

# MIAMIBEACH

OFFICE OF THE CITY ATTORNEY

RAUL J. AGUILA, CITY ATTORNEY

## COMMISSION MEMORANDUM

**To:** Mayor Dan Gelber  
Members of the City Commission

**Date:** July 2, 2018

**cc:** Jimmy L. Morales, City Manager  
Rafael E. Granado, City Clerk

**From:** Raul J. Aguila, City Attorney



**Subject:** Discussion regarding the litigation in *Sunset Land Associates, LLC v. Mark Festa, Maureen Festa, Vincent J. Festa, The Festa Trust, Beach Towing Services, Inc., Beach Towing Services of Miami, Inc., Consolidated Storage Yards, Inc., Goofe Partners, Inc., Miami Avenue Properties, Inc., 1718 Bay Road Corporation, Festa Transport and Storage, Inc., and Corona Storage, LLC* (Florida Eleventh Judicial Circuit Case No. 2016-4547 CA 01).

I have placed the above discussion item on the July 2, 2018 City Commission meeting agenda, in order to advise the Mayor and City Commission of the Circuit Court's informal request(s) for the City's position on an issue that is pending in the above-referenced litigation (the "Litigation"), to which the City is not a party.

On July 28, 2016, Sunset Land Associates, LLC filed a Second Amended Complaint in the Litigation which, at Count 18, "requests that the Court declare that Defendants' operation of a towing service at 1349 Dade Boulevard is unlawful, [and] issue an injunction permanently barring Beach Towing and the Festa Defendants from operating a vehicle towing service at that site . . . ." Second Amended Complaint, at Count 18, attached hereto as Exhibit "A". Directly at issue in the Litigation is whether, pursuant to the City's Land Development Regulations, the current towing operation at 1349 Dade Boulevard is (1) a legal, non-conforming use, or (2) an illegal use. See Second Amended Complaint, at Count 18.

At a hearing on April 23, 2018, on Defendants' Motion for Partial Summary Judgment, the Honorable Judge Rodolfo A. Ruiz suggested, on several occasions, that the pleadings be amended to join the City as a party to the Litigation or, alternatively, that the City file an *amicus curiae* brief stating the City's position. The Court recognized that the City has an interest in the interpretation of its Land Development Regulations, because "all of [the City's] resolutions are at [issue]. All of [the City's] permits are at issue." See Transcript of April 23, 2018 Hearing, at 39:17-18, attached hereto as Exhibit "B". Subsequently, at a hearing on May 29, 2018, Judge Ruiz stated, "I would like to have the City of Miami Beach come to court." See Transcript of May 29, 2018 Hearing, at 10:15-16, attached hereto as Exhibit "C".

The Court ruled, on June 12, 2018, that "the City of Miami Beach is not an indispensable party" to the Litigation. Indeed, since I became aware of the dispute, my position has been to try and

keep the City out of the Litigation. As our office advised the Court at the hearing on June 12, 2018, we have taken the position that the Litigation is a private dispute between the parties, and that the City would prefer not to be involved.

However, in light of Judge Ruiz's comments on April 23, 2018, and May 29, 2018, and given the City's interest in the consistent application of its Land Development Regulations, the City may have an interest in assisting the Court with the underlying zoning issue in Count 18. Further, Beach Towing is one of only two current permittees providing towing services to the City's Parking Department and Police Department, and the public services provided by Beach Towing are implicated in the Litigation.

I am therefore seeking the City Commission's direction regarding how to proceed. I have identified the following options, below, by which the zoning issue underlying Count 18 may be resolved:

1. Beach Towing Services, Inc., et al. ("Beach Towing") may formally request a zoning interpretation from the City's Planning Director, pursuant to City Code Section 118-397, as to whether the towing operation is (1) a legal, non-conforming use, or (2) an illegal use. That interpretation would be appealable to the City's Board of Adjustment, pursuant to Article I, Section 2 of the Related Special Acts, and City Code Sections 118-9(b)(1) and 118-397(b).
2. The City Commission may direct the City Attorney's Office to seek leave of court and file, in consultation with the Planning Director, an *amicus curiae* brief, stating the City's interest in enforcing its Land Development Regulations, and providing a zoning interpretation as to whether the towing operation is (1) a legal, non-conforming use, or (2) an illegal use. Because City Code Section 118-397(b) provides that "[t]he question as to whether a nonconforming use or building exists shall be a question of fact," the *amicus curiae* brief would largely take the form of a zoning interpretation analysis, rather than a legal brief.

A three-week trial in the Litigation is scheduled to commence on September 4, 2018. However, Count 18 of the Second Amended Complaint, which addresses the legality of the towing operation, has been severed from the issues set for trial on September 4th. Accordingly, the City's decision to participate in the Litigation as *amicus curiae* is not immediately time-sensitive.

3. Alternatively, as the Court ruled on June 12, 2018 that the City was not an indispensable party to the Litigation, the City Commission could simply elect to do nothing, and allow the Circuit Court to interpret the City's Land Development Regulations, without the City's input, and render a decision on the merits of the Litigation, consistent with the requirements of the Florida Rules of Civil Procedure. The parties to the Litigation could request such documents and take such discovery as necessary to support their respective positions.

Should you have any questions regarding this matter, please do not hesitate to contact me.

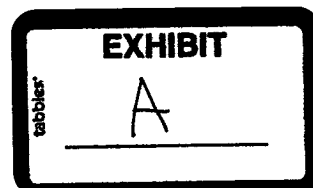
LLC in OR book 29122, page 1223, recorded April 23, 2014. Accordingly, on or about April 23, 2104, Plaintiff purchased the Property by warranty deed for \$6,500,000. The Plaintiff has owned the Property since that date.

335 There are facts demonstrating that a cloud on the title exists. The Covenant that was placed on the title to the Property constitutes a cloud on the title. Furthermore, Defendants have used the Covenant to block the Plaintiff's efforts at developing the Property with any parking garage component. The Defendants have repeatedly asserted that the Covenant prohibits any parking garage component as part of any development of the Property and therefore no development of the Property can include a parking garage component. Specifically, the Defendants have lobbied certain Miami Beach City Commissioners to reject any development of the Property with a parking garage component based on the Covenant, have opposed any development of the Property with a parking garage component at Miami Beach City Commission meetings on the basis that the Covenant precludes any parking on the Property, and have repeatedly told the Plaintiff that they will oppose any effort to build any development with an incorporated parking garage on the Property on the basis of the Covenant. Accordingly, this conduct has caused the Plaintiff to doubt its legal rights to construct and develop the Property with any incorporated parking garage and the Covenant has created a cloud on the title to the Property.

WHEREFORE, Plaintiff respectfully requests that the Court quiet title in it and remove the Covenant from the title to the Property under Fla. Stat. §§ 65.021 and 65.031, and grant any other relief this Court deems just and proper.

**COUNT XVIII**  
**DECLARATORY AND INJUNCTIVE RELIEF – BEACH TOWING'S ILLEGAL USE**  
**(NON-PROJECT DEPENDANT COUNT)**

336 The Plaintiff adopts and realleges paragraphs 1 through 29 and 65 through 87



above, as if fully set forth herein

337. There is a *bona fide*, actual present practical need for the declaration between the Plaintiff and Beach Towing. The Court has the jurisdiction and authority to declare the rights, status, and other equitable and legal relations among the parties to this lawsuit under Fla Stat § 86 011

338 The declaration deals with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts. Specifically, the Plaintiff seeks a declaration that Beach Towing is operating illegally at its property, which relates to whether the Covenant has any legitimate purpose to the dominant estate

339 Some immunity, power, privilege or right of the Plaintiff is dependent upon the facts or the law applicable to the facts. The Plaintiff's right to the unrestricted and unencumbered use of the Property is at issue because it plans to develop it in a manner that the Defendants claim it cannot by including a parking garage as part of its development

340 The Plaintiff has, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or in law

341 The antagonistic and adverse interests are all before the court by proper process or class representation

342 The relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. There is an actual dispute between the Plaintiff and Beach Towing regarding its illegal tow truck operation

343 Furthermore, the Plaintiff has a clear legal right

344 The Plaintiff has an inadequate remedy at law. Money damages will not provide adequate relief because Beach Towing's illegal use drives both the imposition of and the attempts

to enforce the Covenant, which prevents the Plaintiff from proceeding with the Project

345. The Plaintiff will suffer irreparable harm absent injunctive relief. Without an injunction, Beach Towing will continue to operate its illegal towing operation which drives both the imposition of and the attempts to enforce the Covenant, which prevents the Plaintiff from proceeding with the Project

346. In 1989, the City of Miami Beach adopted its current zoning ordinance. At the time, 1349 Dade Boulevard was re-zoned CD-2. Properties zoned CD-2 do not allow towing as a primary use, nor is it a permitted conditional use. Towing is a permitted primary use in areas zoned for industrial use, but the 1349 Dade Boulevard property is not one of them. Thus, Defendants are operating a towing service at 1349 Dade Boulevard unlawfully because towing is not permitted as a primary use at that site, but that is the primary if not exclusive use to which Defendants have put that property.

347. On April 15, 2016, the Plaintiff provided Jimmy Morales, the Miami Beach City Manager, with a letter detailing how Beach Towing was operating illegally on the 1349 Dade Boulevard property (Ex. D, letter dated April 15, 2016). Thereafter, the Miami Beach Planning Department issued its conclusions. The letter stated that towing yards and facilities in CD-2 Zoning District are neither a permitted nor a conditional use.

348. Specifically, the letter stated in pertinent part:

This letter is in response to the attached correspondence pertaining to towing storage yards and facilities in CD-2, Commercial, Medium Intensity, zoning districts.

Under Sections 142-302 and 142-303 of the Land Development Regulations of the City Code, towing storage yards and facilities are not listed as a permitted or conditional use within the CD-2 Zoning District.

(Ex. F, Letter from Miami Beach Planning Department, dated June 15, 2016)

349 A online petition was created and can be accessed online at [www.illegallytowed.com](http://www.illegallytowed.com) to stop Beach Towing's illegal tow truck operation at 1349 Miami Dade Boulevard. Furthermore, hundreds of individuals have signed that petition and shared their stories about being illegally towed.

350. Plaintiff offered six different testimonials where individuals shared their stories about how their vehicles were illegally towed by Beach Towing. Not only is Beach Towing operating illegally from 1349 Dade Boulevard, it is also illegally towing vehicles in the community that results in conduct that disrupts Plaintiff's and the neighborhood's quiet enjoyment of their property. As a result of Beach Towing's conduct as described in the paragraphs below, Plaintiff has suffered special damages.

351. Since the Plaintiff purchased the Property it has changed primarily to a mixed use community comprised of residences and retail shops. Where Beach Towing illegally operates is across the street from the Property.

352. Beach Towing does not have an area for the people to wait while Beach Towing recovers their towed vehicles. The individuals whose vehicles have been towed congregate in front of the bullet-proof glass window where Beach Towing accepts payment in cash only for the vehicles they have towed.

353. The individuals who have their vehicles towed routinely shout obscenities at Beach Towing's employees operating the window where they are required to make payment. There are often loud screaming matches that devolve into fist fights. Sometimes these incidents escalate to the point where the police are called. The individuals also stand and congregate on the street while waiting for their towed vehicles to be returned. All of this conduct disrupts and disturbs the neighborhood's and Plaintiff's quiet enjoyment of their properties simply because Beach Towing

has decided to illegally operate in an area where it is not permitted to operate

354 Furthermore, Beach Towing does not have adequate space to store the vehicles it tows from Miami Beach at its locations as its tow yard is too small Beach Towing's tow truck operators when towing a vehicle have to illegally block the road in front of the gates to the Beach Towing location The tow truck drivers then get out and manually open the gate Once the gate is open, the Beach Towing tow truck operator has to back up the wrong way on the street further impeding traffic in order to back the vehicle into the tow yard lot Again, Beach Towing disturbs the neighborhood's and Plaintiff's quiet enjoyment by having the tow trucks idle unnecessarily, blocking traffic and driving the wrong way on the road, and requiring other vehicles to wait while Beach Towing illegally blocks the road

355. Defendants' desire to prevent competition to its towing operation, detailed in Count VIII above, is among the motivations for their placement of the Covenant on the Property Without Defendants' illegal towing operation on the 1349 Dade Boulevard site, they would not have need for the Covenant because there would be no business to protect (lawfully or otherwise), and thus Plaintiff would be able to proceed with the improvements to the Property unhindered and would not be forced, among other things, to spend the time and money to bring this action to address the Covenant The Covenant is a cloud on the title held by Plaintiff to the Property If the Covenant is read to prohibit the parking of any vehicles on the Property, it will make it impossible for the Property to be developed with any parking garage component

WHEREFORE, Plaintiff respectfully requests that the Court declare that Defendants' operation of a towing service at 1349 Dade Boulevard is unlawful, issue an injunction permanently barring Beach Towing and the Festa Defendants from operating a vehicle towing service at that site, and grant any other relief this Court deems just and proper

1 specifically raised, Judge. I think it more circled  
2 around, you know, the issues of the covenant.

3 THE COURT: Well, how would I go about the --  
4 because it's a different argument in a way. I don't know  
5 that indispensable party means you win on summary  
6 judgment. I mean, that indispensable party is really more  
7 traditional, you have leave to amend and I need Miami  
8 Beach in here, and then if anything, I deny it without  
9 prejudice and let you readdress it when Miami Beach comes  
10 in and has a dog in the fight.

11 Quite frankly, honestly, I would feel a lot  
12 better if I had someone from the city in this case. I'm  
13 not saying that necessarily legally is required, and I'll  
14 hear from Mr. Buckner on that in a moment, but that's  
15 where I got from the beginning, the city has just been,  
16 throughout this entire saga of how this case has played  
17 out, all of their resolutions are at issues. All of their  
18 permits are at issue.

19 And I can see myself in a situation where I  
20 make a ruling on the validity of some of these permits,  
21 making, having a major impact on what happens to the city  
22 in other cases.

23 I mean, this is, I understand this is a  
24 limited set of facts, but for instance, making findings on  
25 the CD Two and what that means, I mean, that to me is, you

**EXHIBIT****B**



1 hearing, Judge, they have four lawyers, a September  
2 trial date.

3 Your Honor basically said I will not hear this  
4 stuff, the illegality without the city. We are  
5 looking at a September trial date. The city is  
6 telling us they don't want to give us --

7 THE COURT: Do this, why don't we do this, take  
8 care of the 1.190 interlineation, so we don't  
9 disrupt the September trial date. Go ahead and take  
10 summary judgment off. That can't be done.

11 What we need to do is set this with time in  
12 July or alternatively set status conference with the  
13 Court. At least, maybe with time, look at how the  
14 city's decision, not coming in amicus, is going to  
15 affect -- I would like to have the city of Miami  
16 Beach come to court. I would like to speak to them.  
17 I don't think there is harm as a friend of the court  
18 or someone involved.

19 Look, this is going forward in September.  
20 There is an argument. You guys take a position. If  
21 even they are dispensable or indefensible out of the  
22 equation, I think I need a little bit of time to  
23 speak to them

24 Mr. Buckner, how are you going to bring --  
25 let's get amicus. Now they're saying they do not

EXHIBIT

C

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