighborhood Owners upon the unanimous written request of the Neighborhood Committee.

3.6 Voting Rights at Meetings of Neighborhood Owners. In each Neighborhood that does not have a Neighborhood Association, the voting rights of the Neighborhood Owners shall be governed by the provisions of this Article 3.6. At all meetings of Neighborhood Owners, each Neighborhood Owner shall have one vote for each Assessment Share allocated to such Neighborhood Owner's Parcel; provided, however, that in the event of multiple ownership of any Parcel, the multiple owners together, and not individually, shall be entitled to the vote attributable to the Parcel. Neighborhood Owners holding at least one-third of the total votes of Parcels in the Neighborhood, represented in person or by proxy, shall constitute a quorum at any meeting of the Neighborhood Owners. Except as otherwise provided by this Declaration, the affirmative vote of Neighborhood Owners holding a majority of the total votes represented at any duly called meeting of Neighborhood Owners at which a quorum is present shall be necessary for approval of any matter brought before the meeting.

3.7 Notices. Written notice of any meeting of Neighborhood Owners held pursuant to Article 3.5 shall be given by the Association not less than 14 days prior to the date set for such meeting. Any such notice shall be given in the manner set forth in Article 22.2.

3.8 Changes in Neighborhood Boundaries. No change in the boundaries of a Neighborhood shall be made except: (a) in the manner set forth in the Supplemental Declaration initially establishing the Neighborhood; or (b) upon the consent of Declarant, the Association, and Neighborhood Owners owning at least 75 percent of the Parcels in each Neighborhood affected by such change, which consent shall be evidenced by the filing in the Public Records of an amendment executed by the Association and Declarant containing the Association's certification that the requisite consent of Neighborhood Owners was obtained.

ARTICLE 4
THE ASSOCIATION

4.1 Purposes. The general purposes of the Association are to operate, maintain, manage, and improve the Common Areas, and other portions of the Community, to the extent set forth in this Declaration and any Supplemental Declaration; to implement and enforce the provisions of this Declaration and any Supplemental Declaration wherever applicable and appropriate; and to promote the health, safety, and social welfare of the Owners. In the furtherance of such purposes, the Association, through the Board, shall have the power and duty to levy Assessments and to enforce collection thereof in

the manner provided in Articles 9 and 10. The Association shall also have such powers and duties as may be prescribed by the terms hereof or its Articles of Incorporation and Bylaws.

4.2 Membership. All Owners shall automatically be members of the Association. Membership of an Owner shall terminate as the Owner's vested interest in the fee title to a Parcel terminates and thereafter shall pass to such Owner's successors in title as an appurtenance to such Parcel. The Association has four classes of members. The Class A members consist of all Owners of Assessable Parcels. The Class B member is Declarant. The Class C members consist of all Owners of the Entry Parcel. The Class D members consist of all Owners of Parcels other than the Assessable Parcels and the Entry Parcel. A Person may, by virtue of such Person's ownership of various Parcels, be a member of more than one class of Association membership.

4.3 Voting. The voting rights of the members of the Association are as follows:

A. Each Class A member shall be entitled to one vote for each Assessment Share allocated to Parcels owned by such Class A member.

B. The Class B member shall not have voting rights by virtue of the Class B membership, but shall have other rights as are set forth in this Declaration and the Articles of Incorporation and Bylaws.

C. The Class C members shall have no voting rights generally, but shall have other rights as are set forth in Article 9.11.C.

D. The Class D members shall have no voting rights.

Although the Class B, C, and D members have limited voting rights, they shall be entitled to notice of, and may participate in, all meetings of Association members.

4.4 Voting Members. All Neighborhood Owners who are Class A members shall be represented in all matters concerning the Association by a representative (the "Voting Member") of their Neighborhood. If a Neighborhood Association has been established for a Neighborhood, the Voting Member for such Neighborhood shall be the president of the Neighborhood Association. For each other Neighborhood, the Voting Member shall be the chairman of the Neighborhood Committee; provided, however, that until the election of a Neighborhood's first Neighborhood Committee, the Voting Member for the Neighborhood shall be the president of the Association. Each Neighborhood's Voting Member shall be entitled to cast, in his discretion, all votes of such Neighborhood's Class A members and shall have exclusive authority to represent such Class A members in meetings of the Association membership. All votes cast by a Neighborhood's Voting Member shall conclusively bind such Neighborhood's Class A members. Voting Members may participate in meetings of the Association membership in person or by proxy. Although Class A members shall be represented at meetings of the Association membership exclusively by their respective Voting Members, any Class A member shall have the right to attend and observe such meetings.

4.5 Neighborhood Districts. In order to promote wider representation of the various Neighborhoods on the Board, Declarant may, from time to time in its discretion, establish Neighborhood Districts. The establishment of Neighborhood Districts, the designation of their number, the delineation of their boundaries, and any subsequent modifications of their number and boundaries shall be as provided in one or more amendments to this Declaration. Each such amendment shall be executed by Declarant, but shall not require the joinder or consent of any other Person. Each such amendment shall be recorded in the Public Records prior to the Turnover. If a Neighborhood District is established, at least

one director on the Board shall be elected exclusively by the Voting Members representing the Neighborhood Class A members within such Neighborhood District. In no event shall the number of directors that are elected by the Class A members be less than the number of Neighborhood Districts.

4.6 Fees. In addition to Assessments, Fines, fees, and charges payable to the Association pursuant to the provisions of this Declaration, any Supplemental Declaration, or the Association's Articles of Incorporation or Bylaws, the Board may, in its sole discretion, adopt one or more schedules of reasonable fees that shall be payable by an Owner to the Association in connection with: (a) the review by the Association of matters submitted by or on behalf of an Owner to the Association for approval; (b) the performance by the Association of obligations or services benefiting an Owner; or (c) the provision, transfer, rental, or sale by the Association to an Owner of items of real or personal property. The amount of such fees, and the circumstances in which such fees shall be payable, shall be as determined by the Board.

ARTICLE 5
COMMON AREAS

5.1 General. The Common Areas of the Community are comprised of the Community Common Areas and the Neighborhood Common Areas. The Community Common Areas are comprised of property intended for the common use and benefit of all Owners. The Neighborhood Common Areas are comprised of property intended for the common use and benefit of one or more Neighborhoods and their respective Neighborhood Owners.

5.2 Community Common Areas. The Community Common Areas shall include the Community Roads and the Surfacewater Management System. By designation in the manner set forth in Article 1.17, the Community Common Areas may also include, by way of illustration and not as a limitation, pedestrian sidewalks and walkways; bicycle paths; street and pathway lighting; parks and common open space; utility and amenity areas intended for the use and benefit of all Owners; water, sewer, well, irrigation, and wastewater treatment lines, facilities, apparatus, equipment, and systems; security gates and guard houses; and other Improvements used by the Association for administrative or maintenance purposes.

5.3 Neighborhood Common Areas. Neighborhood Common Areas shall be identified exclusively in the respective Supplemental Declarations applicable to the Neighborhoods. Neighborhood Common Areas are intended to include all property for the common use and benefit of one or more Neighborhoods and their respective Neighborhood Owners. By way of illustration and not as a limitation, Neighborhood Common Areas may include, to the extent set forth in the applicable Supplemental Declaration, the following: Neighborhood Roads; parking areas; driveways and pedestrian walkways; common open space and landscaped areas; swimming pools, tennis courts, and other recreational facilities; and clubhouses. If any Neighborhood is submitted to condominium ownership, the common elements of the condominium shall be deemed part of the Neighborhood Common Areas of such Neighborhood.

5.4 Entry Common Areas. The Entry Common Areas are a part of the Community Common Areas and are identified separately solely for the purpose of determining the Entry Area Expenses pursuant to Article 7.4.

5.5 Ownership of Common Areas. Title to any portion of the Common Areas owned by Declarant may be transferred to the Association at any time, provided that title to all portions of the Common Areas owned by Declarant shall be transferred to the Association no later than the Final Development Date. Title to any portion of the Common Areas owned by Holdings may be transferred to

the Association at any time, but Holdings shall have no obligation to transfer title to any such portion to the Association. The transfer of title to any portion of the Common Areas to the Association shall be subject to: (a) all rights of Declarant, Holdings, and other Persons set forth in this Declaration or any applicable Supplemental Declaration; and (b) any restrictions or limitations contained in the deed conveying such portion to the Association.

5.6 Enjoyment of Community Common Areas. Every Owner shall have the nonexclusive right to use and enjoy the Community Common Areas, subject to this Declaration, any Supplemental Declaration, the Rules and Regulations, the Community Standards, any agreement entered into by the Association, and any restrictions or limitations contained in any deed conveying any portions of the Community Common Areas to the Association. An Owner may delegate such right to the members of his family, lessees, and social invitees, as applicable. An Owner who leases his Parcel shall be deemed to have delegated such right to the lessee of the Parcel during the term of the lease.

A. No Person shall, without the written approval of Declarant, do any of the following on any part of the Community Common Areas: operate motorcycles for any purpose other than as a means of transportation on the Community Roads; boat, fish, or swim other than in designated lakes or ponds; permit the running of animals; light any fires except in designated picnic areas; fell any trees or injure any landscaping; hunt, or carry or discharge firearms or other weapons; interfere with any drainage, utility, or access easements; build any structures other than recreational or other common facilities constructed or approved by Declarant; discharge any liquid or material, other than natural drainage, into any lake, pond, or watercourse; alter or obstruct any lakes, ponds, or watercourses; or interfere with any water control structures or apparatus. The designation of areas in which certain of the foregoing activities may occur shall be made by the Association, in its discretion, provided that any such designation may be subsequently revoked or changed by the Association or Declarant.

B. The Association and Declarant shall have the right to use suitable portions (if any) of the Community Common Areas for performances, exhibitions, and other presentations of interest to the Owners and others and to charge admission therefor.

C. No portion of the Community Common Areas utilized as common open space shall be denuded, defaced, or otherwise disturbed in any manner at any time, except for maintenance or repair or as otherwise provided in this Declaration, without the prior written approval of the City of North Port.

D. A nonexclusive and perpetual right of ingress and egress over and across all Community Common Areas is hereby granted to the following Persons while in pursuit of their duties: (1) representatives of fire, police, and sheriff's departments; and (2) health, pollution control, and emergency medical service personnel.

5.7 Usage of Community Roads. Usage of the Community Roads shall be subject to the following provisions:

A. A nonexclusive and perpetual right of ingress and egress over and across all Community Roads (and across all sidewalks, walkways, and paths within or adjacent thereto) is hereby granted to all Owners and their respective guests, invitees, tenants, and domestic help; holders of liens on any Parcel; and the following Persons while in pursuit of their duties: (1) representatives of utilities, delivery, pickup, and sanitation services; (2) United States mail carriers; (3) representatives of fire, police, and sheriff's departments and other necessary municipal, county, special district, state, and Federal agencies; and (4) health, pollution control, and emergency service personnel.

B. Declarant hereby delegates the nonexclusive right to exercise control of traffic on all Community Roads to duly constituted law enforcement officers, and, subject thereto, Declarant shall have the right, but not the obligation, to control and regulate all types of traffic on the Community Roads, including the right to control vehicular access to the Community Roads, the right to prohibit their use by traffic which, in the opinion of Declarant, could result in damage to the Community Roads or any part thereof and the right to control, authorize, and prohibit parking on all or any part of the Community Roads. Declarant reserves the right to utilize the Community Roads for the transportation of equipment, machines, vehicles, supplies, materials, and Persons engaged in, or needed for, the construction or development of any portion of the Properties. Declarant further reserves the right to deny access to the Community Roads to any Person other than those Persons referred to in Article 5.7.A and the right to remove or require the removal of any fence, wall, hedge, shrub, tree, or other object, natural or artificial, placed or located on any Parcel if its location will, in the sole opinion of Declarant, unreasonably obstruct the vision of a motorist upon the Community Roads.

C. In the event and to the extent that any portion of the Community Roads shall be dedicated to or otherwise acquired by any governmental agency on behalf of the public, the provisions of Article 5.7.B shall no longer apply to such portion.

5.8 Usage of Neighborhood Roads. A nonexclusive and perpetual right of ingress and egress over and across all Neighborhood Roads (and any adjoining sidewalks and walkways) in a Neighborhood is hereby granted to the Neighborhood Owners. If the Supplemental Declaration for the Neighborhood so provides, a similar right of ingress and egress over and across the Neighborhood's Neighborhood Roads (and adjoining sidewalks and walkways) may be granted to the Owners of Parcels in one or more other Neighborhoods. Any such right of ingress and egress in favor of any Owner shall also extend to such Owner's guests, invitees, tenants, and domestic help; holders of liens on any Parcel; and the following Persons while in pursuit of their duties: (a) representatives of utilities, delivery, pickup, and sanitation services servicing the Owner's Neighborhood; (b) United States mail carriers; (c) representatives of fire, police, and sheriff's departments and other necessary municipal, county, special district, state, and Federal agencies; and (d) health, pollution control, and emergency service personnel.

5.9 Dedication to Public. Until such time as title is conveyed to the Association, Declarant shall have the sole and absolute right at any time, without necessity of approval of the Association, but with the approval of the City of North Port, to dedicate to the public all or any part of the Community Roads as well as any other portion of the Community Common Areas deemed appropriate by Declarant. Notwithstanding anything in this Declaration or the Articles of Incorporation to the contrary, the Association shall not be dissolved, nor shall the Association sell or otherwise convey any portion of the Community Common Areas that is utilized as common open space to any Person other than an organization conceived and organized to own and maintain such portion, without first offering to dedicate such portion to the City of North Port or other appropriate governmental agency.

5.10 Surfacewater Management System. Notwithstanding that the Surfacewater Management System will be part of the Community Common Areas, Holdings reserves sole ownership of the Surfacewater Management System and the sole right to control the water level and maintenance of all lakes, ponds, swales, drainage control devices, and all other areas and apparatus comprising the Surfacewater Management System. No use of the water in any of the Surfacewater Management System's lakes or ponds may be made by the Association or other Persons without Holdings' prior written consent, which consent may be withheld in Holdings' sole and absolute discretion.

A. Without limiting the foregoing, Holdings has the right to control the water level and maintenance of, and to remove or withdraw all or any part of the water from, any lake or any other portion of the Surfacewater Management System for any purpose, including but not limited to

maintenance, compliance with governmental regulations, or extraction of fill dirt. In no event, however, shall Holdings remove or permit to be removed all or substantially all of the water in any such lake or other portion of the Surfacewater Management System for a period longer than one year unless required to do so by governmental regulations or by other reasons beyond the control of Holdings. In conjunction with such activities, Holdings may place temporary stakes, fences, barriers, or equipment within any easement area designated pursuant to Article 15.1 adjacent to any such lake or other portion of the Surfacewater Management System. No Person shall have any claim against Holdings, Declarant, or the Association for any inconvenience or interference with such Person's view, peace and quiet, welfare, access to light and air, or any similar or related claim caused by such activities undertaken or authorized by Holdings.

B. Subject to compliance with applicable governmental regulations, Holdings may, in its sole and absolute discretion and without notice, add Reclaimed Water to any lake or other portion of the Surfacewater Management System for any purpose, including but not limited to purposes related to irrigation of any lands within the Community, the Country Club Parcel, or any other lands outside of the Community. No Person shall have any claim against Holdings, Declarant, the Association, any Neighborhood Developer, or the Country Club Owner for Holdings' exercising of such rights or the manner in which such discretion is exercised.

5.11 Irrigation Water. Notwithstanding that irrigation lines, facilities, apparatus, equipment, and systems may be part of the Community Common Areas, Holdings reserves: (a) sole ownership of all Irrigation Lakes; (b) sole ownership of all wells, well lines, reuse water mains, pumps, intakes, and related equipment and apparatus that are used to supply water to any Irrigation Lake (except to the extent any of the foregoing is owned by the City of North Port or other governmental authority); and (c) the sole right to control the water level and maintenance of any Irrigation Lake. No use of the water in any Irrigation Lake may be made by the Association or other Persons without Holdings' prior written consent, which consent may be withheld in Holdings' sole and absolute discretion. Subject to compliance with applicable governmental regulations, Holdings may, in its sole and absolute discretion and without notice, add Reclaimed Water to any Irrigation Lake for any purpose, including but not limited to purposes related to irrigation of any lands within the Community, the Country Club Parcel, or any other lands outside of the Community. No Person shall have any claim against Holdings, Declarant, the Association, any Neighborhood Developer, or the Country Club Owner for Holdings' exercising of such rights or the manner in which such discretion is exercised

5.12 Assignment by Holdings. Holdings may from time to time assign any or all of its rights, title, interest, easements, powers, duties, obligations, and privileges reserved or granted hereunder to the Association or to any other Person.

5.13 Exercise of Holdings' Rights. The rights of Holdings enumerated in Articles 5.10 - 5.12 or elsewhere in this Declaration are for the sole benefit of Holdings and may be exercised, waived, released, or assigned, in whole or in part, in Holdings' sole discretion. No Person shall have any cause of action against Holdings on account of Holdings' exercise, manner of exercise, failure to exercise, waiver, release, or assignment, in whole or in part, of any of such rights.

ARTICLE 6
MAINTENANCE

6.1 General. The responsibility for maintenance of the Community shall be divided among the Association, the Owners, and the Neighborhood Associations (if any) in the manner set forth in this Article 6.

6.2 Maintenance of the Community Common Areas. Except as otherwise provided by the terms of this Declaration, the Association shall maintain and keep in good repair all portions of the Community Common Areas, which maintenance and repairs shall include, by way of illustration and not as a limitation: maintenance of all lakes, ponds, swales, and other watercourses, and related drainage facilities and apparatus, that are part of the Surfacewater Management System; maintenance of all Community Roads and all landscaping and other Improvements that are part of the Community Common Areas; and insect, pest, and aquatic control to the extent necessary or desirable, in the judgment of the Association, to supplement the service provided or required by Federal, state, and local governments.

A. The Association shall have a perpetual right and easement on, over, and under the Parcels (exclusive of the interior of Parcel Improvements) to dispense pesticides and to take such other action as the Association may deem necessary or desirable to control insects and vermin within the Community. The authorization to provide pest services shall not be construed as an obligation on the part of the Association to provide such services.

B. In the event the Association, or any successor organization, shall fail to maintain the Community Common Areas in reasonable order and condition, the City of North Port shall have the right, but not the obligation, to enter the Community for the purpose of maintaining the Community Common Areas. All expenses incurred by the City of North Port in maintaining the Community Common Areas shall be assessed pro rata against the Assessable Parcels and shall be payable by the Owners of such Parcels within 60 days after receipt of a statement therefor. If any Owner fails to pay such assessment within such 60-day period, the City of North Port may file a lien on such Owner's Parcel for the amount of such assessment. The rights of the City of North Port contained in this Article 6.2.B shall be in addition to any other rights the City of North Port may have in regulating the operation and development of the Community, but shall also be subject to any applicable judicial or legislative restrictions.

6.3 Maintenance of Neighborhood Common Areas. The Neighborhood Common Areas of each Neighborhood shall be maintained by the Association, except as otherwise provided by the terms of this Declaration and except to the extent the Supplemental Declaration applicable to the Neighborhood allocates responsibility for maintenance of the Neighborhood Common Areas to a Neighborhood Association. If a Neighborhood Association is responsible for the maintenance of the Neighborhood Common Areas, the cost of maintaining the Neighborhood Common Areas shall be paid through assessments levied by the Neighborhood Association against Parcels in the Neighborhood in accordance with the provisions of the Supplemental Declaration applicable to the Neighborhood. If the Association is responsible for the maintenance of the Neighborhood Common Areas, the cost of maintaining the Neighborhood Common Areas shall be paid through Neighborhood Assessments levied by the Association pursuant to Article 9.

6.4 Maintenance of Parcels and Certain Adjoining Areas. Except as otherwise provided by the terms of any applicable Supplemental Declaration or as otherwise approved by Declarant:

A. Each Owner shall be responsible for the maintenance of his Parcel Improvements, which responsibility shall include safeguarding the Parcel Improvements in the event of hurricane or tropical storm watches and warnings by, among other things, placing indoors any unfixed items on balconies or lanais and repairing the Parcel Improvements in the event of any damage therefrom.

B. Owners of Parcels abutting the Golf Course shall maintain and irrigate sod on that portion of the Golf Course lying between the Parcel boundary and the irrigated portion of the Golf Course.

C. Owners of Parcels adjacent to any wetlands preserve shall maintain and irrigate sod on that portion of the Properties lying between the Parcel boundary and the wetlands preserve, as more fully described in and to the extent required by the Environmental Preservation Guidelines promulgated pursuant to Article 6.10.

D. Owners of Parcels abutting any portion of the Community Common Areas on which a wall or fence has been constructed shall maintain and irrigate sod on that portion of the Community Common Areas lying between the wall or fence and the Parcel boundary.

E. Owners of Parcels fronting on any Community Road or Neighborhood Road shall maintain the driveways serving their respective Parcels and shall maintain and irrigate sod on that portion of the right-of-way of such Community Road or Neighborhood Road lying between the Parcel boundary and the nearest pavement edge.

F. Owners of Parcels adjacent to any lake or other body of water within the Properties shall maintain and irrigate sod on that portion of the Properties lying between the Parcel boundary and the water's edge of such lake or other body of water.

G. In performing the maintenance obligations set forth in Articles 6.4.B - 6.4.F, the Owners shall have no right to remove or disturb trees, shrubs, or other vegetation without the prior written approval of the owner of the property on which such trees, shrubs, or vegetation is located.

H. Each Owner of an Unimproved Parcel shall keep his Parcel free of trash, junk, litter, and debris and, to the extent the Association's maintenance of the Parcel pursuant to Article 6.5 does not include maintenance of vegetation on the Parcel, shall maintain such vegetation in a neat and trim manner.

All maintenance required by this Article 6.4 shall be performed in a manner consistent with the Community Standards and all applicable restrictions. If any Owner fails to perform his maintenance responsibilities, the Association shall have the right, but not the obligation, to perform such maintenance responsibilities, provided the Association has first, in any situation not involving an emergency, by written notice to the Owner, afforded the Owner a period of 30 days within which to correct the failure. If the Association exercises its right to perform an Owner's maintenance responsibilities, agents and employees of the Association, together with such other Persons as may be authorized by the Board, shall have the right to enter upon the Owner's Parcel to perform such maintenance, all without liability or responsibility, criminal or civil, for trespass or any other action. All costs incurred by the Association in performing an Owner's maintenance responsibilities, together with the Administrative Fee, shall be included in the Individual Parcel Expenses pursuant to Article 7.5 and shall be assessed against the Owner's Parcel as an Individual Parcel Assessment in accordance with Article 9.8. Maintenance responsibilities performed by the Association pursuant to this Article 6.4 shall not be construed as maintenance responsibilities assumed by the Association by agreement with the Owner pursuant to Article 6.6.A.

6.5 Unimproved Parcels. To ensure that Unimproved Parcels do not become overgrown with weeds and other vegetation, the Association may provide for the periodic mowing of the Unimproved Parcels. The cost of providing such periodic mowing shall be included in the Individual Parcel Expenses pursuant to Article 7.5 and shall be assessed against each Unimproved Parcel as an Individual Parcel Assessment pursuant to Article 9.8.

6.6 Additional Association Maintenance. The Association may maintain other property which it does not own in accordance with the following provisions:

A. Any of the maintenance obligations imposed upon Neighborhood Owners pursuant to Article 6.4 may be delegated to the Association by the terms of a Supplemental Declaration. If any such maintenance obligations are delegated to the Association, the Supplemental Declaration shall specify whether the cost of performing such maintenance obligations is to be included in the Neighborhood Expenses and paid through Neighborhood Assessments or whether such cost is to be allocated solely to designated Parcels and paid through Individual Parcel Assessments against such Parcels.

B. With respect to property located within a Neighborhood, the Association may assume maintenance responsibilities in addition to those designated by the Supplemental Declaration applicable to such Neighborhood by agreement with the Neighborhood Owners or the Neighborhood Association. The cost of maintenance provided by the Association pursuant to this Article 6.6.B shall be included in the Neighborhood Expenses if the maintenance is for the benefit of all Neighborhood Owners; otherwise, such cost shall be treated as Individual Parcel Expenses and assessed against only those Parcels within the Neighborhood for whose benefit such maintenance is provided.

C. With respect to property dedicated to the public, property forming part of the Country Club Parcel, or other property not located within a Neighborhood, the Association may undertake or assume maintenance responsibilities for any part of such properties by agreement with the owner thereof, if the Board determines that such maintenance is necessary or desirable to maintain the Community Standards. The cost of such maintenance shall be included in the Community Expenses.

6.7 Maintenance by Neighborhood Associations. Any Neighborhood Association having responsibility for maintenance of property within a Neighborhood shall perform such maintenance responsibility in a manner consistent with the Community Standards. Without limiting the generality of the foregoing, each Neighborhood Association shall comply with directives of the Association requiring: (a) specific maintenance, repairs, or aesthetic changes to the Neighborhood Common Areas; or (b) inclusion of specific items in a Neighborhood Association's proposed budget and expenditures for such items in accordance with the budget. In the event that any Neighborhood Association fails to perform its maintenance responsibilities, the Association shall have the right, but not the obligation, to perform such maintenance responsibilities, provided the Association has first, in any situation not involving an emergency, by written notice to the Neighborhood Association, afforded the Neighborhood Association a period of not less than 30 days within which to correct the failure. If the Association exercises its right to perform a Neighborhood Association's maintenance responsibilities, agents and employees of the Association, together with such other Persons as may be authorized by the Board, shall have the right to enter upon the Neighborhood to perform such maintenance, all without liability or responsibility, criminal or civil, for trespass or any other action. All costs incurred by the Association in performing a Neighborhood Association's maintenance responsibilities, together with the Administrative Fee, shall be included pro rata in the Individual Parcel Expenses of each Assessable Parcel located within the Neighborhood pursuant to Article 7.5 and shall be assessed pro rata against such Assessable Parcels as Individual Parcel Assessments in accordance with Article 9.8.

6.8 Administrative Fee. If any Owner or Neighborhood Association fails to perform its maintenance responsibilities hereunder and the Association thereafter performs such responsibilities, then in addition to any other rights which the Association may have with respect to such failure, the Association shall be entitled to charge a reasonable administrative fee for its rendition of services necessary to cure such failure (the "Administrative Fee"). Unless a lower amount is established by the Board, the amount of the Administrative Fee shall equal 10 percent of the cost to the Association for curing such failure.

6.9 Security of the Community. Although the Community Common Areas may include security gates and guard houses, neither Declarant nor the Association shall be obligated to furnish or

maintain security gates or guard houses within the Community. If security gates or guardhouses are furnished, they may be removed, and their use suspended or discontinued, at any time by Declarant or the Association. **NEITHER DECLARANT NOR THE ASSOCIATION SHALL HAVE ANY LIABILITY TO ANY PERSON FOR ANY INJURY OR LOSS SUSTAINED AS A RESULT OF ANY FAILURE TO PROVIDE SECURITY GATES OR GUARD HOUSES; ANY REMOVAL, OR SUSPENSION OR TERMINATION OF USE, OF ANY SECURITY GATES OR GUARD HOUSES; OR THE ACTIONS OF ANY PERSON ENTERING THE COMMUNITY THROUGH AN AREA MONITORED BY A SECURITY GATE OR GUARD HOUSE WITH OR WITHOUT THE KNOWLEDGE OR PERMISSION OF ANY SECURITY GUARD, REGARDLESS OF THE PROPER OR IMPROPER FUNCTION OF ANY SECURITY GATE OR WHETHER OR NOT THE ENTRANCE OF SUCH PERSON INTO THE COMMUNITY WAS DUE TO THE NEGLIGENT OR INTENTIONALLY WRONGFUL ACT OF ANY SECURITY GUARD OR OTHER PERSON RESPONSIBLE FOR THE MAINTENANCE OR MONITORING OF ANY SECURITY GATE OR GUARD HOUSE.**

6.10 Environmental Preservation Guidelines. The Association shall be responsible for implementing and carrying out the Environmental Preservation Guidelines. The cost of implementing and carrying out the Environmental Preservation Guidelines shall be included in the Community Expenses. The Environmental Preservation Guidelines shall include provisions for the maintenance, upkeep, and preservation of the Surfacewater Management System, wetlands, wetlands fringing hammocks, and all other environmentally sensitive or governmentally regulated areas within the Community. The Environmental Preservation Guidelines may also include applicable governmental requirements regarding the performance and monitoring of the Surfacewater Management System and other environmental conditions and requirements imposed by governmental authority in conjunction with any development order or approval for the Community or the Additional Property, or any part thereof. Except for activities that may otherwise be permitted by the City of North Port and SWFWMD, no activities, including filling, excavating, removal of vegetation (both trees and understory), and storage of materials, may be undertaken or performed within any portion of the Common Areas constituting a "wetland preserve" or "wetland buffer."

6.11 Surfacewater Management System. In addition to its maintenance obligations under the foregoing provisions of this Article 6, the Association shall comply with the following provisions with respect to the Surfacewater Management System:

A. The Association shall operate and maintain the Surfacewater Management System (including supplemental littoral zone planting, maintenance of littoral zone vegetation, removal of exotic and nuisance species from littoral zones and wetlands mitigation areas, and periodic dredging and silt removal from stormwater retention areas) in compliance with all applicable regulations of the City of North Port, SWFWMD, and other governmental authorities.

B. The Association shall provide all stormwater, hydroperiod, wetland mitigation, littoral zone planting, and wetland planted buffer monitoring data collection and reporting required by the City of North Port, SWFWMD, or other governmental authorities.

ARTICLE 7
ASSOCIATION EXPENSES

7.1 Classification of Expenses. The Association Expenses are classified as follows: (a) Community Expenses, which are defined in Article 7.2; (b) Neighborhood Expenses, which are defined in Article 7.3; (c) Entry Area Expenses, which are defined in Article 7.4; and (d) Individual Parcel Expenses, which are defined in Article 7.5.

7.2 Community Expenses. "Community Expenses" shall mean all expenses incurred by the Association in connection with the management and administration of the Community and the operation, maintenance, improvement, protection, management, and conservation of the Community Common Areas. By way of illustration and not as a limitation, the Community Expenses shall include:

A. All ad valorem taxes assessed against the Community Common Areas (other than property described in Article 1.17(d), unless the Association expressly agrees in the applicable written agreement to pay the ad valorem taxes assessed against such property).

B. All other taxes assessed against or payable by the Association in connection with the Community Common Areas or the Community as a whole.

C. All expenses required for the operation, management, repair, maintenance, improvement, and replacement of the Community Roads.

D. All utility charges incurred in connection with the operation of the Community Common Areas, including street lighting expense for the Community Roads.

E. All premiums for insurance obtained by the Association pursuant to Articles 8.1, 8.3, and 8.5.

F. Private police protection, night watchmen, and guard and gate services, if any, provided in the discretion of the Board for the common benefit of the Owners.

G. Construction, repair, maintenance, and replacement of security gates and guardhouses, but only when and to the extent authorized by the Board and Declarant.

H. Repair, maintenance, and replacement of all water, sewer, well, irrigation, and wastewater treatment lines, facilities, apparatus, equipment, and systems that are part of the Community Common Areas.

I. Engineering, architectural, accounting, legal, and other professional and employee services engaged by the Board in connection with the Community Common Areas or the Community as a whole.

J. A reasonable contingency fund for the ensuing fiscal year in such amount, if any, as the Board may deem appropriate.

K. A reasonable annual reserve for anticipated major capital repairs, maintenance and improvement, and capital replacements, in such amount, if any, as the Board may deem appropriate.

L. Compensation of officers and directors and reimbursement of actual expenses incurred by officers and directors, if authorized by the Board.

M. Repayments of loans procured by the Association for any of its authorized purposes in connection with the Community Common Areas or the Community as a whole, including interest thereon.

N. Any expense identified by the terms of this Declaration as part of the Community Common Expenses.

O. All administrative expenses for operating the Association (including salaries, wages, and benefits paid to employees of the Association), to the extent such expenses are not included in the Neighborhood Expenses.

P. All expenses incurred by the Association that are not Neighborhood Expenses or Individual Parcel Expenses.

Q. All other expenses relating to the Community Common Areas or the Community as a whole deemed necessary or desirable by the Board for accomplishing the purposes, objectives, or responsibilities of the Association.

7.3 Neighborhood Expenses. "Neighborhood Expenses" shall mean all expenses, other than expenses classified as Individual Parcel Expenses, incurred by the Association pursuant to the provisions of this Declaration and the Supplemental Declaration applicable to a Neighborhood in connection with the management, maintenance, and administration of the Neighborhood and the operation, maintenance, improvement, protection, management, and conservation of the Neighborhood Common Areas.

A. By way of illustration and not as a limitation, the Neighborhood Expenses for a Neighborhood shall include:

(1) All ad valorem taxes assessed against the Neighborhood Common Areas.

(2) All other taxes assessed against or payable by the Association in connection with the Neighborhood.

(3) All expenses required for the operation, management, repair, maintenance, improvement, and replacement of the Neighborhood Roads and Neighborhood Common Areas in the Neighborhood.

(4) All utility charges incurred in connection with the operation of the Neighborhood Common Areas, including street lighting expense for the Neighborhood Roads.

(5) All premiums for insurance obtained by the Association pursuant to Article 8.2.

(6) Private police protection, night watchman, and guard and gate services, if any, provided in the discretion of the Board exclusively for the Neighborhood.

(7) Construction, repair, and maintenance of entrance gates and gatehouses for the Neighborhood, but only when and to the extent authorized by the Board.

(8) Engineering, architectural, accounting, legal, and other professional and employee services engaged by the Board in connection with the Neighborhood.

(9) A reasonable contingency fund for the ensuing fiscal year in such amount, if any, as the Board may deem appropriate.

(10) A reasonable annual reserve for anticipated major capital repairs, maintenance and improvement, and capital replacements, in such amount, if any, as the Board may deem appropriate.

(11) Repayments of loans procured by the Association for any of its authorized purposes in connection with the Neighborhood, including interest thereon.

(12) Any expense identified by the terms of this Declaration or the applicable Supplemental Declaration as part of the Neighborhood Common Expenses for the Neighborhood.

(13) That portion, as determined by the Board, of the administrative expenses for operating the Association (including salaries, wages, and benefits paid to employees of the Association) reasonably attributable to the discharge of the Association's responsibilities with respect to the Neighborhood.

(14) All other expenses relating exclusively to the Neighborhood deemed necessary or desirable by the Board for accomplishing the purposes, objectives, or responsibilities of the Association with respect to the Neighborhood.

B. If the Supplemental Declaration applicable to a Neighborhood so provides: (1) the Neighborhood Expenses, and the Neighborhood Assessments related thereto, may be comprised of separate categories; (2) the circumstances or conditions for establishing the categories may vary; and (3) the commencement of Neighborhood Assessments, and the frequency of payment of Neighborhood Assessments, related to the categories may vary from category to category.

7.4 Entry Area Expenses. "Entry Area Expenses" shall mean that portion of the Community Expenses which is directly attributable to the management, administration, operation, maintenance, improvement, protection, and conservation of the Entry Common Areas.

7.5 Individual Parcel Expenses. "Individual Parcel Expenses" shall mean all expenses (together with any applicable Administrative Fee and Attorney's Fees) incurred by the Association with respect to a Parcel pursuant to the provisions of this Declaration and any applicable Supplemental Declaration in connection with any of the following:

A. The periodic mowing of the Parcel, if the Parcel is an Unimproved Parcel, pursuant to Article 6.5.

B. The performance by the Association of any of the maintenance responsibilities of the Parcel's Owner pursuant to Article 6.4.

C. The performance by the Association of any of the maintenance obligations of the Parcel's Owner to the extent any Supplemental Declaration applicable to the Parcel specifies pursuant to Article 6.6.A that the cost of such performance is to be included in the Individual Parcel Expenses.

D. The performance by the Association of any of the maintenance responsibilities of the Parcel's Owner pursuant to an agreement between the Association and the Owner in accordance with Article 6.6.B, except to the extent the cost of such performance is included in the Neighborhood Expenses pursuant to Article 6.6.B.

E. The performance by the Association of maintenance responsibilities of any Neighborhood Association of which the Parcel's Owner is a member to the extent provided in Article 6.7.

F. The enforcement by the Association against the Parcel or its Owner of any of the restrictions or other provisions of this Declaration or any Supplemental Declaration applicable to such

Parcel pursuant to Article 18.2, except for judicial actions in which the Parcel's Owner is the prevailing party.

G. The performance by the Association of any of its maintenance responsibilities pertaining to the Community if, in the judgment of the Board, such performance was necessitated by the carelessness, negligence, or intentional act of the Parcel's Owner or the Owner's family, guests, tenants, or invitees.

H. Any other action, service, or matter, the costs of which are specifically included in the Individual Parcel Expenses by the terms of this Declaration or any Supplemental Declaration applicable to the Parcel.

Individual Parcel Expenses shall also include any Fine assessed against a Parcel's Owner pursuant to Article 18.3.

7.6 Approval for Expenses. The Association shall not incur, and the Association Expenses shall not include, any expense for the services of any architect, engineer, contractor, or other consultant engaged by the Association to evaluate, or render an opinion on, the condition or quality of, or conformity to any plans and specifications or governmental laws and regulations applicable to, any then existing Improvements located within the Community unless: (a) such Improvements have been damaged by casualty loss; (b) the condition of such Improvements poses a patent, immediate, and substantial threat to the safety of the Owners; or (c) such expense is approved by Voting Members representing at least 75 percent of the Association's Class A membership voting rights, as determined pursuant to Article 4.3.A. Notwithstanding anything contained in this Declaration or the Articles of Incorporation or Bylaws to the contrary, a Voting Member shall not approve any such expense unless authorized to do so by vote of Neighborhood Owners owning at least 75 percent of the Parcels in the Neighborhood represented by the Voting Member. This Article 7.6 shall not be amended unless such amendment is made by Declarant prior to the Turnover or is approved by the percentage votes, and pursuant to the same procedures, necessary to approve any such expense as provided above.

ARTICLE 8
INSURANCE AND CASUALTY LOSSES

8.1 Community Common Areas Insurance. The Association shall obtain blanket all-risk coverage insurance for all insurable Improvements that are part of the Community Common Areas or, if blanket all-risk coverage is not reasonably available in the determination of the Board, then at a minimum insurance covering loss or damage by fire or other hazards, including extended coverage, vandalism, and malicious mischief. This insurance shall be in an amount sufficient to cover 100 percent of the replacement cost of any repair or reconstruction in the event of damage or destruction from such hazards. The cost of such insurance shall be included in the Community Expenses and paid through Community Assessments levied by the Board pursuant to Article 9.3.

8.2 Neighborhood Insurance. If, by the terms of the Supplemental Declaration applicable to a Neighborhood, the Association is required to provide casualty insurance for some or all of the insurable Improvements within the Neighborhood, the Association shall obtain blanket all-risk coverage insurance for such Improvements or, if blanket all-risk coverage is not reasonably available in the determination of the Board, then at a minimum insurance covering loss or damage by fire or other hazards, including extended coverage, vandalism, and malicious mischief. This insurance shall be in an amount sufficient to cover 100 percent of the replacement cost of any repair or reconstruction in the event of damage or destruction from such hazards. The Supplemental Declaration applicable to the Neighborhood shall specify whether the cost of such insurance is to be included in the Neighborhood Expenses and paid through Neighborhood

Assessments or whether such cost is to be allocated to the individual Parcels in the Neighborhood and paid through Individual Parcel Assessments against such Parcels.

8.3 Liability Insurance. The Association shall obtain public liability insurance covering loss to the Association from damage or injury caused by the negligence of the Association or any of its members, employees, or agents, and, if reasonably available (as determined by the Board), directors' and officers' liability insurance. The public liability policy shall have coverage of at least $1 million for bodily injury or death and $100,000 for property damage. The cost of such insurance shall be included in the Community Expenses and paid through Community Assessments levied by the Association pursuant to Article 9.3.

8.4 Policies. Each policy may contain a reasonable deductible (as determined by the Board), and in the case of casualty insurance, the amount thereof shall be added to the face amount of the policy in determining whether the insurance at least equals the full replacement cost. All insurance coverage obtained by the Association shall be written in the name of the Association as trustee for the respective benefited parties, as further identified in Article 8.4.B. Such insurance shall be governed by the following provisions:

A. All policies shall be written with a company authorized to do business in Florida which is assigned a rating of A or better and a financial size category of 10 or larger by A. M. Best Company, Inc., if reasonably available, or if not available, the most nearly equivalent rating.

B. All policies obtained by the Association pursuant to Articles 8.1 and 8.3 shall be for the benefit of the Association and its members; all policies obtained by the Association pursuant to Article 8.2 shall be for the benefit of the respective Neighborhood Owners and their mortgagees, as their interests may appear.

C. Exclusive authority to adjust losses under policies obtained by the Association shall be vested in the Board.

D. The insurance carried by the Association shall be primary and shall not be brought into contribution with insurance purchased by Owners or occupants of Parcels.

E. If reasonably available, in the determination of the Board, the insurance policies will provide for the following:

(1) A waiver of subrogation by the insurer as to any claims against the Board, the Owners, and their respective tenants, employees, agents, and guests.

(2) A waiver by the insurer of any right to repair and reconstruct in lieu of a cash settlement.

(3) A statement that any "other insurance" clause excludes individual Owners' policies.

(4) A statement that the Association will be given at least 30 days prior written notice of any cancellation, substantial modification, or nonrenewal.

8.5 Other Association Insurance. In addition to the other insurance required by this Article 8, the Association shall obtain worker's compensation insurance if, and to the extent, required by law and a fidelity bond on directors, officers, employees, and other Persons handling or responsible for the Association's funds. The amount of fidelity coverage shall be determined by the Board. Bonds shall contain a waiver of all defenses based upon the exclusion of Persons serving without compensation and

shall require at least 30 days prior written notice to the Association of any cancellation, substantial modification, or nonrenewal.

8.6 Damage and Destruction.

A. Immediately after damage or destruction by fire or other casualty to Improvements covered by insurance obtained by the Association, the Board or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance and obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed Improvements.

B. Any damage or destruction to the Community Common Areas shall be repaired or reconstructed unless all members of the Board shall decide within 60 days after the casualty not to repair or reconstruct, and such decision is approved within 60 days thereafter by Declarant and the Country Club Owner.

C. Any damage or destruction to Improvements insured by policies obtained by the Association pursuant to Article 8.2 shall be repaired or reconstructed except as otherwise provided by the terms of the Supplemental Declaration applicable to the Neighborhood in which such damage or destruction occurs.

D. In the event it is determined in the manner described above that the damage or destruction is not to be repaired or reconstructed and no alternative Improvements are authorized, then and in that event the affected portion of the Community shall be restored substantially to its natural state and maintained by the Association, or by such other Persons as may be responsible for such maintenance under the terms of this Declaration or applicable Supplemental Declaration, in a manner consistent with the Community Standards.

8.7 Disbursement of Proceeds. Proceeds of Association insurance policies shall be disbursed as follows:

A. If the damage or destruction for which the proceeds are paid is to be repaired or reconstructed, the proceeds, or such portion thereof as may be required for such purpose, shall be disbursed in payment of such repairs or reconstruction. Any proceeds remaining after paying such costs of repair or reconstruction shall be: (1) retained by the Association and applied to the payment of the Community Expenses, if the proceeds are payable on policies obtained by the Association pursuant to Article 8.1; or (2) disbursed in the manner provided in the Supplemental Declaration applicable to the Neighborhood in which the damage or destruction occurred, if the proceeds are payable on policies obtained by the Association pursuant to Article 8.2.

B. If it is determined, as provided in Article 8.6, that the damage or destruction for which the proceeds are paid shall not be repaired or reconstructed, such proceeds shall be: (1) retained by the Association and applied to the payment of the Community Expenses, if the proceeds are payable on policies obtained by the Association pursuant to Article 8.1; or (2) disbursed in the manner provided in the Supplemental Declaration applicable to the Neighborhood in which the damage or destruction occurred, if the proceeds are payable on policies obtained by the Association pursuant to Article 8.2.

8.8 Owner's Insurance.

A. Each Owner shall carry casualty insurance on the insurable portions of his Parcel Improvements meeting the same requirements as set forth in Article 8.1 for insurance on the Community Common Areas, unless such Owner's Parcel is located in a Neighborhood and the Association or a

Neighborhood Association carries such insurance pursuant to the Supplemental Declaration applicable to the Neighborhood. Unless the Owner's Parcel is located in a Neighborhood and the Supplemental Declaration applicable to the Neighborhood provides otherwise:

(1) In the event of any damage to the Owner's Parcel Improvements, the Owner shall remove all debris within 60 days, complete repair or reconstruction of the damaged Improvements within one year in a manner consistent with the original construction or such other plans and specifications as are approved in accordance with Article 12, and pay any costs of repair or reconstruction that are not covered by insurance proceeds.

(2) Notwithstanding the provisions of Article 8.8.A(1), in the event of damage resulting in destruction of all or substantially all of the Owner's Parcel Improvements, the Owner may decide not to rebuild or not to reconstruct, in which case the Owner shall, within 60 days, clear the Parcel of all debris and return it to substantially the natural state in which it existed prior to the beginning of construction. Thereafter the Parcel shall be maintained by the Owner, or by such other Persons as may be responsible for such maintenance under the terms of this Declaration or applicable Supplemental Declaration, in a manner consistent with the Community Standards.

B. All policies of insurance required by the terms of this Article 8.8 shall name the Association as an additional insured and shall require that the Association be given at least 30 days prior written notice of any cancellation, substantial modification, or nonrenewal. A Supplemental Declaration may contain more stringent requirements regarding the standards for rebuilding or reconstructing Parcel Improvements within a Neighborhood and the standard for returning the Parcels to their natural state in the event the Parcel Improvements are not rebuilt or reconstructed.

ARTICLE 9
ASSESSMENTS

9.1 Classification of Assessments. There shall be five types of Assessments, to wit: (a) Community Assessments, which shall be levied pursuant to Article 9.3 for the payment of Community Expenses; (b) Neighborhood Assessments, which shall be levied pursuant to Article 9.5 for the payment of Neighborhood Expenses; (c) Entry Parcel Assessments, which shall be levied pursuant to Article 9.7 for the payment of a portion of the Entry Area Expenses; (d) Special Assessments, which shall be levied pursuant to Article 9.9 to supplement Community Assessments, Neighborhood Assessments, or Entry Parcel Assessments; and (e) Individual Parcel Assessments, which shall be levied pursuant to Article 9.8 for the payment of Individual Parcel Expenses.

9.2 Assessable Parcels.

A. Assessment Shares. A Parcel's share of any Community Assessment or Neighborhood Assessment, and any Special Assessment supplementary thereto, shall be determined by reference to a numerical share (the "Assessment Share") allocated to such Parcel in accordance with the provisions of this Article 9.2. No Parcel shall be liable for the payment of any Community Assessment or Neighborhood Assessment (or, if applicable, any Special Assessment supplementary thereto) prior to the allocation of an Assessment Share to such Parcel pursuant to this Article 9. Assessment Shares shall be allocated to the Parcels in the following manner:

(1) Lots. Upon the first conveyance of title by Declarant or a Neighborhood Developer to any subdivision lot intended as a building site for a single dwelling unit, which conveyance is made to any Person other than Declarant or a Neighborhood Developer, there shall be allocated to such lot one Assessment Share.

(2) Condominium Units. Upon the first conveyance of title by Declarant or a Neighborhood Developer to any condominium unit intended for, or restricted to, Residential Use, which conveyance is made to any Person other than Declarant or a Neighborhood Developer, there shall be allocated to such unit one Assessment Share. In the case of any time-sharing or interval ownership condominium, an Assessment Share shall be allocated to each unit in the condominium upon the first conveyance by Declarant or a Neighborhood Developer to any Person other than Declarant or a Neighborhood Developer of an ownership or possessory interest in such unit.

(3) Apartments. Upon the completion of any building (other than a building constructed upon a lot described in Article 9.2.A(1)) containing non-condominium apartments intended for, or restricted to, Residential Use, there shall be allocated to the Parcel on which such building is constructed one Assessment Share for each such apartment. As used herein, "completion" of a building shall be deemed to occur on the date on which a certificate of occupancy therefor is issued by the City of North Port.

(4) Subdivision of Parcels. In the event any subdivision lot or condominium unit is subdivided between two or more Owners, the Assessment Share attributable to such lot or unit shall be prorated between such Owners on the basis of square footage. The combination of any two or more subdivision lots or condominium units into a single lot or unit shall not vary the number of Assessment Shares initially allocated to such lots or units; provided, however, that notwithstanding the provisions of Article 9.2A(1), if a Person acquires title directly from Declarant or a Neighborhood Developer to two adjoining lots that are combined as a building site for a single dwelling unit, there shall be allocated to such combined, adjoining lots a total of one Assessment Share.

B. Appurtenances. Once Assessment Shares have been allocated to a Parcel, such Assessment Shares shall be an appurtenance to the Parcel and may not be separately conveyed, assigned, or encumbered thereafter except as an appurtenance thereto. Subject to the provisions of Article 9.2.A(4), the Assessment Shares allocated to a Parcel may not be terminated or decreased for any reason, including, by way of illustration and not as a limitation, the destruction of any improvement, vacation of any plat, or termination of any condominium. The Assessment Shares allocated to a Parcel may be increased, however, by the occurrence of any event that would have resulted in an allocation of Assessment Shares in the first instance.

C. Intent. By virtue of the provisions of this Article 9.2, Assessment Shares will not be allocated to a Parcel that is not intended for, or restricted to, Residential Use. Declarant has determined this to be a reasonable method to provide for the payment of the Community Expenses, because the Parcels that are developed for recreational, commercial, and other nonresidential uses are primarily intended to benefit the residential Parcels and their Owners. Declarant recognizes that use of the Entry Parcel, due to its location on Sumter Boulevard, may not primarily benefit the residential Parcels and their Owners. Accordingly, special provision for the allocation of a portion of the Community Expenses to the Entry Parcel is made in Article 9.7. Notwithstanding the provisions of Article 2.2, the Entry Parcel is made subject to this Declaration for the limited purpose set forth in Article 9.7.

9.3 Community Assessments. The Community Expenses shall be payable through annual Community Assessments levied by the Board against all Assessable Parcels.

A. Prior to December 15 of each year, the Board shall establish and adopt a budget for the Community Expenses for the next fiscal year and thereupon levy a Community Assessment against each Assessable Parcel. The budget shall provide separately for the Entry Area Expenses so that the

portion of the Entry Area Expenses payable through the Entry Parcel Assessment pursuant to Article 9.7 may be determined. The budget and Community Assessments shall be in such amount as shall be deemed sufficient in the judgment of the Board to enable the Association to pay the Community Expenses as and when they become due.

B. In adopting a budget for any fiscal year, the Board shall consider:

(1) The number of Assessment Shares that will have been allocated by January 1 of such fiscal year;

(2) The number of Assessment Shares that are estimated to be allocated during such fiscal year;

(3) The anticipated times during such fiscal year that allocations of Assessment Shares will be made;

(4) The portion, if any, of the Community Expenses that will be payable with revenue derived from the Entry Parcel Assessment;

(5) Other anticipated income, including interest earned on savings and investments.

The Board shall further consider that, pursuant to Article 9.2, no Parcel shall be liable for the payment of any portion of a Community Assessment prior to the time an Assessment Share is allocated to such Parcel. After giving due consideration to these factors, the Board shall establish for such fiscal year the amount of the Community Assessment per Assessment Share.

9.4 Apportionment of Community Assessments. The Community Assessments for each fiscal year shall be apportioned among the Assessable Parcels such that the annual amount of each Assessable Parcel's Community Assessment shall be a sum equal to: (1) the amount of the Community Assessment per Assessment Share for such fiscal year (as established pursuant to Article 9.3), multiplied by (2) the number of Assessment Shares allocated to such Assessable Parcel pursuant to Article 9.2.

9.5 Neighborhood Assessments. Neighborhood Expenses applicable to a Neighborhood shall be payable through annual Neighborhood Assessments levied by the Board against all Assessable Parcels located within the Neighborhood.

A. Prior to December 15 of each year, the Board shall establish and adopt a budget for the Neighborhood Expenses for the next fiscal year for each Neighborhood on whose behalf Neighborhood Expenses are expected to be incurred during such fiscal year and thereupon levy a Neighborhood Assessment against each Assessable Parcel within the Neighborhood. The Association's obligation to pay Neighborhood Expenses for any Neighborhood, the determination of the items included within the Neighborhood Expenses for any Neighborhood, and the establishment of any categories of Neighborhood Expenses pursuant to Article 7.3.B shall be governed by the terms of the Supplemental Declaration applicable to such Neighborhood, subject to any provision of this Declaration to the contrary. Each budget for Neighborhood Expenses and related Neighborhood Assessments shall be in such amount as shall be deemed sufficient in the judgment of the Board to enable the Association to pay the Neighborhood Expenses as and when they become due.

B. In adopting a budget for Neighborhood Expenses applicable to a Neighborhood for any fiscal year, the Board shall consider:

(1) The number of Assessment Shares that will have been allocated to Parcels in the Neighborhood by January 1 of such fiscal year;

(2) The number of Assessment Shares that are estimated to be allocated to Parcels in the Neighborhood during such fiscal year;

(3) The anticipated times during such fiscal year that allocations of Assessment Shares will be made;

(4) Other anticipated income, including interest earned on savings and investments, applicable to the Neighborhood.

(5) Any categories of Neighborhood Expenses established pursuant to Article 7.3.B and any special provisions of the applicable Supplemental Declaration pertaining to such categories.

The Board shall further consider that, pursuant to Article 9.2, no Parcel shall be liable for the payment of any portion of a Neighborhood Assessment prior to the time an Assessment Share is allocated to such Parcel. After giving due consideration to these factors, the Board shall establish, for each Neighborhood for which a budget is adopted, the amount of the Neighborhood Assessment per Assessment Share for such fiscal year.

9.6 Apportionment of Neighborhood Assessments. Except as otherwise provided by the terms of the Supplemental Declaration applicable to the Neighborhood, the Neighborhood Assessments for each Neighborhood in each fiscal year shall be apportioned among the Assessable Parcels in the Neighborhood such that the annual amount of each Assessable Parcel's Neighborhood Assessment shall be a sum equal to: (1) the amount of the Neighborhood Assessment per Assessment Share for such fiscal year (as established pursuant to Article 9.5), multiplied by (2) the number of Assessment Shares allocated to such Assessable Parcel pursuant to Article 9.2.

9.7 Entry Parcel Assessment. Declarant intends to develop the Entry Parcel for commercial or other purposes not involving Residential Use. Accordingly, it is anticipated that no portion of the Entry Parcel will be allocated Assessment Shares or be liable for the payment of Community Assessments. It is further anticipated that access to the Entry Parcel will be provided across the Entry Common Areas. In recognition of future traffic that may cross the Entry Common Areas to gain access to the Entry Parcel, the Entry Parcel shall be subject to the Entry Parcel Assessment in accordance with the provisions of this Article 9.7. No Entry Parcel Assessment shall be levied by the Board against the Entry Parcel for any fiscal year unless, as of January 1 of such fiscal year, a certificate of occupancy has been issued by the City of North Port for a building constructed on the Entry Parcel. If a certificate of occupancy has been issued for any such building as of January 1 of the fiscal year, the Board shall levy the Entry Parcel Assessment for such fiscal year against the Entry Parcel. As of the date of execution of this Declaration, Holdings is the owner of the Entry Parcel. Holdings, and its successors and assigns, shall have the right from time-to-time hereafter to apportion the Entry Parcel Assessment to specific tracts located within the Entry Parcel. Any such apportionment shall be made by instrument duly executed and recorded in the Public Records, and the provisions thereof shall bind all subsequent Owners of such tracts. The recording of any such instrument shall have the further effect of limiting the lien of any subsequent Entry Parcel Assessment on any tract described in such instrument to the extent stated therein; provided, however, that no instrument shall have such effect to the extent it would result in the total Entry Parcel Assessment being less than 10 percent of the Entry Area Expenses. Notwithstanding the foregoing provisions of this Article 9.7, if the Entry Parcel is made part of the Community and is developed for Residential Use, then Assessment Shares shall be

allocated to the Entry Parcel in accordance with Article 9.2, and the Entry Parcel shall be subject to Community Assessments in lieu of the Entry Parcel Assessment.

9.8 Individual Parcel Assessments. Each Parcel for which the Association incurs Individual Parcel Expenses pursuant to Article 7.5 shall be subject to Individual Parcel Assessments levied by the Board for the payment of such Individual Parcel Expenses. Except as otherwise provided by action of the Board, each Individual Parcel Assessment shall be deemed levied by the Board upon delivery of notice of such Individual Parcel Assessment in accordance with the provisions of Article 9.10.D.

9.9 Special Assessments.
Special Assessments shall be levied in accordance with the following provisions:

A. Community Expenses. The Board may levy a Special Assessment against each Assessable Parcel in the event the revenue receivable by the Association pursuant to the Community Expenses budget adopted by the Board for any fiscal year is insufficient to pay the Community Expenses for such fiscal year; in the event of emergency situations requiring additional funds for the payment of the Community Expenses; or in the event Association reserves applicable to the Community Common Areas are insufficient to cover capital expenditures for the Community Common Areas. Notwithstanding the foregoing, following the Turnover, no Special Assessment shall be levied by the Board to supplement the revenue receivable by the Association pursuant to the Community Expenses budget adopted by the Board for any fiscal year unless the Special Assessment has been first approved by Voting Members representing at least 75 percent of the Association's Class A membership voting rights (as determined pursuant to Article 4.3.A).

B. Neighborhood Expenses. The Board may levy a Special Assessment against each Assessable Parcel located within a Neighborhood in the event the revenue receivable by the Association pursuant to the Neighborhood Expenses budget adopted by the Board for the Neighborhood in any fiscal year is insufficient to pay the Neighborhood Expenses for such Neighborhood in such fiscal year; in the event of emergency situations requiring additional funds for the payment of the Neighborhood Expenses for the Neighborhood; or in the event Association reserves applicable to the Neighborhood are insufficient to cover capital expenditures for the Neighborhood Common Areas. Notwithstanding the foregoing, following the Turnover, no Special Assessment shall be levied by the Board to supplement the Neighborhood Expenses budget adopted by the Board for a Neighborhood for any fiscal year unless the Special Assessment has been first approved by Neighborhood Owners owning at least 75 percent of the Parcels in the Neighborhood.

C. Entry Area Expenses. The Board may levy a Special Assessment against the Entry Parcel in the event the revenue receivable by the Association pursuant to the Entry Area Expenses budget adopted by the Board for any fiscal year is insufficient to pay the Entry Area Expenses for such fiscal year; in the event of emergency situations requiring additional funds for the payment of the Entry Area Expenses; or in the event Association reserves applicable to the Entry Common Areas are insufficient to cover capital expenditures for the Entry Common Areas.

D. Application. All Special Assessments are intended to be supplementary to the Community Assessments, Neighborhood Assessments, and Entry Parcel Assessments, respectively. No Special Assessment that is supplementary to a Community Assessment or a Neighborhood Assessment shall be charged to or be a lien against any Parcel that is not an Assessable Parcel as of the date on which the Board levies the applicable Special Assessment.

9.10 Notice of Assessments. Notice of Assessments shall be given as follows:

A. Notice of Community Assessments. On or before December 20 of each year, the Association shall notify each Owner of an Assessable Parcel of the amount of the Community Assessment levied against such Parcel for the next fiscal year. The notice shall include a copy of the Community Expenses budget for such fiscal year and shall specify the amount of the Community Assessment per Assessment Share.

B. Notice of Neighborhood Assessments. On or before December 20 of each year, the Association shall notify each Owner of an Assessable Parcel that is subject to a Neighborhood Assessment of the amount of the Neighborhood Assessment levied against such Parcel for the next fiscal year. The notice shall include a copy of the applicable Neighborhood Expenses budget for such fiscal year and shall specify the amount of the applicable Neighborhood Community Assessment per Assessment Share.

C. Notice of Entry Parcel Assessments. On or before December 20 of each year, the Association shall notify the Owners of the Entry Parcel of the amount of the Entry Parcel Assessment levied against such Parcel for the next fiscal year. The notice shall include copies of the Community Expenses budget and Entry Area Expenses budget for such fiscal year.

D. Notice of Individual Parcel Assessments. On or before December 20 of each year, the Association shall notify each Owner of an Unimproved Parcel of the amount of the Individual Parcel Assessment, if any, assessed against such Parcel for the periodic mowing of the Parcel for the next fiscal year. Notice of any other Individual Parcel Assessment shall be given by the Association to the Owner of the Parcel against which the Individual Parcel Assessment is levied within 90 days after the Individual Parcel Expenses to which the Individual Parcel Assessment relates are incurred or otherwise determined by the Association.

E. Notice of Special Assessments. Notice of any Special Assessment levied by the Board pursuant to Article 9.9.A or Article 9.9.B shall be given by the Association to each Owner of an Assessable Parcel against which the Special Assessment is levied. Notice of any Special Assessment levied by the Board pursuant to Article 9.9.C shall be given by the Association to the Owners of the Entry Parcel. Notice of any Special Assessment shall be given by the Association within 90 days after Board approval of the Special Assessment. The notice shall include an explanation of the purpose of the Special Assessment and the basis on which the Special Assessment was levied.

F. Failure to Notify. In the event the Association should fail to notify an Owner of any applicable Assessment on or before the time specified above, the levy and lien of such Assessment shall not be invalidated or otherwise affected, but the time for payment of the Assessment shall be extended by the number of days the notice is delinquent. So long as notice has properly been given, failure to receive any notice given by the Association shall not excuse an Owner from the payment of any Assessment when due.

G. Persons Entitled to Notice. Notice of any Assessment need be sent by the Association only to the Owners of Parcels that are subject to such Assessment as of the date of the notice. It is the duty of each Owner of a Parcel that becomes subject to an Assessment subsequent to the date of notice thereof to ascertain from the Association the amount of the Assessment levied against such Parcel. Failure to ascertain such amount shall not excuse any Owner from the payment of any Assessment when due.

9.11 Payment of Assessments. Assessments shall be paid in accordance with the following provisions:

A. Payment of Community Assessments. Each Owner of a Parcel to which an Assessment Share has been allocated as of January 1 of the fiscal year shall pay to the Association on such date the full amount of the Community Assessment levied against such Parcel for such fiscal year. If one or more Assessment Shares are allocated to a Parcel subsequent to January 1 of the fiscal year, the amount of the Community Assessment per Assessment Share for such fiscal year (as established pursuant to Article 9.3) shall be prorated as of the date on which such Assessment Shares are allocated, and the Owner of such Parcel shall pay to the Association on such date such prorated amount for each Assessment Share allocated to his Parcel.

B. Payment of Neighborhood Assessments. Each Owner of a Parcel to which an Assessment Share has been allocated as of January 1 of the fiscal year shall pay to the Association on such date the full amount of the Neighborhood Assessment levied against such Parcel for such fiscal year. If one or more Assessment Shares are allocated to a Parcel subsequent to January 1 of the fiscal year, the amount of the Neighborhood Assessment per Assessment Share for such fiscal year (as established pursuant to Article 9.5) shall be prorated as of the date on which such Assessment Shares are allocated, and the Owner of such Parcel shall pay to the Association on such date such prorated amount for each Assessment Share allocated to his Parcel.

C. Payment of Entry Parcel Assessments. If the Entry Parcel Assessment is levied by the Board pursuant to Article 9.7 for the fiscal year, the Owners of the Entry Parcel shall pay to the Association on or before January 1 of such fiscal year the full amount of the Entry Parcel Assessment. Inasmuch as the Owners of the Entry Parcel have no voting rights in the Association, the Owners of the Entry Parcel shall have the right to contest the amount of any Entry Parcel Assessment in accordance with the following provisions:

(1) The Owners of the Entry Parcel may contest any Entry Parcel Assessment on the basis that the Entry Area Expenses budget to which the Entry Parcel Assessment relates is either excessive or inadequate to accomplish the proper management, administration, operation, maintenance, improvement, protection, and conservation of the Entry Common Areas. To contest an Entry Parcel Assessment, the Controlling Entry Parcel Owners shall notify the Association within 25 days after the Association gives notice to the Owners of the Entry Parcel of the amount of the Entry Parcel Assessment. The notice to the Association shall state that the amount of the Entry Parcel Assessment is contested and shall further state the adjustments which the Controlling Entry Parcel Owners deem should be made to the Entry Area Expenses budget to which the Entry Parcel Assessment relates.

(2) Notwithstanding any other provision of this Article 9.11, the Controlling Entry Parcel Owners shall not have the right to contest the amount of any Entry Parcel Assessment unless the adjustments proposed by the Controlling Entry Parcel Owners to the Entry Area Expenses budget would result in an increase or decrease of more than 10 percent in the amount of the Entry Parcel Assessment.

(3) Following receipt of any notice validly contesting an Entry Parcel Assessment, the Association shall attempt to reach agreement with the Controlling Entry Parcel Owners to either affirm or modify the Entry Parcel Assessment, and any such agreement shall be binding on all Owners.

(4) If the Controlling Entry Parcel Owners and the Association do not reach agreement between themselves as to adjustments to the Entry Area Expenses budget by March 1 of the applicable fiscal year, their dispute concerning such adjustments shall be submitted to and settled by arbitration. Arbitration shall be in accordance with the rules then obtaining of the American Arbitration Association and shall be conducted by three arbitrators. The arbitrators shall, in addition to deciding

whether adjustments to the Entry Area Expenses budget should be made, determine how and when any increases in the Entry Parcel Assessment and Community Assessment required by their decision is to be collected by the Association. The decision of a majority of the arbitrators shall be final and binding on the Association and all Owners, and judgment, including judgment for specific performance, may be entered thereon in any court of competent jurisdiction. The cost of arbitration shall be borne by all Owners of the Entry Parcel if the arbitrators affirm the amount of the Entry Parcel Assessment levied by the Association. The cost of arbitration shall be paid by the Association (from revenues derived from Community Assessments, or Special Assessments supplementary thereto) if the arbitrators adopt the adjustments to the Entry Area Expenses budget proposed by the Controlling Entry Parcel Owners. In all other cases, the cost of arbitration shall be borne equally by the Owners of the Entry Parcel on the one hand, and the Association (from revenues derived from Community Assessments, or Special Assessments supplementary thereto), on the other.

(5) The contesting of the amount of any Entry Parcel Assessment shall not exempt the Owners of the Entry Parcel from paying such contested amount when due. If the amount of the Entry Parcel Assessment is subsequently reduced by arbitration or agreement, the difference shall be credited toward the amount payable by the Owners of the Entry Parcel for the next annual Entry Parcel Assessment, and the corresponding reduction in the Community Assessment shall be credited to funds of the Association held for purposes other than the Entry Area Expenses.

D. Payment of Individual Parcel Assessments. Each Owner of a Parcel against which an Individual Parcel Assessment has been levied by the Board pursuant to Article 9.8 shall pay to the Association, within 30 days after notice thereof, the full amount of the Individual Parcel Assessment. With respect to any Individual Parcel Assessment assessed against an Unimproved Parcel for the periodic mowing of the Parcel during any fiscal year, the Association shall, upon the written request of the Owner of the Parcel, refund to such Owner one-half of such Individual Parcel Assessment if, as of July 1 of such fiscal year, the Parcel is no longer an Unimproved Parcel.

E. Payment of Special Assessments. Each Owner of a Parcel against which a Special Assessment has been levied by the Board pursuant to Article 9.9 shall pay to the Association the full amount of the Special Assessment on or before the time established for payment by the Board; provided, however, that no Special Assessment shall be payable sooner than 30 days following notice thereof.

F. Installment Payments. Any Assessment may be payable in installments if, and only to the extent, approved by the Board.

9.12 Failure to Pay Assessments. Each Assessment shall be the personal obligation of the Owner of the Parcel against which the Assessment is levied, ownership being determined as of the date of such levy. If any Assessment is not paid within 15 days after the date on which payment of the Assessment is due, then:

A. Interest shall accrue on the Assessment from the due date until paid at the rate of 18 percent per annum or such other legal rate as may be established by the Board;

B. A delinquency charge equal to 10 percent of the Assessment (or such lesser amount as may be established by the Board) shall be added to the Assessment;

C. If the Assessment is payable in installments, the remaining installments of such Assessment may be accelerated by the Association to maturity if the delinquent installment, together with the delinquency charge and interest due thereon, is not paid in full by the Owner within 10 days after notice by the Association of its intent to accelerate such remaining installments; and

D. The Association may bring suit against the Owner on his personal obligation to recover the amount of the Assessment, together with the delinquency charge and interest and all costs incurred by the Association, including Attorney's Fees, in preparation for and in bringing such suit.

9.13 Proof of Payment of Assessment. Upon the request of any Owner or Institutional Mortgagee and the payment to the Association of such reasonable processing fee as may be established by the Board, the Association shall furnish a certificate in writing signed by an officer of the Association showing the amount of unpaid Assessments, if any, against any Parcel in which such Owner or Institutional Mortgagee has an interest, the year or years for which any such unpaid Assessments were levied, and any interest or other charges owing thereon. Such certificate, in the absence of fraud, shall be conclusive evidence of the payment of any Assessment therein stated to have been paid.

9.14 Working Capital Contributions. The Board may, in its discretion, require each Owner of an Assessable Parcel who acquires his Parcel directly from Declarant or from a Neighborhood Developer to pay to the Association a one-time contribution (the "Community Working Capital Contribution") to be used by the Association solely for the payment of Community Expenses. The amount of the Community Working Capital Contribution shall be as determined by the Board, but shall not exceed the then applicable Community Assessment. In addition, the Board may, in its discretion, require each Neighborhood Owner who is not a member of a Neighborhood Association and who acquires his Parcel directly from Declarant or from a Neighborhood Developer to pay to the Association a one-time contribution (the "Neighborhood Working Capital Contribution") to be used by the Association solely for the payment of the applicable Neighborhood Expenses. The amount of the Neighborhood Working Capital Contribution shall be as determined by the Board, but shall not exceed the then applicable Neighborhood Assessment. The manner in which the Neighborhood Working Capital Contribution is determined may vary among the Neighborhoods, but shall be uniform within a Neighborhood.

9.15 Parcels Owned by Declarant. Notwithstanding the foregoing provisions of this Article 9, until the Turnover or such earlier date as Declarant may specify by written notice to the Association:

A. Declarant shall not be liable for the payment of any Assessments or expenses of the Association with respect to any Parcel or other property owned by Declarant.

B. Declarant shall pay any Community Expenses in excess of the Community Assessments receivable from other Owners and other income of the Association.

C. With respect to each Neighborhood, Declarant shall pay any Neighborhood Expenses in excess of the Neighborhood Assessments receivable from other Neighborhood Owners and other income of the Association applicable to the Neighborhood.

If Declarant gives the above-described notice to the Association, Declarant shall specify in such notice whether or not the notice applies to Declarant's obligations under both Article 9.15.B and Article 9.15.C. Declarant may terminate its obligations under Article 9.15.B without terminating its obligations under Article 9.15.C, and vice versa. Moreover, Declarant may terminate its obligations under Article 9.15.C with respect to a particular Neighborhood without terminating its obligations as to other Neighborhoods. If Declarant terminates its obligations under Article 9.15.B, the provisions of Article 9.15.A shall not apply to Community Assessments levied against Parcels owned by Declarant. If Declarant terminates its obligations under Article 9.15.C with respect to any Neighborhood, the provisions of Article 9.15.A shall not apply to Neighborhood Assessments levied against Parcels owned by Declarant within such Neighborhood.

ARTICLE 10
LIEN OF ASSESSMENTS

10.1 Creation of Lien. Each Assessment levied by the Board against a Parcel shall be secured by a lien in favor of the Association against the Parcel and Improvements thereon in accordance with the provisions of this Article 10. The lien shall secure not only the amount of the Assessment, but also all interest, delinquency charges, and costs of collection as provided by Article 9.12. The lien of every Assessment levied against a Parcel located within the Initial Property shall attach and become a charge on the Parcel, and all Improvements thereon, upon the recording of this Declaration. The lien of every Assessment levied against a Parcel located within the Additional Property or the Contiguous Property shall attach and become a charge on the Parcel, and all Improvements thereon, upon the recording of the Supplemental Declaration by which the Parcel or the larger tract within which the Parcel is located is made a part of the Community.

10.2 Enforcement of Lien. In the event any Assessment is not paid within 30 days after the Assessment is due, the Association shall have the right to file a claim of lien in the Public Records. The Assessment lien may be enforced by the Association by foreclosure suit in the same manner as a mortgage or construction lien foreclosure or in such other manner as may be permitted by law. In the event the Association files a claim of lien against any Parcel, the Association shall be entitled to recover from the Owner of such Parcel, the interest and delinquency charge provided by Article 9.12 and all costs, including Attorney's Fees, incurred in preparing, filing, and, if applicable, foreclosing the Assessment lien, and all such costs, delinquency charges, interest, and Attorney's Fees shall be secured by such lien.

10.3 Priority of Lien. It is the intent hereof that the Assessment lien against each Parcel shall be subordinate and inferior only to the lien of taxes and special assessments levied by the County of Sarasota and other governmental bodies and to the lien of any mortgage upon such Parcel given to an Institutional Mortgagee prior to the recording of a claim of lien; provided, however, that such subordination shall not apply to Assessments which become due and payable after a sale or transfer of the Parcel pursuant to a decree of foreclosure of such mortgage or any other proceeding or transfer in lieu of foreclosure of such mortgage.

ARTICLE 11
RESTRICTIONS

11.1 Nuisances. No Person shall create any public or private nuisance, or engage in any noxious, illegal, or offensive activity, within the Community. By way of illustration and not as a limitation, no Owner shall place or keep any substance, material, or thing that emits foul or obnoxious odors or that is unsightly, unkempt, or unsanitary; cause unreasonable noise or other conditions that disturb, in the opinion of the Board, the reasonable peace, quiet, safety, or comfort of the occupants of adjacent properties; or conduct outside burning of wood, leaves, trash, garbage, or household refuse. Notwithstanding that construction activities may temporarily disturb the peace and quiet of the occupants of adjacent properties, such construction activities shall be permitted, subject only to such reasonable limitations as may be imposed by the terms of the Rules and Regulations or any applicable Supplemental Declaration. No Person shall have any claim against Declarant or any other Person for any interference with such Person's view, peace and quiet, welfare, or access to light and air caused by any such construction activities.

11.2 Exterior Antennas. No Person other than Declarant shall place or maintain within the Community any exterior antenna, aerial, satellite dish, or other apparatus for the reception or transmission of television, radio, or other electronic signals, without the prior written approval of Declarant or the Association.

11.3 Utility Lines. No Person other than Declarant shall place or maintain any overhead utility or cable television lines within the Community without the prior written approval of Declarant or the Association, except for temporary lines as required during construction or as otherwise may be required by law.

11.4 Air Conditioning Units. No window or wall air conditioning units shall be installed or maintained on any Parcel.

11.5 Artificial Vegetation. No artificial grass or other artificial vegetation shall be permitted on the exterior of any portion of the Community.

11.6 Decorations. No Person shall place or maintain on a Parcel any flags, banners, decorative lights or ornaments, or similar items without the prior written approval of Declarant or the Association; provided, however, that nothing herein shall prohibit the display of seasonal Christmas or holiday decorative lights and ornaments between Thanksgiving and January 10 or the appropriate display of the American Flag.

11.7 Damage and Insurance Rates. No Person shall engage in any activity causing damage to, or any increase in insurance rates on, any Improvements within the Community.

11.8 Clearing of Vegetation. No Person other than Declarant shall cut down, remove, or clear from any Parcel or the Common Areas any trees, shrubs, or other vegetation except pursuant to Plans approved by the Architectural Committee in accordance with Article 12 or except as otherwise may be authorized in writing by Declarant or the Association.

11.9 Pollutants. No Person shall discharge any substance or solution into any street, easement, surfacewater drain, or portion of the Properties so as harmfully to affect any landscaping or vegetation or pollute the Surfacewater Management System.

11.10 Golf Carts. No gasoline-powered golf carts shall be operated within the Community, except golf carts owned and operated by Declarant, the Association, or the Country Club Owner. All other golf carts shall be powered by electricity or by similar non-combustion means. No golf cart shall be parked or stored anywhere within the Community other than in an Owner's garage or other areas specifically designated by the Board as golf cart parking areas. Except for golf carts leased from the Country Club Owner, each owner of a golf cart operated within the Community shall register the golf cart with the Association and shall keep the golf cart in good condition and appearance. No child under the age of 16 years shall be permitted to operate a golf cart within the Community.

11.11 Governmental Regulations. No Person shall violate in any respect the provisions of any governmental laws or regulations applicable to the Surfacewater Management System or the Community. Each Owner, at the time of construction of a dwelling or other Improvements on his Parcel, shall comply with the construction plans for the Surfacewater Management System pursuant to Chapter 40D-4, Florida Administrative Code, approved and on file with SWFWMD. No Owner may construct or maintain any dwelling or other Improvements on, or undertake or perform any activity (including filling; excavating; storage of materials; or removal of trees, understory, or other vegetation) in, any wetland, wetland mitigation area, wetland buffer area, upland conservation area, or drainage easement area described in any SWFWMD approved permit and applicable subdivision plat, unless prior approval is received from SWFWMD, Venice Regulation Department, pursuant to Chapter 40D-4, Florida Administrative Code.

11.12 Alterations. Without limiting the provisions of Articles 12 and 5.6, and except as may otherwise be authorized by the terms of this Declaration or any applicable Supplemental Declaration or by the prior written consent of the Association or Declarant, no Person other than Declarant shall: (a) erect,

install, or alter any Improvements on any portion of the Common Areas; or (b) erect, install, or alter any Improvements which the Association is required to maintain pursuant to the terms of this Declaration or any applicable Supplemental Declaration.

11.13 Occupants Bound. All provisions of this Declaration, the Rules and Regulations, the Community Standards, the Environmental Preservation Guidelines, the Architectural Criteria, and any Supplemental Declaration applicable to an Owner's Parcel governing the conduct of the Owner shall also apply to all occupants of the Parcel and all family members, guests, and invitees of the Owner. Each Owner shall cause all such occupants, family members, guests, and invitees to comply with such provisions and shall be jointly and severally responsible with such occupants, family members, guests, and invitees for any violation by them of such provisions. The lease of any Parcel shall be deemed to include a covenant on the part of the tenant to comply with, and be fully bound by, such provisions.

ARTICLE 12
ARCHITECTURAL CONTROL

12.1 Approval by Architectural Committee. No Construction Work shall be commenced unless and until the plans and specifications for such Construction Work (the "Plans") have been submitted to the Architectural Committee in accordance with Article 12.5 and approved by the Architectural Committee in writing. In keeping with Declarant's intent to establish and maintain a community of quality homes and buildings of aesthetically pleasing design, the Architectural Committee shall evaluate the Plans with respect to the harmony of external design, appearance, and location of all Improvements to which the proposed Construction Work relates in relation to surrounding structures and topography, the proposed materials and construction standards, the conformance of the proposed Construction Work with any applicable Architectural Criteria, the conformance of the proposed Construction Work with restrictions set forth in this Declaration or any applicable Supplemental Declaration, and the general aesthetic impact of the proposed Construction Work. In reviewing Plans for proposed Construction Work, the Architectural Committee shall consider that due to the size of the Community, the division of the Community into separate neighborhoods, and the diversity of residential, recreational, and commercial uses within the Community, a particular architecture appropriate for one portion of the Community may not be appropriate for some other portion. The purpose of the Architectural Committee shall not be to impose a uniform appearance in the Community, but rather to promote and assure architectural and aesthetic quality and discrimination for the benefit of all Owners.

12.2 Architectural Committee. The Architectural Committee shall be composed of not less than three or more than seven members, who need not be members of the Association. Declarant shall have the right to appoint (and, at its discretion, to replace) all members of the Architectural Committee, or such lesser number as Declarant may choose, until such time as Declarant, in its sole discretion, elects to assign such right to the Association; provided, however, Declarant shall assign such right to the Association not later than the Final Development Date. Members of the Architectural Committee as to whom Declarant may have relinquished the right of appointment, and all members of the Architectural Committee after Declarant assigns such right to the Association, shall be appointed by, and shall serve at the pleasure of, the Board. A majority of the Architectural Committee members shall constitute a quorum to transact business at any meeting of the Architectural Committee, and the action of a majority present at a meeting at which a quorum is present shall constitute the action of the Architectural Committee. Any vacancy occurring on the Architectural Committee because of death, resignation, or other termination of service of any member appointed by Declarant shall be filled by Declarant; any other vacancy shall be filled by the Board. No member of the Architectural Committee shall be entitled to compensation for services performed. The Architectural Committee may employ independent advisers, in which case reasonable compensation to such advisers shall be paid by the Association as part of the Community Expenses. All copying, telephone, telecopy, and other out-of-pocket expenses of the Architectural Committee shall also be paid by the

Association as part of the Community Expenses. All decisions of the Architectural Committee shall be final and binding on the Owners.

12.3 Architectural Control Authority. The Architectural Committee's regulatory authority shall include the power to prohibit those uses, activities, or exterior designs deemed inconsistent with the provisions of this Declaration or applicable Supplemental Declaration or contrary to the best interests of the Association in maintaining the value and desirability of the Community. The Architectural Committee shall have authority to adopt, promulgate, rescind, amend, and revise Architectural Criteria for any portion or portions of the Community in connection with the foregoing, provided such Architectural Criteria are reasonable and consistent with the provisions of this Declaration and any applicable Supplemental Declaration. The authority provided herein shall apply not only to preconstruction and construction periods but also to all periods subsequent to construction to ensure that all Architectural Committee requirements continue to be satisfied by the owner of the property on which the Construction Work is to take place.

12.4 Plans. The Plans shall show the nature, kind, shape, height, materials, locations, color, and estimated cost of the proposed Construction Work. An Owner may submit preliminary plans that are conceptual in nature. If preliminary plans are approved by the Architectural Committee, and if Plans are submitted to the Architectural Committee which are consistent with the approved preliminary plans, the Plans will be approved by the Architectural Committee, provided such Plans do not contain any material deviation from the preliminary plans as determined solely and in the absolute discretion of the Architectural Committee. All applications to the Architectural Committee for approval of any of the foregoing shall be accompanied by the following information, to the extent applicable:

A. Architectural, engineering, and construction plans and specifications (which shall show proposed exterior colors and materials);

B. Site plan, including lighting, parking, and drainage plans;

C. Landscaping plan, which shall: (1) show all signage; and (2) show generally all existing trees (trees having a stem diameter of four and one-half inches or greater at 54 inches above the ground shall be shown specifically), shrubs, and other vegetation to be removed or left in place.

D. Construction schedule;

E. A statement of the use to be made of the Improvements; and

F. Such additional information as may be reasonably necessary for the Architectural Committee to evaluate completely the proposed Construction Work.

In the event the Architectural Committee fails to respond to an application within 30 days after the same has been submitted to and received by it, the Architectural Committee's approval shall be deemed to have been given; provided, however, that no Improvements shall be erected or be allowed to remain on any Parcel which violate any building or use restrictions contained in this Declaration or other recorded instrument.

12.5 Procedure.

The Architectural Committee may appoint one or more Persons to make preliminary review of all applications to the Architectural Committee and report such applications to the Architectural Committee with such Person's recommendations for Architectural Committee action thereon. Such preliminary review shall be subject to such regulations and limitations as the Architectural Committee deems advisable. In addition to the fees payable under Article 12.6, the Owner making application to the Architectural Committee shall reimburse the Association for all reasonable costs associated with the review of Plans by

the Architectural Committee, including any expense for architectural, engineering, or Attorney's Fees. If such reimbursement is not made within 15 days after delivery to the Owner of written notice of the costs to be reimbursed, such costs shall be included in the Individual Parcel Expenses pursuant to Article 7.5 and shall be assessed against the Owner's Parcel as an Individual Parcel Assessment in accordance with Article 9.8.

12.6 Fees. The Board shall adopt a schedule of reasonable fees for processing applications to the Architectural Committee. Such fees, if any, shall be payable to the Association, in cash, at the time an application is submitted to the Architectural Committee. No application shall be deemed to have been properly submitted without payment of the applicable fees.

12.7 Certification of Compliance. Upon written request of any Owner, the Architectural Committee shall issue an acknowledged certificate in recordable form setting forth generally whether or not the Owner, to the knowledge of the Architectural Committee, is in violation of any of the terms and conditions of this Article 12. The written statement shall be conclusive in favor of all Persons who relied thereon in good faith. The statement shall be furnished by the Architectural Committee within a reasonable time, but not to exceed 20 days from the receipt of a written request for such statement. If such statement is not furnished within such 20-day period, it shall be presumed that the Owner has fully complied with the terms and conditions of this Article 12 and that the Parcel is in conformance with all such terms and conditions.

12.8 Proceeding with Work. Upon receipt of approval from the Architectural Committee, the Owner shall as soon as practical satisfy any and all conditions of such approval and shall diligently proceed with the commencement and completion of the approved Construction Work. In all cases, the approved Construction Work shall commence within six months from the date of approval, and if the Construction Work is not so commenced, approval shall be deemed revoked unless the Architectural Committee pursuant to written request made and received prior to the expiration of the six-month period extends the period of time within which the approved Construction work must be commenced.

12.9 Liability. The Architectural Committee and its members shall not be liable in damages to anyone submitting an application to them for approval or to anyone affected by this Declaration by reason of mistake in judgment, negligence, or nonfeasance arising out of or in connection with the approval or disapproval of same. All Persons who submit plans or specifications to the Architectural Committee for approval agree, by the submission of same, and each Owner of a Parcel agrees, by acquiring title thereto or an interest therein, that they will not bring any action or suit against the Architectural Committee, its members, or Declarant to recover damages in connection with matters to which this Article 12 pertains.

12.10 Interior Alterations. Notwithstanding any other provision of this Declaration to the contrary, the provisions of Articles 12.1 – 12.8 shall not apply to Construction Work relating to Improvements lying solely within the interior of a building located, or to be constructed, on an Owner's Parcel.

ARTICLE 13
WARRANTIES

Except as Declarant may otherwise expressly provide by written contract, **THE CONSTRUCTION, DEVELOPMENT, AND SALE BY DECLARANT OF ANY PARCEL OR OTHER PROPERTY OR IMPROVEMENTS IN THE COMMUNITY IS WITHOUT WARRANTY, AND NO WARRANTIES OF FITNESS, HABITABILITY, OR MERCHANTABILITY AS TO ANY PORTION OF THE COMMUNITY OR IMPROVEMENTS CONSTRUCTED BY DECLARANT THEREON OR IN CONNECTION THEREWITH SHALL**

BE IMPLIED. EXCEPT AS DECLARANT MAY OTHERWISE EXPRESSLY PROVIDE BY WRITTEN CONTRACT, DECLARANT HEREBY EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY COMMON LAW IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, MERCHANTABILITY, HABITABILITY, AND CONFORMITY OF ANY IMPROVEMENTS WITH PLANS AND SPECIFICATIONS FILED WITH ANY GOVERNMENTAL AUTHORITY. DECLARANT MAKES NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO THE EXISTENCE OR LEVELS OF ODORS, NOXIOUS FUMES, LOW FREQUENCY ELECTROMAGNETIC FIELDS, RADON, OR ANY OTHER POLLUTANT WITHIN THE COMMUNITY OR WITH RESPECT TO ANY PROPERTY OR IMPROVEMENTS CREATED FOR, CONVEYED TO, DEDICATED TO, OR MADE AVAILABLE FOR THE USE OF THE ASSOCIATION OR ANY NEIGHBORHOOD ASSOCIATION PURSUANT TO THIS DECLARATION, ANY SUPPLEMENTAL DECLARATION, OR ANY OTHER INSTRUMENT. DECLARANT, THE COUNTRY CLUB OWNER, AND THE ASSOCIATION SHALL NOT IN ANY MANNER BE CONSIDERED INSURERS OR GUARANTORS OF ANY PERSON'S SAFETY WITHIN THE COMMUNITY NOR SHALL DECLARANT, THE COUNTRY CLUB OWNER, OR THE ASSOCIATION HAVE ANY LIABILITY TO ANY PERSON FOR INJURY OR LOSS RESULTING FROM THE PRESENCE OR ACTIONS OF POISONOUS SNAKES, ALLIGATORS, OR WILDLIFE OR RESULTING FROM THE PRESENCE OR MAINTENANCE OF STORMWATER RETENTION PONDS, WETLAND AREAS, OR ROADWAYS WITHIN OR ADJACENT TO THE COMMUNITY.

ARTICLE 14
CONDEMNATION

All proceeds received by the Association in connection with the condemnation, or conveyance under threat of condemnation, of the Common Areas shall be applied as follows:

A. If the proceeds are payable in connection with the Community Common Areas, the proceeds shall be applied by the Association to the payment of the Community Expenses.

B. If the proceeds are payable in connection with the Neighborhood Common Areas, the proceeds shall be applied by the Association to the payment of the Neighborhood Expenses applicable to such Neighborhood Common Areas.

ARTICLE 15
EASEMENTS

15.1 Creation of Easements. Declarant hereby reserves unto itself, its successors and assigns, and hereby grants to the Association and the Country Club Owner, a perpetual, alienable, and releasable nonexclusive easement, right, and privilege: (a) on, over, and under the right-of-way of all Community Roads, Neighborhood Roads, sidewalks, and pathways in the Community for ingress and egress by pedestrians, runners, bicycles, golf carts, automobiles, trucks, construction equipment, and other vehicles for the purpose of obtaining access to the Properties and for the installation, construction, maintenance, replacement, and use of electric power and telephone poles, wires, cables, conduits, water mains, sewers, irrigation and drainage lines, drainage ditches and swales, underdrains, and any other equipment or appurtenances pertaining to the installation, maintenance, transmission, or use of electricity, telephone, television or electronic data signal transmission, gas, street lighting, water, irrigation, drainage, or other utilities or conveniences; (b) on, over, and under any unimproved area of any property lying between any Community Road or Neighborhood Road and any lake, pond, canal, swale, or ditch serving as part of the Surfacewater Management System for the installation, construction, maintenance, replacement, and use of

irrigation and drainage lines, pipes, ditches, swales, and other irrigation or drainage devices, including the right of pedestrian and vehicular ingress and egress to such lake, pond, canal, swale, or ditch for such purposes; and (c) on, over and under all property lying within 20 feet of the normal water line of all lakes and ponds, and within 10 feet of the top of the bank of all canals, swales, and ditches serving as part of the Surfacewater Management System for access to and maintenance of all portions thereof and for installation, maintenance, and replacement of drainage control devices and apparatus. As used herein, "unimproved area" shall mean any area on which there are situated no permanent Improvements other than landscaping, paving, walkways, or driveways. Any area upon which any such permanent Improvements are hereafter constructed in compliance with the provisions of Article 12 shall thereupon be deemed to be released from the easement described in subparagraph (b) above.

15.2 Disturbances. If Declarant, the Association, or any other Person should in the exercise of its rights under any of the easements designated in Article 15.1 disturb any grass, soil, paving, or other Improvements, Declarant, the Association, or such other Person, as the case may be, shall restore the same as nearly as practicable to its condition prior to the disturbance.

ARTICLE 16
RIGHTS OF DECLARANT

16.1 Declarant's Rights in the Association. Until the Final Development Date, the Board shall have no authority to, and shall not, without the written consent of Declarant, which may be withheld in Declarant's sole discretion, undertake any action which shall:

A. Prohibit or restrict in any manner the sales, marketing, and leasing activities and programs of Declarant or any Neighborhood Developer or Owner;

B. Decrease the level of maintenance services performed by the Association pursuant to this Declaration or any Supplemental Declaration;

C. Impose any Special Assessment, Individual Parcel Assessment, or Fine against Declarant's property or Declarant;

D. Impair or interfere with the operation of the Architectural Committee or the exercise of its powers;

E. Alter or amend this Declaration, any Supplemental Declaration, the Articles of Incorporation, or the Bylaws;

F. Modify, amend, or alter the Surfacewater Management System;

G. Terminate or cancel any contracts of the Association entered into prior to the Turnover;

H. Terminate or waive any rights of the Association under this Declaration or any Supplemental Declaration;

I. Convey, lease, or encumber any portion of, or interest in, the Common Areas;

J. Terminate or cancel any easements granted hereunder or by the Association;

K. Terminate or impair in any fashion any easements, powers, or rights of Declarant hereunder;

L. Restrict Declarant's right of use, access, and enjoyment of any of the Properties; or

M. Take any other action impairing, in Declarant's sole discretion, the quality of the Community or the health, safety, or welfare of the Owners.

16.2 Rights to Common Areas. Declarant shall have the right in its sole discretion to permit the use of any portion of the Common Areas by the general public or by such Persons as Declarant may designate.

16.3 Development. At the time of recording of this Declaration, development and construction of the Parcels and Improvements in the Community have not been completed. Declarant reserves all rights and easements necessary or desirable with respect to the Community to complete such development and construction and to effect the sale or lease of all the Parcels. Inasmuch as the completion of such development, construction, sales, and leasing is essential to the establishment and welfare of the Community and the Owners, no Owner shall do anything to interfere with the development, construction, sales, or leasing activities of Declarant or any Neighborhood Developer. Without limiting the generality of the foregoing, nothing in this Declaration, the Articles of Incorporation, or the Bylaws shall be construed to:

A. Prevent Declarant or any Neighborhood Developer, or their contractors or subcontractors, from taking whatever steps they determine to be necessary or desirable to effect the completion of the development of the Community, including, without limitation, the alteration of construction plans and designs as Declarant or any Neighborhood Developer deems advisable in the course of such development (all models, sketches, and artists' representations showing plans for future development of the Properties being subject to modification by Declarant or a Neighborhood Developer at any time and from time to time without notice); or

B. Prevent Declarant or any Neighborhood Developer, or their contractors or subcontractors, from erecting, constructing, and maintaining within the Community such structures as may be reasonably necessary for the development of the Community, the construction of Improvements therein, and the sale and leasing of the Parcels.

Declarant shall have the express right to construct, maintain, and carry on such facilities and activities within the Community as, in the sole opinion of Declarant, may be reasonably necessary, convenient, or appropriate to the construction of Improvements or sale or leasing of Parcels, including, but not limited to, administrative offices, signs, model units, and sales offices. The right to construct, maintain, and carry on such facilities and activities shall specifically include the right to use any Parcel owned by Declarant and any clubhouse, community center, or other property owned by the Association as administrative offices, sales offices, and models.

16.4 Heron Creek Name. No Person shall use the term "Heron Creek" or any derivative thereof in any printed or promotional material without the prior written consent of Declarant. However, Owners may use the term "Heron Creek" in printed or promotional matter where such term is used solely to specify that the Owner's Parcel is located within the Community, and the Association shall be entitled to use the term "Heron Creek" in its name.

16.5 Assignment. Declarant may from time to time assign any or all of its rights, title, interest, easements, powers, duties, obligations, and privileges reserved hereunder to the Association or to any other Person.

16.6 Exercise of Declarant's Rights. The rights of Declarant enumerated in this Article 16 or elsewhere in this Declaration are for the sole benefit of Declarant and may be exercised, waived, released, or assigned, in whole or in part, in Declarant's sole discretion. No Person shall have any cause of action against Declarant on account of Declarant's exercise, manner of exercise, failure to exercise, waiver, release, or assignment, in whole or in part, of any of such rights.

ARTICLE 17
COUNTRY CLUB

17.1 Country Club Lease. The Country Club Parcel is owned by Holdings and Glendinning and has been leased by Declarant from Holdings and Glendinning pursuant to an unrecorded Lease Agreement dated as of May 1, 1998 (the "Country Club Lease"). The initial term of the Country Club Lease expires on December 31, 2008. If Declarant exercises an option to renew the Country Club Lease, the term of the Country Club Lease will be extended until December 31, 2013. Declarant presently is the owner of the Country Club. The Country Club Lease presently provides that upon its expiration or sooner termination, ownership of the Country Club will vest in Holdings and Glendinning. The provisions of the Country Club Lease may be amended at any time by consent of Declarant, Holdings, and Glendinning.

17.2 Use of Country Club. Neither membership in the Association nor ownership or occupancy of a Parcel shall confer upon any Person any right to use the Country Club or the Country Club Parcel or any ownership interest, or other legal or equitable property interest of any kind whatsoever, in the Country Club or the Country Club Parcel. Rights to use the Country Club will be granted only to such Persons, and only on such terms and conditions, as may be determined from time to time by the Country Club Owner. The Country Club Owner shall have the right, from time to time in its sole and absolute discretion and without notice, to: (a) establish, amend, or waive the terms and conditions of use of the Country Club, including, without limitation, eligibility for and duration of use rights, number of Persons entitled to use rights, categories of use, and extent of use rights; (b) reserve use rights; and (c) terminate use rights altogether. Operation, maintenance, and use of the Country Club shall be controlled exclusively by the Country Club Owner in its sole and absolute discretion, and no Person shall have any claim against the Country Club Owner or Declarant for the manner in which such discretion is exercised.

17.3 Changes in Ownership or Operation. Except as set forth herein, no representations or warranties have been or are made by Declarant, Holdings, or Glendinning with regard to the continuing ownership or operation of the Country Club, and no purported representation or warranty in such regard, either written or oral, shall have any effect unless set forth in an amendment to this Declaration executed by Declarant and the Country Club Owner and recorded in the Public Records prior to the Turnover. The ownership and operation of the Country Club may change at any time and from time to time for any reason, including, without limitation: (a) the sale of the Country Club to, or assumption of operations of the Country Club by, one or more Persons unaffiliated with Declarant, (b) the transfer, pursuant to contract, option, or otherwise, of the Country Club to one or more affiliates, employees, or independent contractors of Declarant, (c) the foreclosure of any lien encumbering the Country Club or the conveyance of the Country Club in lieu of foreclosure; or (d) the expiration or termination of the Country Club Lease. No such change of ownership or operation of the Country Club shall require the consent of the Association or any Owner. In addition, the Country Club Owner may elect at any time to suspend or terminate the operation of the Country Club. Under no circumstances shall the Country Club or the Country Club Parcel ever be conveyed to the Association.

17.4 Rights of Access and Parking.

No Person shall have any right to use or enter upon the Country Club without the authorization of the Country Club Owner. All Persons having such authorization, which, by way of illustration and not as a

limitation, may include members, guests, invitees, employees, agents, and contractors, shall at all times have a nonexclusive easement of access over: (a) all Community Roads to the extent reasonably necessary to travel to and from the Country Club and the entrances to the Community; and (b) all portions of the Community to the extent reasonably necessary for the operation, maintenance, repair, and replacement of the Country Club. Furthermore, to the extent authorized by the Country Club Owner, all Persons attending golf tournaments and other functions at the Country Club shall have the right to park their vehicles on the Common Areas at reasonable times before, during, and after such tournaments and functions.

17.5 Golf Course. The Country Club presently includes the Golf Course. The Country Club Owner may, in its discretion and without obligation, modify the location and configuration of bunkers, greens, fairways, tees, and other portions of the Golf Course and expand the Golf Course to include additional holes and facilities. To the extent any Golf Course landscaping, irrigation systems, maintenance vehicle access drives, or golf cart paths connecting holes of the Golf Course are located on any portion of the Community not owned or leased by the Country Club Owner, the Country Club Owner shall have a nonexclusive easement over such portion for the use, maintenance, and replacement of such landscaping, irrigation systems, access drives, and golf cart paths and Improvements incidental thereto. The extent of Golf Course landscaping, and the extent of maintenance thereof, shall be as determined by the Country Club Owner. The Country Club Owner shall have no obligation to preserve or enhance the view of any Owner through the installation, maintenance, trimming, or pruning of any Golf Course trees or landscaping. The Country Club Owner may do all things necessary or appropriate, as determined by the Country Club Owner in its sole discretion, to maintain or operate the Golf Course, including: (a) apply pesticides, fertilizers, and other chemicals to the Golf Course; (b) conduct Golf Course maintenance operations, including the operation of maintenance vehicles and equipment, during such hours as the Country Club Owner may determine; and (c) permit play on the Golf Course, and the operation of golf carts, during such hours as the Country Club Owner may determine. No Person shall have any claim against the Country Club Owner or Declarant for any interference with such Person's view, peace and quiet, welfare, or access to light and air caused by any such maintenance or other activities undertaken or authorized by the Country Club Owner. No Person shall have the right to use the Golf Course for jogging, walking, exercising, picnicking, sunbathing, fishing, or other purposes without the express, written consent of the Country Club Owner, which consent may be withheld by the Country Club Owner in its sole and absolute discretion. Each Person playing golf upon the Golf Course shall have a nonexclusive license to go upon any portion of the Community adjacent thereto to retrieve errant golf balls as long as such Person does not damage the adjacent property while accomplishing such retrieval. Any golfer causing damage by his errant golf ball or while retrieving it shall be solely responsible for such damage, and neither Declarant nor the Country Club Owner shall have any responsibility therefor. The present or future use of the Golf Course for golf course purposes may be discontinued or suspended at any time hereafter by the Country Club Owner.

17.6 Association Actions. The Association shall not authorize, take, or implement any action, policy, or program which, in the reasonable judgment of the Country Club Owner, may have any adverse effect on the ownership, operation, maintenance, or use of the Country Club, without the prior written consent of the Country Club Owner. Such consent shall be deemed to have been given with respect to any proposed action if the Country Club Owner does not give the Association written notice of objection to the proposed action within 30 days after receipt of written notice from the Association specifying the proposed action. If the Country Club Owner gives such notice of objection, the Country Club Owner shall specify with reasonable particularity the basis for the objection. Any action requiring consent of the Country Club Owner taken by the Association without such consent shall not be void, but shall be voidable by the Country Club Owner at any time by delivery to the Association of notice of the Country Club Owner's objection to such action.

17.7 Landfill. A portion of the Country Club Parcel is located on the property described in Exhibit "C" attached hereto. The property described in Exhibit "C" was formerly used as a landfill for the

disposal of waste materials. The Florida Department of Environmental Protection ("FDEP") issued a permit authorizing closure of the landfill in 1990. In 1998, FDEP issued an order determining that the landfill had stabilized. Under FDEP rules, "stabilized" means that the biological and chemical decomposition of the wastes has ceased or diminished to a level so that such decomposition no longer poses a pollution, health, or safety hazard. **DECLARANT AND GLENDINNING MAKE NO WARRANTY, EXPRESS OR IMPLIED, WITH RESPECT TO ANY ASPECT OF THE PROPERTY DESCRIBED IN EXHIBIT "C," INCLUDING ANY PRESENT OR FUTURE EMANATIONS FROM SUCH PROPERTY AND THE IMPACT, IF ANY, OF SUCH PROPERTY'S FORMERLY BEING USED AS A LANDFILL.**

17.8 Assignment by Country Club Owner. The Country Club Owner may from time to time assign any or all of its rights, title, interest, easements, powers, duties, obligations, and privileges reserved hereunder to any Person.

17.9 Exercise of Country Club Owner's Rights. The rights of the Country Club Owner enumerated in this Article 17 or elsewhere in this Declaration are for the sole benefit of the Country Club Owner and may be exercised, waived, released, or assigned, in whole or in part, in the Country Club Owner's sole discretion. No Person shall have any cause of action against the Country Club Owner on account of the Country Club Owner's exercise, manner of exercise, failure to exercise, waiver, release, or assignment, in whole or in part, of any of such rights.

ARTICLE 18
REMEDIES

18.1 Compliance by Owners. Each Owner shall comply, and shall cause the Owner's family, guests, tenants, and invitees to comply, with the restrictions and covenants set forth in this Declaration and in any Supplemental Declaration applicable to such Owner's Parcel. Each Owner shall further comply, and shall cause the Owner's family, guests, tenants, and invitees to comply, with the Environmental Preservation Guidelines, the Architectural Criteria, the Community Standards, and the Rules and Regulations.

18.2 Enforcement. Upon failure of an Owner to comply with the provisions of Article 18.1, the Association shall be entitled to exercise all rights and remedies provided by the terms of this Declaration and, in addition, to commence an action against the Owner for any relief allowed by law, including, without limitation, money damages, injunctive relief, or any combination thereof. In any such action in which the Association is the prevailing party, the Association shall be entitled to recover its costs and Attorney's Fees.

18.3 Fines. Upon failure of an Owner to comply with the provisions of Article 18.1, the Association may, in the sole discretion of the Board and in addition to all other remedies to which the Association may be entitled pursuant to Article 18.2, impose a Fine upon the Owner pursuant to the following provisions:

A. Notice. The Association shall afford an opportunity for hearing to the Owner, after notice of not less than: (1) three days in the event of an emergency or if the Owner's actions constitute: (a) a threat to the health or safety of other Owners; (b) a threat to the water quality of the Surfacewater Management System or a violation of any provisions of this Declaration applicable to the Surfacewater Management System; or (c) a violation of any provisions of the Environmental Preservation Guidelines or any governmental laws and regulations applicable to the Surfacewater Management System or the Community; or (2) 10 days, in all other cases. The notice shall include a statement of the date, time, and place of the hearing and a statement of the matters allegedly constituting a violation of Article 18.1.

B. Hearing. At the hearing, the Owner shall have the opportunity to review, challenge, and respond to any material considered by the Board; to present evidence; and to provide written and oral argument on all issues involved.

C. Amount. The Board may impose Fines according to the following schedule:

(1) The Board may impose a Fine not in excess of $1,000 per day from the date of the Owner's violation of the provisions of Article 18.1 until such violation ceases, if the violation threatens the health or safety of other Owners or constitutes a violation of: (a) any provisions of this Declaration applicable to the Surfacewater Management System; (b) any provisions of the Environmental Preservation Guidelines; or (c) any provisions of governmental laws and regulations applicable to the Surfacewater Management System or the Community.

(2) With respect to any other violation by an Owner of the provisions of Article 18.1, the Board may impose a Fine not in excess of $250 per day from the date of the Owner's violation until such violation ceases.

D. Individual Parcel Assessments. Any Fine levied by the Board against an Owner shall be included in the Individual Parcel Expenses applicable to such Owner's Parcel and shall be assessed as an Individual Parcel Assessment in accordance with the provisions of Article 9.

E. Application of Fines. All proceeds received by the Association from Fines shall be applied to the payment of the Community Expenses or applicable Neighborhood Expenses, as the Board in its discretion may determine.

F. Nonexclusive Remedy. Fines shall not be construed as an exclusive remedy and shall exist in addition to all other rights and remedies to which the Association may be legally entitled; however, any Fine paid by an Owner shall be deducted or offset against any damages that the Association may otherwise be entitled to recover from such Owner.

G. Governing Law. The right of the Association to impose Fines, the procedures applicable to the imposition of Fines, and the amount of Fines shall be subject to the provisions of controlling law.

18.4 Association Litigation. No judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by Voting Members representing at least 75 percent of the Association's Class A membership voting rights, as determined pursuant to Article 4.3.A. Notwithstanding anything contained in this Declaration or the Articles of Incorporation or Bylaws to the contrary, a Voting Member shall not approve the commencement or prosecution of any such proceeding unless authorized to do so by vote of Neighborhood Owners owning at least 75 percent of the Parcels in the Neighborhood represented by the Voting Member. The foregoing provisions of this Article 18.4 shall not apply, however, to:

A. Judicial or administrative proceedings brought by the Association against Persons other than Declarant, Holdings, Glendinning, or the Country Club Owner to enforce the provisions of this Declaration, any Supplemental Declaration, the Articles of Incorporation, or the Bylaws;

B. Judicial or administrative proceedings brought by the Association against Persons other than Declarant, Holdings, Glendinning, or the Country Club Owner for the collection of Assessments;

C. Judicial or administrative proceedings involving challenges to ad valorem taxation;

D. Judicial or administrative proceedings instituted against the Association; or

E. Counterclaims brought by the Association in judicial or administrative proceedings instituted against it.

This Article 18.4 shall not be amended unless such amendment is made by Declarant prior to the Turnover or is approved by the percentage votes, and pursuant to the same procedures, necessary to commence or prosecute proceedings as provided above.

18.5 Mediation. No Owner or other Person bound by this Declaration shall commence or prosecute any judicial or administrative proceeding against the Association or Declarant involving any matter related to this Declaration, any Supplemental Declaration, the Articles of Incorporation, the Bylaws, the Community, any property or Improvements within the Community, or rights or interest therein, without first submitting the issue to which such proceeding relates to nonbinding mediation in accordance with the following provisions:

A. If agreed to by the Association or Declarant, respectively, the mediation shall be conducted through the Citizens Dispute Settlement Center for the Twelfth Judicial Circuit for the State of Florida pursuant to Section 44.201, Florida Statutes.

B. In all other cases, the mediation shall be conducted in accordance with Rule 1.700 et. seq. of the Florida Rules of Civil Procedure; provided, however, that mediation in accordance with such rules may be initiated through a mediator agreed upon by the parties without order of court. If the parties cannot agree upon a mediator, then either party may move the court to name a mediator and initiate mediation pursuant to such rules.

C. The requirement for mediation of a claim against the Association or Declarant may be waived by the Association or Declarant, respectively.

ARTICLE 19
COMMUNITY SYSTEM SERVICES

19.1 Ownership. Except as otherwise provided by the terms of any Supplemental Declaration, Declarant reserves the ownership of all components of the Community Systems and the right to convey any of such components to the Association; a Neighborhood Association; a governmental authority; a utility, telecommunications, or cable television company; or other Person as Declarant may deem appropriate.

19.2 Contracts. Declarant and the Association shall each have the right to enter into contracts for the provision of any of the Community System Services to the Parcels upon such terms as Declarant or the Association, respectively, shall deem, in its sole discretion, to be in the best interests of the Association and the Owners. Any such contract, including any provision thereof requiring payment by the Association or any Owner for the furnishing of any of the Community System Services pursuant to the contract, shall be binding upon the Association and the Owners.

ARTICLE 20
DURATION

20.1 Covenants to Run with the Title to the Land. The provisions of this Declaration, as amended and supplemented from time to time as herein provided, shall be deemed to run with the title to the

property subject hereto and shall remain in full force and effect until terminated in accordance with the provisions of Article 20.2 or otherwise according to the laws of the State of Florida.

20.2 Term. The provisions of this Declaration shall be binding upon all Owners and shall continue in full force and effect for a period of 50 years from the date on which this Declaration is recorded in the Public Records, after which time they shall be deemed to be automatically extended for successive periods of 10 years each unless prior to the commencement of any such 10-year period: (a) the termination of this Declaration is approved by Voting Members representing at least 75 percent of the Association's Class A membership voting rights (as determined pursuant to Article 4.3.A), by Institutional Mortgagees holding at least 51 percent of all mortgages held by Institutional Mortgagees, and by Class C and Class D members of the Association owning a majority (as measured by acreage) of all Parcels other than the Assessable Parcels (such members being referred to herein as the "Majority Owners"); and (b) a written instrument certifying that such approval has been obtained is signed by the president and secretary of the Association and by the Majority Owners and recorded in the Public Records. The termination of this Declaration shall not terminate any easement rights then existing in favor of any Person by virtue of the provisions of Article 15, any easement or usage rights then existing in favor of any Person by virtue of the provisions of Articles 5.7 or 5.8; any ownership, easement, usage, or control rights then existing in favor of Holdings by virtue of the provisions of Article 5.10; any easement or usage rights then existing in favor of Declarant by virtue of the provisions of Article 16; or any easement or usage rights then existing in favor of the Country Club Owner by virtue of Article 17; it being the intent hereof that all such rights shall survive a termination of this Declaration.

ARTICLE 21
AMENDMENTS

This Declaration may be amended at any time and from time to time upon: (a) the approval of Voting Members representing at least two-thirds of the Association's Class A membership voting rights (as determined pursuant to Article 4.3.A) and the approval of the Majority Owners; and (b) the recording in the Public Records of an amendatory instrument executed by the president and secretary of the Association and by the Majority Owners certifying that such approval has been obtained; provided, however, that: (1) no amendment shall be effective prior to the Final Development Date without Declarant's express written joinder and consent; (2) no amendment to Article 10.3 and no amendment materially and adversely affecting the rights or interests of Institutional Mortgagees shall be effective without the written consent of Institutional Mortgagees holding at least 51 percent of all mortgages held by Institutional Mortgagees; (3) no amendment affecting the Surfacewater Management System, including the water management portions of the Common Areas, shall be effective without the written consent of SWFWMD; and (4) no amendment materially and adversely affecting the rights or interests of the City of North Port under Articles 5.6.C, 5.9, or 6.2.B shall be effective without the written consent of the City of North Port. This Declaration may also be amended by Declarant alone at any time prior to the Turnover by the recording in the Public Records of an instrument for that purpose executed by Declarant. All amendments shall reasonably conform to the general purposes of this Declaration set forth herein.

ARTICLE 22
MISCELLANEOUS

22.1 Governing Law. The construction, validity, and enforcement of the provisions of this Declaration shall be determined according to the laws of the State of Florida. The venue of any action or suit brought in connection with this Declaration shall be in Sarasota County, Florida.

22.2 Notices. Any notice authorized or required to be given to any Owner, or such Owner's representative, under the provisions of this Declaration shall be in writing and shall be deemed to have been

properly given when mailed, postage prepaid, to the last known address of the Person who appears as the Owner, or such Owner's representative, on the records of the Association at the time of such mailing. Any notice authorized or required to be given to the Association under the provisions of this Declaration shall be in writing and shall be deemed to have been properly given when mailed, postage prepaid, to the address of the Association's principal office at the time of such mailing.

22.3 Waiver. Failure of Declarant or the Association to insist upon strict performance of any provision of this Declaration with respect to any Owner or property in the Community shall not be deemed to be a waiver of such provision as to such Owner or property unless Declarant or the Association has executed in writing a waiver thereof. Any such written waiver of any provision of this Declaration by Declarant or the Association with respect to any Owner or property in the Community shall not constitute a waiver of such provision as to any other Owner or property.

22.4 Individual Liability. The obligations of Declarant or Holdings arising out of this Declaration or under any other instrument are corporate obligations and do not extend to the employees, officers, directors, shareholders, and limited partners of Declarant or Holdings or of any corporate partner of Declarant or Holdings. Such employees, officers, directors, shareholders, and limited partners shall have no individual liability in any action brought, or for any claim asserted, by the Association or by any Owner in connection with the construction, development, or sale of any Parcel or other property or Improvements within the Community or in connection with any matter related to the Properties or the rights or obligations created by or pursuant to this Declaration. Glendinning is a party to this Declaration solely in her capacity as Trustee under Trust Agreement dated April 30, 1998, and under deed recorded in Official Records Book 3107, page 264, of the Public Records, and not in an individual capacity. Any liability of Glendinning hereunder shall be limited to the Trust assets, and Glendinning shall not be individually or personally obligated in any manner whatsoever on account of any of the provisions of this Declaration.

22.5 Invalidation. The invalidation of any provision of this Declaration by lawful court order shall not affect or modify any of the other provisions of this Declaration, which other provisions shall remain in full force and effect.

22.6 Usage. Whenever used herein, the singular number shall include the plural and the plural the singular, and the use of any gender shall include all genders. Titles of Articles, paragraphs, and subparagraphs of this Declaration are for convenience only and neither limit nor amplify the provisions of this Declaration.

IN WITNESS WHEREOF, Declarant, Holdings, and Glendinning have caused this Declaration to be executed in their names as of the date set forth above.

WITNESSES:

Signature of Witness

J MICHAEL HARTENSTINE

Print Name of Witness

Signature of Witness

Elizabeth Burns

Print Name of Witness

HERON CREEK ASSOCIATES, LTD.
By: Marsh Creek Communities, Inc.,
a Florida corporation, as General Partner

By: _____
H. Dieter Gebhard
As its Vice President

MARSH CREEK HOLDINGS, LTD.
By: Marsh Creek Properties, Inc.,
a Florida corporation, as General Partner

By: _____
H. Dieter Gebhard
As its Vice President

_____
Signature of Witness
J MICHAEL HARTENSTINE
Print Name of Witness

_____
Signature of Witness
Lisabeth Berg
Print Name of Witness

Doreen M. Tillman
Signature of Witness
Doreen M. Tillman
Print Name of Witness

Kathleen A. Galloreth
Signature of Witness
Kathleen A. Galloreth
Print Name of Witness

Renea M. Glendinning
RENEA M. GLENDINNING
As Trustee aforesaid

STATE OF FLORIDA
COUNTY OF SARASOTA

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to take acknowledgments in the state and county named above, personally appeared H. Dieter Gebhard, as Vice President of Marsh Creek Communities, Inc., a Florida corporation and general partner of **HERON CREEK ASSOCIATES, LTD.**, a Florida limited partnership, to me known to be the person described in and who executed the foregoing instrument, and he acknowledged, not under oath, that he executed the foregoing instrument for and on behalf of the corporation and the partnership as such officer for the purposes therein expressed and that he was duly authorized by the corporation and the partnership to do so.

WITNESS my hand and official seal in the state and county named above this 16 day of September 1999.

(Notary Seal)

LISABETH BERG
Notary Public, State of Florida
My comm. expires Oct. 4, 2002
Comm. No. CC 780522

Lisabeth Berg
Signature of Notary Public

Lisabeth Berg
Print Name of Notary Public
I am a Notary Public of the State of Florida,
and my commission expires on 10-4-02.

STATE OF FLORIDA
COUNTY OF SARASOTA

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to take acknowledgments in the state and county named above, personally appeared H. Dieter Gebhard, as Vice President of Marsh Creek Properties, Inc., a Florida corporation and general partner of **MARSH CREEK HOLDINGS, LTD.**, a Florida limited partnership, to me known to be the person described in and who executed the foregoing instrument, and he acknowledged, not under oath, that he executed the foregoing instrument for and on behalf of the corporation and the partnership as such officer for the purposes therein expressed and that he was duly authorized by the corporation and the partnership to do so.

WITNESS my hand and official seal in the state and county named above this 16 day of September 1999.

Signature of Notary Public

(Notary Seal)

LIZABETH BERG
Notary Public, State of Florida
My comm. expires Oct. 4, 2002
Comm. No. CC 780522

Lizabeth Berg
Print Name of Notary Public
I am a Notary Public of the State of Florida,
and my commission expires on 10-4-02.

STATE OF FLORIDA
COUNTY OF SARASOTA

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to take acknowledgments in the state and county named above, personally appeared **RENEA M. GLENDINNING**, as Trustee aforesaid, to me known to be the person described in and who executed the foregoing instrument, and she acknowledged, not under oath, that she executed the foregoing instrument for the purposes therein expressed.

WITNESS my hand and official seal in the state and county named above this 17 day of September 1999.

Signature of Notary Public

(Notary Seal)

Margaret Shoaf
My Commission CC606052
Expires December 8, 2000

MARGARET SHOAF
Print Name of Notary Public
I am a Notary Public of the State of FLORIDA,
and my commission expires on 12-8-00.

JMH-366311.4

OFFICIAL RECORDS INSTRUMENT # 1999127212 79 pgs

JOINDER OF ASSOCIATION

HERON CREEK COMMUNITY ASSOCIATION, INC., a Florida corporation not for profit (the "Association"), hereby joins in and consents to the foregoing Declaration of Covenants, Conditions, and Restrictions for Heron Creek and hereby agrees to the provisions thereof and the obligations imposed upon the Association therein.

IN WITNESS WHEREOF, the Association has caused this joinder to be executed in its name by its duly authorized officer this 15th day of September 1999.

HERON CREEK COMMUNITY ASSOCIATION, INC.

By: _____
James L. Bevillard
As its Vice President

STATE OF FLORIDA
COUNTY OF Lee

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to take acknowledgments in the state and county named above, personally appeared James L. Bevillard, as Vice President of Heron Creek Community Association, Inc., a Florida corporation not for profit, to me known to be the person described in and who executed the foregoing instrument, and he acknowledged that he executed the foregoing instrument for and on behalf of the corporation as such officer for the purposes therein expressed and that he was duly authorized by the corporation to do so.

WITNESS my hand and official seal in the state and county named above this 15th day of September 1999.

KAREN G
MY COMMISSIO : 31
EXPIRES: Feb
Bonded Thru Notary
Seal
KAREN G. MAYES
MY COMMISSION # CC 804631
EXPIRES: February 13, 2003
Bonded Thru Notary Public Underwriters

_____
Signature of Notary Public
Karen G. Mayes
Print Name of Notary Public

I am a Notary Public of the State of Florida, and my commission expires on 02/13/03.

JMH-367359

OFFICIAL RECORDS INSTRUMENT # 1999127212 79 pgs

EXHIBIT "A"

All that property lying within and being a part of HERON CREEK, UNIT I, as per plat thereof recorded in Plat Book 40, page 47, Public Records of Sarasota County, Florida.

EXHIBIT "B"

TRACT "A": A portion of Section 21, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northwest corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Snover Waterway (200' wide), as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00° 43'08"W. along the Westerly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision also being the Westerly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 100.00 feet to the POINT OF BEGINNING; at the intersection of said Right-of-Way Line with the South Line of said Snover Waterway; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following two courses; S.00° 43'08"W., a distance of 1346.71 feet to the point of curvature of a 2100.00 foot radius curve to the left, with the center point bearing S.89°16'52"E.; thence Southerly along the arc of said curve, through a central angle of 15°16'04", a distance of 559.59 feet to an intersection with the Northerly Right-of-Way Line of Price Boulevard, with said point also being a point of reverse curvature of a 25.00 radius curve to the right, with the center point bearing S.75°27'04"W.; thence along the said Northerly Right-of-Way Line of Price Boulevard (100' wide) the following four courses; Southwesterly along the arc of said curve, through a central angle of 85°42'32", a distance of 37.40 feet to a point of reverse curvature of a 1650.00 foot radius curve to the left, with the center point bearing S.18°50'24"E.; thence Southwesterly along the arc of said curve, through a central angle of 22°20'06", a distance of 643.20 feet to a point of tangency; thence S.48°49'30"W., a distance of 408.66 feet to the point of curvature of a 1950.00 foot radius curve to the right, with the center point bearing N.41°10'30"W.; thence Westerly along the arc of said curve, through a central angle of 71°11'22", a distance of 2422.85 feet; thence leaving said Northerly Right-of-Way Line of Price Boulevard N.29°59'32"E., a distance of 1198.77 feet; thence N.15°00'00"W., a distance of 1800.00 feet to the South Line of the aforesaid Snover Waterway (O.R. Book 1941, Page 6); thence along said South Line, S.89°16'51"E., a distance of 2953.00 feet to the Point of Beginning.

Containing 170.30 Acres, more or less.

TRACT "B": A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northeast corner of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Snover Waterway as shown on the Plat of the Eighteenth Addition to Port Charlotte Subdivision, per plat thereof, recorded in Plat Book 14, Pages 6, 6-A through 6-V, Public Records of Sarasota County, Florida; thence S.00°43'08"W., along the Easterly Boundary Line of said Fifty-Sixth Addition to Port Charlotte Subdivision, also being the Easterly Right-of-Way Line of Sumter Boulevard (200' wide) a distance of 700.00 feet to the POINT OF BEGINNING; thence leaving the said Westerly Right-of-Way Line, S.89° 16'51"E., a distance of 606.00 feet, thence N.00°43'09"E., a distance of 600.00 feet to the Southerly Right-of-Way Line of the Snover Waterway (O.R. Book 1941, Page 6); thence S.89°16'51"E. along said Southerly Right-of-Way Line, a distance of 880.95 feet to the Northwesterly corner of North Port Water Control District property (O.R. Book 2357, Page 382); thence leaving said Southerly Right-of-Way Line, and along the Westerly Boundary Line of the said North Port Water Control District Property, S.00°43'09"W., a measured distance of 1052.76 feet (Deed 1050.00') to the Southwest corner of said North Port Water Control District property; thence along the Southerly Boundary of said North Port Water Control District property S.89°16'51"E., a distance of 1028.67 feet to the Westerly Boundary Line of the Blueridge Waterway (100 feet wide) (O.R. Book 1941, Page 6), said point also being a point on the arc of a 1000.00 foot radius curve with the center point of said curve bearing N.77° 26'14"W.; thence along the Westerly Right-of-Way Line of said Blueridge Waterway the following two courses; Southwesterly along the arc of said curve, through a central angle of 55°49'01", a distance of 974.19 feet to a point of reverse curvature of a 1150.00 foot radius curve to the left, with the center point bearing S.21°37'14"E.; thence Southwesterly along the arc of said curve, through a central angle of 32°16'11", a distance of 647.69 feet to the intersection of said Westerly Right-of-Way Line with the Northerly Right-of-Way Line of Price Boulevard (100' wide); thence along the Northerly Right-of-Way Line of said Price Boulevard the following three courses; N.56°24'18"W., a distance of 131.21 feet to the point of curvature of a 1650.00 foot radius curve to the left, with the center point bearing S.33°35'42"W.,thence along the arc of said curve, through a central angle of 43°52'31", a distance of 1263.51 feet to a point of reverse curvature of a 25.00 foot radius curve to the right with the center point bearing N.10°16'49"W.; thence along the arc of said curve through a central angle of 85°43'55", a distance of 37.41 feet to a point in the aforesaid Easterly Right-of-Way Line of Sumter Boulevard and the Easterly Boundary Line of the aforesaid Fifty-Sixth Addition to Port Charlotte Subdivision, said point is also the point of compound curvature of a 1900.00 foot radius curve to the right, with the center point bearing N.75°27'06"E.; thence along the said Easterly Right-of-Way Line for the following two courses; Northerly along the arc of said curve through a central angle of 15°16'02", a distance of 506.28 feet to the point of tangency; thence N.00°43'08"E. a distance of 746.71 feet to the Point of Beginning.

Containing 72.12 Acres, more or less.

TRACT "C": A portion of Sections 21 and 28, Township 39 South, Range 21 East, Sarasota County, Florida, more particulary described as follows:

Beginning at a concrete monument at the Northwest corner of the Right-of- of North Port Boulevard as shown on the Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof Recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, thence S.82°01'05"W. (S.82°00'00"W. Plat bearing) along the Northerly Right-of Way of said North Port Boulevard (Myakkahatchee Boulevard) as shown on the Plat of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21 Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, a distance of 947.20 feet (946.95 feet plat distance) to a concrete monument at the Southeast corner of Block 2653 in said Fifty-Second Addition to Port Charlotte Subdivision; thence leaving said Northerly Right-of-Way Line and along the Northeasterly Boundary Line of said Block 2653 the following four courses; N.08°00'00"W., a distance of 955.00 feet; thence S.82°00'00"W., a distance of 365.00 feet; thence N.08°00'00"W., a distance of 630.90 feet; thence S.82°00'00"W., a distance of 150.00 feet; thence leaving said Boundary Line, N.29°59'32"E., a distance of 1080.80 feet to the Southerly Right-of-Way Line of Price Boulevard (100' Wide); thence along said Southerly Right-of-Way Line the following five courses; S.59°55'11"E., a distance of 23.99 feet to the point of curvature of a 2050.00 foot radius curve to the left with the center point bearing N.30°04'49"E.; thence Easterly along the arc of said curve, through a central angle of 71°15'19", a distance of 2549.46 feet to a point of tangency; thence N.48°49'30"E., a distance of 408.68 feet to the point of curvature of a 1550 foot radius curve to the right, with the center point bearing S.41°10'30"E.; thence Northeasterly along the arc of said curve, through a central angle of 22°06'43", a distance of 598.19 feet to a point of compound curvature of a 25 foot radius curve to the right with the center point bearing S.19°03'47"E.. thence Easterly and Southerly along the arc of said curve through a central angle of 90° 27'50", a distance of 39.47 feet to a point on the Westerly Right-of-Way Line of Sumter Boulevard as shown on the aforesaid Plat of the Fifty-Sixth Addition to Port Charlotte Subdivision, said point also being a point of reverse curvature of a 2100.00 foot radius curve to the left, with the center point bearing N.71°24'03"E.; thence along said Westerly Right-of-Way Line of Sumter Boulevard the following four courses: Southerly, along the arc of said curve through a central angle of 00°13'14", a distance of 8.09 feet to a point of reverse curvature of a 1300.00 foot radius curve to the right, with the center point bearing S.71°10'49"W.; thence Southerly along the arc of said curve, through a central angle of 77°57'00", a distance of 1768.63 feet to a point of reverse curvature of a 1600.00 foot radius curve to the left, with the center point bearing S.30°52'11"E.; thence Southwesterly along the arc of said curve through a central angle of 59°57'23", a distance of 1674.30 feet to a point of reverse curvature of a 50.11 foot radius curve to the right, with the center point bearing S.89°10'26"W.; thence Southwesterly along the arc of said curve through a central angle of 86°32'36", a distance of 75.69 feet to the aforesaid Northerly Right-of-Way Line of North Port Boulevard; thence along the said Northerly Right-of Way Line the following three courses; S.85°43'11"W., a distance of 208.42 feet to the point of curvature of a 2750.00 foot radius curve to the left, with the center point bearing S.04°16'49"E.; thence Southwesterly along the arc of said curve, through a central angle of 03°42'20", a distance of 177.85 feet to a point of tangency; thence S.82°00'51"W., a distance of 355.73 feet to the Point of Beginning.

Containing 140.58 Acres, more or less.

TRACT "D": A portion of Sections 21 and 22, Township 39 South, Range 21 East, Sarasota County, Florida, more particularly described as follows:

Commencing at the Northeasterly corner of the Fifty-Second Addition to Port Charlotte Subdivision per plat thereof recorded in Plat Book 21, Pages 13, 13-A through 13-NN, Public Records of Sarasota County, Florida, said corner also being on the centerline of the Blueridge Waterway (100' wide)(O.R. Book 1941, Page 6); thence leaving the said centerline and along the Northerly Boundary Line of the said Fifty-Second Addition to Port Charlotte Subdivision, N.84°56'11"W., a distance of 50.00 feet to the POINT OF BEGINNING, said point also being on the Westerly Right-of-Way Line of the said Blueridge Waterway; thence leaving said Westerly Right-of-Way Line and along the Northerly Boundary Line of said Fifty-Second Addition the following three courses; N.84°56'11"W., a distance of 1375.64 feet to the point of curvature of 400 foot radius curve to the right, with the center point bearing N.05°03'49"E., thence along the arc of said curve, through a central angle of 29°49'49". a distance of 208.26 feet to a point of tangency; thence N.55°06'22"W., a distance of 442.85 feet to a corner on the Boundary Line of the Fifty-Sixth Addition to Port Charlotte Subdivision, per plat thereof recorded in Plat Book 28, Pages 50 and 50-A, Public Records of Sarasota County, Florida, said point is also on the arc of a 2350.00 foot radius nontangent curve with the center point bearing N.55°05'20"W.; thence Southwesterly along the Westerly Boundary Line of Tract "D" as platted in said Fifty-Sixth Addition and the arc of said curve, through a central angle of 10°06'22", a distance of 414.51 feet to a point on the Easterly Right-of-Way Line of Sumter Boulevard (200' wide) as platted in said Fifty-Sixth Addition with said point also being on the arc of a 1400.00 foot radius nontangent curve with the center point bearing S.73°36'02"E.; thence Northeasterly along said Easterly Right-of-Way Line, the following three courses; along the arc of said curve, through a central angle of 42°43'51" a distance of 1044.11 feet to a point of reverse curvature of a 1500.00 foot radius curve to the left, with the center point bearing N.30°52'11"W.; thence along the arc of said curve through a central angle of 77°31'15", a distance of 2029.49 feet to a point of reverse curvature of a 25.00 foot radius curve to the right, with the center point bearing N.71°36'34"E., thence along the arc of said curve through a central angle of 98°45'30", a distance of 43.09 feet along the Southerly Right-of-Way Line of Price Boulevard (100' wide), to a point of compound curvature of a 1550.00 foot radius curve to the right with the center point bearing S.09°37'56"E., thence along the said Southerly Right-of-Way Line for the following two courses; along the arc of said curve through a central angle of 43°13'39", a distance of 1169.42 feet to a point of tangency; thence S.56°24'18'E., a distance of 131.17 feet to a point on the aforesaid Westerly Right-of-Way Line of the Blueridge Waterway, said point also being on the arc of a 1150.00 foot radius curve, with the center point bearing S.58°52'26"E.; thence along said Westerly Right-of-Way Line the following two courses; Southwesterly along the arc of said curve through a central angle of 26°04'14", a distance of 523.27 feet to a point of tangency; thence S.05°03'20"W. a distance of 1932.28 feet to the Point of Beginning.

Containing 83.90 Acres, more or less.

TRACT "E":

DESCRIPTION OF THE PROPOSED REVERSIONARY BOUNDARY FOR A PORTION OF THE 52ND. ADDITION TO PORT CHARLOTTE SUBDIVISION PER PLAT THEREOF RECORDED IN PLAT BOOK 21, PAGES 13 THROUGH 13NN AND A PORTION OF THE 56TH ADDITION PER PLAT THEREOF RECORDED IN PLAT BOOK 28, PAGES 50 AND 50A, PUBLIC RECORDS OF SARASOTA COUNTY, FLORIDA WITH SAID BOUNDARY BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE POINT OF INTERSECTION OF THE CENTERLINE OF NORTH PORT BLVD. (FORMERLY MYAKKAHATCHEE BLVD) WITH THE NORTHERLY LINE OF APPOMATTOX DRIVE AS PLATTED IN SAID 52ND. ADDITION; THENCE S.45°34'35"E., ALONG SAID NORTHERLY LINE OF APPOMATTOX DRIVE A DISTANCE OF 1833.51 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 260.00 FEET, A CENTRAL ANGLE OF 23°13'38", A CHORD BEARING OF S.57°11'24"E. AND A CHORD LENGTH OF 104.68 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 105.40 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.68°48'13"E., ALONG SAID NORTHERLY LINE A DISTANCE OF 2715.05 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 260.00 FEET, A CENTRAL ANGLE OF 17°44'15", A CHORD BEARING OF S.77°40'20"E. AND A CHORD LENGTH OF 80.17 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 80.49 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.86°32'28"E., ALONG SAID NORTHERLY LINE A DISTANCE OF 403.32 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 25.00 FEET, A CENTRAL ANGLE OF 89°58'27", A CHORD BEARING OF N.48°28'18"E. AND A CHORD LENGTH OF 35.35 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 39.26 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE N.03°29'05"E., ALONG THE WESTERLY LINE OF SUMTER BLVD. (200 FEET WIDE) A DISTANCE OF 7.66 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE RIGHT, HAVING: A RADIUS OF 1524.84 FEET, A CENTRAL ANGLE OF 26°10'34", A CHORD BEARING OF N.16°34'22"E. AND A CHORD LENGTH OF 690.60 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 696.64 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE N.29°39'39"E., ALONG SAID WESTERLY LINE OF SUMTER BLVD. A DISTANCE OF 1900.39 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 949.64 FEET, A CENTRAL ANGLE OF 35°45'49", A CHORD BEARING OF N.11°46'44"E. AND A CHORD LENGTH OF 583.18 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 592.76 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE N.06°06'10"W., ALONG SAID WESTERLY LINE A DISTANCE OF 682.16 FEET TO THE SOUTHEAST CORNER OF TRACT "A" AS PLATTED IN SAID 56TH ADDITION; THENCE N.06°06'10"W., ALONG SAID WESTERLY LINE OF SUMTER BLVD. A DISTANCE OF 405.72 FEET TO A POINT ON A CURVE TO THE RIGHT, HAVING: A RADIUS OF 1600.00 FEET, A CENTRAL ANGLE OF 05°18'00", A CHORD BEARING OF N.03°27'41"W. AND A CHORD LENGTH OF 147.95 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 148.01 FEET TO A POINT OF CUSP WITH A CURVE TO THE RIGHT, HAVING: A RADIUS OF 50.00 FEET, A CENTRAL ANGLE OF 86°32'01", A CHORD BEARING OF S.42°27'20"W. AND A CHORD LENGTH OF 68.54 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 75.51 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.85°43'21"W., ALONG THE NORTH LINE OF AFORESAID NORTH PORT BLVD. (100 FEET WIDE) A DISTANCE OF 208.40 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF

2750.00 FEET, A CENTRAL ANGLE OF 03°42'18", A CHORD BEARING OF S.83°52'12"W. AND A CHORD LENGTH OF 177.80 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 177.83 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.82°01'03"W., ALONG SAID NORTH LINE A DISTANCE OF 355.74 FEET TO THE NORTHWEST CORNER OF SAID 56TH ADDITION; THENCE S.82°01'01"W., ALONG THE NORTH LINE OF SAID NORTH PORT BLVD. AS PLATTED IN SAID 52ND ADDITION A DISTANCE OF 947.20 FEET; THENCE N.08°00'00"W., ALONG THE EAST LINE OF BLOCK 2653 A DISTANCE OF 955.00 FEET; THENCE S.82°00'00"W., ALONG THE NORTH LINE OF BLOCK 2653 A DISTANCE OF 365.00 FEET; THENCE N.08°00'00"W., ALONG THE EAST LINE OF BLOCK 2653 A DISTANCE OF 630.90 FEET; THENCE S.82°00'00"W., A DISTANCE OF 150.00 FEET TO THE NORTHWEST CORNER OF LOT 39 IN SAID BLOCK 2653; THENCE S.08°00'00"E., ALONG AND EXTENDING THE WEST LINE OF SAID LOT 39 A DISTANCE OF 175.00 FEET TO THE CUL-DE-SAC CENTER AT THE NORTH END OF FLEETWAY ROAD (50 FEET WIDE); THENCE S.07°57'17"E., ALONG THE CENTERLINE OF SAID FLEETWAY ROAD A DISTANCE OF 605.90 FEET TO A POINT OF INTERSECTION WITH THE CENTERLINE OF CAMERO STREET (50 FEET WIDE); THENCE S.82°00'00"W., ALONG SAID CENTERLINE OF CAMERO STREET A DISTANCE OF 1636.11 FEET TO THE POINT OF CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 100.00 FEET, A CENTRAL ANGLE OF 90°00'00", A CHORD BEARING OF S.37°00'00"W. AND A CHORD LENGTH OF 141.42 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 157.08 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.08°00'00"E., ALONG THE CENTERLINE OF DAMON AVE. (50 FEET WIDE) A DISTANCE OF 185.03 FEET; THENCE S.82°00'00"W., ALONG THE LINE DIVIDING LOTS 7 AND 8 IN AFORESAID BLOCK 2653 A DISTANCE OF 150.11 FEET TO THE WEST LINE OF SAID BLOCK 2653; THENCE S.08°00'00"E., ALONG SAID WEST LINE OF SAID BLOCK 2653 A DISTANCE OF 606.62 FEET TO A POINT ON THE NORTHWESTERLY LINE OF AFORESAID NORTH PORT BLVD.; THENCE S.19°45'51"E., A DISTANCE OF 50.00 FEET TO THE CENTERLINE OF SAID NORTH PORT BLVD. AND A POINT ON A CURVE TO THE LEFT, HAVING: A RADIUS OF 4070.00 FEET, A CENTRAL ANGLE OF 16°49'34", A CHORD BEARING OF S.61°49'22"W. AND A CHORD LENGTH OF 1190.95 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 1195.24 FEET TO THE POINT OF COMPOUND CURVATURE OF A CURVE TO THE LEFT, HAVING: A RADIUS OF 700.00 FEET, A CENTRAL ANGLE OF 18°24'35", A CHORD BEARING OF S.44°12'17"W. AND A CHORD LENGTH OF 223.95 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 224.92 FEET TO THE POINT OF REVERSE CURVATURE OF A CURVE TO THE RIGHT, HAVING: A RADIUS OF 1422.00 FEET, A CENTRAL ANGLE OF 09°25'25", A CHORD BEARING OF S.39°42'43"W. AND A CHORD LENGTH OF 233.62 FEET; THENCE ALONG THE ARC OF SAID CURVE, AN ARC LENGTH OF 233.88 FEET TO THE POINT OF TANGENCY OF SAID CURVE; THENCE S.44°25'25"W., ALONG SAID CENTERLINE A DISTANCE OF 203.96 FEET TO THE POINT OF BEGINNING.

LESS AND EXCEPT THE FOLLOWING TWO PARCELS:

PARCEL 1

ALL THAT PROPERTY LYING WITHIN AND BEING A PART OF HERON CREEK, UNIT I, AS PER PLAT THEREOF RECORDED IN PLAT BOOK 40, PAGE 47, PUBLIC RECORDS OF SARASOTA COUNTY, FLORIDA.

PARCEL 2

TRACT "X", 52ND ADDITION TO PORT CHARLOTTE SUBDIVISION, AS PER PLAT THEREOF RECORDED IN PLAT BOOK 21, PAGE 13, PUBLIC RECORDS OF SARASOTA COUNTY, FLORIDA.

OFFICIAL RECORDS INSTRUMENT # 1999127212 79 pgs

EXHIBIT "C"

Tract "X", 52nd ADDITION TO PORT CHARLOTTE SUBDIVISION, as per plat thereof recorded in Plat Book 21, page 13, Public Records of Sarasota County, Florida.

JMH-367319

OFFICIAL RECORDS INSTRUMENT # 1999127212 79 PGS

EXHIBIT "D"

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ARTICLES OF INCORPORATION
OF
HERON CREEK COMMUNITY ASSOCIATION, INC.

(A Corporation Not For Profit)

In order to form a corporation under and in accordance with the provisions of the laws of the State of Florida for the formation of corporations not for profit, the undersigned does hereby adopt and set forth these Articles of Incorporation, viz.:

ARTICLE 1
NAME AND ADDRESS OF CORPORATION

The name of this corporation shall be:

HERON CREEK COMMUNITY ASSOCIATION, INC.

hereinafter in these Articles referred to as the "Association." The initial principal office address of the Association is 635 South Orange Avenue, Suite 10, Sarasota, Florida 34236.

ARTICLE 2
PURPOSES

2.1 General Purposes. The Association is organized for the general purpose of promoting the health, safety, and social welfare of the Owners of Parcels within the community known as Heron Creek, being developed in Sarasota County, Florida, by Heron Creek Associates, Ltd., a Florida limited partnership ("Associates"). The Community is more particularly described in that certain document entitled "Declaration of Covenants, Conditions, and Restrictions for Heron Creek" (the "Declaration"), which is to be recorded in the Public Records.

2.2 Specific Purposes. The purposes of the Association shall include the following:

A. To operate, maintain, manage, improve, and administer the use of the Common Areas, and other portions of the Community, to the extent set forth in the Declaration and any Supplemental Declaration.

B. To perform all duties and obligations assigned to the Association by the terms of the Declaration or any Supplemental Declaration.

C. To take such action as may be deemed appropriate by the Board of Directors to promote the health, safety, and social welfare of the Owners.

D. To operate without profit for the sole and exclusive benefit of its members.

2.3 Construction. All capitalized words and terms used herein which are defined in the Declaration shall be used herein with the same meaning as defined in the Declaration. In the event of any conflict between the provisions of these Articles of Incorporation and the provisions of the Declaration, the provisions of the Declaration shall control.

ARTICLE 3
POWERS

3.1 General Powers. The Association shall have all powers that are or may be conferred upon a corporation not for profit by the laws of the State of Florida, except as prohibited herein.

3.2 Specific Powers. The Association's powers shall include the following:

A. To purchase, accept, lease, or otherwise acquire title to, and to hold, mortgage, rent, sell or otherwise dispose of, any and all real or personal property related to the purposes or activities of the Association; to make, enter into, perform, and carry out contracts of every kind and nature with any person, firm, corporation, or association; and to do any other acts necessary or expedient (including the borrowing of money and the sale of property owned by the Association) for carrying on any of the activities of the Association and pursuing any of the objects and purposes set forth in these Articles of Incorporation and not forbidden by the laws of the State of Florida.

B. To establish budgets and to fix Assessments to be levied against Assessable Parcels pursuant to the Declaration for the purpose of defraying the expenses and costs of effectuating the objects and purposes of the Association and to create reasonable reserves for such expenditures, including reasonable contingency funds for ensuing years and reasonable annual reserves for anticipated major capital repairs, maintenance, improvements, and replacements.

C. To place liens against any Assessable Parcel for delinquent and unpaid Assessments or charges and to bring suit for the foreclosure of such liens or to otherwise enforce the collection of such Assessments and charges for the purpose of obtaining revenue in order to carry out the purposes and objectives of the Association, all in accordance with the provisions of the Declaration.

D. To hold funds solely and exclusively for the benefit of the members of the Association for the purposes set forth in these Articles of Incorporation.

E. To adopt, promulgate, and enforce rules, regulations, bylaws, covenants, restrictions, and agreements in order to effectuate the purposes for which the Association is organized.

F. To delegate such of the ministerial functions of the Association as may be deemed to be in the Association's best interest by the Board of Directors.

G. To charge recipients of services rendered by the Association and users of property of the Association where such charges are deemed appropriate by the Board of Directors.

H. To pay all taxes and other charges or assessments, if any, levied against property owned, leased, or used by the Association.

I. To borrow money for the acquisition of property or for any other lawful purpose of the Association, and to make, accept, endorse, execute, and issue debentures, promissory notes, or other obligations of the Association for borrowed monies, and to secure the payment of any such obligation by mortgage, pledge, security agreement, or other instrument of trust, or by lien upon, assignment of, or agreement in regard to all or any part of the real or personal property, or property rights or privileges, of the Association wherever situated.

J. To enforce by any and all lawful means the provisions of these Articles of Incorporation, the Bylaws of the Association which may be hereafter adopted, and the terms and provisions of the Declaration and any Supplemental Declaration.

K. To exercise all powers conferred upon the Association by the Declaration or any Supplemental Declaration, subject to all limitations and obligations imposed upon the Association by the terms thereof.

ARTICLE 4
MEMBERS

4.1 Classes of Members. The Association shall have four classes of members, comprised as follows::

A. Class A Members. Class A members shall be all Owners of Assessable Parcels in the Community. Such Owners shall automatically become Class A members upon acquiring the fee simple title to their respective Parcels.

B. Class B Members. The Class B member shall be Associates, any successor to or legal representative of Associates, or any Person to whom all rights of Associates under the Declaration or these Articles of Incorporation are hereafter assigned pursuant to written instrument recorded in the Public Records.

C. Class C Members. Class C members shall be all owners of the Entry Parcel. Such Owners shall automatically become Class C members upon acquiring the fee simple title to all or any portion of the Entry Parcel.

D. Class D Members. Class D members shall be all owners of Parcels in the Community other than the Assessable Parcels and the Entry Parcel. Such Owners shall automatically become Class D members upon acquiring fee simple title to their respective Parcels.

4.2 Termination of Membership. The Class B membership shall automatically terminate on the Final Development Date, after which time the Association membership shall be comprised solely of Class A, Class C, and Class D members. The membership of any Class A, Class C, or Class D member in the Association shall automatically terminate upon conveyance or other divestment of title to such member's Parcel, except that nothing herein contained shall be construed as terminating the membership of any member who may own two or more Parcels as long as such member continues to own at least one Parcel.

4.3 Membership Appurtenant to Parcel Ownership. The interest of any Class A, Class C, or Class D member in the funds and assets of the Association may not be assigned, hypothecated, or transferred in any manner, except as an appurtenance to the Parcel which is the basis of his membership in the Association.

4.4 List of Members. The Secretary of the Association shall maintain a list of the members of the Association. Whenever any person or entity becomes a member of the Association, it shall be such party's duty and obligation to so inform the Secretary in writing, giving his name, mailing address, and legal description of his Parcel; provided, however, that any notice given to or vote accepted from the prior Owner of such member's Parcel before receipt of written notification of change of ownership shall be deemed to be properly given or received. The Secretary may, but shall not be required to, search the Public Records or make other inquiry to determine the status and correctness of the list of members of the

Association maintained by him and shall be entitled to rely upon the Association's records until notified in writing of any change in ownership.

ARTICLE 5
VOTING

The voting rights of the members of the Association, including provisions for representation of Class A members through Voting Members, shall be as set forth in the Declaration. In all matters requiring the vote of Voting Members, each Voting Member shall cast the number of votes held by Class A members represented by such Voting Member.

ARTICLE 6
BOARD OF DIRECTORS

6.1 Number. The affairs of the Association shall be managed by a Board of Directors consisting initially of three Directors. The number of Directors comprising succeeding Boards of Directors shall be as provided from time to time in the Bylaws of the Association, but in no event shall there be less than three Directors.

6.2 Appointment and Election. All Directors shall be appointed by the Class B member until the annual meeting of members in the year 2000. Commencing with such annual meeting and continuing thereafter until the Turnover Meeting, the Class B member shall have the right to appoint a majority of the Directors, and the remaining Directors shall be elected by Voting Members representing the Class A members in accordance with the provisions of Article 6.3. Commencing with the Turnover Meeting and continuing thereafter until the Termination Meeting, a majority of the Directors shall be elected by Voting Members representing the Class A members in accordance with the provisions of Article 6.3, and the Class B member shall have the right to appoint the remaining Directors. Commencing with the Termination Meeting, all Directors shall be elected by Voting Members representing the Class A members in accordance with the provisions of Article 6.3.

A. Turnover Meeting. As used herein, the "Turnover Meeting" shall mean the first annual or special meeting of members following the earlier of the following two dates: (1) the date which is three months after 90 percent of the parcels that will ultimately be included in the Community have been conveyed to Class A members; or (2) the date on which the Class B member, by written notice to the Association, relinquishes its right to appoint a majority of the Directors.

B. Termination Meeting. As used herein, the "Termination Meeting" shall mean the first annual or special meeting of members following the earlier of the following two dates: (1) the date on which the Class B member no longer holds for sale in the ordinary course of business at least five percent of the parcels that will ultimately be included in the Community; or (2) the date on which the Class B member, by written notice to the Association, relinquishes its right to appoint any Directors.

6.3 Election Procedures. Elections of Directors shall be by plurality vote. In the event any Neighborhood District is established by the Class B member pursuant to the provisions of the Declaration, at least one Director shall be elected by Voting Members representing the Class A members owning Parcels within such Neighborhood District. In no event shall the total number of Directors elected by Voting Members representing the Class A members be less than the number of Neighborhood Districts.

6.4 Qualification and Term. Directors need not be members of the Association. Directors appointed by the Class B member shall not serve fixed terms, but shall serve at the pleasure of the Class B

member. Except as may be otherwise required by the terms of Article 6.2, Directors elected pursuant to Article 6.3 shall be elected at the annual meeting of members, and their term shall expire at the next succeeding annual meeting of members. Commencing with the Turnover Meeting, except for persons appointed as Directors by the Class B member, no person shall serve as a Director for successive terms or more than two terms during any five-year period.

6.5 Removal. Any Director elected pursuant to Article 6.3 exclusively by Voting Members representing Class A members owning Parcels within a specific Neighborhood District may be removed from office with or without cause only by majority vote of such Voting Members. Any other Director elected pursuant to Article 6.3 may be removed from office with or without cause only by majority vote of Voting Members representing all Class A members. Any Director appointed by the Class B member may be removed and replaced with or without cause by the Class B member, in the Class B member's sole discretion.

6.6 Initial Board. The names and addresses of the persons constituting the first Board of Directors are as follows:

H. Dieter Gebhard	-	Suite 10, 635 South Orange Avenue Sarasota, Florida 34236
Ronald A. York -	-	Suite 3, 4524 S.E. 16th Place Cape Coral, Florida 33904
James L. Bevillard	-	Suite 3, 4524 S.E. 16th Place Cape Coral, Florida 33904

ARTICLE 7
OFFICERS

7.1 Number, Qualification, and Term. The officers of the Association, to be elected by the Board of Directors, shall be a President, a Vice President, a Secretary, and a Treasurer and such other officers as the Board of Directors shall deem appropriate from time to time. The President shall be elected from among the membership of the Board of Directors, but no other officer need be a Director. The same person may hold two or more offices, provided, however, that the office of President and Secretary shall not be held by the same person. The affairs of the Association shall be administered by such officers under the direction of the Board of Directors. Officers shall be elected at the annual meeting of the Board of Directors, and their term shall expire at the next succeeding annual meeting of the Board of Directors. Commencing with the Turnover Meeting, no person shall serve as an officer for successive terms or for more than two terms during any five-year period.

7.2 Initial Officers. The names of the officers who are to manage the affairs of the Association until the first annual meeting of the Board of Directors are as follows:

President	-	Ronald A. York
Vice President	-	James L. Bevillard
Treasurer	-	H. Dieter Gebhard
Secretary	-	James L. Bevillard

ARTICLE 8
CORPORATE EXISTENCE

The Association shall have perpetual existence.

ARTICLE 9
BYLAWS

The first Board of Directors of the Association shall adopt Bylaws consistent with these Articles of Incorporation. Thereafter, the Bylaws may be altered, amended, or rescinded by a majority vote of the Directors in the manner provided by such Bylaws. No amendment to the Bylaws prior to the Final Development Date, however, shall be effective without the written consent of the Class B member.

ARTICLE 10
AMENDMENTS TO ARTICLES OF INCORPORATION

These Articles may be altered, amended, or repealed by the affirmative vote of a majority of the Board of Directors. No amendment to these Articles of Incorporation prior to the Final Development Date, however, shall be effective without the written consent of the Class B member.

ARTICLE 11
REGISTERED OFFICE AND REGISTERED AGENT

The registered office of the Association shall be 200 South Orange Avenue, Sarasota, Florida 34236, and the registered agent at such address shall be J. Michael Hartenstine. The Association may, however, maintain offices and transact business in such other places within or without the State of Florida as may from time to time be designated by the Board of Directors.

ARTICLE 12
BUDGET AND EXPENDITURES

The Association shall obtain funds with which to operate by Assessments levied against its members in accordance with the provisions of the Declaration, as the same may be supplemented by the provisions of these Articles of Incorporation, the Association's Bylaws, and any Supplemental Declaration. Pursuant to the Declaration, the Board of Directors shall annually adopt budgets for the operation of the Association for the ensuing fiscal year and for the purpose of levying Assessments against all Assessable Parcels, which budget shall be conclusive and binding upon all members; provided, however, that the Board of Directors may thereafter at any time approve or ratify variations from such budgets.

ARTICLE 13
INCORPORATOR

The name and street address of the incorporator of the Association is as follows:

J. Michael Hartenstine
200 South Orange Avenue
Sarasota, Florida 34236

ARTICLE 14
INDEMNIFICATION OF OFFICERS AND DIRECTORS

All officers and Directors shall be indemnified by the Association against all expenses and liabilities, including attorney's fees, reasonably incurred in connection with any proceeding (including appellate proceedings) or settlement thereof in which they may become involved by reason of holding such office. In no event, however, shall any officer or Director be indemnified for his own willful misconduct or, with respect to any criminal proceeding, his own knowing violation of provisions of law. The Association may purchase and maintain insurance on behalf of all officers and Directors for any liability asserted against them or incurred by them in their capacity as officers and Directors or arising out of their status as such.

ARTICLE 15
DISSOLUTION OF THE ASSOCIATION

15.1 Dissolution. Upon expiration of the term of the Declaration, the Association may be dissolved upon a resolution to that effect being approved by the holders of two-thirds of the members of the Board of Directors and upon compliance with any applicable laws then in effect.

15.2 Distribution of Assets. Upon dissolution of the Association, all of its assets remaining after provision for payment of creditors and all costs and expenses of such dissolution shall be distributed in the following manner:

A. Any Neighborhood Common Areas owned by the Association shall be distributed to the applicable Neighborhood Owners pro rata to the number of Parcels in the Neighborhood, such that an equal, undivided share of the Neighborhood Common Areas shall be allocated to each Parcel in the Neighborhood. Alternatively, the Board of Directors may, in its discretion, distribute the Neighborhood Common Areas: (1) to a banking corporation having trust powers, to be held in trust for the benefit of the applicable Neighborhood Owners; or (2) to a corporation not for profit whose members are comprised solely of the applicable Neighborhood Owners. If the Neighborhood Common Areas are distributed in trust, an equal, undivided share in the trust assets shall be allocated to each Parcel in the Neighborhood. If the Neighborhood Common Areas are distributed to a corporation not for profit, an equal, undivided share in the corporation's assets shall be allocated to each Parcel in the Neighborhood. Each Parcel's share in the Neighborhood Common Areas, trust assets, or corporate assets, as applicable, shall be deemed an appurtenance to such Parcel.

B. Any property other than Neighborhood Common Areas determined by the Board of Directors to be appropriate for dedication to any applicable municipal or other governmental authority may be dedicated to such authority provided the authority is willing to accept the dedication.

C. Any Community Common Areas owned by the Association shall be distributed to the Owners of the Assessable Parcels pro rata to the number of Assessment Shares allocated to such Assessable Parcel, such that each Assessable Parcel shall receive one undivided share of the Community Common Areas for each Assessment Share allocated to such Assessable Parcel. Alternatively, the Board of Directors may, in its discretion, distribute the Community Common Areas: (1) to a banking corporation having trust powers, to be held in trust for the benefit of the Owners of the Assessable Parcels; or (2) to a corporation not for profit whose members are comprised solely of the Owners of the Assessable Parcels. If the Community Common Areas are distributed in trust, each Assessable Parcel shall receive one undivided share in the trust assets for each Assessment Share allocated to such Assessable Parcel. If the Community Common Areas are distributed to a corporation not for profit, each Assessable Parcel shall receive one undivided share in the corporation's assets for each Assessment Share allocated to such

Assessable Parcel. Each Assessable Parcel's share in the Community Common Areas, trust assets, or corporate assets, as applicable, shall be deemed an appurtenance to such Parcel.

D. All remaining assets, or the proceeds from the sale of such assets, shall be distributed among the Owners of the Assessable Parcels pro rata to the number of Assessment Shares allocated to such Parcels, such that each Assessable Parcel shall receive one undivided share of such assets for each Assessment Share allocated to such Assessable Parcel.

ARTICLE 16
BINDING EFFECT

The provisions hereof shall bind and inure to the benefit of the members and their respective successors and assigns.

IN WITNESS WHEREOF, the above-named incorporator has executed these Articles of Incorporation this 7th day of September 1999.

J. Michael Hartenstine
Incorporator

ACCEPTANCE BY REGISTERED AGENT

Having been appointed Registered Agent for the above corporation, I hereby accept such appointment. I further certify that I am familiar with, and accept, the obligations of that position as provided by Florida Statutes.

J. Michael Hartenstine

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FILED
SECRETARY OF STATE
DIVISION OF CORPORATIONS
99 SEP -9 AM 9:30

OFFICIAL RECORDS INSTRUMENT # 1999127212 79 pgs

EXHIBIT "E"

BYLAWS
OF
HERON CREEK COMMUNITY ASSOCIATION, INC.

ARTICLE 1
IDENTITY AND DEFINITIONS

Heron Creek Community Association, Inc. (the "Association"), has been organized for the purpose of promoting the health, safety, and welfare of the Owners of Parcels within the development known as "Heron Creek" (the "Community") and performing all duties assigned to it under the provisions of the "Declaration of Covenants, Conditions, and Restrictions for Heron Creek" (the "Declaration"), which will hereafter be recorded in the Public Records of Sarasota County, Florida. The terms and provisions of these Bylaws are expressly subject to the Articles of Incorporation of the Association and to the terms, provisions, conditions, and authorizations contained in the Declaration. All words and terms used herein that are defined in the Declaration shall be used herein with the same meanings as defined in the Declaration.

ARTICLE 2
LOCATION OF PRINCIPAL OFFICE

The principal office of the Association shall be located at Suite 10, 635 South Orange Avenue, Sarasota, Florida 34236, or at such other place as may be established by resolution of the Board of Directors of the Association.

ARTICLE 3
MEMBERSHIP, VOTING, QUORUM, AND PROXIES

3.1 Classification. The qualification and classification of members, the manner of their admission to membership and termination of such membership, and the method of voting by the members shall be governed by Article 4 and Article 5 of the Association's Articles of Incorporation, as supplemented by the provisions of these Bylaws.

3.2 Voting Members. All Class A members of the Association shall be represented by a Voting Member, whose authorization to cast votes on behalf of the Class A members and whose manner of designation shall be as set forth in the Declaration.

3.3 Quorum. A quorum at any meeting of the Association's members shall consist of Voting Members entitled to cast votes representing at least one-third of the total votes of the Association's Class A members as determined in the manner set forth in Article 4.3.A of the Declaration.

3.4 Proxies. Votes may be cast by Voting Members in person, by proxy, or by written ballot. Proxies shall be valid only for the particular meeting designated thereon and must be filed with the Secretary at or before the designated time of the meeting.

3.5 Record Date. The number of votes to which any Class A Member is entitled at any meeting of members shall be determined as of the date fixed by the Board of Directors as the record date for such meeting, provided that such record date shall not be more than 60 days or less than 10 days prior to the date of such meeting. In the event the Board of Directors does not set a record date for any meeting of members, the record date for such meeting shall be the date of the notice of such meeting. The determination of the number of votes to which any Class A Member is entitled as of the record date shall

be final, and no conveyance or acquisition of any Parcel arising after such record date shall be taken into consideration in determining the number of votes to which such member is entitled at such meeting.

3.6 Required Vote. Except as otherwise provided by law or by the provisions of the Articles of Incorporation, these Bylaws, or the Declaration, the affirmative vote of Voting Members representing a majority of the Class A membership voting rights (as determined pursuant to Article 4.3.A of the Declaration) represented at any duly called members' meeting at which a quorum is present shall be necessary for approval of any matter and shall be binding upon all members.

ARTICLE 4
ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP

4.1 Annual Meeting. An annual meeting of the membership of the Association shall be held each year during November or such other month as the Board of Directors may determine. The date, time, and place of the annual meeting shall be designated by the Board of Directors. The annual meeting shall be held for the purpose of electing Directors and transacting any other business authorized to be transacted by the members.

4.2 Special Meetings. Special meetings of the members of the Association shall be held whenever called by the President or by a majority of the Board of Directors.

4.3 Member Attendance. Although Class A members shall be represented at meetings of the Association membership exclusively by their respective Voting Members, each Class A member of the Association shall be entitled to attend and observe all annual and special meetings of members. Although Class B, C, and D members have no voting rights generally, they shall be entitled to attend and participate in all annual and special meetings of members.

4.4 Notices. Written notice of all members' meetings, annual or special, shall be given to all Class B, C, and D members and to all Voting Members (but not to Class A members individually). Such notice shall be given by the President, Vice President, or Secretary or by such other officer of the Association as may be designated by the Board of Directors. Such notice shall state the time and place of the meeting and the purpose for which the meeting is called and shall be given not less than 14 days prior to the date set for such meeting. If presented personally, a receipt of such notice shall be signed by the member or Voting Member, indicating the date on which such notice was received. If mailed, such notice shall be deemed to be properly given when deposited in the United States mails, postage prepaid, addressed to the member or Voting Member at his post office address as the same appears on the records of the Association. Proof of such mailing may be given by the affidavit of the person giving the notice and filed with the Association's minutes of meetings. Any member or Voting Member may, by written waiver signed by such member or Voting Member, waive such notice, and such waiver, when filed with the Association's minutes of meetings (whether executed and filed before or after the meeting), shall be deemed equivalent to the giving of such notice to such member or Voting Member.

4.5 Lack of Quorum. If any members' meeting cannot be organized because a quorum has not attended or because the greater percentage of the membership required to constitute a quorum for particular purposes has not attended, wherever the latter percentage of attendance may be required by the terms of the Articles of Incorporation, these Bylaws, or the Declaration, the Voting Members who are present, either in person or by proxy, may adjourn the meeting from time to time until a quorum is present.

4.6 Presiding Officer. At meetings of the membership, the President, or in his absence the Vice President, shall preside, or in the absence of both, the Board of Directors shall select a chairman.

ARTICLE 5
BOARD OF DIRECTORS

5.1 Number. The affairs of the Association shall be managed by a Board of Directors consisting initially of three Directors. The number of Directors may be changed by resolution of the Board of Directors.

5.2 Quorum. A majority of the Board of Directors shall constitute a quorum to transact business at any meeting of the Board of Directors, and the action of a majority present at a meeting at which a quorum is present shall constitute the action of the Board of Directors.

5.3 Vacancies. Any vacancy occurring on the Board of Directors due to a director's death, resignation, or removal shall be filled by the Board of Directors, except that the Class B member shall fill any vacancy created by the death, resignation, or removal of any Director appointed by the Class B member. A Director appointed to fill a vacancy, whether by the Board of Directors or the Class B member, shall serve for the unexpired term of his predecessor in office.

ARTICLE 6
POWERS AND DUTIES OF THE BOARD OF DIRECTORS

6.1 Powers. The Board of Directors shall have power:

A. To call meetings of the members.

B. To appoint and remove at pleasure all officers, agents, and employees of the Association, prescribe their duties, fix their compensation, and require of them such security or fidelity bond as it may deem expedient. Nothing contained in these Bylaws shall be construed to prohibit the employment of any member, officer, or Director of the Association in any capacity whatsoever.

C. To establish, levy and assess, and collect the Assessments necessary to operate the Association, carry on its activities, and pay the Association Expenses and to create such reserves for extraordinary expenditures as may be deemed appropriate by the Board.

D. To adopt and publish rules and regulations governing and restricting the use and maintenance of the Community (or any part thereof or improvements thereon) and the personal conduct of the members and their guests within the Community.

E. To authorize and cause the Association to enter into contracts for the day-to-day operation of the Association and the discharge of its responsibilities and obligations.

F. To appoint such committees as the Board may desire and to grant to such committees such duties and responsibilities as the Board may deem advisable.

G. To enforce by appropriate legal means the provisions of the Declaration, the Articles of Incorporation, and these Bylaws.

H. To exercise for the Association all powers, duties, and authority vested in or delegated to the Association, except those reserved to the members in the Declaration or in the Articles of Incorporation of the Association.

6.2 Duties. It shall be the duty of the Board of Directors:

A. To cause to be kept a complete record of all its acts and corporate affairs.

B. To supervise all officers, agents, and employees of the Association, and to see that their duties are properly performed.

C. With reference to Assessments of the Association:

(1) To fix the amount of the Assessments against the members for each fiscal year in accordance with the provisions of the Declaration;

(2) To prepare a roster of the members and Assessments applicable thereto, which shall be kept in the office of the Association and shall be open to inspection by any member; and

(3) To send written notice of each Assessment to each member entitled thereto.

D. To make payment of all ad valorem taxes assessed against Association property, real or personal.

E. To pay all expenses incurred by the Association pursuant to the Declaration or any Supplemental Declaration for repairs, maintenance, services, insurance, and other operating expenses.

F. To ensure that all obligations of the Association under the Declaration and any Supplemental Declaration are performed.

ARTICLE 7
MEETINGS OF DIRECTORS

7.1 Annual Meeting. An annual meeting of the Board of Directors shall be held immediately after, and at the same place as, the annual meeting of members.

7.2 Regular Meetings. Regular meetings of the Board of Directors shall be held at such time and place as provided by appropriate resolution of the Board of Directors.

7.3 Special Meetings. Special meetings of the Board of Directors shall be held when called by the President of the Association or by a majority of the Directors.

7.4 Notice. Notice of regular or special meetings of the Board of Directors shall be given to each Director, personally or by mail, telephone, or telegram, at least three days prior to the day named for such meeting, which notice shall state the time and place of the meeting and, as to special meetings, the purpose of the meeting, unless such notice is waived.

7.5 Consents. The transaction of any business at any meeting of the Board of Directors, however called and noticed, or wherever held, and any Board action taken in lieu of a meeting, shall be as valid as though made at a meeting duly held after regular call and notice, provided that, either before or after the meeting or the effective date of the action taken, each of the Directors signs a written waiver of notice and consent to the holding of such meeting, or an approval of the minutes thereof, or a consent to the action taken in lieu of a meeting. All such waivers, consents, or approvals shall be filed with the Association's minutes of meetings.

ARTICLE 8
OFFICERS

8.1 Number. The officers of the Association shall be a President, a Vice President, a Secretary, and a Treasurer, and such other officers as may be elected in accordance with the Articles of Incorporation. The President shall be a member of the Board of Directors.

8.2 Election. All the officers of the Association shall be elected by the Board of Directors at the annual meeting of the Board of Directors. New offices may be created and filled at any meeting of the Board of Directors.

8.3 Vacancies. A vacancy in any office because of death, resignation, or other termination of service may be filled by the Board of Directors for the unexpired portion of the term.

8.4 Removal. All officers shall hold office at the pleasure of the Board of Directors. If an officer is removed by the Board of Directors, such removal shall be in accordance with the contract rights, if any, of the officer so removed.

8.5 President. The President shall preside at all meetings of the Board of Directors, shall see that orders and resolutions of the Board of Directors are carried out, and shall sign all notes, leases, mortgages, deeds, and other written instruments on behalf of the Association.

8.6 Vice President. The Vice President, or the Vice President so designated by the Board of Directors if there is more than one Vice President, shall perform all the duties of the President in his absence. The Vice President(s) shall perform such other acts and duties as may be assigned by the Board of Directors.

8.7 Secretary. The Secretary shall be ex officio the Secretary of the Board of Directors and shall record the votes and keep the minutes of all proceedings in a book to be kept for that purpose. He shall keep the records of the Association. He shall maintain a record of the names of all of the members of the Association, together with their Neighborhood affiliation, if any, and their addresses as registered by such members.

8.8 Treasurer. The Treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as may be directed by resolution of the Board of Directors; provided, however, that a resolution of the Board of Directors shall not be necessary for disbursements made in the ordinary course of business conducted within the limits of the budgets adopted by the Board of Directors. The Treasurer or his appointed agent shall keep proper books of account and shall prepare the annual budgets, statements of receipts and disbursements, and balance sheets.

8.9 Salaries. The salaries, if any, of the officers of the Association shall be set by the Board of Directors.

ARTICLE 9
FISCAL MANAGEMENT

9.1 General. The Board of Directors shall conduct the fiscal management of the Association in accordance with the provisions of the Declaration and Articles of Incorporation.

9.2 Fiscal Year. The fiscal year of the Association shall be the calendar year.

9.3 Budgets. The Board of Directors shall adopt the budgets prescribed by the Declaration for each fiscal year, which budgets, respectively, shall contain estimates of the cost of performing the functions of the Association. The adoption of any budget shall not, however, be construed as restricting the right of the Board of Directors, at any time in its sole discretion, to levy any Special Assessment in the event that the budget originally adopted shall appear to be insufficient to pay costs and expenses of operation, maintenance, and management; in the event of emergencies; or in the event the Association's reserves are insufficient to cover expenditures for capital improvements or replacements.

9.4 Loans. No loans shall be contracted on behalf of the Association, and no evidences of indebtedness shall be issued in its name, unless authorized by a resolution of the Board of Directors. With respect to any loan whose proceeds are used in connection with the Community Common Areas, the Board of Directors may authorize the pledge and assignment of the Community Assessments and the lien rights of the Association as security for the repayment of such loan. With respect to any loan whose proceeds are used in connection with a specific Neighborhood, the Board of Directors may authorize the pledge and assignment of the Neighborhood Assessments applicable to the Neighborhood and the lien rights of the Association as security for the repayment of such loan.

9.5 Monetary Instruments. All checks, drafts or other orders for payment of money, notes, or other evidences of indebtedness issued in the name of the Association shall be signed by such officer or officers, agent or agents, of the Association and in such manner as shall from time to time be determined by resolution of the Board of Directors.

9.6 Deposit of Funds. All funds of the Association shall be deposited from time to time to the credit of the Association in such savings and loan associations, banks, trust companies, or other depositories as the Board of Directors may select.

9.7 Fidelity Bonds. Fidelity bonds may be required by the Board of Directors from all officers and employees of the Association and from any contractor handling or responsible for Association funds. The amount of such bonds shall be determined by the Board of Directors. The premiums on such bonds shall be paid by the Association.

ARTICLE 10
NEIGHBORHOOD COMMITTEES

The Declaration contemplates the establishment of Neighborhood Committees to advise the Board of Directors on matters affecting the interests of the Neighborhood Owners. The composition of the Neighborhood Committees and the delineation of their powers and duties are set forth in the Declaration. With respect to each budget prepared by the Board of Directors for a Neighborhood, the Board of Directors shall request and consider the Neighborhood Committee's recommendations concerning the budget prior to its adoption by the Board of Directors. The Neighborhood Committees shall perform such other functions and duties as may be prescribed by the Declaration, a Supplemental Declaration, or the Board of Directors.

ARTICLE 11
OFFICIAL SEAL

The Association shall have an official seal, which shall be in circular form bearing the name of the Association, the word "Florida," the words "Corporation Not For Profit," and the year of incorporation.

ARTICLE 12
BOOKS AND RECORDS

The books, records, and other papers of the Association shall be available at the Association's office and shall be subject to inspection by any of the Association members during regular business hours.

ARTICLE 13
AMENDMENTS

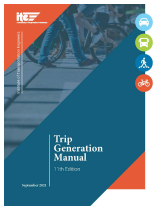
These Bylaws may be altered, amended, or repealed by a majority vote of the Directors present at a duly constituted meeting of the Board of Directors. Any proposed alteration, amendment, or repeal shall be contained in the notice of the meeting at which it will be considered. Notwithstanding the foregoing, no amendment to the Bylaws prior to the Final Development Date shall be effective without the written consent of the Class B member.

JMH-309013.4

Joint Exhibit 34

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Trip Generation 11th Edition - Print Edition



ITE Trip Generation 11th Edition - Print Edition

This new edition of the Trip Generation Manual enhances the 10th edition's modernized content and data set - making it an invaluable resource.

The 11th edition is a five (5) volume printed set that includes a Desk Reference and four volumes of data plots:

-All the latest multimodal trip generation data for urban, suburban and rural applications,
-Reclassified land uses to better meet user needs,
-Copies of all land use definitions, plots and supporting materials.

By ordering this print edition, you will only receive the print version of TripGen11 and no access to the digital version. There are combined digital and printed options available at a discount. For more details, go here: https://www.ite.org/technical-resources/topics/trip-and-parking-generation/

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Publisher: ITE

Format: Printed Version

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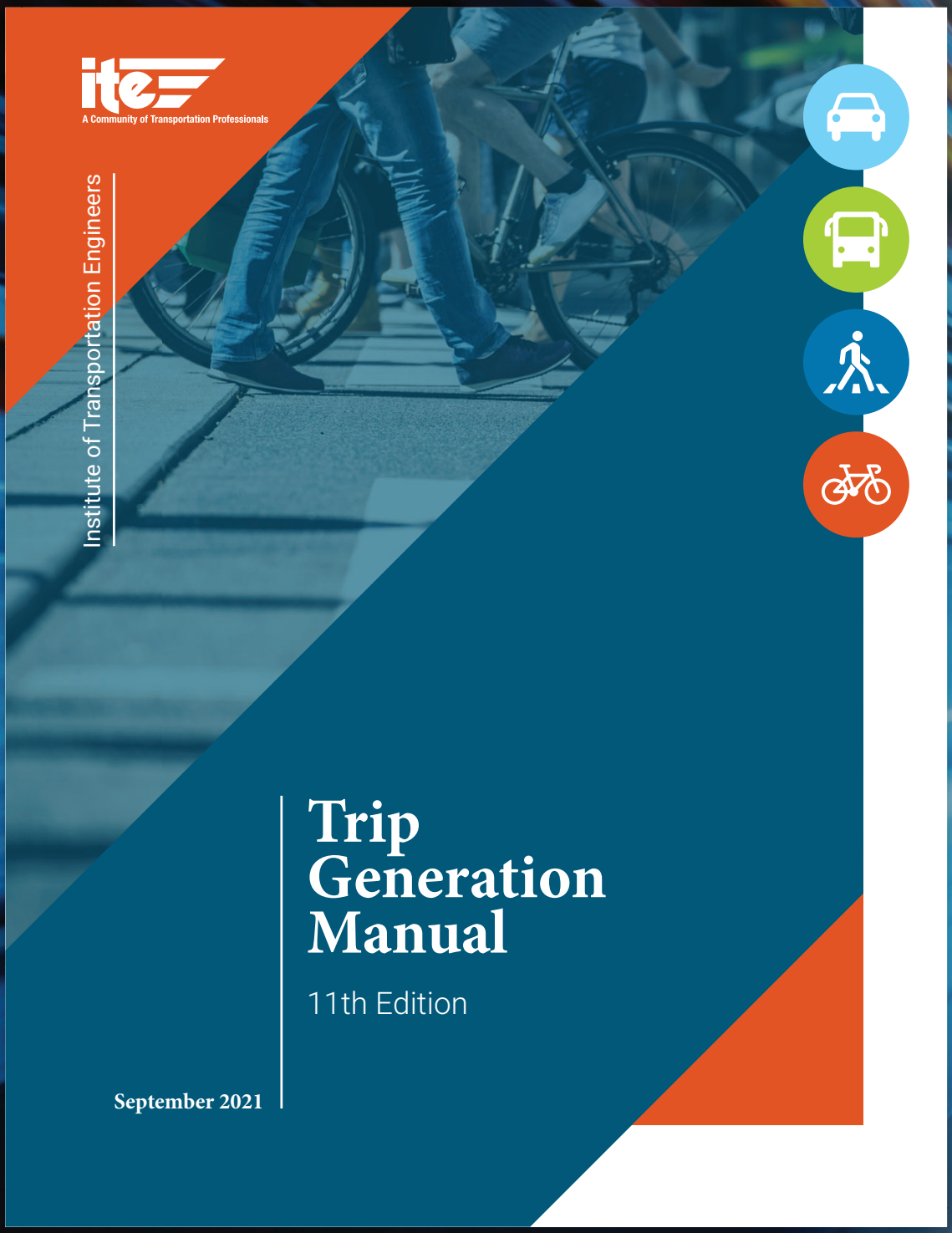
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Updates to the Trip Generation Manual, 11th Edition

In September 2021, ITE released the 11th Edition of the transportation profession's leading source of trip generation information—*Trip Generation Manual* (TGM). This new edition updates and enhances the 10th Edition by providing the latest multimodal trip generation data for urban, suburban, and rural locations.

Trip Generation Manual contains text, tables, data plots, and statistics that describe current state-of-the-practice understanding of the relationship between walk, bicycle, transit, motor vehicle, and truck trip generation and characteristics associated with an individual development site or land use. TGM also presents land use descriptions and data plots for combinations of available land uses, time periods, independent variables, and settings contained in the ITE database.

The 11th Edition of TGM has undergone numerous changes in content and format when compared to the 10th Edition. The significant improvements described in this article are due largely to the efforts, attention, and diligence of the Trip Generation Review Panel.

TGM Format and Organization Changes

The primary means for accessing the 11th Edition is through the ITETripGen web app. The web app provides immediate access to integrated digital copies of all related land use definitions, plots, and supporting materials (including the desk reference, pass-by trip generation information, *Trip Generation Handbook*, truck trip generation, hourly distribution data, and supplemental plots). The entire PDF version of the 11th Edition is now accessible through the web app.

Trip Generation Manual, 11th Edition is also offered in five hard copy volumes. The first volume (Desk Reference) includes the chapter content that establishes the format, framework, and content of the overall 11th Edition (same as for the 10th Edition).

Volume 2 includes the land use description pages and data plots for the 43 land uses with sites in either a dense multi-use urban setting or center city core setting. If data are available, plots are provided for vehicle, person, walk, bicycle, transit, and walk+bicycle+transit trips.

Volumes 3 through 5 contain the land use description pages and data plots for the 177 land uses with sites in either a suburban or rural setting. Data plots are provided for vehicle and walk+bicycle+transit trips.

Further, the 11th Edition includes over 900 supplemental data plots accessible through the ITETripGen web app or through access to a protected ITE website for hard copy users. These supplemental plots include truck trip plots for all land uses for which data are available and individual modal and person trip plots for suburban and rural settings.

ITETripGen Web App Updates

The menu order on the ITETripGen Graph Look Up page has been changed to allow selection of the site setting immediately after selection of a land use code. The default site setting is General Urban/Suburban. By promoting this selection to earlier in the web app data plot definition process, the analyst can see what independent variable and time period combinations have data plots available in their site setting. This early definition also minimizes potential errors in the mixing of urban and suburban data plots.

For the 10th Edition, upon selection of a land use, the app provided a "Click for more details" link that pulled up a PDF of the

Land Use Description page for the specified land use. For the 11th Edition, the link pulls up a PDF of the Land Use Description page plus all data plots associated with that land use. The PDF format enables the analyst/user to print individual pages or to copy/paste selected data plots into reports as desired.

The Technical Support button on the left banner of the Graph Look Up page has been expanded by adding three buttons:

- TGM Desk Reference–includes all nine chapters of the 11th Edition Desk Reference (e.g., definitions of terms, list of data sources)
- TGM Appendices–includes tables with time-of-day distributions, tables with pass-by trips (previously available only in *Trip Generation Handbook*), modal data plots for sites in suburban settings, truck data plots for all land uses, and modal and truck percentages for all land uses
- Supporting Trip Generation Documents–includes *Trip Generation Handbook* 3rd Edition and other ITE resources that also reside on the ITE Trip Generation Resource Page

Trip Generation Land Use Description/Data Updates

Industrial Land Uses (100s)

The 10th Edition Supplement introduced the use of land use subcategories for High-Cube Fulfillment Center Warehouse (Land Use 155) with sort and non-sort subcategories. These subcategories provide, in essence, additional land uses as subsets of the current Land Use 155.

Marijuana Cultivation and Processing Facility (Land Use 190) has been added as a new land use.

Residential Land Uses (200s)

Single-Family Attached Housing (Land Use 215) has been added as a new land use. Sites included in this land use are any single-family housing unit that shares a wall with an adjoining dwelling unit, whether the walls are for living space, a vehicle garage, or storage space. The database includes duplexes, townhouses, and row houses.

The number-of-floors threshold between Multifamily Housing (Low-Rise) (Land Use 220) and Multifamily Housing (Mid-Rise) (Land Use 221) has been revised. Low-rise sites are now defined as having three or fewer floors, and mid-rise sites have between four and 10 floors.

The proximity of a residential site to a rail transit station has been added as a factor to consider when using any of the multifamily housing land uses (Land Uses 220, 221, and 222). The default land use subcategory selection in the web app (and the initial set of data plots in the PDF and hard-copy versions) is that the site is not located close to a rail transit station. If the study site is located within a half-mile walk of a rail transit station, the land use subcategory "Close to Rail Transit" is the appropriate selection.

The 10th Edition Supplement introduced the use of land use subcategories for Affordable Housing (Land Use 223) with Income Limits and Senior as its two land use subcategories. The 11th Edition has added a third subcategory for affordable housing for special needs residents (which can include persons with physical and mental impairments, single mothers, recovering addicts, and others).

Off-Campus Student Apartments are now divided into low-rise, mid-rise, and high-rise land uses (Land Uses 225, 226, and 227).

The proximity of an off-campus student apartment to a college campus was added with the 10th Edition Supplement as a factor to consider when using any of the off-campus student apartment land uses (Land Uses 225, 226, and 227). The default land use subcategory selection in the web app (and the initial set of data plots in the PDF and hard copy versions) is named/titled "Adjacent to Campus." If the study site is located more than a half-mile walk of the college campus, the land use subcategory "Over 1/2 Mile from Campus" is the appropriate selection.

Multifamily Residential with 1st-Floor Commercial land uses (Land Uses 231 and 232) have been renamed Multifamily Residential with Ground-Floor Commercial, and have been split into Low-Rise, Mid-Rise, and High-Rise (Land Uses 230, 231, and 232) using the same number-of-floors thresholds as Land Uses 220, 221, and 222.

For the Multifamily Residential with Ground-Floor Commercial land uses (230, 231, and 232), the amount of gross floor area (GFA) designated for commercial use is used as a factor when estimating site trip generation. The default land use subcategory selection in the web app (and the initial set of data plots in the PDF and hard copy versions) is named/titled "GFA (1-25k)" which indicates the commercial GFA is between 1,000 and 25,000 square feet. The other commercial GFA choice provided is "GFA (25-65k)."

Senior Adult Housing–Detached (Land Use 251) and Senior Adult Housing–Attached (Land Use 252) have been combined into a new Senior Adult Housing–Single-Family (Land Use 251) that includes both detached and attached housing. New data have been used to create a new land use, Senior Adult Housing–Multifamily (Land Use 252).

The 11th Edition removes occupied dwelling units as an independent variable for the residential land uses in the 200s: (Land Uses 210 through 223, 230 through 252, and 260 through 270). The total number of dwelling units is considered a more accurate and reliable independent variable and has been retained.

The 11th Edition removes occupied beds as an independent variable for land uses that include at least some elements of group quarters living: Affordable Housing (Land Use 223), Assisted Living (Land Use 254), and Congregate Care Retirement Community (Land Use 255). The total number of beds is considered a more accurate and reliable independent variable and has been retained.

Recreational Land Uses (400s)

Movie Theater (Land Use 444) and Multiplex Movie Theater (Land Use 445) have been combined into a single land use Movie Theater (Land Use 445) that now contains all movie theater data.

Arena (Land Use 450) has been removed as a land use after reexamination of the single study site in the database indicated the site may not conform to the land use description.

The primary independent variable for Snow Ski Area (Land Use 466) has been changed to the number of lifts.

Casino/Video Lottery Establishment (Land Use 473) has been renamed Casino (Land Use 473) because the database now includes full-service casinos as well as the smaller video lottery establishments.

Institutional Land Uses (500s)

Primary and secondary school land uses have been reorganized to provide a more logical numbering sequence.

- Public school land uses are now assigned within the 520-528 range–Elementary School (Land Use 520), Middle/Junior High School (Land Use 522), and High School (renumbered as Land Use 525). Because School District Office consists entirely of facilities for public schools, it has been recoded as Land Use 528.
- Private school land uses are now assigned within the 530-534 range–Private School (K-8) (renumbered as Land Use 530), Private School (K-12) (renumbered as Land Use 532), and Private High School (added as Land Use 534).
- Charter school land uses are now assigned within the 536-538 range–Charter Elementary School (renumbered as Land Use 536) and Charter School (K-12) (added as Land Use 538).

Prison (Land Use 571) has been renamed Adult Detention Facility because the database includes both jails and prisons.

The 11th Edition removes occupied beds as an independent variable for Adult Detention Facility (Land Use 571). The total number of beds is considered a more accurate and reliable independent variable and has been retained.

Medical Land Uses (600s)

The 11th Edition removes occupied beds as an independent variable for Nursing Home (Land Use 620). The total number of beds is considered a more accurate and reliable independent variable and has been retained.

Office Land Uses (700s)

The description of a Small Office Building (Land Use 712) has been changed to be a single-tenant office with less than or equal to 10,000 square feet of GFA. The description for General Office Building (Land Use 710) has been adjusted accordingly.

Trip Generation Manual, 11th Edition, Review Panel

Justin Barrett (M), JCB Engineering
Paul Basha (M), Summit Land Management
Gina Bonyani, FDOT
Chris Brehmer (M), Kittelson & Associates
Kenneth Cram (F), Bayside Engineering
Debbie Dantin (M), Dantin Consulting
Brian Dempsey (F), Provident Design Engineering
Alison Felix, Metropolitan Area Planning Council
John Gard (M), Fehr & Peers
Wes Guckert (F), The Traffic Group
Dan Hardy (M), Renaissance Planning Group
Randy McCourt (F), ITE Past President Retired
Nadereh Moini (M), New Jersey Sports and Exposition Authority
Cole Piechotta (M), City of Calgary
Fede Puscar (M), Bunt & Associates
Lisa Schletzbaum (M), MassDOT
Peter Terry (F), Benchmark Civil Engineering
Eric Tripi (M), GHD
Paul Villaluz (F), Westwood Professional Services
Tony Voigt (M), Voigt Associates
Mike Workosky (M), Wells and Associates
Brad Yarger, Yarger Engineering, Inc.
Darlene Danehy Yellowhair (M), Psomas
Diane Zimmerman (M), Zimmerman Traffic Engineering



The proximity of a Medical-Dental Office Building to a hospital has been added as a factor to consider for Land Use 720. The default land use subcategory selection in the web app (and the initial set of data plots in the PDF and hard copy versions) is that the site is stand-alone and is not adjacent to or within a hospital campus. If the study site is located within or near a hospital campus, the land use subcategory "Within/Near Hospital Campus" is the appropriate selection.

Government Office Complex (Land Use 733) has been removed because its single data point consists of a mixed-use site and not a single land use. The data is of limited value due to the uniqueness of the site.

The 11th Edition removes occupied GFA as an independent variable for all office land uses. Total GFA is considered a more accurate and reliable independent variable and has been retained.

Retail Land Uses (800s)

Shopping Center (Land Use 820) has been divided into three separate land use codes:

- Shopping Center (>150k) (Land Use Code 820) for sites with more than 150,000 square feet of gross leasable area (GLA)
- Shopping Plaza (40-150k) (Land Use Code 821) for sites between 40,000 and 150,000 square feet GLA
- Strip Retail Plaza (<40k) (Land Use 822) for sites with less than 40,000 square feet GLA

Whether or not a Shopping Plaza includes a supermarket has been added as a factor to consider for Land Use 821. The default land use subcategory selection in the web app (and the initial set of data plots in the PDF and hard copy versions) is that the shopping plaza includes a supermarket. If the study site does not include a supermarket, the land use subcategory "Supermarket - No" is the appropriate selection.

Convenience Market (Land Use 851) has been renamed Convenience Store (Land Use 851).

The data from the existing Discount Supermarket (Land Use 854) have been reclassified. The large discount supermarkets have been merged into the overall Supermarket (Land Use 850) and Land Use 854 has been removed as a land use.

Services Land Uses (900s)

Quality Restaurant (Land Use 931) has been renamed Fine Dining Restaurant (Land Use 931).

Gross floor area (GFA) has been removed as an independent variable and replaced by the number of drive-through lanes for two land uses:

- Fast-Food Restaurant with Drive-Through Window and No Indoor Seating (Land Use 935)
- Coffee/Donut Shop with Drive-Through Window and No Indoor Seating (Land Use 938)

Examination of the study sites that comprise Bread/Donut/Bagel Shop without Drive-Through Window (Land Use 939) and Bread/Donut/Bagel Shop with Drive-Through Window (Land Use 940) revealed that the sites included in these land uses fit the definition and trip generation characteristics of the existing coffee/donut shop land uses. Therefore, land uses 939 and 940 have been removed and the study sites reassigned to the appropriate coffee/donut shop land uses (Land Uses 936 and 937).

Convenience Market with Gasoline Pumps (Land Use 853), Gasoline/Service Station with Convenience Market (Land Use 945), and Super Convenience Market/Gas Station (Land Use 960) have been reassigned to a single new land use Convenience Store/Gas Station (Land Use 945). Land Uses 853 and 960 have been removed.

Multiple land use subcategories have been added to Land Use 945 to allow for a multi-variable evaluation of sites with single-variable data plots. All study sites are assigned to one of three subcategories, based on the number of vehicle fueling positions (VFP) at the site:

- Between 2 and 8 VFP
- Between 9 and 15 VFP, and
- Between 16 and 24 VFP

For each VFP range subcategory, Land Use 945 data plots are presented with GFA as the independent variable for all available time periods and trip types. The use of both GFA and VFP (as the independent variable and land use subcategory, respectively) provides a significant improvement in the reliability of a trip generation estimate when compared to the single-variable data plots in prior editions of *Trip Generation Manual*. Further, the study sites are also assigned to one of three other subcategories, based on the convenience store GFA at the site:

- Between 2,000 and 4,000 square feet
- Between 4,000 and 5,500 square feet, and
- Between 5,500 and 10,000 square feet

For each GFA subcategory range, Land Use 945 data plots are presented with VFP as the independent variable for all available time periods and trip types. The use of both VFP and GFA (as the independent variable and land use subcategory, respectively) provides a significant improvement in the reliability of a trip generation estimate. Each combination of GFA and VFP values for a convenience store/gas station, the two sets of data plots produce two estimates of site-generated trips.

The trips recorded for Truck Stop (Land Use 950) have been modified to include only truck trips. Data plots now use the commercial VFP as the independent variable rather than general use VFP or site GFA.

Three service land uses with a focus on the consumption of alcoholic beverages are now grouped in the 970s. Wine Tasting Room (Land Use 970) has been renamed to better reflect the data contained in this land use. Brewery Tap Room (Land Use 971) has been added as a new land use. Drinking Place has been renumbered as Land Use 975.

Long-Term Effects of COVID Pandemic on Trip Generation

The COVID-19 pandemic has had immediate and significant impacts on the North American economy and on many elements of personal and business trip-making. Some of these effects, still ongoing as of this writing, are expected to be long lasting. The extent to which these impacts will have long-term impacts on ITE Trip Generation rates remains unknown.

All data plots and statistics presented in *Trip Generation Manual* (TGM) are based on data collected prior to the pandemic. ITE recognizes that some TGM data plots and statistics may need to be updated once post-pandemic conditions stabilize. ITE does not know with certainty which data plots and statistics will need to be updated until future study site data are collected and analyzed. Nevertheless, *Trip Generation Manual* identifies and discusses several land uses for which measurable changes in trip generation characteristics may occur. **itej**

Resources

For additional guidance on impacts of COVID-19 on travel demand, ITE has developed a COVID-19 resource web page that presents a wide variety of technical resource material to help provide an understanding of anticipated short- and longer-term impacts of COVID-19 on the transportation system and trip making characteristics.

See **www.ite.org/about-ite/covid-19-resources** for more information. Of particular relevance is the ITE report titled "What a Transportation Professional Needs to Know about Counts and Studies during a Pandemic." The report can be accessed through the ITE website: **https://ecommerce.ite.org/IMIS/ItemDetail?iProductCode=IR-148-E.**



Resources

Trip and Parking Generation Resources

The following is a listing of the most recent publications for this topic.

PUBLICATION TITLE

Updates to the Trip Generation Manual, 11th Edition
In September 2021, ITE released the 11th Edition of the transportation profession's leading source of trip generation information--Trip Generation Manual (TGM). This new edition updates and enhances the 10th Edition by providing the latest multimodal trip generation data for urban, suburban, and rural locations.
Oct 1, 2021

Parking Requirements for Limited-Service Hotels
An empirical study of five limited-service hotels ("hotels") located in South Florida, USA was performed to measure actual parking demand. This study is based on 35 total field-data-collection observations, seven different observations for each hotel, one for each day of the week, all performed at or near the 1 a.m. peak hour of occupancy for hotel guest rooms (all times are Eastern Standard Time). Following is a summary of key findings and conclusions.
Feb 1, 2021

Trip Generation 10th Edition Supplement - Hard Copy
The Trip Generation, 10th Edition Supplement offers significantly expanded multimodal data, including walk, transit, bicycle, and truck data. In addition, new land uses are available (high-cube fulfillment center warehouse, high-cube parcel hub warehouse and affordable housing has been as a new land use).
Feb 3, 2020

Trip Generation 10th Edition Supplement - Electronic
The Trip Generation, 10th Edition Supplement offers significantly expanded multimodal data, including walk, transit, bicycle, and truck data. In addition, new land uses are available (high-cube fulfillment center warehouse, high-cube parcel hub warehouse and affordable housing has been as a new land use).
Feb 3, 2020

Trip Generation Web-Based App
Trip Generation Web-Based App
Nov 4, 2019

ITEParkGen: Your Companion to the ITE Parking Generation Manual 5th Edition
ITEParkGen: Your Companion to the ITE Parking Generation Manual 5th Edition
Oct 24, 2019

Decision Support Methodologies for Parking Management on University Campuses
What's New in Trip and Parking Generation
Jul 23, 2019

Fulfillment Center Trip Generation
A large commercial development, spanning 700 acres, within a city in western San Joaquin County, CA, USA was approved after completion of the Environmental Impact Report in 2013. The development adjoins a number of collector distributor roads, and is in close proximity to two Interstate freeways 580 and 205, both running east to west at this location. International Parkway, a major collector road--slated to be improved to a major arterial--runs north to south between the two interstate freeways.
Jul 1, 2019

Parking Generation Manual, 5th Edition - FAQs
Parking Generation Manual, 5th Edition - FAQs
Mar 22, 2019

PUBLICATION TITLE

Features of the New ITE Parking Generation Manual
Latest Edition of the ITE Parking Generation Manual: What's Included • 60 percent new data than previous versions • Additional analysis capabilities (e.g., day of the week variations, seasonal variations) • Presents information for 121 land uses--including 19 new uses • Available in both hardcopy and electronic formats • Web-based app ITEParkGen allows convenient electronic access to entire data set
Feb 1, 2019

Parking Generation, 5th Edition - Printed Copy, Electronic, & App
This updated manual follows the lead of the modernized, updated, and expanded Trip Generation Manual, 10th Edition. The analyses in Parking Generation will differentiate the levels of parking demand observed at rural, general urban/suburban, dense multi-use urban, and center city core sites.
Jan 31, 2019

Parking Generation, 5th Edition - All Electronic (PDF + App)
This updated manual follows the lead of the modernized, updated, and expanded Trip Generation Manual, 10th Edition. The analyses in Parking Generation will differentiate the levels of parking demand observed at rural, general urban/suburban, dense multi-use urban, and center city core sites.
Jan 31, 2019

Hourly Distribution of Entering and Exiting Vehicle Trips by Land Use
Hourly Distribution of Entering and Exiting Vehicle Trips by Land Use
Aug 17, 2018

Time of Day Distribution
Hourly Distribution of Entering and Exiting Vehicle Trips by Land Use
Aug 17, 2018

Parking Generation Data Submission Form
Parking Generation Data Submission Form
Jul 11, 2018

Trip Generation Handbook Spreadsheet
Trip Generation Handbook Spreadsheet
Jul 11, 2018

Parking Generation, 4th Edition - Errata
Parking Generation, 4th Edition - Errata
May 14, 2018

Parking Generation, 3rd Edition - Errata
Parking Generation, 3rd Edition - Errata
May 14, 2018

Trip Generation, 9th Edition - Errata
Trip Generation, 9th Edition - Errata
May 14, 2018

Trip Generation, 8th Edition - Errata
Trip Generation, 8th Edition - Errata
May 14, 2018

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