MIAMIBEACH

PLANNING DEPARTMENT
1700 Convention Center Drive, Miami Beach, Florida 33139; Tel: 305.673.7550; Web: www.miamibeachfl.gov/planning

LAND USE BOARD HEARING APPLICATION

The following application is submitted for review and consideration of the project described herein by the land use board selected below. A separate application must be completed for each board reviewing the proposed project.

Application Information

FILE NUMBER: PB16-085

Board of Adjustment	Design Review Board
☐ Variance from a provision of the Land Development Regulations	☐ Design review approval
☐ Appeal of an administrative decision	☐ Variance
Planning Board	**Historic Preservation Board**
☐ Conditional use permit	☐ Certificate of Appropriateness for design
☐ Lot split approval	☐ Certificate of Appropriateness for demolition
☐ Amendment to the Land Development Regulations or zoning map	☐ Historic district/site designation
■ Amendment to the Comprehensive Plan or future land use map	☐ Variance

☐ **Other:**

Property Information – Please attach Legal Description as "Exhibit A"

ADDRESS OF PROPERTY: N/A

FOLIO NUMBER(S): N/A

Property Owner Information

PROPERTY OWNER NAME: N/A

ADDRESS	CITY	STATE	ZIPCODE

BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS

Applicant Information (if different than owner)

APPLICANT NAME: Miami Beach Port, LLC

ADDRESS	CITY	STATE	ZIPCODE
315 S Biscayne Blvd	Miami	FL	33131

BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS
305-533-0093		jpperez@relatedgroup.com

Summary of Request

PROVIDE A BRIEF SCOPE OF REQUEST

Text amendments to the Comprehensive Plan as follows: (i)Land Use Element - Policy 1.2 of Objective 1, Urban Light Industrial (I-1) Use Category to permit multifamily residential uses on the waterfront as a conditional use and establish a maximum density; (ii) Transportation Element - Policy 6.19 of Objective 6, to update referenced uses to Terminal Island; and (iii) Conservation/ Coastal Management Element - Objective 9 and Policy 9.2 to create an exception to density increases to incentivize workforce or affordable housing or to provide improved governmental operations and infrastructure.

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☐ **Other:**

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ADDRESS OF PROPERTY: N/A

FOLIO NUMBER(S): N/A

Property Owner Information

PROPERTY OWNER NAME: N/A

ADDRESS	CITY	STATE	ZIPCODE

BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS

Applicant Information (if different than owner)

APPLICANT NAME: Florida Power & Light Company

ADDRESS	CITY	STATE	ZIPCODE
700 Universe Blvd	Juno Beach	FL	33408

BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS
561-691-7072		timothy.oliver@fpl.com

Summary of Request

PROVIDE A BRIEF SCOPE OF REQUEST

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Project Information				
Is there an existing building(s) on the site?	■ Yes	☐ No		
Does the project include interior or exterior demolition?	☐ Yes	☐ No	N/A	
Provide the total floor area of the new construction.			N/A	SQ. FT.
Provide the gross floor area of the new construction (including required parking and all usable area).			N/A	SQ. FT.

Party responsible for project design				
NAME N/A		☐ Architect ☐ Contractor ☐ Landscape Architect ☐ Engineer ☐ Tenant ☐ Other_____		
ADDRESS		CITY	STATE	ZIPCODE
BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS		

Authorized Representative(s) Information (if applicable)				
NAME Tracy R. Slavens, Esq		■ Attorney ☐ Contact ☐ Agent ☐ Other_____		
ADDRESS 701 Brickell Avenue		CITY Miami	STATE FL	ZIPCODE 33131
BUSINESS PHONE 305-789-7642	CELL PHONE	EMAIL ADDRESS tracy.slavens@hklaw.com		
NAME Vanessa Madrid		■ Attorney ☐ Contact ☐ Agent ☐ Other_____		
ADDRESS 701 Brickell Avenue		CITY Miami	STATE FL	ZIPCODE 33131
BUSINESS PHONE 305-789-7453	CELL PHONE	EMAIL ADDRESS vanessa.madrid@hklaw.com		
NAME		☐ Attorney ☐ Contact ☐ Agent ☐ Other_____		
ADDRESS		CITY	STATE	ZIPCODE
BUSINESS PHONE	CELL PHONE	EMAIL ADDRESS		

Please note the following information:

- A separate disclosure of interest form must be submitted with this application if the applicant or owner is a corporation, partnership, limited partnership or trustee.
- All applicable affidavits must be completed and the property owner must complete and sign the "Power of Attorney" portion of the affidavit if they will not be present at the hearing, or if other persons are speaking on their behalf.
- To request this material in alternate format, sign language interpreter (five-day notice is required), information on access for persons with disabilities, and accommodation to review any document or participate in any City sponsored proceedings, call 305.604.2489 and select (1) for English or (2) for Spanish, then option 6; TTY users may call via 711 (Florida Relay Service).

Please read the following and acknowledge below:

- Applications for any board hearing(s) will not be accepted without payment of the required fees. All checks are to be made payable to the "City of Miami Beach".

- All disclosures must be submitted in CMB Application format and be consistent with CMB Code Sub-part A Section 2-482(c):
  (c) If the lobbyist represents a corporation, partnership or trust, the chief officer, partner or beneficiary shall also be identified. Without limiting the foregoing, the lobbyist shall also identify all persons holding, directly or indirectly, a five percent or more ownership interest in such corporation, partnership, or trust.

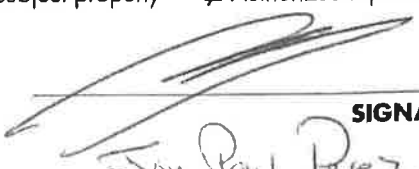
- Public records notice – All documentation submitted for this application is considered a public record subject to Chapter 119 of the Florida Statutes and shall be disclosed upon request.

- In accordance with the requirements of Section 2-482 of the code of the City of Miami Beach, any individual or group that will be compensated to speak or refrain from speaking in favor or against an application being presented before any of the City's land use boards, shall fully disclose, prior to the public hearing, that they have been, or will be, compensated. Such parties include: architects, engineers, landscape architects, contractors, or other persons responsible for project design, as well as authorized representatives attorneys or agents and contact persons who are representing or appearing on behalf of a third party; such individuals must register with the City Clerk prior to the hearing.

- In accordance with Section 118-31. – Disclosure Requirement. Each person or entity requesting approval, relief or other action from the Planning Board, Design Review Board, Historic Preservation Board or the Board of Adjustment shall disclose, at the commencement (or continuance) of the public hearing(s), any consideration provided or committed, directly or on its behalf, for an agreement to support or withhold objection to the requested approval, relief or action, excluding from this requirement consideration for legal or design professional service rendered or to be rendered. The disclosure shall: (I) be in writing, (II) indicate to whom the consideration has been provided or committed, (III) generally describe the nature of the consideration, and (IV) be read into the record by the requesting person or entity prior to submission to the secretary/clerk of the respective board. Upon determination by the applicable board that the forgoing disclosure requirement was not timely satisfied by the person or entity requesting approval, relief or other action as provided above, then (I) the application or order, as applicable, shall immediately be deemed null and void without further force or effect, and (II) no application form said person or entity for the subject property shall be reviewed or considered by the applicable board(s) until expiration of a period of one year after the nullification of the application or order. It shall be unlawful to employ any device, scheme or artifice to circumvent the disclosure requirements of this section and such circumvention shall be deemed a violation of the disclosure requirements of this section.

- When the applicable board reaches a decision a final order will be issued stating the board's decision and any conditions imposed therein. The final order will be recorded with the Miami-Dade Clerk of Courts. The original board order shall remain on file with the City of Miami Beach Planning Department. Under no circumstances will a building permit be issued by the City of Miami Beach without a copy of the recorded final order being included and made a part of the plans submitted for a building permit.

The aforementioned is acknowledged by: ☐ Owner of the subject property ☒ Authorized representative



SIGNATURE

Jon Paul Perez

PRINT NAME

8/16/18

DATE SIGNED

OWNER AFFIDAVIT FOR INDIVIDUAL OWNER

STATE OF _____

COUNTY OF _____

I, _____, being first duly sworn, depose and certify as follows: (1) I am the owner of the property that is the subject of this application. (2) This application and all information submitted in support of this application, including sketches, data, and other supplementary materials, are true and correct to the best of my knowledge and belief. (3) I acknowledge and agree that, before this application may be publicly noticed and heard by a land development board, the application must be complete and all information submitted in support thereof must be accurate. (4) I also hereby authorize the City of Miami Beach to enter my property for the sole purpose of posting a Notice of Public Hearing on my property, as required by law. (5) I am responsible for remove this notice after the date of the hearing.

_____
SIGNATURE

Sworn to and subscribed before me this _____ day of _____ , 20_____. The foregoing instrument was acknowledged before me by _____ , who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

_____
NOTARY PUBLIC

My Commission Expires: _____

_____
PRINT NAME

ALTERNATE OWNER AFFIDAVIT FOR CORPORATION, PARTNERSHIP OR LIMITED LIABILITY COMPANY

STATE OF FLORIDA

COUNTY OF MIAMI-DADE COUNTY

I, JON PAUL PEREZ, being first duly sworn, depose and certify as follows: (1) I am the VP OF PRH TERMINAL ISLAND, LLC, MANAGING MEMBER OF MICO, LLC THE SOLE MEMBER AND MANAGER (print title) of Miami Beach Port, LLC (print name of corporate entity). (2) I am authorized to file this application on behalf of such entity. (3) This application and all information submitted in support of this application, including sketches, data, and other supplementary materials, are true and correct to the best of my knowledge and belief. (4) The corporate entity named herein is the owner of the property that is the subject of this application. (5) I acknowledge and agree that, before this application may be publicly noticed and heard by a land development board, the application must be complete and all information submitted in support thereof must be accurate. (6) I also hereby authorize the City of Miami Beach to enter my property for the sole purpose of posting a Notice of Public Hearing on my property, as required by law. (7) I am responsible for remove this notice after the date of the hearing.

_____
SIGNATURE

Sworn to and subscribed before me this 10 day of August , 2018. The foregoing instrument was acknowledged before me by Jon Paul Perez , who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

Victoria Delgado
NOTARY PUBLIC
STATE OF FLORIDA
Comm# GG162393
Expires 2/20/2022

Victoria Delgado
NOTARY PUBLIC

My Commission Expires: 2-20-22

Victoria Delgado

PRINT NAME

POWER OF ATTORNEY AFFIDAVIT

STATE OF FLORIDA

COUNTY OF MIAMI-DADE

I, JON PAUL PEREZ, being first duly sworn, depose and certify as follows: (1) I am the owner or representative of the owner of the real property that is the subject of this application. (2) I hereby authorize TRACY R. SLAVENS AND VANESSA MADRID to be my representative before the Planning Board. (3) I also hereby authorize the City of Miami Beach to enter my property for the sole purpose of posting a Notice of Public Hearing on my property, as required by law. (4) I am responsible for remove this notice after the date of the hearing.

JON PAUL PEREZ, VP OF PRH TERMINAL ISLAND, LLC,
MANAGING MEMBER OF MICO, LLC, THE SOLE MEMBER AND MANAGEROF MIAMI BEACH PORT LLC

PRINT NAME (and Title, if applicable)

SIGNATURE

Sworn to and subscribed before me this 10 day of August, 2018. The foregoing instrument was acknowledged before me by Jon Paul Perez, who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

Victoria Delgado
NOTARY PUBLIC
STATE OF FLORIDA
Comm# GG162393
Expires 2/20/2022

My Commission Expires: 2-20-18

NOTARY PUBLIC

Victoria Delgado

PRINT NAME

CONTRACT FOR PURCHASE

If the applicant is not the owner of the property, but the applicant is a party to a contract to purchase the property, whether or not such contract is contingent on this application, the applicant shall list the names of the contract purchasers below, including any and all principal officers, stockholders, beneficiaries or partners. If any of the contact purchasers are corporations, partnerships, limited liability companies, trusts, or other corporate entities, the applicant shall further disclose the identity of the individuals(s) (natural persons) having the ultimate ownership interest in the entity. If any contingency clause or contract terms involve additional individuals, corporations, partnerships, limited liability companies, trusts, or other corporate entities, list all individuals and/or corporate entities.

NAME

DATE OF CONTRACT

NAME, ADDRESS AND OFFICE	% OF STOCK

In the event of any changes of ownership or changes in contracts for purchase, subsequent to the date that this application if

COMPENSATED LOBBYIST

Pursuant to Section 2-482 of the Miami Beach City Code, all lobbyists shall, before engaging in any lobbying activities, register with the City Clerk. Please list below any and all persons or entities retained by the applicant to lobby City staff or any of the City's land development boards in support of this application.

NAME	ADDRESS	PHONE
Tracy R. Slavens, Esq.	701 Brickell Ave, Miami Fl 33131	305-78-7642
Vanessa Madrid, Esq.	same	305-789-7453

Additional names can be placed on a separate page attached to this application.

APPLICANT HEREBY ACKNOWLEDGES AND AGREES THAT (1) AN APPROVAL GRANTED BY A LAND DEVELOPMENT BOARD OF THE CITY SHALL BE SUBJECT TO ANY AND ALL CONDITIONS IMPOSED BY SUCH BOARD AND BY ANY OTHER BOARD HAVING JURISDICTION, AND (2) APPLICANT'S PROJECT SHALL COMPLY WITH THE CODE OF THE CITY OF MIAMI BEACH AND ALL OTHER APPLICABLE CITY, STATE AND FEDERAL LAWS.

APPLICANT AFFIDAVIT

STATE OF _____

COUNTY OF _____

I, Jon Paul Perez, being first duly sworn, depose and certify as follows: (1) I am the applicant or representative of the applicant. (2) This application and all information submitted in support of this application, including sketches, data, and other supplementary materials, are true and correct to the best of my knowledge and belief.

SIGNATURE

Sworn to and subscribed before me this 6th day of August, 2018. The foregoing instrument was acknowledged before me by Jon Paul Perez, who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

Vanessa Olcese
NOTARY PUBLIC
STATE OF FLORIDA
Comm# FF935785
Expires 11/12/2019

My Commission Expires: _____

NOTARY PUBLIC

Vanessa Olcese

PRINT NAME

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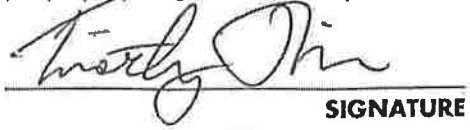

SIGNATURE

Timothy Oliver

PRINT NAME

8/8/18

DATE SIGNED

OWNER AFFIDAVIT FOR INDIVIDUAL OWNER

STATE OF _____

COUNTY OF _____

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_____
SIGNATURE

Sworn to and subscribed before me this _____ day of _____, 20_____. The foregoing instrument was acknowledged before me by _____, who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

_____
NOTARY PUBLIC

My Commission Expires: _____

_____
PRINT NAME

ALTERNATE OWNER AFFIDAVIT FOR CORPORATION, PARTNERSHIP OR LIMITED LIABILITY COMPANY

STATE OF FL

COUNTY OF Palm Beach

I, Timothy Oliver, being first duly sworn, depose and certify as follows: (1) I am the VP, Corp. Real Estate (print title) of Florida Power & Light Company (print name of corporate entity). (2) I am authorized to file this application on behalf of such entity. (3) This application and all information submitted in support of this application, including sketches, data, and other supplementary materials, are true and correct to the best of my knowledge and belief. (4) The corporate entity named herein is the owner of the property that is the subject of this application. (5) I acknowledge and agree that, before this application may be publicly noticed and heard by a land development board, the application must be complete and all information submitted in support thereof must be accurate. (6) I also hereby authorize the City of Miami Beach to enter my property for the sole purpose of posting a Notice of Public Hearing on my property, as required by law. (7) I am responsible for remove this notice after the date of the hearing.

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SIGNATURE

Sworn to and subscribed before me this 8th day of August, 2018. The foregoing instrument was acknowledged before me by Timothy Oliver, who has produced _____ as identification and/or is personally known to me and who did/did not take an oath.

NOTARY SEAL OR STAMP

Notary Public State of Florida
Michelle M Kahmann
My Commission FF 901483
Expires 09/18/2019

_____
NOTARY PUBLIC
Michelle M. Kahmann

My Commission Expires: _____

PRINT NAME

POWER OF ATTORNEY AFFIDAVIT

STATE OF FL

COUNTY OF Palm Beach

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Timothy Oliver V.P., Corp. Real Estate

PRINT NAME (and Title, if applicable)

SIGNATURE

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NOTARY SEAL OR STAMP

Notary Public State of Florida
Michelle M Kahmann
My Commission FF 901483
Expires 09/18/2019

My Commission Expires: _____

NOTARY PUBLIC
Michelle M. Kahmann

PRINT NAME

CONTRACT FOR PURCHASE

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DATE OF CONTRACT

NAME, ADDRESS AND OFFICE	% OF STOCK

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APPLICANT AFFIDAVIT

STATE OF FL

COUNTY OF Palm Beach

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SIGNATURE

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NOTARY SEAL OR STAMP

Notary Public State of Florida
Michelle M Kahmann
My Commission FF 901483
Expires 09/18/2019

My Commission Expires: _____

NOTARY PUBLIC

Michelle M. Kahmann

PRINT NAME

filed, but prior to the date of a final public hearing, the applicant shall file a supplemental disclosure of interest.

DISCLOSURE OF INTEREST

CORPORATION, PARTNERSHIP OR LIMITED LIABILITY COMPANY

If the property that is the subject of the application is owned or leased by a corporation, partnership or limited liability company, list ALL of the owners, shareholders, partners, managers and/or members, and the percentage of ownership held by each. If the owners consist of one or more corporations, partnerships, trusts, partnerships or other corporate entities, the applicant shall further disclose the identity of the individual(s) (natural persons) having the ultimate ownership interest in the entity.

Miami Beach Port, LLC

NAME OF CORPORATE ENTITY

NAME AND ADDRESS	% OF OWNERSHIP
Please see attached Exhibit B	

NAME OF CORPORATE ENTITY

NAME AND ADDRESS	% OF OWNERSHIP

If there are additional corporate owners, list such owners, including corporate name and the name, address and percentage of ownership of each additional owner, on a separate page.

DISCLOSURE OF INTEREST
TRUSTEE

If the property that is the subject of the application is owned or leased by a trust, list any and all trustees and beneficiaries of the trust, and the percentage of interest held by each. If the owners consist of one or more corporations, partnerships, trusts, partnerships or other corporate entities, the applicant shall further disclose the identity of the individual(s) (natural persons) having the ultimate ownership interest in the entity.

_____

TRUST NAME

NAME AND ADDRESS	% INTEREST

filed, but prior to the date of a final public hearing, the applicant shall file a supplemental disclosure of interest.

DISCLOSURE OF INTEREST

CORPORATION, PARTNERSHIP OR LIMITED LIABILITY COMPANY

If the property that is the subject of the application is owned or leased by a corporation, partnership or limited liability company, list ALL of the owners, shareholders, partners, managers and/or members, and the percentage of ownership held by each. If the owners consist of one or more corporations, partnerships, trusts, partnerships or other corporate entities, the applicant shall further disclose the identity of the individual(s) (natural persons) having the ultimate ownership interest in the entity.

Florida Power and Light Company (FPL)

NAME OF CORPORATE ENTITY

NAME AND ADDRESS	% OF OWNERSHIP
FPL is the principle subsidiary of NextEra Energy, Inc., a publicly traded company (NYSE: NEE)	100%

NAME OF CORPORATE ENTITY

NAME AND ADDRESS	% OF OWNERSHIP

If there are additional corporate owners, list such owners, including corporate name and the name, address and percentage of ownership of each additional owner, on a separate page.

DISCLOSURE OF INTEREST
TRUSTEE

If the property that is the subject of the application is owned or leased by a trust, list any and all trustees and beneficiaries of the trust, and the percentage of interest held by each. If the owners consist of one or more corporations, partnerships, trusts, partnerships or other corporate entities, the applicant shall further disclose the identity of the individual(s) (natural persons) having the ultimate ownership interest in the entity.

_____

TRUST NAME

NAME AND ADDRESS	% INTEREST

EXHIBIT A

LEGAL DESCRIPTION

LEGAL DESCRIPTION PARCEL "A":

COMMENCING AT A POINT 1580 FEET NORTH AND 2015 FEET WEST FROM THE SOUTHEAST CORNER OF SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, SAID POINT BEING AT THE INTERSECTION OF THE CENTERLINE OF THE ROADWAY OF THE ORIGINAL MIAMI COUNTY CAUSEWAY VIADUCT AND THE FACE OF THE WEST BRIDGE ABUTMENT, RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST ALONG THE CENTERLINE OF SAID ROADWAY PRODUCED, A DISTANCE OF 58.70 FEET TO A POINT; THENCE RUN SOUTH 37 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 64.75 FEET TO A POINT, SAID BEING THE POINT OF BEGINNING (1); THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 117.78 FEET TO THE POINT OF BEGINNING OF CUT-OUT PARCEL OF LAND HEREIN DESCRIBED,

FROM SAID POINT OF BEGINNING; THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SAID SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 40.43 FEET; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 06 DEGREES 15 MINUTES 30 SECONDS AND A RADIUS OF 243.86 FEET, A DISTANCE OF 26.64 FEET TO A POINT; SAID POINT BEING THE POINT OF COMPOUND CURVATURE OF A CIRCULAR CURVE; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, AND HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 01 DEGREES 25 MINUTES 44 SECONDS AND A RADIUS OF 1,566.95 FEET, A DISTANCE OF 39.08 FEET TO A POINT; THENCE RUN SOUTH 31 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 403.80 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 97.46 FEET TO A POINT; THENCE RUN NORTH 64 DEGREES 31 MINUTES 00 SECONDS WEST A DISTANCE OF 120.00 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 100.00 FEET TO A POINT; THENCE RUN SOUTH 64 DEGREES 31 MINUTES 00 SECONDS EAST, ALONG A LINE PARALLEL TO THE MUNICIPAL CHANNEL A DISTANCE OF 832.55 FEET (RECORD AND LOCAL DESCRIPTION) 832.55 FEET (CALCULATE) TO A POINT; THENCE RUN NORTH 31 DEGREES 43 MINUTES 00 SECONDS WEST A DISTANCE OF 583.57 FEET; THENCE SOUTH 58 DEGREES 17 MINUTES 00 SECONDS WEST FOR A DISTANCE OF 175.85 FEET; THENCE NORTH 32 DEGREES 27 MINUTES 12 SECONDS WEST FOR A DISTANCE OF 59.61 FEET; THENCE NORTH 32 DEGREES 00 MINUTES 10 SECONDS WEST FOR A DISTANCE OF 61.22 FEET; THENCE NORTH 31 DEGREES 57 MINUTES 07 SECONDS WEST FOR A DISTANCE OF 59.87 FEET; THENCE NORTH 31 DEGREES 45 MINUTES 47 SECONDS WEST FOR A DISTANCE OF 99.47

FEET; THENCE NORTH 32 DEGREES 00 MINUTES 04 SECONDS WEST FOR A DISTANCE OF 109.79 FEET: THENCE NORTH 58 DEGREES 01 MINUTES 56 SECONDS EAST FOR A DISTANCE OF 19.00 FEET TO THE POINT OF CURVE OF A NON TANGENT CURVE TO THE RIGHT, OF WHICH THE RADIUS POINT LIES NORTH 87 DEGREES 07 MINUTES 46 SECONDS EAST, A RADIAL DISTANCE OF 71.65 FEET: THENCE NORTHERLY ALONG THE ARC, THROUGH A CENTRAL ANGLE OF 43 DEGREES 56 MINUTES 24 SECONDS, A DISTANCE OF 54.95 FEET: THENCE NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST FOR A DISTANCE OF 10.00 FEET; TO THE SOUTHEASTERLY CORNER OF AN EXISTING ONE-STORY C.B.S. BUILDING LINE, A DISTANCE OF 39.60 FEET, TO THE NORTHEASTERLY CORNER OF SAID EXISTING ONE-STORY C.B.S. BUILDING; THENCE CONTINUE NORTHEASTERLY, NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST, FOR A DISTANCE OF 30.28 FEET, TO THE POINT OF BEGINNING OF THE CUT OUT PARCEL OF LAND.

CONTAINING 161,716 SQUARE FEET OR 3.71 ACRES, MORE OR LESS.

LYING AND BEING IN SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, CITY OF MIAMI BEACH, MIAMI-DADE COUNTY, FLORIDA:

FPL Parcel Legal Description

STR 4-54-42 3.13 AC

BEG AT PT 1580 FT N & 2015 FT W OF SE
COR SEC BEING X OF C/L RDWAY OF
ORIGINAL CO CSWY VIA & FACE
OR W BRIDGE ABUTHT S 67 DEG
W 58.7 FT S 31 DEG E 64.75 FT TH SWLY
ALG SLY BDRY OF CSWY 322.72 FT
TO POB S 10 DEG E162.52FT S 25
DEG W 223.24 FT N 64 DEG W 646.73 FT
N 25 DEG E 7.55 FT TO PT SLY BDRY
CSWY ELY ALG SLY BDRY
615.57 FT TO POB
LOT SIZE 136402 SQ FT

Folio: 02-4204-000-0070

EXHIBIT B

Disclosure of Interest for Miami Beach Port, LLC

Miami Beach Port, LLC, a Florida limited liability company, is 100% owned by MICO, LLC, a Florida limited liability company

MICO, LLC is 50% owned by PRH Terminal Island, LLC, a Florida limited liability company, and 50% owned by BCH Terminal Island, LLC, a Florida limited liability company

- PRH Terminal Island, LLC is 97.5% owned by PRH Investments, LLC, a Florida limited liability company, and 2.5% owned by Carlos Rosso Revocable Trust
    - PRH Investments, LLC, a Florida limited liability company, is wholly owned by PRH Related Holdings, LLC
        - PRH Related Holdings, LLC, a Florida limited liability company, is wholly owned by Perez Ross Holdings, LLC
            - Perez Ross Holdings, LLC, is 75% owned by Jorge M Perez Holding Ltd., and 25% owned by Related NY Holdings, LLC
                - Jorge M Perez Holdings, Ltd is 68% owned by Jorge M. Perez, 15% owned by Jorge M Perez 2012 Family Trust, 15% owned by Jorge M Perez 2002 Family Trust, 1% owned by Related Florida Inc., and 1% owned by JMP Holdings GP, LLC
                    - Jorge M Perez 2012 Family Trust
                        - Jon Paul Perez and Nicholas Alexander Perez are the beneficiaries
                    - Jorge M Perez 2002 Family Trust
                        - Jon Paul Perez, Nicholas Alexander Perez, Christina Anne Perez and Felipe Manuel Perez are the beneficiaries
                    - Related Florida Inc.
                        - Wholly owned by Jorge M. Perez
                    - JMP Holdings GP, LLC
                        - Wholly owned by Jorge M. Perez
                - Related NY Holdings, LLC, a Florida limited liability company, is 99.99% owned by The Related Companies, L.P., and .01% owned by RCMP, Inc.

- The Related Realty Group, Inc., a Delaware corporation, is the sole general partner of The Related Companies, L.P., a New York limited partnership.
    - The Related Realty Group, Inc. is wholly owned by Stephen M. Ross
- RCMP, Inc., a Delaware corporation, is wholly owned by The Related Companies, L.P.
    - The Related Realty Group, Inc., a Delaware corporation, is the sole general partner of The Related Companies, L.P., a New York limited partnership.
        - The Related Realty Group, Inc. is wholly owned by Stephen M. Ross

- Carlos Rosso Revocable Trust
    - Carlos Rosso is the sole beneficiary during his lifetime

- BCH Terminal Island, LLC, a Florida limited liability company, is 67% owned by BeachCo Holdings, LLC, and 33% owned by NLI Holdings, LLC
    - BeachCo Holdings, LLC, a Florida limited liability company, is wholly owned by Victor A. Bared
    - NLI Holdings, LLC, a Florida limited liability company, is 25% owned by Jose Boschetti and Silvia Boschetti, as Tenants by the Entirety, 24.25% owned by Luis Boschetti and Lina Boschetti, as Tenants by the Entirety, 23.50% owned by Jose R. Boschetti, as trustee of the Jose R. Boschetti Declaration of Children's Irrevocable Trust dated March 30, 2009, 24.25% owned by Luis R. Boschetti as trustee of the Luis R. Boschetti Declaration of Children's Irrevocable Trust dated March 4, 2009, and 3% owned by Mariannie Boschetti and Juan S. Cordovez, as Tenants by the Entirety.
        - Jose R. Boschetti Declaration of Children's Irrevocable Trust dated March 30, 2009
            - Jose Boschetti, Jr. and Maurice Boschetti are the beneficiaries
        - Luis R. Boschetti Declaration of Children's Irrevocable Trust dated March 4, 2009
            - Luis E. Boschetti is the sole beneficiary

WRITTEN CONSENT OF THE SOLE MANAGER
OF
PRH TERMINAL ISLAND, LLC

The undersigned, PRH Investments, LLC, a Florida limited liability company ("PRHI"), being the sole manager of PRH TERMINAL ISLAND, LLC, a Florida limited liability company (the "Company"), does hereby consent to the adoption of, and hereby does adopt, the following preamble, resolutions and the actions specified herein:

WHEREAS, the Company is the managing member of MICO, LLC, a Florida limited liability company ("MICO");

WHEREAS, MICO is the sole member and manager of MIAMI BEACH PORT, LLC, a Florida limited liability Company ("MBP");

WHEREAS, MBP is the owner of that certain parcel of real property located at 120 MacArthur Causeway, Miami Beach, Florida 33139 (the "Property");

WHEREAS, pursuant to that certain Second Amended and Restated Operating Agreement of MICO, dated as of June 15, 2016 (the "MICO Agreement"), MICO intends to cause MBP to develop a residential condominium tower on the Property;

WHEREAS, on July 5, 2016, pursuant to that certain Action By Written Consent of the Sole Member of the Company in Lieu of a Special Meeting executed by Jorge M. Perez, as President of PRHI (the "First Member Action"), PRHI (i) appointed Jon Paul Perez as a Vice President of the Company, and (ii) delegated to Jon Paul Perez, as Vice President of the Company, specific authorities and responsibilities (the "Delegated Authorities");

WHEREAS, on November 2, 2016, pursuant to that certain Action By Written Consent of the Sole Manager of the Company in Lieu of a Special Meeting executed by Jorge M. Perez, as President of PRHI (the "Manager Action"), PRHI (i) revoked the Delegated Authorities, and (ii) delegated to Jon Paul Perez, as Vice President of the Company, revised specific authorities and responsibilities; and

WHEREAS, on July 19, 2016, pursuant to that certain Written Consent of the Sole Member of the Company executed by Jorge M. Perez, as President of PRHI (the "Second Member Action"), PRHI consented to the adoption of certain resolutions relating to the delegation of specific authorities and responsibilities to Jon Paul Perez, in his capacity as Vice President of the Company.

NOW, THEREFORE, it is:

RESOLVED, that this Written Consent shall serve to affirm the contents of the First Member Action and the Manager Action, both of which shall remain in full force and effect;

RESOLVED, that this Written Consent shall serve to amend, restate and supersede in its entirety the Second Member Action; and

RESOLVED, that Jon Paul Perez, as Vice President of the Company, be, and he hereby is, authorized, empowered and directed in the name and on behalf of the Company, in its own right or in its capacity as the managing member of MICO, in the name and on behalf of MICO, in its own right or in its capacity as the sole member and manager of MBP, and in the name and on behalf of MBP to execute and deliver on behalf of the Company, MICO and MBP any and all documents, applications, certifications, papers or other instruments as may be necessary or desirable in conjunction with any of the following actions; provided, however, that the Vice President of the Company may only enter into such instruments on behalf of MICO and MBP, and otherwise act to bind MICO and MBP, in accordance the MICO Agreement:

- Obtaining and maintaining such permit and/or permit applications required of any governmental divisions or agencies as may be necessary, including but not limited to permitting for water, sewer, land use, City or County Code variances, zoning, environmental actions, air use rights, water use rights, landfill authority, infrastructure, elevators, business licenses, real estate development, construction, excavation, demolition, fencing, signage, crane operations, street or partial street closures, trash and waste management, vacating a street of public roadway, access, egress, electrical power, cellular towers, creation of rights of way, creation of curbing, and any other permit application required in the normal and usual course of development of a residential and commercial tower;
- Environmental tests of the Property site;
- Selection and hiring of sales and marketing teams;
- Determination of marketing vendors and marketing protocol;
- Selection and purchase of furniture, finishes, appliances, and fixtures;
- Sales center construction and design;
- Election and hiring of an association management company;
- Condominium purchase contracts; and

* All other tasks customarily necessary in the process of developing a residential and commercial tower.

A PDF or facsimile of a signature to this Written Consent shall be deemed and treated for all purposes of execution to be as valid as an original signature thereto.

[Signature page follows]

IN WITNESS WHEREOF, the undersigned has executed this Written Consent effective as of the 9th day of December, 2016.

PRHI:

PRH INVESTMENTS, LLC
a Florida limited liability company

By: Jorge M. Perez, President

(Signature Page to Written Consent of the Sole Manager of PRH TERMINAL ISLAND, LLC)

The Zoning Specialists Group, Inc.

December 4, 2018

City of Miami Beach
Planning Department
1700 Convention Center Drive
Miami Beach, FL 33139

RE: Property Owners List within 375 feet of:

LEGAL DESCRIPTION:
Portion of Section 4, Township 54 South, Range 42 East, Miami-Dade County, Florida.

ADDRESS: 120 Macarthur Causeway, Miami Beach, FL 33139
FOLIO NO. 02-4204-000-0060 and -0070
PREPARE FOR: HOLLAND & KNIGHT, LLP
Order: 181201

Total number of property owners without repetition: 8

This is to certify that the attached ownership list, map and mailing matrix is a complete and accurate representation of the real estate property and property owners within 375 feet of the subject property listed above. This reflects the most current records on the file in Miami-Dade County Tax Assessor's Office.

Sincerely,
THE ZONING SPECIALISTS GROUP, INC.

Jose F. Lopez, P.S.M. #3086

7729 NW 146th Street • Miami Lakes, FL 33016
Phone: 305 828-1210
www.thezoningspecialistsgroup.com

OWNERS LIST

THE FOLLOWING ARE PROPERTY OWNERS WITHIN A 375-FOOT RADIUS OF THE FOLLOWING LEGALLY DESCRIBED PROPERTY
LEGAL DESCRIPTION:
Portion of Section 4, Township 54 South, Range 42 East, Miami-Dade County, Florida.

ADDRESS: 120 Macarthur Causeway, Miami Beach, FL 33139
FOLIO NO. 02-4204-000-0060 and -0070
PREPARED FOR: HOLLAND & KNIGHT, LLP
Order: 181201

---

4 54 42 2.16 Ac Port Mc Arthur Causeway Per Db 1509-81
Property address: 140 Macarthur Cswy
Folio number: 0242040000010

City Of Miami Beach City Hall
1700 Convention Center Drive
Miami Beach, FL 33139

4 54 42 17.52 Ac Port Of Mc Arthur Causeway Per Db 2199-414
Property address: 100 Macarthur Cswy
Folio number: 0242040000020

U S Coast Guard Air Station
Opa Locka Airport
Opa Locka, FL 33054-0000

04 54 42 Comm 1580Ftn & 2015Ftw Of SE Cor Th S 66 Deg W 58.70Ft S 31 DegE 64.75Ft S 66 Deg W 20.36Ft N 23 Deg E 11.65Ft For POB Cont N 23 Deg E47Ft N 66 Deg E 51Ft S 23 Deg W 47Ft S 66 Deg W 51Ft To POB
Property address:
Folio number: 0242040000030

City Of Miami Beach
1700 Convention Center Dr
Miami Beach, FL 33139-1819

4 54 42 .13 Ac Beg At Pt 1580Ftn & 2015Ftw Of SE Cor Sec Being X Of C/LRdway Of Original Co Cswy Via & Face Of W Bridge Abutht S 67 Deg W58.70FT S 31 Deg E64.75Ft Th SWly Alg Sly Bdry Of Cswy 938.28Ft To POB Cont SWLy 193.715Ft S 25 Deg W50.24Ft S 64 Deg E190ft N 25 Deg E87.55Ft To POBLess Parcel 22 As Desc Or 18215-3765
Property address: 190 Macarthur Cswy
Folio number: 0242040000040

Fisher Island Holdings LLC
1 Fisher Island Dr
Miami Beach, FL 33109-0001

4 54 42 .159 Ac Comm At Pt 1580Ftn & 2015Ftw Of SE Cor Of Sec Being X Of C/L Reway Of Original Co Cswy Via Face Of W Bridge Abutment Th S 67 Deg W 58.70Ft S 31 Deg E 64.75Ft S 67 Deg W 158.21Ft SWly Ad 780.075Ft For POB Cont SWly Ad 92.345Ft S 25 Deg W 66.93Ft S 64 Deg E 90Ft N 25 Deg E87.55Ft To POB
Property address: 168 Macarthur Cswy
Folio number: 0242040000041

Fisher Island Holdings LLC
1 Fisher Island Dr
Miami Beach, FL 33109-0001

4 54 42 .239 Ac Legal Desc In Lease Agreement Between City Of Miami & IsLand Developers Ltd

Property address:
Folio number: 0242040000045

City Of Miami Islnd Dev
Asset Management Division
444 SW 2nd Ave Ste 325
Miami, FL 33130-1910

04 54 42 3.71 Ac M/L Comm 1580Ftn & 2015Ftw Of SE Cor Of Sec Th S 67 DegW 58.7Ft S 31 Deg E64.75Ft S 67 Deg W Alg Sly Line Of Causeway 117.78 FOr POB Cont S 67 Deg W 40.43Ft SWly & Wly 65.72Ft S 31 Deg E 403.80Ft S25 Deg W 97.46Ft N 64 Deg W 120Ft S 25 Deg W 100Ft S 64 Deg E 832.55Ft N31 Deg W 583.57Ft S 58 Deg W 175.85Ft N 32 Deg W 59.61Ft N 32 Deg W 61.22Ft N 31 Deg W 59.87Ft N 31 Deg W 99.47Ft N 32 Deg W 109.79Ft N 58 DegE 19Ft NWly 54.95Ft N 31 Deg W 79.88Ft To POB

Property address: 120 Macarthur Cswy
Folio number: 0242040000060

Miami Beach Port LLC
315 S Biscayne Blvd
Miami, FL 33131-2312

04 54 42 1.89 Ac M/L Comm 1580Ft N & 2015Ft W 0F SE Co Rof Sec Th S 67 DEg W58.7Ft S 31 Deg E64.75Ft For POB Cont S 67 Deg W Alg Sly Line Of CauSeway A Dist Of 158.21Ft SWly & Wly 65.72Ft S 31 Deg E403.8Ft S 25 Deg W97.46Ft N 64 Deg W 120Ft S 25 Deg W 100Ft S 64 Deg E 832.55Ft N 31 DegW 1069.40Ft To POB Less Port Desc Comm 1580Ftn & 2015Ftw Of SE Cor Of SEC Th S 67 Deg W 58.7Ft S 31 Deg E64.75Ft S67 Deg W Alg Sly Line Of CauseWay 117.78 For POB Cont S 67 Deg W 40.43Ft SWly & Wly 65.72Ft S 31 Deg W403.80Ft S 25 Deg W 97.46Ft N 64 Deg W 120Ft S 25 Deg W 100Ft S 64 DegE 832.55Ft N 31 Deg W 583.57Ft S 58 Deg W 175.85Ft N 32 Deg W 59.61Ft N

Property address: 112 Macarthur Cswy
Folio number: 0242040000065

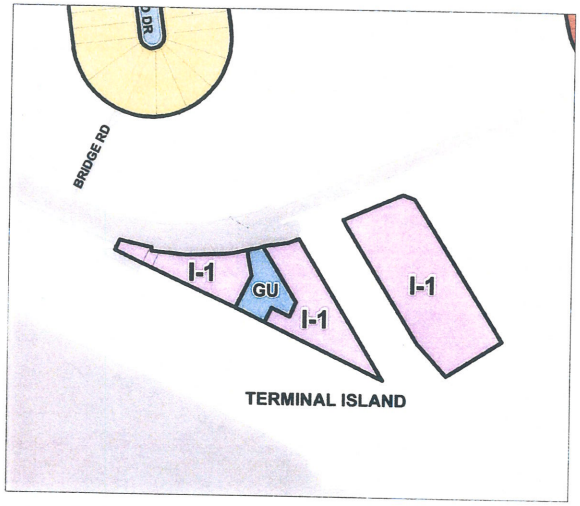
Fisher Isl Community Assn Inc
1 Fisher Island Dr
Miami Beach, FL 33109-0001

4 54 42 3.13 Ac Beg At Pt 1580Ftn & 2015Ftw Of SE Cor Sec Being X Of C/L Rdway Of Original Co Cswy Via & Face Or W Bridge Abutht S 67 Deg W58.7FT S 31Deg E64.75Ft Th SWly Alg Sly Bdry Of Cswy 322.72Ft To POB S 10 Deg E162.52Ft S 25 Deg W223.24Ft N 64 Deg W646.73Ft N 25 Deg E87.55Ft To PtSly Bdry Cswy Ely Alg Sly Bdry 615.57Ft To POB

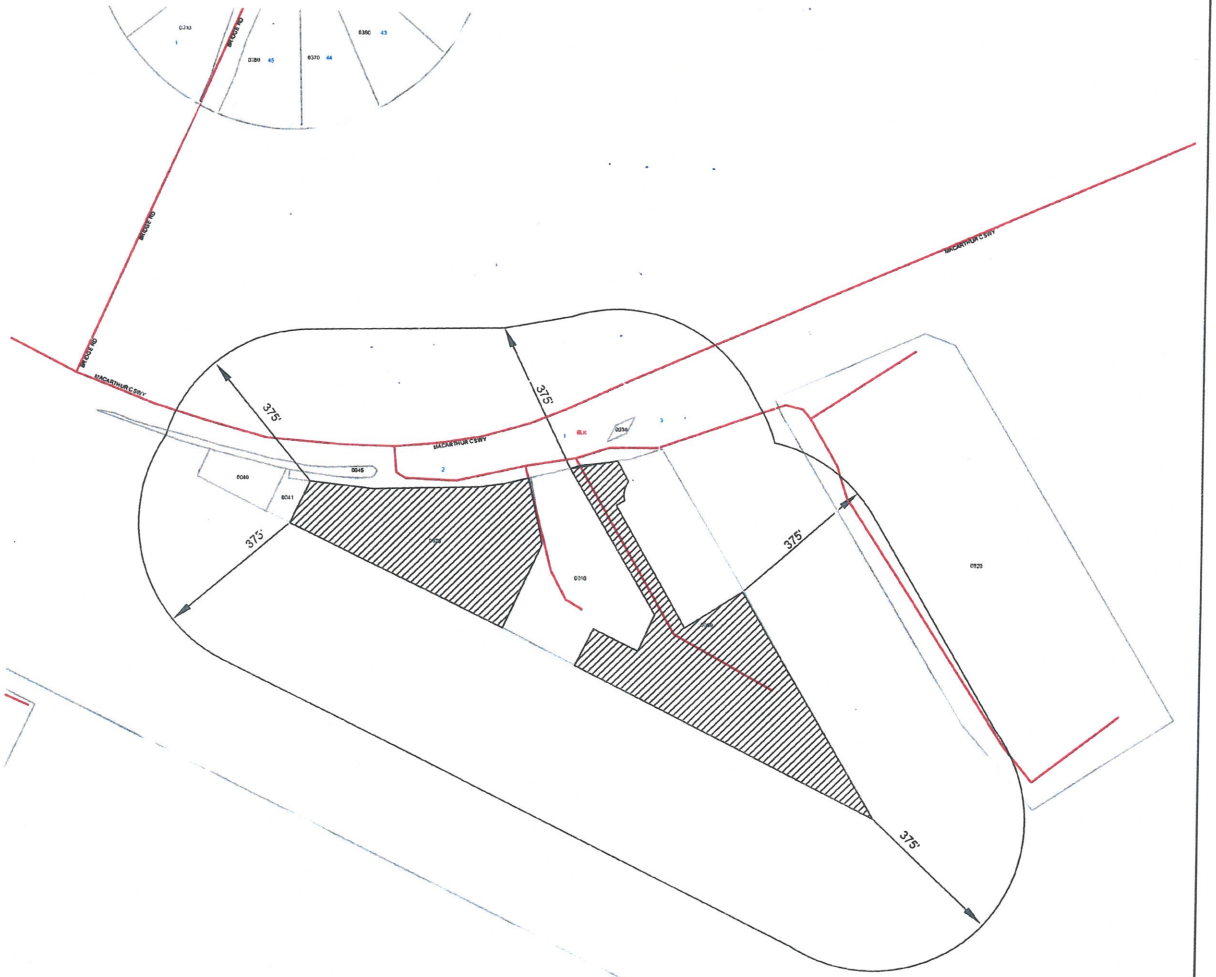
Property address: 150 Macarthur Cswy
Folio number: 0242040000070

Florida Power & Light Co
Attn Property Tax Dept
700 Universe Blvd
North Palm Beach, FL 33408-2657

CITY OF MIAMI BEACH ZONING ATLAS



375-FOOT RADIUS MAP:



LEGAL DESCRIPTION:
Portion of Section 4, Township 54 South, Range 42 East, Miami-Dade County, Florida.

ADDRESS: 120 Macarthur Causeway, Miami Beach, FL 33139
FOLIO NO. 02-4204-000-0060 and -0070
PREPARED FOR: HOLLAND & KNIGHT, LLP
Order: 181201
DATE: December 4, 2018

N
W E
S

SCALE: 1"= 300'

The Zoning Specialists Group, Inc.
7729 NW 146th Street
Miami Lakes FL 33016
Ph: (305)828-1210
www.thezoningspecialistsgroup.com

I HEREBY CERTIFY: That all the properties shown herein are lying within a 375-foot radius from all boundary lines of the subject property.

BY: _____
JOSE F. LOPEZ, P.S.M.
Professional Surveyor & Mapper
No. 3086, State of Florida.

NOTE:
NOT VALID UNLESS SEALED WITH THE SIGNING SURVEYOR'S SEAL

Holland & Knight

701 Brickell Avenue, Suite 3300 | Miami, FL 33131 | T 305.374.8500 | F 305.789.7799
Holland & Knight LLP | www.hklaw.com

Tracy R. Slavens
(305) 789-7642
tracy.slavens@hklaw.com

December 7, 2018

Mr. Thomas Mooney, AICP
Director, Planning Department
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139

Re: Miami Beach Port, LLC and Florida Power & Light – Third Amended Letter of Intent Application No. 16-085 – Comprehensive Plan Amendments

Dear Mr. Mooney:

Please accept this Third Amended Letter of Intent for Application No. PB16-085 (the "Application") on behalf of Miami Beach Port, LLC and Florida Power & Light Company (the "Applicants"). Updated disclosure of interest forms are enclosed for your consideration. As you are aware, Miami Beach Port, LLC ("MBP") is the owner of that certain ±3.71 acre parcel of land located on the southeastern tip of Terminal Island at 120 MacArthur Causeway (the "MBP Property"; identified as folio no. 02-4204-000-0060). FP&L is the owner of that certain ±3.13 acre parcel of land located at 150 MacArthur Causeway (the "FP&L Property"; identified as folio no. 02-4204-000-0070). The MBP Propery and the FP&L Property, together, are hereinafter the subject property of the Application and referred to as the "Property". Previously, the Applicants had amended the Application to update the Applicant information and the proposed text amendments to include the recommended language proffered by the Planning Department in the Staff Report & Recommendation dated February 28, 2017. The Applicants are hereby amending the Application to update the draft ordinance to reflect the recent changes to the City's Comprehensive Plan and I-1 category text and to provide additional information relating to compatibility and resiliency.

This request is being made in connection with a proposed mixed-use redevelopment plan for a portion of Terminal Island. As stated in the Applicants' March 13, 2017 correspondence, the addition of FP&L as an applicant is not required to proceed with the Application pursuant to Section 118-162 of the City's Land Development Regulations. MBP owns more than 80,000 square feet of land within Terminal Island. However, in an abundance of caution, MBP has determined that it is appropriate to include FP&L in the Application given that FP&L will be a party to the future applications for approval of the development of the Property. The FP&L Property has 609.50 linear feet of frontage on the Terminal Island right-of-way. Subsection 118-162(a) provides:

> (a) **An application for a land development regulation amendment which would change the actual list of permitted, conditional or prohibited uses in a zoning**

category or the actual zoning map designation of a parcel or parcels of land or the future land use map of the comprehensive plan may be submitted to the planning and zoning director by the city manager, city attorney, or upon an adopted motion of the city commission, planning board, board of adjustment, or historic preservation board with regard to the designation of historic districts, sites or matters that directly pertain to historic preservation, or **by owners of a majority of lot frontage in the area which is the subject of the proposed change, provided that the area shall contain not less than 400 feet of lot frontage on one public street or a parcel of not less than 80,000 square feet.** Matters submitted by the city manager or city attorney shall first be referred to the city commission.

The Terminal Island right-of-way is officially identified as part of the MacArthur Causeway right-of-way. Terminal Island is the only portion of the MacArthur Causeway within the City that contains properties fronting the right-of-way. The total Terminal Island right-of-way zoned I-1 is 1,027.30 linear feet (the 98.79 linear feet of City-owned land fronting the right of way is zoned Government Use (GU)) according to the Specific Purpose Survey prepared by Schwebke-Shiskin & Associates, Inc. The survey confirms that there are no properties fronting the north side of the right-of-way. When combined and as amended herein, the Property contains a total of 715.36 linear feet or 69.6% of the total right-of-way frontage. By virtue of the amendment language, only I-1 zoned properties located within Terminal Island are subject to the proposed change. Therefore, based on both the Property size and the frontage width, the amendment of the Application to include FP&L further satisfies the requirements to file a private application set forth by the Land Development Regulations.

Terminal Island

Terminal Island is located on the MacArthur Causeway and is a gateway to Miami Beach. Terminal Island is currently made up of six separate properties, which include the Fisher Island ferry terminal and parking area, an FPL Substation, the City's Fleet Management facility (the "City Property"), and the U.S. Coast Guard Base (the "Base"). MBP has owned the MBP Property since 2013. Until recently, the MBP Property was operated as a shipping container port and storage yard. Terminal Island is underdeveloped and functions more like a parking lot than an industrial hub:

Current Street View

Cargo Operation Congestion on MacArthur Causeway

In 2016, the cargo operation was ceased when MBP began the redevelopment process for the Property.

The waterfront land on Terminal Island is unique and special with spectacular unobstructed views of the Atlantic Ocean, Miami Beach, PortMiami, Biscayne Bay, and the Miami skyline. Terminal Island is located on the north side of Government Cut is located between Dodge Island to the southwest, Star Island to the north, Fisher Island to the southeast, and the South of Fifth Neighborhood to the east. It is surrounded by both luxury residential uses and marine operations. This is the appropriate time to consider the revitalization of the island with modern development featuring urban mixed-uses.

Comprehensive Plan Text Amendment

The purpose of this application is to allow mixed-use development within the I-1 category where appropriate and compatible. The Applicants seek to amend the text of the Comprehensive Plan to reflect the language proffered by the Planning Department in the Staff Report & Recommendation dated February 28, 2017, and to reflect the recent changes to the I-1 category text. The proposed text amendments, as amended, are as follows:

LAND USE ELEMENT

Policy 1.2

The land development regulations which implement this Comprehensive Plan shall, at a minimum, be based on and be consistent with s.163.3202, F.S., and shall further be based on the following standards for land use category, land use intensity and land use:

* * *

Urban Light Industrial (I-1)

Purpose: To provide development opportunities for existing and new light industrial facilities.

Uses which may be permitted: Light industrial and compatible retail and service facilities**, and multi-family residential uses as a conditional use for waterfront parcels.**

Density Limits: 25 dwelling units per acre.

* * *

TRANSPORTATION ELEMENT

Policy 6.19: Mac Arthur Causeway

There shall be a full facility impact review of any request for a development permit to be issued by the City for the expansion of ~~the existing cargo port facility~~ **any additional proposed uses on the I-1-designated parcels on Terminal Island** in order to preserve the limited traffic capacity of the MacArthur Causeway and the ferry service to Fisher Island and ensure consistency with the Conservation/Coastal Management Element. ~~Conversely, the existing MacArthur Causeway cargo terminal shall continue to be designated Light Industrial on the Future Land Use Map as to protect the facility from the encroachment of incompatible land uses.~~

* * *

CONSERVATION/COASTAL ZONE MANAGEMENT ELEMENT

OBJECTIVE 9: DENSITY LIMITS

Direct population concentrations away from city-wide coastal high hazard area by prohibiting residential density increases, except to incentivize workforce or affordable housing~~.~~**, or to provide improved government operations and infrastructure.**

POLICY 9.2

The City shall approve no future land use plan map amendments that cumulatively increase residential densities, except to incentivize workforce or affordable housing~~.~~**, or to provide improved government operations and infrastructure and risk reduction to the threat of sea level rise.** Furthermore, the City shall continue to evaluate ways to further modify the Future Land Use Map to reduce densities and intensities.

* * *

The proposed text amendment to the Comprehensive Plan permits multi-family residential uses only when I-1 land is located directly on the waterfront. In addition, the proposed text amendment limits the density of such use to 25 dwelling units per acre (equivalent to ±90 dwelling units on the Property).

According to the City of Miami Beach Future Land Use Map, the only two areas designated as I-1 within the City are Sunset Harbour and Terminal Island. However, only Terminal Island contains waterfront land with the I-1 designation. In Sunset Harbour, I-1 lands are not waterfront and are separated from water, at a minimum, by a street or park. Waterfront property is inherently buffered on at least one side from industrial use and implementing this criteria on the permissibility of the use helps to ensure compatibility.

The Applicants believe that allowing for multi-family residential development along the Terminal Island waterfront while at the same time preserving all permitted industrial, governmental and similar uses comports with Objectives 3 and 7 of the Comprehensive Plan. Objective 3 encourages "innovative land development techniques, such as mixed-use development," and Objective 7 encourages land development regulations to discontinue "non-conforming land and building uses which are incompatible or inconsistent with the Future Land Use Plan." The expansion of land uses

in the I-1 category to include multi-family residential uses creates a mixed-use environment, is compatible with the Future Land Use Plan, does not deprive any adjacent property owners of their rights, does not create any negative impacts, and, since the only waterfront properties in the City within the I-1 zoning district are on Terminal Island, would not impact any other properties with the I-1 designation. A draft ordinance reflecting the proposed amendments is enclosed as Exhibit A for your consideration.

Justification for the Amendment

As addressed in the Applicants' initial letter of intent, the resubmittal correspondence, and the Staff Report and Recommendation, the Applicants have met the standards for approval of these requests in accordance with the criteria set for by Section 118-163 of the Land Development Regulations and are consistent with the Goals, Objectives, and Policies of the City's Comprehensive Plan. The amendments address the City's evolving needs for improved infrastructure and government services as follows:

1. **Whether the proposed change is consistent and compatible with the comprehensive plan and any applicable neighborhood or redevelopment plans.**

   The Applicants are proposing text amendments that are consistent with the Goals, Objectives, and Policies of the Comprehensive Plan. Specifically, the amendments are consistent with the following objectives and policies of the Comprehensive Plan:

   OBJECTIVE 2: *LAND USE COMPATIBILITY. Land development regulations will be used to address the location, type, size and intensity of land uses and to ensure adequate land use compatibility between residential and non-residential land uses.*

   Policy 2.2: *Development in land use categories which permit both residential and non-residential uses shall be regulated by formalized land development regulations which are designed to ensure adequate land use compatibility.*

   Objective 3: *INNOVATIVE DEVELOPMENT. The land development regulations shall continue to be consistent with s. 163.3202, F.S. and with the Future Land Use map, consistent with sound planning principles, minimal natural limitations, the goals, objectives and policies contained within this plan, and the desired community character, and which shall emphasize innovative land development techniques, such as mixed use development.*

   Objective 7: *INCONSISTENT USES. The City land development regulations shall continue to provide for the discontinuation of non-conforming land and building uses which are incompatible or inconsistent with the Future Land Use Plan.*

   Policy 9.1: *Continue to designate the V storm surge zone of the beach front as a Conservation-Protected area on the future Land Use Map.*

   Policy 9.2: *The City shall approve no future land use plan map amendments that cumulatively increase residential densities, except to incentivize workforce or affordable housing~~.~~, **or to provide improved government operations and infrastructure and risk reduction to the threat of sea level rise**. Furthermore, the City shall continue to evaluate ways to further modify the Future Land Use Map to reduce densities and intensities.*

The proposed amendments are consistent with the Future Land Use Plan. The addition of multi-family residential use on the waterfront in I-1 will encourage a successful mix of uses that will be regulated by administrative procedures and special land use criteria to ensure compatibility with the uses in the surrounding area. Multi-family residential use will be allowed only as a conditional use when land is located directly on the waterfront, and restaurant use as an accessory use when associated with multi-family residential uses. Light Industrial would continue to be the predominant use at the waterfront but residential and accessory recreational uses will be layered in to increase vitality, livability and spur economic development in this highly visible area of the City. Compatibility is established through the review process required for the approval of a conditional use, which ensures that the necessary safeguards are provided for the protection of surrounding land uses and neighborhood values.

The Applications are consistent with Policies 9.1 and 9.2 as follows:

Policy 9.1: The subject property is not located on the beach front and the proposed amendments do not impact any Conservation-Protected areas. Only the narrow perimeter of Terminal Island, like majority of the waterfront areas of the City, is shown as Category 1 Storm Surge Area on the Coastal High Hazard Map. An excerpt of the map is provided below:

Coastal High Hazard Area

Category 1 Storm Surge and Evacuation Routes

All future building designs on Terminal Island shall comply with the applicable building code requirements to ensure protection from major storm and flooding events.

Policy 9.2: The Applicants are not proposing any changes to the Future Land Use Map or Zoning Map boundaries. No new districts are proposed by these applications. The proposed change does not modify existing district boundaries but does provide for a mixed-use development opportunity by expanding permitted uses under certain qualifying circumstances. As noted above, the density being applied, 25 dwelling units per acre, is an established density within the City's multi-family residential and mixed-use districts.

The approval of the Applications will not create any new impacts on the community or impose any detrimental effects on the public health, safety, and welfare of the residents of the City.

2. **Whether the proposed change would create an isolated district unrelated to adjacent or nearby districts.**

   The Applicants are not proposing any changes to the Future Land Use Map or Zoning Map boundaries. No new districts are proposed by these applications.

3. **Whether the change suggested is out of scale with the needs of the neighborhood or the city.**

   The proposed amendment establishes multi-family residential on waterfront properties and limited accessory amenities, including a private restaurant, as conditional and accessory uses, respectively. The scale being proposed is not out of character with the surrounding area and will not negatively impact any view corridors. Residential use currently exists within Base Miami Beach, which is home to many enlisted servicemen who live in the housing on the base.

4. **Whether the proposed change would tax the existing load on public facilities and infrastructure.**

   The proposed change will decrease traffic on the MacArthur Causeway, decrease pollution and stormwater runoff on Terminal Island and will lessen impacts on public facilities and infrastructure. A trip generation analysis, prepared by David Plummer and Associates, compared the vehicular impacts of the proposed use with the approved cargo terminal operations. The analysis concluded that the proposed 90 residential dwelling units will have significantly less impacts on the traffic operation of MacArthur Causeway than the cargo terminal operations as follows:

   - Will eliminate in excess of 125,000 heavy truck trips annually;
   - Will reduce maintenance cost for roadways and bridges;
   - Will reduce the ambient emission, improving the air quality in the area;
   - Will reduce PM peak hour trips by 52%; and
   - Will significantly improve traffic operations on the City's busiest roadway and safety of the adjacent roadways and intersections.

   In addition, a mixed-use development will require soil remediation, the addition of clean fill, and require state of the art drainage infrastructure to be installed.

5. **Whether existing district boundaries are illogically drawn in relation to existing conditions on the property proposed for change.**

   Not applicable. The proposed change does not modify existing district boundaries but does provide for a mixed-use development opportunity by expanding permitted uses under certain qualifying circumstances.

6. **Whether changed or changing conditions make the passage of the proposed change necessary.**

   Cities around the country are increasingly using mixed-use industrial districts to preserve industrial land and increase density, which will result in higher property values that will benefit all residents. The proposed amendment in conjunction with the development of the MBP Property and the City Property is intended to create a functional site while beautifying and encouraging the revitalization

of the waterfront. Due to its strategic location and incredible visibility, there are market influences that suggest this higher and better use for Terminal Island than its current blighted condition. However, the Applicants acknowledge the importance of protecting the City's remaining industrial lands. The proposed amendments allow multi-family residential uses within the scope of the existing land use category and ensures compatibility between permitted uses.

7. **Whether the proposed change will adversely influence living conditions in the neighborhood.**

The proposed change will not adversely affect living conditions in the neighborhood. In fact, the proposed change will significantly decrease traffic (particularly heavy truck trips) on the MacArthur Causeway for the immediate benefit of residents of Star Island, Palm Island, and Hibiscus Island, the three communities which are in closest proximity to Terminal Island, and improving access to and from the Fifth Street and Alton Road corridors and the South of Fifth Neighborhood. As noted above, the elimination of 125,000 heavy truck trips will also improve air quality along this corridor.

The Applicants believe that other uses may be better for the parcel and for the City as a whole. Cities around the country are increasingly incorporating a mix of uses in their industrial districts. This mixed-use industrial environment helps to preserve industrial land and increase density, which result in higher property values that serve as a benefit to all residents. The proposed amendment will protect a functioning industrial site while beautifying and encouraging the revitalization of the waterfront. Due to its strategic waterfront location and exceptional visibility, market influences indicate that incorporating mixed-use is a higher and better use for Terminal Island. The proposed amendments allow multi-family residential uses within the scope of the existing land use category but limiting it to a conditional use will ensure compatibility between permitted uses.

In order to appropriately update the Comprehensive Plan in response to these changes, the Applicants included an amendment to Transportation Element Policy 6.19: Mac Arthur Causeway in order to accommodate the proposed use.

8. **Whether the proposed change will create or excessively increase traffic congestion beyond the levels of service as set forth in the comprehensive plan or otherwise affect public safety.**

As mentioned above and as evidenced in the Applicants' trip generation analysis, the proposed change will have an immensely positive effect on traffic by reducing heavy truck trips by 125,000 trips and reducing PM Peak Hour volumes by 52%. The proposed use will reduce maintenance cost for roadways and bridges, reduce ambient emission, improving the air quality in the area, and will significantly improve traffic operations on the City's busiest roadway, increasing the safety of the adjacent roadways and intersections. Undoubtedly, the proposed change will have a meaningful decrease on traffic on the MacArthur Causeway and improve the quality of life for all residents, workers, and visitors traveling to and from the City on this major arterial.

Many of the industrial uses permitted in the I-1 land use category, which constitutes the majority of Terminal Island, create far greater traffic impacts than the proposed residential density of 25 dwelling units per acre. Any traffic generated by residential development on Terminal Island will not impact the City's internal street network and will result in a significant increase on its evacuation routes. The Applicants submitted a trip generation analysis, prepared by David Plummer and Associates, in connection with the Applications. The analysis compared the vehicular impacts on the MacArthur Causeway of the proposed use with the approved cargo

terminal operations. The analysis concluded that the proposed 90 residential dwelling units will have significantly less impacts on the traffic operation of MacArthur Causeway than the cargo terminal operations.

The approval of the proposed amendment will provide the opportunity for a significant decrease in traffic (particularly heavy truck trips) on the MacArthur Causeway, a main evacuation route for the south portion of the City. In times of emergency when evacuation is necessary, the alternative of removing hundreds of cargo containers by trucks from the cargo terminal facility as opposed to the evacuation of 90 families from the same site is an example of the reduction of impacts on the route.

9. **Whether the proposed change will seriously reduce light and air to adjacent areas.**

The proposed change will not impact light and air to adjacent areas. Residential building height shall be limited to 300 feet, which is lower than the average tower height visible in the nearby South of Fifth and West Avenue neighborhoods.

10. **Whether the proposed change will adversely affect property values in the adjacent area.**

Mixed-use encourages economic development. In general, the proximity and clustering of uses adds value to neighborhoods. The addition of a well-designed residential building with private amenities for the residents to enjoy and an intelligent expansion of the City's facilities will significantly improve Terminal Island. The proposed development will enhance the entrance to Miami Beach, create a landmark addition to the already stunning views of the surrounding buildings, and increase property values in the adjacent area.

11. **Whether the proposed change will be a deterrent to the improvement or development of adjacent property in accordance with existing regulations.**

The proposed change will not be a deterrent to the improvement or development of properties in the City nor in any of the I-1 designated areas. The City's Land Development Regulations require that any new development plans must be presented to and approved by the Design Review Board at a public hearing to verify that any new development and uses are compatible with the surrounding neighborhood. Establishing residential use as a conditional use within I-1 will provide a safeguard to ensure the compatibility of any such new residential or mixed-use development.

12. **Whether there are substantial reasons why the property cannot be used in accordance with existing zoning.**

The Transportation Element of the Comprehensive Plan clearly identifies that the current industrial uses on Terminal Island are taxing on the traffic capacity of MacArthur Causeway and generate environmental concerns. In time, Terminal Island will benefit from a mix of uses that actually decrease traffic, reduce the environmental impact on Biscayne Bay, and beautify the island.

13. **Whether it is impossible to find other adequate sites in the city for the proposed use in a district already permitting such use.**

Terminal Island is unique in its location and features and serves as the gateway to Miami Beach. At the same time, industrially-designated lands are scarce in the City. The proposed amendments will allow for a balance between the unique location and the need for a wide range of uses.

The proposed amendments are consistent with the Goals, Objectives, and Policies of the Comprehensive Plan. The amendments are consistent with Objectives 2, 3, and 7 and Policy 2.2 of the Comprehensive Plan. The addition of multi-family residential use on the waterfront in I-1 will encourage a successful mix of uses that will be regulated by administrative procedures and special land use criteria to ensure compatibility with the uses in the surrounding area. Multi-family residential use will be allowed only as a conditional use when land is located directly on the waterfront, and restaurant use as an accessory use when associated with multi-family residential uses. Light Industrial would continue to be the predominant use at the waterfront at the lower levels but residential and accessory recreational uses will be layered in above to increase vitality, livability and spur economic development on Terminal Island.

Coordination with United States Coast Guard ("USCG")

The proposed amendments to the Comprehensive Plan and Land Development Regulations requires transmittal and coordination with the U.S. Coast Guard pursuant to Section 163.3175(1) of the Florida Statutes[1] and Objective 11 of the Future Land Use element of the 2025 Miami Beach Comprehensive Plan as follows:

OBJECTIVE 11: COOPERATION WITH MILITARY INSTALLATIONS

The City will cooperate with the U.S. Coast Guard station located within its jurisdiction by exchanging and providing information to prevent encroachment of incompatible land uses in order to facilitate its continued presence in the City.

Policy 11.1: The City will transmit to the commanding officer information relating to proposed changes to comprehensive plans, plan amendments, and proposed changes to land development regulations which, if approved, would affect the intensity, density, or use of the land adjacent to or in close proximity to the U.S. Coast Guard Station.

Policy 11.2: The City will provide the commanding officer or his or her designee an opportunity to review and submit comments on the proposed changes regarding the impact such proposed changes may have on the mission of the U.S. Coast Guard Station.

Policy 11.3: The City will take into consideration any comments provided by the commanding officer or his or her designee when making such decision regarding comprehensive planning or land development regulation and will forward a copy of any such comments to the state land planning agency.

The Applicants have taken multiple steps to coordinate with the USCG and to ensure compatibility with Base operations in accordance with Section 163.3175(1) of the Florida Statutes and in furtherance of Objective 11 of the City's Comprehensive Plan. The USCG has been provided notice of all public hearings and the Applicants have met with USCG officials on numerous occasions. In addition, the Applicants have engaged two world-renown consulting firms to assess the appropriateness of the proposed project, Seebald & Associates International (SAI) and Ridge Global.

SAI is a full-time maritime security firm composed of a team of former USCG professionals with over a century of combined experience while serving as Captains of the Port, facility and vessel

[1] Base Miami Beach is not a major military installation under Sec. 163.3175(2) F.S. However, the Applicants have analyzed public safety and compatibility pursuant to Sec. 163.3175(1) F.S.

inspectors, security analysts, and regulatory compliance specialists. SAI was engaged to provide a maritime risk assessment and analysis to understand the impacts of development on Base Miami Beach operations (the "Risk Assessment"). The Risk Assessment determined that "no significant risks are involved with developing Terminal Island that cannot be addressed with effective collaboration... All risks in developing the property can be mitigated or eliminated either through structural or environmental design, planning, or processes and procedures." A copy of the Risk Assessment is attached hereto as Exhibit B.

Ridge Global is a security and risk management firm founded by Tom Ridge, the first U.S. Secretary of Homeland Security and 43rd Governor of Pennsylvania, that works with organizations to identify and decrease security risks. The analysis prepared Ridge Global concluded that the proposed residential uses and the USCG can successfully coexist with each other, and the assurances provided by the developer that future residents, through legal means of waivers, restrictive covenants, and a nuisance easement, will consent to the Base Miami Beach operations and any necessary changes to said operations without objection will improve and protect the USCG mission execution. A copy of the Ridge Global analysis is attached hereto as Exhibit C.

In addition, the Applicants have drafted and proffered instruments that it proposes to record on the residential portion of the Property to run with the land to prevent incompatible encroachments, protect the residents, and ensure compatibility of uses. The instruments include the following: 1) a Waiver, executed by the each condominium owner, that expressly waives the right of the condominium owner to quiet enjoyment of their Property based on the proximity to the adjacent industrial uses. The waiver requirement is intended to be recorded as a notice on the Property, included in the purchase agreements for any portion of the MBP Property and in condominium association documents, and provided as a deed restriction for each unit; 2) Nuisance Easement in favor of the USCG to permit any infringement and interference that occurs as a result of any USCG operations. This easement is also intended to be recorded and run with the land; and 3) condominium association protocol intended to be implemented to address residents' concerns relating the USCG or City's facility operations. A copy of the proposed draft waiver and easement agreement instruments are attached hereto as Exhibits D and E, respectively.

Compatibility

The Applicants have critically analyzed the compatibility of the amendments. Pursuant to the Compatibility, Sea Level Rise and Resiliency Analysis prepared by The Curtis Group, dated December 5, 2018, the proposed amendments do not create a use or condition that causes undue negative impact directly or indirectly to other uses or conditions in the area. The analysis contemplates numerous examples throughout the United States of multi-family residential coexisting adjacent USCG Bases and facilities. A copy of the analysis is enclosed as Exhibit F hereto.

The subject Property abuts an approximately 300-foot wide channel that provides a significant buffer between the uses of the proposed project and the USCG Base. Furthermore, to ameliorate any concerns that future condo owners will complain about the operations at the USCG base, all proposed Project condo owners will be required to execute a Waiver in favor of the USCG to allow the USCG to continue to conduct its operations at Base Miami Beach without encroaching or depriving any adjacent project property owners of the use of their property due to noise, vibrations, fear, anxiety, fumes, residue and other related impacts that the USCG operations may cause. As noted above, the Applicants are also proffering a Nuisance Easement in favor of the USCG, which will allow Base Miami Beach to continue its operations in an uninterrupted manner in the vicinity of, over, and around

the Terminal Island parcel. Therefore, even though the uses are compatible, the Waiver and Nuisance Easement will ensure future residents acknowledge the Base Miami Beach proximity and use; and, guarantee the Project's residents shall not interfere with the Base's use or operation and further ensure that the uses can coexist in a compatible manner.

Sea-Level Rise and Resiliency Criteria – Section 133-50(a):

(1) A recycling or salvage plan for partial or total demolition shall be provided.

A recycling or salvage plan for partial or total demolition of any structures will be provided at the appropriate time in the development process in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(2) Windows that are proposed to be replaced shall be hurricane proof impact windows.

Applicant acknowledges that all windows in any future development shall be hurricane proof impact windows. Further details regarding the windows for the project will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(3) Where feasible and appropriate, passive cooling systems, such as operable windows, shall be provided.

Applicant acknowledges that passive cooling systems, including, but not limited to, operable windows, shall be provided for any future development. Further details regarding the passive cooling systems for the project will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(4) Whether resilient landscaping (salt tolerant, highly water-absorbent, native or Florida friendly plants) will be provided.

Applicant will explore resilient landscape options for any future project and will provide further details at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(5) Whether adopted sea level rise projections in the Southeast Florida Regional Climate Action Plan as may be revised from time-to-time by the Southeast Florida Regional Climate Change Compact including a study of land elevation and elevation of surrounding properties were considered.

Adopted Sea level rise projections in the Southeast Florida Regional Climate Action Plan, including a study of land elevation and elevation of surrounding properties, will be considered at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(6) The ground floor, driveways, and garage ramping for new construction shall be adaptable to the raising of public rights-of-ways and adjacent land.

Applicant acknowledges that the ground floor, driveways, and garage ramping shall be adaptable to the raising of public rights-of-ways and adjacent land. Further details will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(7) Where feasible and appropriate, all critical mechanical and electrical systems shall be located above base flood elevation.

Noted. Further details will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(8) Existing buildings shall be, where reasonably feasible and appropriate, elevated to the base flood elevation.

Noted. Further details will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(9) When habitable space is located below the base flood elevation plus City of Miami Beach Freeboard, wet or dry flood proofing systems will be provided in accordance with Chapter of 54 of the City Code.

Wet or dry flood-proofing systems will be provided for any future development in accordance with Chapter 54 of the City Code for habitable space located below the base flood elevation plus City of Miami Beach Freeboard. Further details will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

(10) Where feasible and appropriate, water retention systems shall be provided.

As noted above, further details will be provided at the appropriate time in the development process for any new construction in accordance with Code requirements. At this time, Application No. PB16-0085 only entails a Comprehensive Plan text amendment.

The Applicant has carefully considered sea level rise protections and resiliency measures, and, as noted in the analysis prepared by the Curtis Group, the proposed development will be developed in compliance with all City's recent Code amendments and will be designed to ensure resiliency and protection from sea level rise and storm surges. *See* Exhibit F. The proposed devolvement, which also includes reconstruction of the City's Sanitation Department and Fleet Management Facility, inclusive of its service bays, vehicle maintenance, storage and related facilities, will be developing a fully resilient component of the City's infrastructure thereby protecting public assets and resources against the impacts of climate change and sea level rise. In addition to the above codified criteria, the proposed development will incorporate significant terraced areas as green roofs,

landscaped with Florida Friendly plantings, install and provide access to electrical power supply rated at 240 volts or greater, in parking garages for the use of residents, guests, and employees, and provide a new, resilient Fleet Facility for the City, allowing Fleet Management and the Sanitation Departments to provide services to protect human life and City resources.

The approval of this Application will ensure that the Property, and Terminal Island, will be developed with the highest and best use. The proposed text amendment and expansion of uses will promote a mixed-use environment in the suitable circumstances that would be both compatible and consistent with the character of the surrounding area. This would allow development that is consistent with the goal of the Comprehensive Plan to promote innovative mixed-use development and satisfy an immediate need for improved government services.

Based on the foregoing, we respectfully request the City's continued favorable consideration of the Application as amended. Please do not hesitate to contact me if you have any questions or concerns regarding the application.

Respectfully submitted,

HOLLAND & KNIGHT LLP

Tracy R. Slavens, Esq.

Enclosures

Exhibit A

DRAFT ORDINANCE

ORDINANCE NO._____

AN ORDINANCE OF THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA, AMENDING GOALS, OBJECTIVES AND POLICIES OF THE CITY OF MIAMI BEACH COMPREHENSIVE PLAN, CHAPTER 1 LAND USE ELEMENT, POLICY 1.2 OF OBJECTIVE 1: LAND DEVELOPMENT REGULATIONS OF THE FUTURE LAND USE ELEMENT BY AMENDING THE URBAN LIGHT INDUSTRIAL USE CATEGORY TO PERMIT MULTIFAMILY RESIDENTIAL USES ON WATERFRONT PARCELS AND ACCOMPANYING STANDARDS FOR LAND DEVELOPMENT REGULATIONS; AMENDING CHAPTER 2 TRANSPORTATION ELEMENT, POLICY 6.19 OF OBJECTIVE 6: MULTI-MODAL TRANSPORTATION TO UPDATE REFERENCED USES ON TERMINAL ISLAND; AMENDING CHAPTER 6 CONSERVATION/COASTAL ZONE MANAGEMENT, OBJECTIVE 9: DENSITY LIMITS BY CREATING AN EXCEPTION TO PROVIDE IMPROVED GOVERNMENT OPERATIONS AND INFRASTRUCTURE; POLICY 9.2 TO PROVIDE IMPROVED GOVERNMENT OPERATIONS AND INFRASTRUCTURE AND RISK REDUCTION TO THE THREAT OF SEA LEVEL RISE; PURSUANT TO THE PROCEDURES IN SECTION 163.3184, FLORIDA STATUTES AND AUTHORIZING AND DIRECTING THE CITY ADMINISTRATION TO SUBMIT THE ADOPTED AMENDMENT TO THE FLORIDA DEPARTMENT OF ECONOMIC OPPORTUNITY AND ANY OTHER REQUIRED STATE AND LOCAL AGENCIES; PROVIDING FOR REPEALER, SEVERABILITY, CODIFICATION AND AN EFFECTIVE DATE

WHEREAS, The Light Industrial Use Category is comprised of a mix of transportation, light industrial, office, and military base (including residential units) uses; and

WHEREAS, amending the text of the Land Use Element of the City of Miami Beach Comprehensive Plan, as provided herein, will encourage appropriate and compatible development on waterfront lands within the Light Industrial Use Category; and

WHEREAS, amending the text of the Transportation Element of the City of Miami Beach Comprehensive Plan, as provided herein, will reflect the current character of Terminal Island and how its land uses may impact the MacArthur Causeway; and

WHEREAS, amending the text of the Conservation/Coastal Zone Management Element of the City of Miami Beach Comprehensive Plan, as provided herein, will allow

for the implementation of industrial mixed-use on Terminal Island; and

WHEREAS, said text amendments are necessary to ensure that the future development of waterfront lands is in the best interest and welfare of the residents of the City; and

WHEREAS, the City of Miami Beach Planning Board, which serves as local planning agency, transmitted the text amendment to the City Commission with a favorable recommendation; and

WHEREAS, the City Commission held a duly noticed public hearing, at which time it voted to transmit the text amendment for review by state, regional, and local agencies, as required by law; and

WHEREAS, the City Commission hereby finds that the adoption of this text amendment is in the best interest and welfare of the residents of the City.

NOW THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COMMISSION OF THE CITY OF MIAMI BEACH, FLORIDA:

SECTION 1. AMENDMENT TO THE LAND USE ELEMENT OF THE CITY'S COMPREHENSIVE PLAN.

That Policy 1.2 of Objective 1, Land Development Regulations of the Future Land Use Element of the City of Miami Beach Comprehensive Plan is hereby modified as follows:

Policy 1.2

The land development regulations which implement this Comprehensive Plan shall, at a minimum, be based on and be consistent with s.163.3202, F.S., and shall further be based on the following standards for land use category, land use intensity and land use:

* * *

Urban Light Industrial (I-1)

Purpose: To provide development opportunities for existing and new light industrial facilities.

Uses which may be permitted: Light industrial and compatible retail and service facilities**, and multi-family residential uses as a conditional use for waterfront parcels.**

Density Limits: 25 dwelling units per acre.

* * *

SECTION 2. AMENDMENT TO THE TRANSPORTATION ELEMENT OF THE CITY'S COMPREHENSIVE PLAN.

That Policy 6.19 of Objective 6, Transportation Element of the City of Miami Beach Comprehensive Plan is hereby modified as follows:

* * *

Policy 6.19: Mac Arthur Causeway

There shall be a full facility impact review of any request for a development permit to be issued by the City for the expansion of ~~**the existing cargo port facility**~~ **any additional proposed uses on the I-1-designated parcels on Terminal Island** in order to preserve the limited traffic capacity of the MacArthur Causeway and the ferry service to Fisher Island and ensure consistency with the Conservation/Coastal Management Element. ~~**Conversely, the existing MacArthur Causeway cargo terminal shall continue to be designated Light Industrial on the Future Land Use Map as to protect the facility from the encroachment of incompatible land uses.**~~

* * *

SECTION 3. AMENDMENT TO THE CONSERVATION/COASTAL MANAGEMENT ZONE ELEMENT OF THE CITY'S COMPREHENSIVE PLAN.

That Objective 9 and Policy 9.2, Land Development Regulations of the Conservation/Coastal Management Zone Element of the City of Miami Beach Comprehensive Plan is hereby modified as follows:

OBJECTIVE 9: DENSITY LIMITS

Direct population concentrations away from city-wide coastal high hazard area by prohibiting residential density increases, except to incentivize workforce or affordable housing~~.~~**, or to provide improved government operations and infrastructure.**

POLICY 9.2

The City shall approve no future land use plan map amendments that cumulatively increase residential densities, except to incentivize workforce or affordable housing~~.~~**, or to provide improved government operations and infrastructure and risk reduction to the threat of sea level rise.** Furthermore, the City shall continue to evaluate ways to further modify the Future Land Use Map to reduce densities and intensities.

* * *

SECTION 4. REPEALER.

All ordinances or parts of ordinances and all section and parts of sections in conflict herewith be and the same are hereby repealed.

SECTION 5. SEVERABILITY.

If any section, subsection, clause or provision of this Ordinance is held invalid, the remainder shall not be affected by such invalidity.

SECTION 6. INCLUSION IN COMPREHENSIVE PLAN.

It is the intention of the City Commission, and it is hereby ordained that the amendment provided for in Section I is made part of the of the City of Miami Beach Comprehensive Plan, as amended; that the sections of this Ordinance may be renumbered or relettered to accomplish such intention; and that the word "ordinance" may be changed to "section" or other appropriate word.

SECTION 7. TRANSMITTAL

The Planning Director is hereby directed to transmit this ordinance to the appropriate state, regional and county agencies as required by applicable law.

SECTION 8. EFFECTIVE DATE.

This Ordinance shall take effect on the _____ day of _____, 20____; however, the effective date of any plan amendment shall be in accordance with Section 163.3184, Florida Statutes.

PASSED and ADOPTED this _____ day of _____, 20____.

_____

MAYOR

ATTEST:

_____

CITY CLERK

APPROVED AS TO
FORM AND LANGUAGE
& FOR EXECUTION

_____ _____
City Attorney Date

First Reading:
Second Reading:

Verified by: _____ _____
Thomas Mooney, AICP, LEED Date
Planning Director

Exhibit B

RISK ASSESSMENT AND PREPARED BY
SEEBALD & ASSOCIATES INTERNATIONAL

Seebald & Associates International
5881 Meadows Road
Dewittville, NY 14728

www.Seebald.com

November 19, 2018

Miami Beach Port, LLC
1200 Brickell Avenue, Suite 1500
Miami, FL 33131

To Whom It May Concern:

The attached report contains a risk assessment for the proposed development of the property on Terminal Island in the Port of Miami owned by Miami Beach Port, LLC. Research for this project consisted of analyzing public information and, where applicable, interviews with affected parties.

Should you have any questions regarding this report, please contact me personally at (716) 481-5597, or via email at Edward@Seebald.com.

Sincerely,

Edward P. Seebald
CDR, USCG (ret.)
CEO, Seebald & Associates

Encl: Terminal Island Miami Beach Port – S&A Development Risk Analysis

BUSINESS CONFIDENTIAL

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Miami Beach Port's Terminal Island Development Risk Assessment

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I. DEVELOPMENT RISK ASSESSMENT

A. Introduction

Miami Beach Port, LLC engaged Seebald & Associates International (S&A) to conduct a risk assessment on several options for future development of the southeastern portion of Terminal Island, adjacent to the Port of Miami, in Miami Beach, Florida. This document reflects Seebald Associates' professional opinions, based on more than a century of U.S. Coast Guard (CG) operational experience and risk management. Seebald & Associates is a full-service maritime security firm featuring a team of former CG professionals with over a century of combined experience while serving as Captains of the Port, facility and vessel inspectors, security analysts, multi-mission operators, and regulatory compliance specialists. See Attachment A for further background. Attachment B contains brief biographies of the S&A personnel participating in this analysis.

No significant risks are involved with developing Terminal Island that cannot be addressed with effective collaboration. This paper summarizes risks and mitigation actions that S&A determines will affect CG Base Miami Beach, the City of Miami Beach, and Miami Beach Port, LLC. The information provided herein is intended to assist decision makers, investors and all stakeholders decide upon a course of action that will positively impact the Miami Beach community and Terminal Island in the year 2020 and beyond.

As a way of background, Miami Beach Port, LLC, acquired property at the southeastern portion of Terminal Island, adjacent to the Port of Miami in Miami Beach, Florida. The property is currently referred to as One Island Park Marina. The site is currently zoned for light industrial use, which includes light manufacturing, office, and marine-related uses. The intent of the property development is to build a mixed-use development consisting of 90 luxury multi-family residential units and the City of Miami's Fleet Management and Sanitation facility. Multi-family residential use would require a change to the zoning applicable to the site.

In 2014, the CG provided no objection to the proposed multi-family residential use on the property, which is located across an estuary approximately 300-feet from the CG's Base Miami Beach. *See Letter from CG Base Miami Beach Commanding Officer Captain B.L. Davis, dated April 22, 2014 (Attachment C)*. However, most recently the CG has opposed the redevelopment of the property and has identified risks to the base and operations as well as risks to the surrounding area from operations occurring on the CG base. The potential hazards the CG identifies are refutable and those not disclaimed can be mitigated. **Similar to the private sector, the CG's business is to *manage risk*, not *avoid it***. Many of the safety and security risks that the CG cites are being successfully managed at the CG base and in its other operating areas. This risk management approach serves as precedence, and the developers' and City of Miami Beach's willingness to work with the CG demonstrates that the issues the CG cites no longer have merit.

Miami Beach Port's Terminal Island in its present state is underutilized and underdeveloped. The CG and nearby municipal, commercial, and residential properties are long term neighbors. Collaboratively, these neighbors have successfully managed risk and established a safe and secure community.

Miami Beach Port, LLC intends to be a model development that will benefit the CG and the City of Miami Beach by mitigating existing and imagined risks, offering relief to the City of Miami Beach in terms of a much needed a state-of-the-art facility for the City's Fleet Management, Sanitation and Public Works operations, and improving traffic on the MacArthur Causeway. The opportunities to offer the community's hard-working people an exceptional work place environment abundant parking and a safe and secure neighborhood are all attainable. Miami Beach Port, LLC, will take full advantage of the unique opportunities that Terminal Island offers while completely including its public and private sector neighbors as partners in the island's long-term, sustainable development.

B. Development Options

Miami Beach Port, LLC has identified the following potential courses of action for development of the property:

- Mixed-Use Residential Building: Up to 90 condominium units in a multi-level building with parking within the lower levels of the building's footprint, and a City government facility
- Commercial Office Building: Approximately 160,000 square feet of office area with a 640-car parking garage
- Industrial Port/Cargo Facility: Cargo port terminal, e.g., cement delivery/distribution facility comprising approximately four acres

1. Mixed-Use Residential Building.

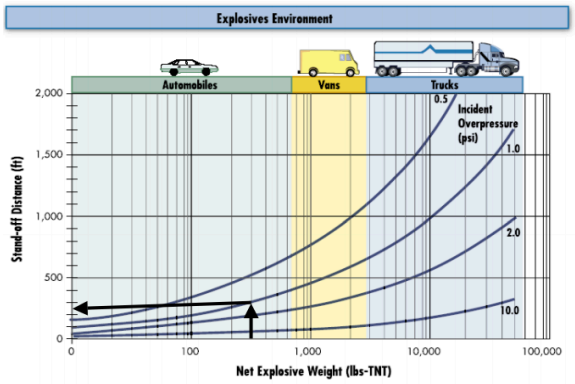
The CG perceives a multi-family residential building as a risk due to potential *nuisance calls* from residents. CG operational units are first responders, like local police departments, fire departments and emergency medical services. First response organizations exist to save and protect lives and property, they do not get to choose what time of day they must do what is necessary. The CG believes that the residential building occupants will find fault with the sound, light and atmospherics that might emanate from its base operations. Conversations during the last year between Miami Beach Port personnel and nearby residents from local homeowner associations reveal the opposite. The residents report they feel more safe and secure – and a sense of pride – to have CG operations based in their neighborhood.

Safety

Safety will not be a significant risk to or created by a residential condominium building. The CG cites the dangers from ammunition transfers and ordinance storage occurring on the CG base. This minimal risk will not change as a result of the proposed residential development. Regarding a mixed-use residential building, the impacts of the risk from dangers relating to ammunition transfers and ordnance storage in the CG Base will be reduced when compared to more intense or high traffic generation uses on the property (i.e., a commercial office building or cargo/port facility).

Notwithstanding the foregoing, it is important to emphasize that it would require a significant detonation device to initiate an explosion that would impact adjacent structures and most of the ordinance stored at the base is smaller caliber ammunition. Refer to images below (also included as Attachments D through G hereto).

Pressure versus Distance

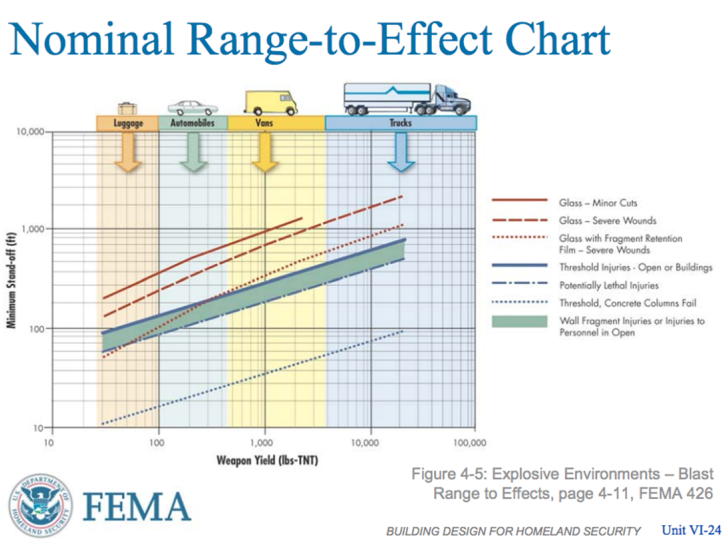


FEMA

Figure 4-10: Incident Overpressure Measured in Pounds Per Sq. Inch, as a Function of Stand-Off Distance and Net Explosive Weight, page 4-17, FEMA 426

BUILDING DESIGN FOR HOMELAND SECURITY Unit VI-30

The Pressure versus Distance image above (also included as Attachment D) provides a method for predicting the expected overpressure (expressed in pounds per square inch or psi) on a building for a specific explosive weight and stand-off distance. By correlating the resultant effects of overpressure with other data, the degree of damage that the various components of a building might receive can be estimated. This method can be used by building designers to mitigate the risk of an explosive effects to building occupants.



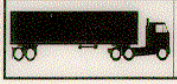
The Nominal Range-to-Effect Chart above (also included as Attachment E) illustrates blast-effects predictions for a building based on a typical car bomb or large truck bomb detonated in the building's vicinity. Based on the results shown above, a huge amount of explosives would have to be detonated to inflict injury or property damage at the planned distance between the CG Base and the mixed-use residential building.

BOMB THREAT STAND-OFF CHART

Threat Description Improvised Explosive Device (IED)		Explosives Capacity[1] (TNT Equivalent)	Building Evacuation Distance[2]	Outdoor Evacuation Distance[3]
	Pipe Bomb	5 LBS	70 FT	1200 FT
	Suicide Bomber	20 LBS	110 FT	1700 FT
	Briefcase/Suitcase	50 LBS	150 FT	1850 FT
	Car	500 LBS	320 FT	1500 FT
	SUV/Van	1,000 LBS	400 FT	2400 FT
	Small Moving Van/ Delivery Truck	4,000 LBS	640 FT	3800 FT
	Moving Van/ Water Truck	10,000 LBS	860 FT	5100 FT
	Semi-Trailer	60,000 LBS	1570 FT	9300 FT

1. These capacities are based on the maximum weight of explosive material that could reasonably fit in a container of similar size.
2. Personnel in buildings are provided a high degree of protection from death or serious injury; however, glass breakage and building debris may still cause some injuries. Unstrengthened buildings can be expected to sustain damage that approximates five percent of their replacement cost.
3. If personnel cannot enter a building to seek shelter they must evacuate to the minimum distance recommended by Outdoor Evacuation Distance. These distance is governed by the greater hazard of fragmentation distance, glass breakage or threshold for ear drum rupture.

The Bomb Threat Stand-Off Chart above (also included as Attachment F) offers information about the minimum evacuation distance from an Improvised Explosive Device (IED) threat, which is the range at which a life-threatening injury from blast or fragmentation hazards is unlikely. Thus, this chart further illustrates the explosive capacity required to pose a serious threat to persons inside the proposed building.

ATF	VEHICLE DESCRIPTION	MAXIMUM EXPLOSIVES CAPACITY	LETHAL AIR BLAST RANGE	MINIMUM EVACUATION DISTANCE	FALLING GLASS HAZARD
	COMPACT SEDAN	500 Pounds 227 Kilos *(In Trunk)*	100 Feet 30 Meters	1,500 Feet 457 Meters	1,250 Feet 381 Meters
	FULL SIZE SEDAN	1,000 Pounds 455 Kilos *(In Trunk)*	125 Feet 38 Meters	1,750 Feet 534 Meters	1,750 Feet 534 Meters
	PASSENGER VAN OR CARGO VAN	4,000 Pounds 1,818 Kilos	200 Feet 61 Meters	2,750 Feet 838 Meters	2,750 Feet 838 Meters
	SMALL BOX VAN *(14 FT BOX)*	10,000 Pounds 4,545 Kilos	300 Feet 91 Meters	3,750 Feet 1,143 Meters	3,750 Feet 1,143 Meters
	BOX VAN OR WATER/FUEL TRUCK	30,000 Pounds 13,636 Kilos	450 Feet 137 Meters	6,500 Feet 1,982 Meters	6,500 Feet 1,982 Meters
	SEMI-TRAILER	60,000 Pounds 27,273 Kilos	600 Feet 183 Meters	7,000 Feet 2,134 Meters	7,000 Feet 2,134 Meters

The chart above (also included as Attachment G) indicates the correlation between explosive capacities and lethal air blast ranges. *There is no evidence that suggests the CG Base has any explosives, and certainly not in the quantities required to cause injury or property damage to the residents at Miami Beach Port.*

The CG transfers small arms and vessel weapons ammunition at CG Base Miami Beach. The transfers occur in a specific safety zone to and from its vessels moored on CG Base Miami Beach. The safety zone is designed to ensure that personnel and property risk of injury or damage from an incident is minimized. (See Section II of this Assessment for specifics and further discussion on safe ammunition handling.) *The CG's history of safely operating with ordnance, specifically loading, unloading and storage of munitions is excellent. In fact, there have been no documented ammunition-related accidents in the area surrounding the CG base.* Presently, there are mega-yachts mooring across the estuary and the Fisher Island Ferry, loaded with commercial and personal vehicles, regularly transits the estuary adjacent to the CG base multiple times a day within 125 feet of the safety area. The CG base is bounded to the south by the Fisher Island Turning Basin and Government Cut, both navigational waterways of the Port of Miami. Many types of vessels, from large commercial ocean-going vessels and large cruise ships to small recreational vessels use the waters near the CG base. Both the moored yachts and the Fisher Island Ferry operate closer to the CG base than the proposed residential use building would be located.

Operational Security

The CG identifies operational security concerns from persons who might surveil the base from the residential building. This risk already exists as the base is located in plain sight of many places that present an opportunity for "spotters" or "early warning persons" to observe and

collect information on CG activities, including from the adjacent waterways, MacArthur Causeway, and the many residential towers to the east and south of the CG base.

Other risks the CG cites include *vessels operating in the estuary* that could impact CG operations. This would include private recreational vessels and the Fisher Island Ferry. Constructing a residential building does not increase this risk. The property currently owns a leasehold property right to its submerged lands and was previously operated as a private cargo terminal. The vessels that would be mooring at the residential complex marina or seawall will be personally- or corporate-owned luxury yachts with an average size of 200 feet. These vessels typically are operated by professional CG licensed mariners, and the vessel moorings & unmoorings are conducted in a highly competent manner with deference to and minimal impact on CG operations.

Communications

The CG claims that its *communications* capability will be affected by a tall structure across the estuary, landward of its base. There will be no impact to communications by the proposed development. Most communications to the base are expected to originate from seaward of the base. In addition, current technologies exist to easily manage/overcome any communications signal challenges.

CG Personnel

Work-life for CG base personnel will not be impacted with the exception of the base's presently unobstructed "scenic view" across the estuary. Miami Beach Port, LLC will work with the CG to minimize impact during construction of the complex to avoid traffic delays. Of note is the current congestion on the CG base, specifically a shortage of parking and office space. Also, the single access road to the CG base is a critical bottleneck, offering only one land-connected ingress/egress from the base. The congestion and bottleneck will not be affected by the residential building, but can be mitigated if the CG engages the developers on identifying vehicle movement concerns to access the CG base and identifying parking opportunities on the residential property's footprint. When compared to an office building or industrial port/cargo facility, the proposed residential development significantly reduces the traffic impacts on Terminal Island and its surroundings.

Risk Mitigation

There are several courses of action that can be pursued to lower or eliminate risks associated with a mixed-use residential development:

- As noted in an April 22, 2014, letter from then-CG Base Miami Beach Commanding Officer CAPT Davis to the City of Miami Beach Planning & Zoning Department, the CG was open to property developer solutions, such as "incorporating covenants and stipulations into the condominium documents to address the potential nuisance

issues, and recording the documents so they would be permanently enshrined in covenants that run with the land, thus unalterable without the CG's prior consent." Further, Captain Davis's letter indicates a favorable CG response to using the building's roof space and access to allow for placement of sensors to enable the CG to monitor the port.

- The new buildings will be designed to minimize environmental (noise, light) effects caused by the CG base. Hurricane protection impact glass will be installed for each unit. Mitigating the risk posed by nuisance complaints and lawsuits is common among many places where industrial and residential uses coexist (e.g., military bases, airfields, industrial facilities, airports). If managed collaboratively with a proactive engagement strategy, the nuisance claim risk can be mitigated or effectively eliminated using the lessons learned from similar instances where residential properties are constructed near pre-existing sources of noise, light, or atmospheric disturbances. Any City of Miami Beach provisions in law that prevent nuisance complaints against its first response organizations should/can be extended to the CG as a reasonable accommodation. Including notice of proximity to the CG base and providing for nuisance claims restrictions in sales, lease, and home owner agreements can be effective in reducing the risk.
- Based on their past performance, the CG can be relied upon to mitigate safety risks presented by its base operations. The CG should be expected to maintain its safety record in ammunition handling. Similarly, the CG's safety and environmental compliance in its industrial area is an expected norm.
- Establishing access-control on the property with professional personnel performing security checks and random patrols on the island will lessen concerns. CG communications concerns can be mitigated by placing equipment in restricted areas on the top of the condo building, and coordination with CG telecommunications requirements may actually enhance communication coverage.
- Offering CG civil engineers an opportunity to present options for improvements to the access right of way leading to the CG base will enhance the CG's readiness and preparedness. Collaboration between the CG and property developers on how to remedy this existing vulnerability can greatly enhance the CG's safety and security.
- Work-life concerns can be mitigated by traffic management during construction and once the residential property is operating. Typical occupancy of a building of this kind is less than 30%, which reduces the impact that the residential building would have on traffic congestion compared to the other two options. Working with the CG base to establish a first right-of-refusal to access additional parking can mitigate CG vehicle overflows.

2. Commercial Office Building

Similar to a residential building, the CG's nuisance call risk perception, including risks relating to safety, operational security, communications and CG personnel applies in this option, although at a lower level than with a residential building. Safety impacts are minimal as described in the residential property section, while security risk mitigation measures will be enhanced by adding access control and security measures associated with the office spaces. The CG base will be invited to assist or participate in the planning and introduce safety and security concerns to Miami Beach Port, LLC. Like any construction of a residential building, Miami Beach Port, LLC can be expected to work collaboratively with the CG to minimize impacts and mitigate risks.

Risk Mitigation

The following mitigating actions will reduce or erase perceived risks associated with a commercial office building:

- Again, these measures have had favorable interest from the CG in the past, as evidenced in Captain Davis's April 22, 2014, letter. Nuisance complaint and lawsuit risk mitigation for an office building is akin to that of a residential building. However, the developer will not be implementing the same mitigation measures for a commercial development that would be implemented for a residential development, such as the legal instruments protecting against nuisance claims.
- Background checks on employees and access control measures can be established, such as guarded entry points and access badges.
- Strategic positioning of entry points, and design of the structure should all be considered in the planning phase of the development.
- Constructing an office complex that offers office and parking space to the CG will mitigate the CG's base overcrowding. Offering early opportunities to lease office space(s) with additional parking will positively impact the readiness, quality of work-life and efficiency of the CG's personnel and units stationed nearby. Work-life for new occupants and CG base personnel can be greatly enhanced if small retail or service-oriented businesses like a coffee shop, restaurant, or convenience store are included in the support role of an office complex or marina.

3. Cargo/Port Facility

A new privately-operated cargo port facility will require establishing another Maritime Transportation Security Act (MTSA) of 2002, CFR 33 Subchapter H, Part 105 facility that the USCG must inspect and must enforce the compliance measures this type of facility will require. This option does not offer amenities to the CG, nor the City of Miami Beach, nor its residents.

Safety

Safety issues on the entrance road will not improve with the high mixture of personal vehicles with commercial vehicles, including large trucks and tractor trailers. Nuisance calls against the CG will not be a factor as the facility itself will generate environmental nuisance issues.

Operational Security

Navigation in the estuary will most certainly be heavily affected while large mostly foreign-flagged (cargo) vessels are maneuvering to and from their berths. In most cases, the large vessels are constrained by draft and have effective right-of-way while maneuvering. This can be detrimental to CG operations if there is a need for CG patrol or small boats to transit the estuary while the cargo/container vessels are maneuvering, a concern that was raised by CG Base Miami Beach Commanding Officer Captain Davis in his April 22, 2014, letter to the City of Miami Beach Planning & Zoning Department. The frequency of the large vessel movements can be expected to exceed that of the personal and corporate vessels in the other scenarios.

The traffic on the entrance road to the port facility, and consequently the CG base will be worsened with heavy trucks and trailers consistently coming and going around the clock. This will increase the number of large trucks on all roadways radiating from the port facility. Anticipate traffic back-ups to the facility and, consequently, the CG base as trucks and trailers queue up for cargo transfer operations. This phenomenon has occurred in the past when the property was operated as a port facility.

CG Personnel

Workers and drivers going into the complex may require TSA-issued Transportation Workers Identification Credentials (TWIC) for the facility to operate within the law. Maritime safety and security levels will be impacted by this type of facility with vessels loading and unloading containers and/or dry bulk materials. The facility will be required to facilitate seafarer access across its property, which will result in foreign crews at the facility's entrance/exit adjacent to the CG base entrance.

Work-life for the CG will be negatively impacted. Airborne residue from dry bulk materials may be wind blown over the estuary toward the CG base. Air quality may be impacted, vehicles, vessels and facility maintenance will increase due to air intake blockages. Personnel with allergy issues may also impacted.

Risk Mitigation

- The risk mitigation measures for safety and security for a port facility will be established via regulatory compliance.

- The facility owner/operator will be responsible for obeying the regulations, and the CG must ensure compliance through regular inspections. Vessels mooring at the facility are in most cases foreign-flagged and subject to the International Ship and Port Facility Security code in addition to other safety and environmental conventions. The CG is responsible for ensuring the vessels fulfill those requirements. This means an added burden to the CG for vessel and facility safety and security compliance inspections as well as incident responses.

C. Risk Matrix

The following Miami Beach Port Risk Matrix summarizes areas of risk that the CG identifies in documents criticizing development of the property in question. For each area of emphasis, an overall level of risk (High-Medium-Low) is assessed for the three development options (Industrial Port Facility, Commercial Office Building, Mixed-Use Residential Building). A comparable risk mitigation measure is included with each risk assessment.

Miami Beach Port and CG Base Miami Beach (BMB) Risk Matrix

	Risk Posed by Property Options		
CG Risk Area of Emphasis	**Industrial Port Facility**	**Commercial Office Building**	**Mixed-Use Residential Building**
Security	• Risk: **High** • Foreign Vessels & Crews • Requires federal enforcement	• Risk: **Low** • Commercial security measures in place	• Risk: **Low** • Access control & security measures in place
Communications	• Risk: **Medium** • Large foreign vessels impeding communications	• Risk: **Low** • Use building vantages to increase range	• Risk: **Low** • Use building vantages to increase range
CG Restricted Zone Incursions	• Risk: **High** • Large foreign vessels mooring in estuary	• Risk: **Low** • Smaller/less vessel movements	• Risk: **Low** • Smaller/less vessel movements
CG Cutter Impediments	• Risk: **High** • Large foreign vessels mooring in estuary	• Risk: **Low** • Smaller/less vessel movements	• Risk: **Low** • Smaller/less vessel movements
Base Vehicular Access	• Risk: **High** • Commercial heavy vehicle traffic	• Risk: **Medium** • More traffic during rush hour	• Risk: **Low** • Low building occupancy rates
Nuisance Claims	• Risk: **Low** • Noise, light, air quality from port facility	• Risk: **Low** • Less exposure during non-business hours	• Risk: **Low** • Caveats in place to eliminate claims
Base Office Space	• Risk: **High** • No relief from existing office space limitations	• Risk: **Low** • CG access to office space adjacent to BMB	• Risk: **Low** • CG access to office space adjacent to BMB
Base Parking	• Risk: **High** • No relief from existing base parking limits	• Risk: **Low** • CG access to parking adjacent to BMB	• Risk: **Low** • CG access to parking adjacent to BMB

D. Recommendations

- Based on the risk table provided, the **RESIDENTIAL DEVELOPMENT** represents the **LOWEST RISK** profile in terms of the CG's areas of emphasis.
- The risks cited in this assessment can all be mitigated. The *most effective risk mitigation strategy* is to engage all stakeholders early and agree to a feasible course of action for the safety and security of all parties.
- Make further attempts to engage the CG as soon as possible. Ensure the CG understands that they do not have the decision-making authority in the matter of zoning the property. Further make it clear that the CG stands alone in objecting to the consensus of the entire community.
- Address each of the CG's concerns by offering reasonable risk mitigation accommodations as noted in this document. Put the accommodation in writing and give the CG a reasonable deadline to respond in writing before the City of Miami Beach makes its decision and Miami Beach Port, LLC starts the redevelopment.
- The CG base is constrained by its current location. Parking and office spaces are prized. Even if the City of Miami Beach or a surrounding municipality offers, there is an extremely low likelihood that the CG will entertain relocating the base to gain more room. Miami Beach Port, LLC has the ability to offer the CG a first right of refusal for affordable parking and office space at the property, and traffic flow concessions at the base entrance.

E. Conclusion

As described earlier, the property remaining vacant and underutilized is not an option. The property owner and the City of Miami Beach has held off long enough and cannot be held hostage to the CG's outdated histrionics. The CG will continue to oppose any changes to the present state, perhaps even after realizing that they have no authority in the matter and that they stand alone in opposing the redevelopment. The property owner has attempted to work with the CG and provide concessions and features within its proposed development that would both minimize risk exposure and provide security and operational enhancements to the CG. The CG must be made to understand it is in its best interest to accept that the property will be redeveloped and to engage the property redevelopment team to make its interests known in line with the April 22, 2014 letter from CG Base Miami Beach Commanding Officer Captain Davis. Where the CG still has concerns reasonable accommodations should be offered. There is established evidence that residential uses and the CG can successfully coexist. Examples of CG bases near residential uses include CG Base Miami Beach and Fisher Island; CG Base in Charleston, South Carolina, which is adjacent to a high-rise apartment building; the Battery Wharf in Boston, also adjacent to a mixed-use development consisting of office, retail and residential uses; and Marina del Sol CG base in California, directly abutting the Breakwater

apartment community consisting of over 220 luxury residential units. If the CG does not respond to City or developer overtures, ensure a public record is made of the attempts.

II. ANALYSIS OF CG OPPOSITION

A. Background.

This section specifically addresses the bases for the CG's opposition to the proposed development, as expressed in CG Base Miami Beach letter dated April 10, 2017 from Base Commander, Captain Brian Keffer. The letter describes CG operations in the area, its operational units, and industrial support activities. The CG cites development proposals since 2002. In each case, the CG opposed the development, except in 2014 when the developer proposed a similar residential project. In no case has the service offered mitigating circumstances that would encourage or enable enhancing the use of nearby properties. This obstructionist, risk-averse position continues.

B. Responses to CG Objections.

The CG identifies several concerns, but offers no substantiating facts (despite numerous references in their letter) to validate their claims that developing the residential property will be bad for CG operations. The following analysis refers to and refutes or offers a mitigating solution for each factor the CG claims will impede or obstruct CG operations, or force a potential relocation from Base Miami Beach.

1. Security Factors.

While the CG claims to conduct 24-hour/365-day activities on its base, ***this is no different than any other federal, state, or municipal center where emergency or law enforcement services are located in or near a residential community***. The activities the CG mentions are similar to those seen in and around urban neighborhoods across the country, including Miami Beach. Residential development near CG properties is not unique to Miami Beach. The CG operates hundreds of stations and vessels near neighborhoods. Its logistics centers also operate in or in close proximity to residential communities (e.g., Boston, New York, Philadelphia, Portsmouth, New Orleans, Honolulu, Los Angeles, and Seattle). Residential development in these areas near CG properties continues across the country.

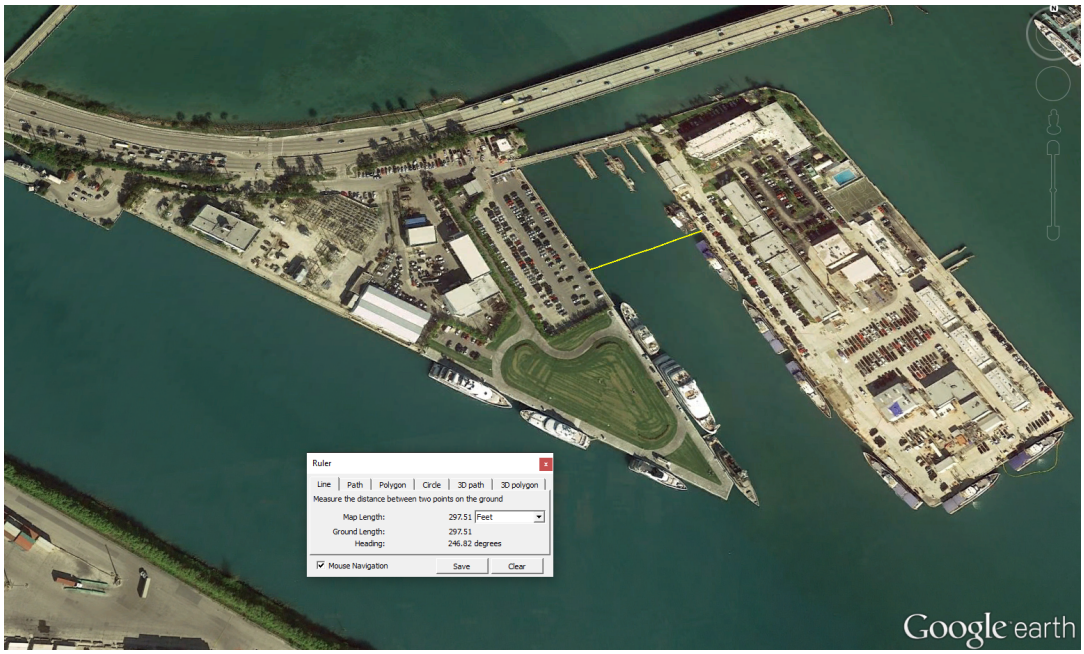
2. Tower Height.

Building a residential building would not place CG operations or personnel in serious jeopardy. If transnational criminal organizations desire to surveil CG operations, then it's already being done. There is no advantage to using a high-cost condominium to track CG activities when the same level of surveillance could occur from MacArthur Causeway, Government Cut, the nearby Fisher Island Ferry parking lot, other residential buildings with a line of sight to Terminal Island, drones, other nearby facilities, or even an office building on the property with numerous tenants and daily visitors.

Mitigation: The building height can be beneficial to CG operations. For instance, the building can be used by the CG as a vantage for surveillance and counter-surveillance activities. In addition, to protect the CG's safety and operations, additional background screenings and qualifications of prospective property owners can be implemented by the organization that will manage sales and resales. It is anticipated that the proposed luxury condos will be expensive and that the residential community is gated/guarded 24/7, providing an additional deterrent to surveillance from and around the property.

3. Restricted Zone Incursions.

Yacht tenders are typically very small vessels used to ferry personnel or to serve as a platform for hull maintenance. In most cases, ***the tenders are operated by professional mariners who are proficient in the CG Navigation Rules and Regulations***. What the CG calls a "narrow boat basin" is an estuary with a width of 250 feet or less. However, as shown in the image below, the measured distance across the subject estuary is approximately ±300 feet, which can easily accommodate CG cutters, ferries, and mega yachts simultaneously. Thus, ***the subject estuary is <u>not</u> a "narrow boat basin."***



The CG restricted zone extends 100 feet from the CG base waterfront. As depicted in the following image, this is not even halfway across the estuary, leaving at least 150 feet for vessel maneuvering.

Estimation of Security Zone Surrounding CG Base Miami Beach

There is no prohibition to any vessel exercising its right to navigate outside the restricted zone, and there is ample room in the estuary to maneuver yachts and tenders outside the CG restricted zone. For example, the Fisher Island Ferry operates in the estuary on a 24/7 basis in very close proximity to the CG base. Property owners also have a submerged lands lease to allow mooring along the property's sea wall.

4. CG Cutter Mooring and Unmooring.

The CG raises conditions affecting vessel operations that are already present. ***A residential building would have no impact on these factors.*** For CG cutter mooring and unmooring, a prudent CG coxswain or conning officer must consider the current and conditions affecting vessel maneuvers, especially during mooring and unmooring evolutions. ***A residential building would not change or worsen the present conditions in the estuary***.

a) ***Based on the CG's comments, it appears the service has lost faith in the abilities of its qualified coxswains and conning officers***. The CG implies that the current might present difficulty entering and exiting the waterway with no vessels docked on Terminal Island. CG professionals are highly trained and capable of handling their vessels in the most challenging conditions, such as high winds, currents, restricted waterways, and vessel congestion. Further, radio communications among vessels operating in the area are widely used to express vessel intent and to make maneuvering and passing arrangements. ***A residential building does not change the present conditions.***

Mitigation: Ensure close coordination between the CG and vessel operators in the estuary, such as yacht captains and the Fisher Island Ferry operators. Reminders and visual cues, such as wind and current indicators, can be

facilitated by the residential community and call attention to any conditions that might affect vessel movements.

b) ***There is ample room in the estuary to maneuver CG vessels, even when a large yacht is moored at the residential development.*** As noted, the estuary is approximately ±300 feet wide. A CG Fast Response Cutter, typically moored at Base Miami Beach, has an overall length of 154 feet and a beam width of less than 30 feet. Moreover, the FRCs are equipped with bow thrusters for maneuvering in crowded anchorages and channels. A typical yacht mooring at the property is approximately 200 feet in length and 50 feet in beam width, leaving over 245 feet for vessel maneuvering. An even larger yacht, measuring 300-feet in length and 60 feet in beam width would still leave well over 220 feet to operate the cutter or other CG vessels (typically the CG's highly maneuverable RB-M or SPC-LE boats). Additionally, conning officers for larger vessels will assess each movement for environmental conditions (e.g., wind, tide and current) and vessel traffic density.

Mitigation: Encourage all yachts on the property to keep their tenders moored along the waterfront or stowed onboard the vessel and not outboard of the vessel unless in use.

Estuary Showing Moored CG Vessels and Private Yachts

5. Vehicular Ingress and Egress.

Miami Beach Port has already made accommodations to ease vehicle ingress and egress. In 2014, the CG was willing to work with the Terminal Island project developers and was interested in the risk mitigation solutions. In 2014, the CG Base Miami Beach Commanding

Officer, Captain B.L. Davis, issued a letter stating the CG had no objection to the Fisher Island Ferry dock and parking contingent on implementing traffic improvement initiatives. The same negotiation approach applies in this case.

The letter further indicated a willingness to reach an agreement with the developers to effectuate proposed mitigation actions. The letter noted that the developers were accommodating in offering solutions to address CG concerns, as Miami Beach Port, LLC, is doing now.

a) ***The CG offers conjecture and no facts to substantiate their concerns about the effects on traffic conditions***. The traffic study that accompanied the proposed development options indicates that a residential building offers the least overall impact to traffic conditions when compared to other development possibilities. The most adverse effect to current traffic conditions would be to keep the property's current zoning designation and revert to its use as a port facility. The 24/7 heavy truck and tractor trailer traffic would worsen traffic conditions.

   Mitigation: The Miami Beach Port developers will continue to offer traffic mitigating suggestions and plans to appease CG concerns about traffic congestion.

b) Adding a residential building where there currently is none will add to the traffic in the area, as noted in the traffic study. However, the residential traffic and non-rush hour traffic patterns associated with ***the residential development offers the lowest traffic impacts of all current development options***.

   Mitigation: Miami Beach Port developers have offered the CG parking on the property. This would have the effect of reducing traffic transiting the bottleneck at the Base Miami Beach Gate.

6. CG Communications Systems.

As the CG states, communications systems continuously evolve and, periodically, new systems come on-line that have "next generation" capabilities and additional system requirements. The increased capabilities of new communications systems, coupled with ***using the features of the residential building offered by the developers, can actually improve CG communications capabilities***.

a) The communications systems requirements the CG describes will not be affected by a residential building.

   Mitigation: The developers will accommodate the ***CG to use the features of the building and property to improve its communications capabilities***.

b) The proposed development may (not will, as the CG fears) cause communications signal interference, although the building is not strictly situated between CG antennas and locations of vessels or waterways. The CG states it is being "forced to work with developers" in the Brickell section of Downtown Miami around its CGD7 office building. This indicates the service's reticence to work with developers, and offers insight as to the service's obstructionist attitude. As a matter of right, developers are allowed to build a four-story office building with a 40-foot wall surrounding the property. This would cause significant interference with the CG communications systems. However, under the proposed residential development such wall is not contemplated and developers are willing to accommodate to the CG's needs to help improve the effectiveness of its communications systems.

Mitigation: ***Developments in communications technologies, coupled with the ability to augment antenna locations on Miami Beach Port property can improve CG communications systems***. Miami Beach Port has offered its structural features to the CG to enhance its communications capability. Although in its best interest, the CG, in its resistance to change or community improvement, chooses not to cooperate.

c) Communications emanating from Base Miami Beach are no different than any other emergency broadcast system. ***The frequency or volume of the CG base noise is akin to the sound patterns of urban life***.

Mitigation: ***Miami Beach Port residential designers are capable of including sound-mitigation features to the building***. Even before these features are considered, the distance between the CG base and residential areas mitigates sound effects. The residential building's lower floors will be garage levels. The lowest residential level will be 75 feet above ground, and the building will be at least 350 feet from the CG base (±300-foot estuary plus ±50-foot building offset from the waterfront). As sound levels decay by 6dB per doubling of distance from a point source, a 135dB sound (similar to an air raid siren) on Base Miami Beach would be heard at 100 dB (similar to a motorcycle) from outdoors on the lowest balcony of the residential building. The sounds inside the building would be significantly quieter, if heard at all. In addition, impact glass is contemplated throughout the building.

7. Potential Forced Relocation.

Potential forced relocation of the CG from Base Miami Beach. This claim amounts to the "Firemen First" or "Washington Monument" principle that describes the phenomenon when an agency claims that an undesirable action (e.g., building a residential development near a CG base) would force cutting or removing essential services. The CG suggests that it may "need to relocate Base Miami Beach if faced with the Base's inability to meet CG's ever evolving missions and responsibilities." Moving CG Base Miami Beach in today's federal budget environment is extremely unlikely. There would have to be a tectonic shift in CG operations to make moving

Base Miami Beach a viable option to other courses of action, such as increasing environmental remediation for hazardous material releases. There is neither funding nor organizational initiative to seek another location, despite the bases identified in the CG opposition. ***The CG is averse to risk, and, as in this case, the CG perceives change as a risk, not an opportunity***.

In addition, this claim is unfounded as there are various examples locally and nationwide of CG bases coexisting near residential uses, including: CG Base Miami Beach and Fisher Island; CG Base in Charleston, South Carolina, which is adjacent to a high-rise apartment building; the Battery Wharf in Boston, also adjacent to a mixed-use development consisting of office, retail and residential uses; and Marina del Sol CG base in California, directly abutting the Breakwater apartment community consisting of over 220 luxury residential units.

8. Litigation Risk.

This section of the CG contains references that may be debated in legal circles, but largely point to the CG's penchant to avoid risk and not take advantage of opportunities to improve communities because of the perception that the proposed changes will affect the CG's status quo. CG legal counsel identifies various claims that can be weighed upon the service by Miami Beach Port owners or occupants. *Each of the scenarios has a mitigation that can reduce the risk of adverse claimant actions*.

i. Nuisance claims are what the CG fears most. Building a base on a light industrial zoned property does not exonerate the CG from nuisance claims, even if the property is surrounded by similarly zoned properties. We have not been able to locate precedence where CG operations were impeded by a nuisance claim. The CG has not been proactive in mitigating any nuisance claim risk because it chooses to oppose the development rather than work with the developers.

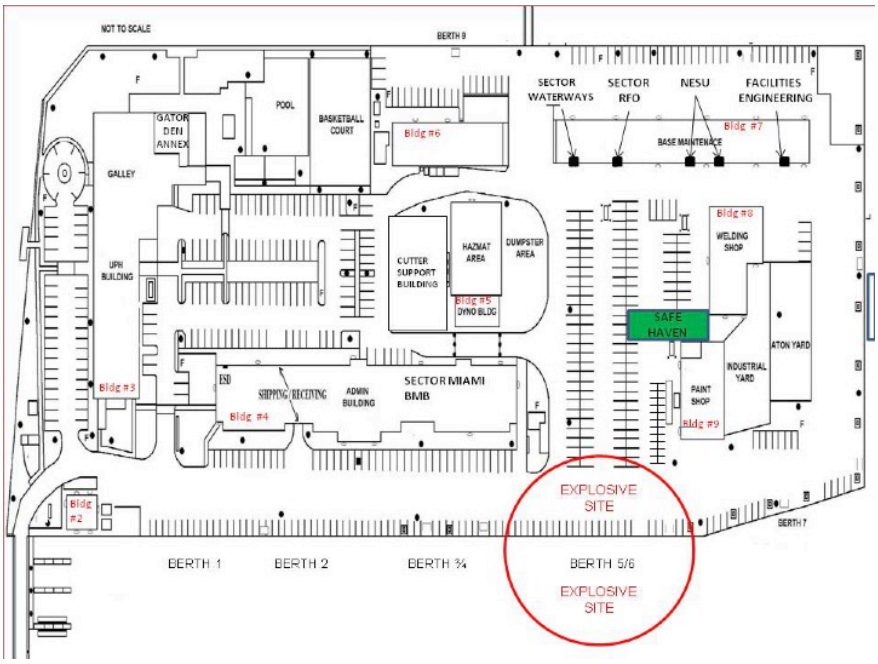
Mitigation: Having good relations with neighboring residential, commercial, and industrial properties has been a hallmark for success for CG base and station commanders for centuries. This project is no exception. Legal clauses in sales and occupancy contracts, a waiver, nuisance easement, and condominium related documents can further limit or eliminate nuisance claims.

ii. ***The CG grossly overstates the risks associated with exposure to Base Miami Beach operations***. It is unconscionable to threaten that the CG might exceed the allowable levels of "noxious aspects" and "potential hazards" of its base activities. Miami Beach is a vibrant 24/7 urban environment. Residents of Miami Beach are familiar with loud noise of all kinds day and night. Artificial nighttime lights are a prominent feature of Miami Beach and a selling point, otherwise known as "spectacular skyline views," for the building's units.

Miami Beach Stock Photo

Ammunition on the CG base is used by the personnel and vessels conducting operations. This includes the cutters and small boats that operate from the base. This ammunition includes 25-mm, .50 caliber, and small arms rounds. Contrary to the CG description, ***this is not high explosive ordnance***. This ordnance does not explode when dropped or nor does it create a large explosion when exposed to excessive heat, such as a fire. The rounds are designed to be fired from a chamber, thus concentrating and transferring the energy to the projectile. When discharged outside a barrel to channel the energy, any projectile would not be particularly damaging, especially at distances outside the safety zone.

The "explosive blast zone" exposure depicted in Attachment (2) of the CG letter and repeated in the following image describes the 100-foot evacuation zone used for safety when ammunition transfers occur. The 100-foot security zone that exists in the water off the CG base contains the evacuation zone. ***The depiction of the safety area is not an "Explosive Site" as overstated in the illustration. It is a designated safe ammunition handling area.*** The CG Base Commander sensationalizes the area in media statements by calling it a "maim zone." ***This is an exaggeration***.



CG Base Miami Beach Ammunition Transfer Safety Zone

This blast zone is more than 200 feet from the seawall of the subject property, and the first residence in the building will be set back 50 feet and elevated more than 75 feet above ground level. The Fisher Island Ferry and recreational boats operate in the estuary between the blast zone and the proposed Miami Beach Port residential building. The Fisher Island Ferry parking lot is located across the estuary from the blast zone, and, during hours of operation of the parking garage on Fisher Island, the ferry travels in close proximity to the 100-foot CG restricted zone every 15 minutes. In addition, the yachts moored on the east side of the Miami Beach Port property are directly across the estuary from the blast zone. Note that none of these activities occur in the blast zone, or the CG would have acted to mitigate the risk.

The CG's ammunition handling record is impeccable, largely due to the meticulous care that CG personnel exercise when following strict protocols for ammunition transfers. We have not either in our professional CG experience spanning four decades or in research identified any occasion when ammunition has been mishandled on Base Miami Beach or any CG base where the result was a serious injury or significant property damage.

All armories, where ammunition is stored, are designed to mitigate the effects of a worse-case accidental discharge. The base armory is located in a building even farther away on the property than the ammunition transfer zone, separated by numerous other buildings, structures, and vessels. Armories on CG cutters are inherently safe for anyone outside the vessel.

Mitigation: Miami Beach Port designers are capable of making design changes to further mitigate the risks associated with nuisance claims (sound, light, environmental) or safety issues associated with the building's proximity to Base Miami Beach. In addition, developer is proposing legal instruments such as waivers, restrictive covenants, and a nuisance easement that will allow the CG Base Miami Beach operations to continue without objection from the condominium owners.

Conclusions:

In the correspondence, the CG continues its discussion of litigation risk and zoning and incompatible use concerns in the remainder of its opposition. Most of their concerns are based on speculation and "what if" scenarios. These concerns are best mitigated and/or eliminated by proactively engaging the Miami Beach Port developers prior to finalizing the property design. *There are huge opportunities for the CG to mitigate its existing risks (e.g., lack of sufficient parking and traffic congestion) by being accessible and responsive to developer overtures.* In order to effectively mitigate risk of such claims, the CG needs to engage with its neighbors on an ongoing and continuous basis to ensure good community relations. Any perceived problems or issues that arise can be solved or mitigated to the mutual satisfaction of the CG and its neighbors.

- The status quo is not an option. Considering the interests of the City of Miami Beach, the CG, and Miami Beach Port, the best alternative is a condominium residential property development.
- The CG has exhibited a history of objections to developing the property across the estuary to the west of Base Miami Beach. In its most recent objection, the statements offered to substantiate their concerns are grossly exaggerated and overly sensationalize the risk to Base Miami Beach in developing the property.
- All risks in developing the property can be mitigated or eliminated either through structural or environmental design, planning, or processes and procedures.
- The CG can take advantage of the Miami Beach Port development to reduce its own risks of limited parking space, but it must be willing to negotiate similar to Captain Davis's method in 2014.

ATTACHMENT A

SEEBALD & ASSOCIATES - CAPABILITIES, PRODUCTS, AND SERVICES

Purpose

This defines the services and deliverables that Seebald & Associates (S&A) can accomplish in support of our client. This work fulfills the requirements of the International Ship and Port Facility Security (ISPS) Code, the Maritime Transportation Security Act (MTSA), the Security and Accountability for Every Port (SAFE Port) Act, and their supporting regulations, government agency policies, and guidance issued by applicable authorities. These requirements apply to the owner or operator of the regulated maritime facility.

Background

Seebald & Associates is a full-service maritime security firm. We provide the necessary advice, services, and assistance to our clients to ensure that they comply with all U.S. Federal laws as well as International Maritime Organization standards. We are a proven team of former U.S. Coast Guard professionals with over a century of combined experience while serving as Captains of the Port, facility and vessel inspectors, security analysts, multi-mission operators, and regulatory compliance specialists. Our personal involvement in each project is the hallmark of our consultancy. We solve problems, and we guarantee our work.

Vessel- and Facility-related Assessments, Plans & Audits

Seebald & Associates conducts assessments and audits of facilities and vessels for compliance with the following regulations:

- 33 CFR 104 Maritime Security: Vessels
- 33 CFR 105 Maritime Security: Facilities
- 33 CFR 126 Handling of Dangerous Cargo at Waterfront Facilities
- 33 CFR 127 Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas
- 33 CFR 154 Facilities Transferring Oil or Hazardous Materials in Bulk
- 33 CFR 155 Oil or Hazardous Material Pollution Prevention Regulations for Vessels
- 33 CFR 156 Oil and Hazardous Material Transfer Operations
- 33 CFR 158 Reception Facilities for Oil, Noxious Liquid Substances, and Garbage
- Transportation Workers Identification Credential Final Rule

Vessel Security Assessment

MTSA and 33 CFR 104 require a Vessel Security Assessment (VSA), which applies to the owner or operator of a variety of regulated vessels as determined in §104.105. The Company Security Officer (CSO) may use a third party, such as Seebald & Associates, in any aspect of the Vessel Security Assessment if the CSO reviews and accepts the work product. Seebald & Associates will provide the expert assistance that is necessary to fulfill the VSA requirements.

The VSA is a critical process that serves as the basis of the Vessel Security Plan. Seebald & Associates starts the VSA process with a documents review and an on-scene survey to compile background information. The vessel's risks will be determined by analyzing the threats, vulnerabilities, and consequences associated with security–related incidents affecting the vessel. A Seebald & Associates analysis of the vessel's background and an on-scene survey will result in recommendations to establish and prioritize the security measures that should be included in the Vessel Security Plan. The Seebald & Associates' VSA report will include a full description of vessel elements, such as personnel, operations, and logistics, and documents the strengths and weaknesses of existing security measures.

Facility Security Assessment

Required by MTSA and 33 CFR 105, every maritime facility owner or operator must conduct an assessment to identify its security threats, vulnerabilities, and consequences. Those involved in the Facility Security Assessment (FSA) must be able to draw upon expert assistance for applicable facility security requirements. The FSA consists of three key steps: documents review, on-scene survey, and analysis/recommendations.

The FSA is a critical process that serves as the basis of the Facility Security Plan. Seebald & Associates starts the FSA process with a documents review and an on-scene survey to compile background information. A Seebald & Associates analysis of the facility background information and the on-scene survey will result in recommendations to establish and prioritize the security measures that should be included in the Facility Security Plan. The Seebald & Associates' FSA report will include a full description of facility elements, such as personnel, operations, and logistics, and documents the strengths and weaknesses of existing security measures. Finally, as required by regulations, Seebald & Associates utilizes a Coast Guard-approved Risk-Based Analysis (RBA) methodology to identify critical weaknesses in the existing facility security regime. The scenario-based RBA identifies facility vulnerabilities and impacts as well as prioritizes mitigation actions to reduce the facility's exposure to risk.

Vessel Security Plan

33 CFR 104 requires the Company Security Officer (CSO) to ensure that a Vessel Security Plan (VSP) is developed and implemented for each vessel. Each VSP must be approved by the Commanding Officer of the U.S. Coast Guard Marine Safety Center. Seebald & Associates will draft and submit the VSP to the Coast Guard, and will serve as the vessel's representative along with the CSO throughout the VSP submission and approval process. If required, Seebald & Associates will also develop and submit any required amendments to the VSP.

Facility Security Plan
As required by 33 CFR 105, the maritime facility's Facility Security Officer (FSO) must develop and implement a Facility Security Plan (FSP). The FSP must be approved by the cognizant Coast Guard Captain of the Port prior to commencing maritime facility operations. Seebald & Associates will draft and submit the FSP to the Coast Guard, and will serve as the facility's representative along with the FSO throughout the FSP submission and approval process. If required, Seebald & Associates will also develop and submit any required amendments to the FSP.

Vessel Security Plan Audits
Seebald & Associates will conduct an annual Vessel Security Plan (VSP) audit to ensure the vessel remains in compliance with federal security regulations. The audit includes a review of the Vessel Security Assessment and VSP along with any recommended changes or amendments. The Seebald & Associates auditor will prepare all required documentation for the CSO in order to remain in regulatory compliance. This includes a confidential full audit report for the CSO and an audit confirmation for the regulatory authority. If required, Seebald & Associates will also conduct a drill and annual exercise of the VSP. In addition to fulfilling federal requirements, the audit will prepare the FSO for the facility's annual Coast Guard inspection.

Facility Security Plan Audits
Seebald & Associates will conduct an annual audit of the maritime facility's FSP to ensure the facility remains in compliance with federal security regulations. The audit includes a review of the FSA and FSP along with any recommended changes or amendments. The Seebald & Associates auditor will prepare all required documentation for the FSO in order to remain in regulatory compliance. This includes a confidential full audit report for the FSO and an audit attestation for the government. If required, Seebald & Associates will also conduct a drill and annual exercise of the FSP. In addition to fulfilling federal requirements, the audit will prepare the FSO for the facility's annual Coast Guard inspection.

Facility Security Design
For maritime facilities under development or planning design changes, Seebald & Associates will offer expert advice to ensure the facility is compliant with existing and forthcoming facility security requirements. The facility design support will incorporate facility security into the engineering and logistics planning process to minimize security impacts while bringing a facility into operational status.

Facility Security Consulting Services
Seebald & Associates will provide the necessary assistance to ensure that the maritime facility follows all ISPS codes and applicable U.S. laws and regulations. Experts will be available for consultation and offer remedies to any maritime facility challenges.

Facility Security Training

Seebald & Associates will provide MARAD-approved and U.S. Coast Guard-accepted 33 CFR 105 training for Facility Security Officers and Personnel with Security Duties. Graduates are certified in compliance with federal training requirements. This training is mandated and the courses are tailored to the maritime facility's operations, personnel, and environment. Seebald and Associates will also deliver Security Awareness training for all other facility personnel, to include employees and contractors routinely working within the facility's regulated areas.

FACILITY SECURITY OFFICER (FSO) TRAINING

This is a highly interactive 20-hour course to educate FSOs on pertinent laws, regulations and policy, including additional modules on current threats. The course covers all of the required elements found in 33 CFR 105, including practical application of skills, such as credentialing, screening, conducting drills & exercises, and developing a Facility Security Plan. Additionally, the course is rich in resources that participants can take away and use as "ready references" when they return to their facilities. Seebald and Associates also offers all students one year of continuing education through webinars specific to facility security. *This course is Maritime Administration (MARAD) Certified and Coast Guard Accepted.*

PERSONNEL WITH SPECIFIC SECURITY DUTIES TRAINING

This highly interactive 9-hour course provides a tremendous amount of practical applications. The course covers all of the required elements found in 33 CFR 105, and includes learning and applying skills, such as credentialing, random screening, security awareness, and crowd management. This course is rich in resources that participants can take away as references, and offers continuing education through webinars specific to facility security. *This course is Maritime Administration (MARAD) Certified and Coast Guard Accepted.*

SECURITY AWARENESS COURSE

This course covers the six required elements found in 33 CFR 105 for employees who are neither the FSO nor Security Personnel with Specific Security Duties that work on a regulated facility. We typically refer to these employees as "All Others." In addition to employees, the course is also valuable for any long-term contractors, and contractors who will work unescorted on the regulated facility. This training includes modules on threat recognition and measures to circumvent security. We address prominent threats, featuring segments on Cyber Security and Active Shooter that guide prevention and prepare employees for responding to these impactful events.

Facility Waterway Suitability Assessments, Facility Response, Emergency, and Operations Manuals and Plans

As required by 33 CFR 127, facilities that are being constructed to handle, import or export Liquefied Natural Gas or Liquefied Hazardous Gas cargoes in bulk must conduct a Waterway Suitability Assessment as well as draft and submit for approval to the U.S. Coast Guard an Operations Manual and an Emergency Manual. Seebald & Associates will use the best practices developed from unparalleled experience and success after having successfully written more than 20 of these documents for projects throughout the United States to generate these documents and obtain their Coast Guard approval. Similarly, facilities handling oil and hazardous materials under 33 CFR 154, 155, and 156 must have an approved Pollution Response Plan as well as Emergency and Dock Operations Manuals. Seebald & Associate will utilize lessons learned and best practices from a long record of success in generating these plans and obtaining their approval from the cognizant USCG office to draft and submit all required documents.

Facility Design

For maritime facilities under development or planning design changes, Seebald & Associates will offer expert advice to ensure the facility is compliant with existing and forthcoming facility regulatory requirements. The facility design support will work with the engineering and logistics planning process to minimize regulatory impacts while bringing a facility into operational status.

Specialized Risk Assessments

Seebald & Associates will conduct specialized risk assessments on marine transportation facility operations involving hazardous materials, including dispersion modeling and both HAZID and HAZOP analysis.

Port and Vessel Operations, Emergency Response Consulting Services

Seebald & Associates will provide assistance and consulting services on port and vessel operations in matters of USCG policy and procedures and regulatory requirements for US flagged vessels as well as in Port State Control. We also have extensive experience in marine pollution response and can provide expert advice on incident and emergency response involving facilities and vessels in the coastal region, US Ports and on inland rivers.

Expert Witnesses

Seebald & Associates will provide expert witness support in matters of vessel and port facility operations.

ATTACHMENT B

SEEBALD & ASSOCIATES – PARTICIPANTS IN THIS ANALYSIS

CDR Edward Seebald, USCG (ret.) - Founding President & CEO

Commander Ed Seebald, Founding President and CEO of Seebald & Associates International, has over 37 years of experience in leadership and management within the international maritime community. A graduate of the United States Coast Guard Academy with a B.S. degree in Management, CDR Seebald pursued his post-graduate studies at the United States Naval War College, where he specialized in maritime operations, national security and decision-making, and strategy and policy. He also attended the Navy Shipboard Security and Engagement Tactics program, an anti-terrorism course taught by the United States Navy SEALS.

Throughout his long and distinguished Coast Guard career, CDR Seebald was dedicated to the cause of national and international maritime security in posts from the Bering Sea to the South Pacific, and from the Arctic Circle to the Coast of South America. During his tenure at sea, he was involved in counter narcotics operations, stemming the tide of illegal immigrants, command and control of coastal facilities, and maritime security and safety training in the Dominican Republic, Solomon Islands and Latvia.

Following his retirement from the Coast Guard in 2003, CDR Seebald has grown Seebald & Associates to be the preeminent international maritime security consulting firm.

CAPT Brian Kelley, USCG (ret.) - Chief Operating Officer

Brian Kelley is a retired Coast Guard Captain. During his Coast Guard career, he developed his expertise as a leader in Emergency Preparedness, Strategy Development, Operational Planning, Operations Management, Crisis Leadership & Management, All-Hazards Response, Resource Management, and Process Improvement. Captain Kelley has broad strategic and operational senior management experience ranging from small units to large organizations in maritime safety and security, crisis management, incident response, inter-agency coordination, command center operations, and human resource management. Brian's multi-mission experience ranged from Coast Guard afloat commands and shore-based Captain of the Port operations to command centers, human resource management, contingency planning, and budgeting.

His second career with Seebald & Associates has focused on improving maritime port reliability through facility problem-solving, which has included security assessments, planning, audits, and training design & delivery.

Brian "Ike" Eisentrout - Maritime Compliance Analyst

Brian "Ike" Eisentrout brings 40 years of exceeding excellence in government service as a US Army Special Forces Chief Warrant Officer and US Coast Guard Federal Civilian. Prior to joining Seebald & Associates, Ike was the Deputy Director of the US Coast Guard's National Maritime Center with responsibilities for the daily oversight and management for the professional credentialing and training approvals of the United States Merchant Marine Service consisting of 208,000 active mariners. Ike's first assignment with the Coast Guard was in the Port Security Directorate as a Senior Maritime Security Specialist where he contributed to regulatory, implementation guidance and policy development in support of the Maritime Transportation Security Act of 2002, Homeland Security Presidential Directives and National Security Presidential Directives and Plans.

In his first career he was a 25-year combat veteran of US Army Special Forces serving at the operational detachment level up to Theater and Department of the Army. Ike specialized in Counter-terrorism, Anti-terrorism, Counter-narcotics operations and training, Advanced Intelligence operations, United States Diplomatic Security Assessments and Planning, Non-combatant Emergency Evacuation Plans and Execution, Foreign Internal Defense and Unconventional Warfare. Ike attended the Naval War College, Campbell University and University of Oklahoma.

RADM Thomas Atkin, USCG (ret.) -

Rear Admiral Atkin served as the Acting Assistant Secretary of Defense for Homeland Defense and Global Security. He was responsible for Department of Defense (DoD) strategy and policy on cyber, countering weapons of mass destruction, space, homeland defense, domestic antiterrorism, global force protection, continuity of government, mission assurance, critical infrastructure, defense support to civil authorities, border security support, and technology/equipment transfers to domestic agencies. He also served as the DoD Domestic Crisis Manager, DoD Principal Cyber Advisor, and Executive Director of the Council of Governors.

Before serving in the Defense Department, Tom was a Director for Raytheon U.S. Business Development for Homeland Security. In this capacity, he was responsible for linking technological, engineering and service solutions to maritime, border, public safety and other security-related requirements in the domestic and international market.

Tom retired from the Coast Guard as a Rear Admiral (Upper Half) in June 2012 after more than 30 years of service in various operational and strategic roles. He has significant government experience, serving in roles at the White House National Security Council, Department of Defense, Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), and U.S. Navy. His senior leadership positions include: Assistant Commandant for Intelligence and Criminal Investigations; Special Assistant to the President and Senior Director

for Transborder Security on the National Security Council; Commander of the Coast Guard Deployable Operations Group; and Chief of Staff to the DHS Principal Federal Official for Hurricanes Katrina and Rita. His Pentagon assignments were Chief, Maritime Homeland Security and Defense Policy, Office of the Secretary of Defense; and Chief, Counter-Terrorism Branch, Chief of Naval Operations (Deep Blue).

In addition to his work with S&A, Tom is Founder and Managing Principal of The Atkin Group, a firm that provides strategic and operational advice to senior government and corporate executives. Additionally, The Atkin Group provides mentoring, executive coaching and leadership development training for individuals, teams and organizations.

ATTACHMENT C

U.S. Department of Homeland Security
United States Coast Guard

Commanding Officer
U. S. Coast Guard
Base Miami Beach

100 MacArthur Causeway
Miami Beach, FL 33139
Staff Symbol: (c)
Phone: (305) 535-4498
Fax: (305) 535-4520
E-mail: Benjamin.L.Davis@uscg.mil

11011
April 22, 2014

Mr. Richard Lorber
City of Miami Beach
Planning & Zoning Department
1700 Convention Center Drive
Miami Beach, FL 33139

Dear Mr. Lorber,

I am writing to inform you of the U.S. Coast Guard's views related to the proposed Terminal Island Residential project being offered by the Newgard Development Group (Newgard).

The Coast Guard and Newgard have been engaged since June 2013 regarding the proposed project. The Coast Guard, through me, has outlined our concerns related to luxury residential encroachment on our light-industrial facility. The prospective development may not be compatible with the Coast Guard's around-the-clock operations including effects on issues such as:

- Nuisance issues for nearby land owners and users;
- Interference with vessel traffic service (VTS), radar and other similar operations;
- The increased risk of potential damage to private property from allisions and wake damage from Coast Guard emergency operations;
- Vessel traffic management issues in an already-crowded waterway resulting in increased difficulty for Coast Guard vessel maneuvers and decreased emergency response capabilities.

Notwithstanding our concerns, Newgard has been accommodating in offering solutions to address our concerns. These include their intent to incorporate covenants and stipulations into the condominium documents to address the potential nuisance issues, and recording the documents so they would be permanently enshrined in covenants that run with the land, thus unalterable without the Coast Guard's prior consent. Additionally, Newgard has offered roof space and access in perpetuity to allow for placement of sensors to enable us to monitor the port.

We appreciate the City's recognition of our concerns regarding potential incompatibility of divergent land uses between the Coast Guard facility and Newgard's prospective development. Assuming the Coast Guard and Newgard can reach agreement on the details to effectuate Newgard's proposed solutions, then I would not object to the project. The Coast Guard is a willing partner in the communities in which we reside. We commit to future engagement to work through the outstanding issues related to this project.

11011
April 22, 2014

Sincerely,

B. L. DAVIS
Captain, U. S. Coast Guard
Commanding Officer

Copy: Commander, Seventh Coast Guard District (dcs, dcg, dl)
Commander, Coast Guard Sector Miami (sd)
Commander, Shore Infrastructure Logistics Center
Commanding Officer, Coast Guard Civil Engineering Unit Miami

ATTACHMENT D

Pressure versus Distance

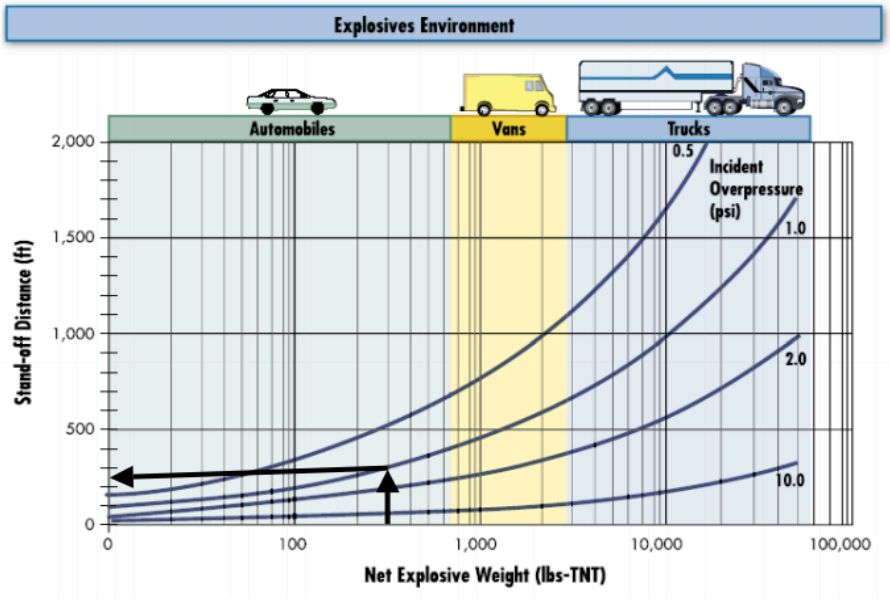


Figure 4-10: Incident Overpressure Measured in Pounds Per Sq. Inch, as a Function of Stand-Off Distance and Net Explosive Weight, page 4-17, FEMA 426

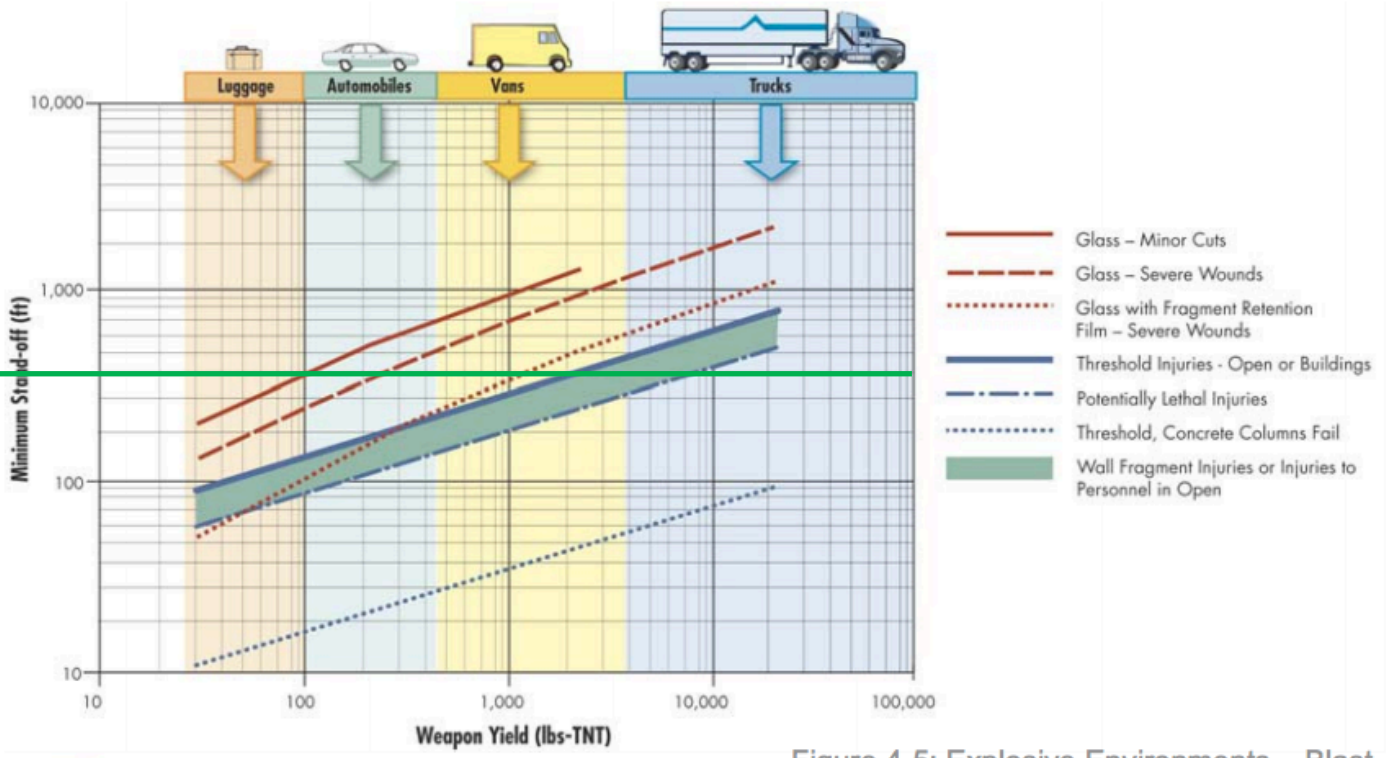
FEMA

BUILDING DESIGN FOR HOMELAND SECURITY Unit VI-30

ATTACHMENT E

Nominal Range-to-Effect Chart

Closest distance between CG base and Miami Beach Port residences



FEMA

Figure 4-5: Explosive Environments – Blast Range to Effects, page 4-11, FEMA 426

ATTACHMENT F

BOMB THREAT STAND-OFF CHART

Threat Description Improvised Explosive Device (IED)		Explosives Capacity[1] (TNT Equivalent)	Building Evacuation Distance[2]	Outdoor Evacuation Distance[3]
	Pipe Bomb	5 LBS	70 FT	1200 FT
	Suicide Bomber	20 LBS	110 FT	1700 FT
	Briefcase/Suitcase	50 LBS	150 FT	1850 FT
	Car	500 LBS	320 FT	1500 FT
	SUV/Van	1,000 LBS	400 FT	2400 FT
	Small Moving Van/ Delivery Truck	4,000 LBS	640 FT	3800 FT
	Moving Van/ Water Truck	10,000 LBS	860 FT	5100 FT
	Semi-Trailer	60,000 LBS	1570 FT	9300 FT

1. These capacities are based on the maximum weight of explosive material that could reasonably fit in a container of similar size.
2. Personnel in buildings are provided a high degree of protection from death or serious injury; however, glass breakage and building debris may still cause some injuries. Unstrengthened buildings can be expected to sustain damage that approximates five percent of their replacement cost.
3. If personnel cannot enter a building to seek shelter they must evacuate to the minimum distance recommended by Outdoor Evacuation Distance. These distance is governed by the greater hazard of fragmentation distance, glass breakage or threshold for ear drum rupture.

ATTACHMENT G

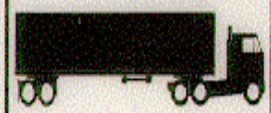
ATF	VEHICLE DESCRIPTION	MAXIMUM EXPLOSIVES CAPACITY	LETHAL AIR BLAST RANGE	MINIMUM EVACUATION DISTANCE	FALLING GLASS HAZARD
	COMPACT SEDAN	500 Pounds 227 Kilos *(In Trunk)*	100 Feet 30 Meters	1,500 Feet 457 Meters	1,250 Feet 381 Meters
	FULL SIZE SEDAN	1,000 Pounds 455 Kilos *(In Trunk)*	125 Feet 38 Meters	1,750 Feet 534 Meters	1,750 Feet 534 Meters
	PASSENGER VAN OR CARGO VAN	4,000 Pounds 1,818 Kilos	200 Feet 61 Meters	2,750 Feet 838 Meters	2,750 Feet 838 Meters
	SMALL BOX VAN *(14 FT BOX)*	10,000 Pounds 4,545 Kilos	300 Feet 91 Meters	3,750 Feet 1,143 Meters	3,750 Feet 1,143 Meters
	BOX VAN OR WATER/FUEL TRUCK	30,000 Pounds 13,636 Kilos	450 Feet 137 Meters	6,500 Feet 1,982 Meters	6,500 Feet 1,982 Meters
	SEMI-TRAILER	60,000 Pounds 27,273 Kilos	600 Feet 183 Meters	7,000 Feet 2,134 Meters	7,000 Feet 2,134 Meters

Exhibit C

ANALYSIS PREPARED BY RIDGE GLOBAL

Mr. Jorge Perez
Related Group
315 Biscayne Blvd., 4th Floor
Miami, FL. 33131

November 13, 2018

Dear Mr. Perez,

We have been asked to provide further analysis of the potential impacts of the proposed Terminal Island development in connection with the recent history involving the Miami Beach Port, LLC ("MBP") and circumstances surrounding its application to amend the City of Miami Beach Comprehensive Plan and Land Use Development Regulations text and offer the following assessment.

Applications PB16-0085 and PB16-0087 (the "Applications") were originally filed by Miami Beach Port LLC[1] in late 2016 with the City of Miami Beach (the "City"). The intent and purpose of the Applications is to amend the existing I-1 land use category and zoning district to allow for the establishment of multi-family residential uses on waterfront properties as a conditional use, and create limited restaurant use as an accessory use to the residential use. In addition, the proposed text amendments establish height and density limitations for the conditional multi-family residential use. This submission began a process of meetings, public hearings, informational exchanges, and the further submission of documentation to several stakeholders in the process including, but not limited to the City of Miami Beach Planning Board and United States Coast Guard (USCG). The USCG has publicly stated its opposition to the proposed changes to Terminal Island.

Terminal Island is located on the MacArthur Causeway and is a gateway to Miami Beach. Terminal Island is currently made up of six separate properties, which include the Fisher Island ferry terminal and parking area, an FPL Substation, the City's Fleet Management facility, and U.S. Coast Guard Base Miami Beach. The Applicants' property is located at 120 MacArthur Causeway at the southernmost tip of Terminal Island (the "Property"). Until recently, the Property was operated as a private shipping container port and storage yard and it is now being contemplated for redevelopment with mixed-use residential and industrial uses.

The purpose of this letter is to address those matters described in the correspondence by the USCG submitted in connection with the Applications on April 10, 2017. The most recent plan prepared by MBP involves a comprehensive strategy for the redevelopment

[1] Although not required to proceed with the Applications, FP&L was added as an applicant in March 2017 (together with Miami Beach Port LLC, the "Applicants").

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of the Property that recognizes the concerns stated by the USCG and suggests several remedies to assure that the USCG mission and operations will not be impeded in any way.

It is important to note that the USCG had previously reviewed the proposed development in 2014. The then Commanding Officer of Base Miami Beach, Captain B. L. Davis, issued a letter identifying the USCG concerns but also acknowledging that the USCG would have no objection to the project if the concerns were adequately addressed. The Palm Star Hibiscus Neighborhood Association also provided a letter in support of the project. As mentioned above, the Property was previously operated as a cargo terminal generating high volumes of truck traffic along Mac Arthur Causeway and within Terminal Island. This traffic resulted in security and safety concerns for all of the Property's neighbors, residential and governmental alike. The owner of the Property ceased the cargo operation in 2016 to be a good neighbor and with the intent of moving forward with the proposed residential project. Copies of these letters are attached as Exhibit "A."

Notwithstanding the foregoing, in response to the compatibility concerns raised by both the USCG and the City in 2017, we have analyzed existing examples of industrial and residential uses immediately adjacent to each other. Chapter 163, Florida Statutes, defines compatibility to mean 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 of condition is unduly negatively impacted directly or indirectly by another use or condition. Based on the compatibility analysis prepared by The Curtis Group, there is ample evidence that the USCG, the proposed City facility, and the proposed multi-family residential development can successfully coexist in a stable fashion. Local examples of mixed-use residential coexisting with industrial uses include: Sunset Harbour, Fisher Island, Village of Merrick Park, USCG Base in Islamorada, and USCG Sector Key West. Other examples nationwide include: the USCG Base in Charleston, South Carolina, which is adjacent to a high-rise apartment building; the Battery Wharf in Boston, also adjacent to a mixed-use development consisting of office, retail and residential uses; and Marina del Sol USCG Base in California, directly abutting the Breakwater apartment community consisting of over 220 luxury residential units.

We have determined that the proposed residential use improves Base Miami Beach mission execution and the developer has provided assurances that future residents, through legal means of waivers, restrictive covenants, and a nuisance easement, will consent to the Base Miami Beach operations and any necessary changes to said operations without objection.

To further address compatibility concerns, it is critical to scrutinize the building design to provide a safe environment to the residents, employees, and visitors of the proposed development. MBP has committed to thoughtful and strategic design in order to mitigate the effects of both the proposed City facility and USCG operations, including explosive risk zone, which has been determined to be low. Under the current right of use, a building may or may not be designed to mitigate this risk. In fact, the current USCG residential

barracks building lies within the same distance from this explosive risk as the subject residential property. Ongoing coordination between the Applicants' development team and USCG will ensure the safety and protection of the Terminal Island residents, workers, and guests and for the personnel located at the base. Attached to this memorandum is an outline of the USCG concerns and how these concerns play out under industrial and residential development scenarios. See Exhibit "B." This chart explicitly demonstrates that residential use with contractual safeguards in favor of the USCG is clearly the preferred development option.

In response to the concerns relating to nuisance claims, legal counsel for the Applicants has prepared two memoranda of law discussing whether the future condominium owners may bring suit against the USCG, or the City based on a claim that the existing uses located adjacent to the development disrupt the owners' quiet enjoyment of their property, and whether a nuisance easement will protect the USCG against any liability caused by its operations (i.e., ship repair, cargo loading and unloading, high explosive ammunition storage and loading, painting, metal work and grinding, forklift and heavy truck operations, migrant and criminal detention transfers, and boat/ship operations) on the on the "use and quiet enjoyment" of the properties within the proposed development in Terminal Island. In accordance with Florida case law, it was concluded that certain legal instruments such as a waiver and nuisance easement, both to be recorded on the residential portion of the subject property to run with the land, will protect the USCG and the City against nuisance claims, and will also prevent incompatible encroachments, and ensure compatibility of uses. *See* Exhibits "C" and "D."

These legal safeguards will ensure that the risk of nuisance claims will be abated to the greatest extent of the law. In order to preclude a nuisance claim the Applicants have drafted and proffered a waiver of nuisance claims to be executed by the condominium owners along with a nuisance easement.

A waiver by the condominium owners of the ability to file a nuisance complaint will be enforceable and will provide protection to the City and USCG Base from nuisance related law suits. Through the execution and recordation of an express waiver for each unit, not only will the condominium owners be bound to the relinquishment of their right to quiet enjoyment, but third parties will also be given notice of the uses and operations that surround the residential development. The proffered waiver is intended to be executed by each condominium owner, which will effectively and expressly waive his or her right to quiet enjoyment of their property based on the proximity to the adjacent industrial uses. The waiver will be recorded as a notice on the property, included in the purchase agreements for the property and condominium association documents, and provided as a deed restriction for each unit. This waiver in favor of the USCG will allow the USCG to continue to conduct its operations on the USCG Base without encroaching or depriving any adjacent project property owners of the use of their property due to noise, vibrations, fear, anxiety, fumes, residue and other related impacts that the USCG operations may cause.

In addition, the nuisance easement in favor of the USCG will permit any infringement and interference that occurs as a result of any USCG operations. An easement is a legally enforceable use of property by someone other than the owner. Easements are most commonly granted to public utilities or government agencies for uses that benefit the public at large. Generally, easements run with the land. Therefore, easements are enforceable against all succeeding owners of the property. The concept of nuisance easements is widely recognized in Florida. Most notably, the United Sates Supreme Court held that noise can be a nuisance and that such nuisance can give rise to an easement, and that such noise may come straight down from above, or from some other direction. *See* United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, and Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). *See* Exhibit "D."

Avigation easements are a common form of nuisance easements used by Airports to protect against liability for any nuisance caused by airplanes using the airport, including, but not limited to, noise, fumes and vibration. In recent years, the Federal Aviation Administration (FAA) has promoted the imposition of avigation easements as a condition of approval of subdivisions or other new development near airports. These impositions are intended to eliminate the airport's liability for nuisance claims due to noise or fumes. Nuisance easements are enforceable in Florida and a person who grants such an easement does not have a valid legal cause of action related to the nuisance. *See e.g.*, City of Jacksonville v. Schumann, 199 So. 2d 727, 728 (Fla. 1st DCA 1967) (Court entered summary judgments against Plaintiffs that had given avigation easements over their respective properties). *See* Exhibit "D."

Given these points, the proffered nuisance easement in favor of the USCG, and tailored to the unique operational attributes of the USCG at this location, would allow the USCG to continue to conduct its operations on the USCG Base without encroaching or depriving any adjacent property owners of the use of their property due to noise, vibrations, fear, anxiety, fumes, residue and other related impacts that the USCG operations may cause. An easement on the Property to the USCG and the USCG Base will allow the creation of certain nuisances such as noise that would otherwise be challengeable under a common law claim of nuisance. In other words, the USCG's operations will be permitted to continue in an uninterrupted manner in the vicinity of, over, and around the Property. The nuisance is intended to be recorded. As such, the grant would be appurtenant to the land and remain with the land through further transfer.

Equally important is the Applicants commitment to implement a protocol with the building's Homeowner's Association intended to address concerns raised by the residents relating the USCG or City's facility operations. Implementation of these legal instruments and protocol will protect the City and USCG from legal action. This is a protection that does not exist under the current right of use.

The developer has no incentive to proffer any of the above referenced documents or protocols to protect USCG interests under the existing light industrial uses and is not expected to do so. Under the light industrial zoning, the developer may build a walled

four-story, 160,000+ square foot building for office, storage, or manufacturing uses. In this case, there will be no safeguards against lawsuits against USCG operational or environmental impacts. In the event the Property is divided into an office condominium, there would be nothing preventing each unit owner from suing the USCG for any interruptions, perceived or real, to their respective business operations.

Lastly, it is important to emphasize that any development on Terminal Island will impact growth on and around the current USCG Base. The presumption is made that the USCG is constantly assessing the changing nature of its mission and the capacity of its facilities to adequately support its requirements and responsibilities in the 21st century. The Applicants have committed to working with the USCG to provide the operational and legal assurances needed to protect the Base Miami Beach mission objectives. We strongly believe that, taking into consideration all of the above, the USCG will be in a significantly improved position to execute its mission at Base Miami Beach with the development of this residential use on the Property subject to all of the protections described above than it would with the development of any other of the permitted uses allowed under the current regulations, which would not provide any such protections.

The USCG has communicated that it has a national policy designed to oppose residential development near USCG bases and facilities. However, a waiver of national policy is appropriate and warranted in this unique Miami Beach circumstance. The developer has given strong assurances and protections against nuisance litigation claims that would not otherwise be provided under an industrial development scenario. These assurances wholly address the concerns recently raised by USCG and the development proposes no material risk to the Base Miami Beach operations.

Respectfully submitted,

Tom Ridge

Tom Ridge

First Secretary US Department of Homeland Security

Former Governor of Pennsylvania

Steve Kohler

Ridge Global

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EXHIBIT “A”

U.S. Department of Homeland Security

United States Coast Guard

Commanding Officer
U. S. Coast Guard
Base Miami Beach

100 MacArthur Causeway
Miami Beach, FL 33139
Staff Symbol: (c)
Phone: (305) 535-4498
Fax: (305) 535-4520
E-mail: Benjamin.L.Davis@uscg.mil

11011
April 22, 2014

Mr. Richard Lorber
City of Miami Beach
Planning & Zoning Department
1700 Convention Center Drive
Miami Beach, FL 33139

Dear Mr. Lorber,

I am writing to inform you of the U.S. Coast Guard's views related to the proposed Terminal Island Residential project being offered by the Newgard Development Group (Newgard).

The Coast Guard and Newgard have been engaged since June 2013 regarding the proposed project. The Coast Guard, through me, has outlined our concerns related to luxury residential encroachment on our light-industrial facility. The prospective development may not be compatible with the Coast Guard's around-the-clock operations including effects on issues such as:

- Nuisance issues for nearby land owners and users;
- Interference with vessel traffic service (VTS), radar and other similar operations;
- The increased risk of potential damage to private property from allisions and wake damage from Coast Guard emergency operations;
- Vessel traffic management issues in an already-crowded waterway resulting in increased difficulty for Coast Guard vessel maneuvers and decreased emergency response capabilities.

Notwithstanding our concerns, Newgard has been accommodating in offering solutions to address our concerns. These include their intent to incorporate covenants and stipulations into the condominium documents to address the potential nuisance issues, and recording the documents so they would be permanently enshrined in covenants that run with the land, thus unalterable without the Coast Guard's prior consent. Additionally, Newgard has offered roof space and access in perpetuity to allow for placement of sensors to enable us to monitor the port.

We appreciate the City's recognition of our concerns regarding potential incompatibility of divergent land uses between the Coast Guard facility and Newgard's prospective development. Assuming the Coast Guard and Newgard can reach agreement on the details to effectuate Newgard's proposed solutions, then I would not object to the project. The Coast Guard is a willing partner in the communities in which we reside. We commit to future engagement to work through the outstanding issues related to this project.

Sincerely,

B. L. DAVIS
Captain, U. S. Coast Guard
Commanding Officer

Copy: Commander, Seventh Coast Guard District (dcs, deg, dl)
Commander, Coast Guard Sector Miami (sd)
Commander, Shore Infrastructure Logistics Center
Commanding Officer, Coast Guard Civil Engineering Unit Miami

Palm • Hibiscus • Star
ISLANDS ASSOCIATION, INC.

March 31, 2014

City of Miami Beach Mayor, Commission & City Manager
Miami Beach City Hall
1700 Convention Center Drive
Miami Beach, FL 33139

RE: Proposed Terminal Island Project

Dear Mr. Mayor, Members of the City Commission and City Manager:

On Tuesday, March 18th, Newgard Development presented their proposal for a Terminal Island Project to the Board of Directors of the Palm-Hibiscus-Star Islands Association. The presented plan included developing an approximately 60-unit luxury condominium, a deep-water yacht marina and the rebuilding of a state-of-the-art maintenance facility for the City of Miami Beach to replace the existing City facility.

The members of the Board of Directors present, representing the Association supported the plan as presented that night. While providing many tangible benefits to the City and nearby residents, including beautifying Terminal Island, if carried out as represented, the project would also significantly reduce traffic on the MacArthur Causeway by removing all of the semi-truck traffic generated by the current container port use on the site. That will be replaced with a much preferred, limited number of private vehicles belonging to residents of Terminal Island. Additionally, Newgard Development committed that no restaurants open to the general public, nightclub or entertainment venues would be included, nor would special events be permitted, thus alleviating our concerns that the development would introduce traffic, crowds, noise and other impacts adverse to the community.

The Terminal Island Group will additionally be making a presentation to our residents at the next General Homeowners Association Meeting to be held in April.

Please feel free to contact me or our Executive Director Tim Rose, if you have any questions concerning our stand on this issue. You can contact me at 786-253-9567 or by e-mail at deagostini@aol.com. You can reach Tim at 305-299-2617 or by e-mail at tim.rose@phsislands.org.

Sincerely,

Pierre De Agostini
President

From: Gerald@SOFNA [mailto:gerald@sofna.net]
Sent: Monday, April 07, 2014 01:31 PM
To: Malakoff, Joy <JoyMalakoff@miamibeachfl.gov>; jonahwolfson@miamibeachfl.gov <jonahwolfson@miamibeachfl.gov>; michaelgrieco@miamibeachfl.gov <michaelgrieco@miamibeachfl.gov>
Cc: deedeweithorn@miamibeachfl.gov <deedeweithorn@miamibeachfl.gov>; thomasmooney@miamibeachfl.gov <thomasmooney@miamibeachfl.gov>; Steve Mandy <steve@mandymd.com>; victor diaz <victor@diazpartners.com>; ronald starkman <rpstarkman@gmail.com>; mike perlmutter <MuranoMike@aol.com>; Michael Barrineau <michael.barrineau@gmail.com>; Dawn McCall <dmccall190@aol.com>; Gerald Posner <gerald@posner.com>
Subject: SOFNA/Terminal Island

Dear Commissioners Malakoff, Wolfson and Grieco,

At a general meeting of the South of Fifth Neighborhood Association held on Tuesday, April 1, the following resolution was passed, with 5 directors in favor and 2 abstentions.

We are forwarding it to you so you may consider it as part of your deliberations this coming Wednesday for this agenda item.

WHEREAS, the Board of Directors of the South of Fifth Neighborhood Association (SOFNA) has reviewed the safeguards proposed for a condo and yacht facility at Terminal Island, as contained in the developer's March 24, 2014 letter to the city, attention of the City Manager, highlights below,* and

WHEREAS, the Board understands that the development will be subject to the terms of a Florida Statutes Chapter 163 development agreement that is yet to be negotiated with the city, whose terms may include developer-funded construction of city facilities and/or other remuneration to the city, and that other considerations regarding site unification under the city's charter are yet to be determined, and

WHEREAS, Board endorsement of the proposed use and impact safeguards shall not be construed to mean that the SOFNA Board may not hereafter take a position on the other aspects of the proposal,

NOW THEREFOR, the SOFNA Board concludes that the safeguards proposed, inclusive of mandatory prohibitions on dance halls, entertainment establishments, neighborhood impact establishments, outdoor entertainment establishments or open air entertainment establishments, as listed in the developer's March 24, 2014 letter, with the addition of a mandatory prohibition on special events, will ensure that the project will not increase traffic impacts on MacArthur Causeway over the present volumes, and will not object to the project on use and impact grounds.

Gerald Posner
Secretary
On behalf of the SOFNA Board of Directors

EXHIBIT “B”

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Residential/Light Industrial vs. Light Industrial Comparison

Coast Guard Concerns (1)	Mixed Light Industrial and Residential Development with Coast Guard safeguards (2)	Light Industrial Development without Coast Guard safeguards (3)
Operational Concerns		
(1) Residential building height facilitate Base surveillance.	(1) Fixed group of residents will be known and controlled. Surveillance also available from approved Fisher Is. parking garage.	(1) Forty-foot-tall building can be built which provides equal surveillance opportunity with less control of residents.
(2) Moored yachts threaten restricted zone around Base and hamper CG cutter movement.	(2) Only yachts with professional crews and long term moorage will be moored. Smaller vessels give more room to CG vessels for maneuvering.	(2) Large, transient cargo ships with wider beam can be moored with foreign crews increasing surveillance and forcing ferry closer to security zone. Less room for CG cutter maneuvering.
(3) CG vehicle ingress/egress from Base.	(3) Relatively fixed number of residents, staff and workers using parking garage. Complete traffic study will be done for the city.	(3) Owner temporarily ended marine terminal use of property which greatly reduced large truck traffic. This could return if not residential. More traffic with office workers, customers etc.
(4) Tall building will interfere with CG communications.	(4) Owners will allow communication and surveillance equipment to be placed on their roof top with unfettered access.	(4) Maximum forty-foot-tall building should not interfere but there is no promise of allowing CG roof space or access if needed.
(5) Public address systems are loud and used 24/7.	(5) Building design will mitigate sound attenuation. Safeguards will protect against suits.	(5) Building design will mitigate sound attenuation. No safeguard against suits.
Litigation Risk		
(1) Nuisance complaints for operational and industrial activities.	(1) Condo owners and developer will contract not to sue the CG for activities. Requirement for contract will be part of deed and exist in perpetuity.	(1) Business owners will be subjected to same nuisances but not required to sign no-suit contract protecting the CG.
(2) Exposure to noise and toxic chemicals.	(2) Building designed to mitigate these issues. Contracts will protect CG from suit.	(2) Building may or may not designed to mitigate these issues. No contracts to protect the CG from suit.
(3) Exposure to explosive blast zone.	(3) Building will be designed to mitigate this risk. CG barracks building lies	(3) Building may or may not be designed to mitigate this risk.

	within same distance as the residential property. Risk is considered low. Contracts will protect CG from suit.	No contracts to protect the CG from suit.
(4) Megayacht owners will be inconvenienced during heightened security.	(4) Megayachts can moor at Terminal Is under existing zoning, making this moot.	(4) Large, foreign flag vessels may moor at the facility. More of a threat than yachts.
(5) Residential zoning will require the CG Base to meet higher environmental and public safety/health standards.	(5) CG Base already exists close to an urban area with great waterway use. Standards are already high. Building design will mitigate these issues. Contracts will protect CG from suit.	(5) Building design may or may not mitigate these issues. Larger, transient population will increase exposure risk. No contracts to protect the CG from suit.
(6) Decreased potential for future growth.	(6) Any development on Terminal Is. will impact growth on and around the CG Base.	(6) Any development on Terminal Is. will impact growth on and around the CG Base.

Notes:

(1) Coast Guard concerns taken from Captain Keffer's letter to the City of Miami Beach Planning and Zoning Department dated 10 April 2017.

(2) Development on the Treasure Island property would include an improved maintenance facility for the City of Miami Beach, a parking garage, and approximately 90 condominium residences. The buildings would be designed with Coast Guard input to minimize exposure of residence to noise, light and other environmental factors. A condition of condo purchase would be to sign a contract that prevents owners from suing the Coast Guard for operational and industrial impacts. The property owner would sign the same contract which would be filled with the deed and exist in perpetuity. In addition, the owners would provide space and access on their property for Coast Guard communications and surveillance equipment. Traffic would be limited to residents, maintenance staff and moorage customers.

(3) Light industrial development on Treasure Island can be done under existing zoning and can include a building with the same square footage as the residential building with offices, restaurants, churches, some industrial work and more (see attachment for comprehensive list). This option would bring more people on the property with less control of their activities and identification. Traffic would increase as customers, workers and staff enter and leave. A 70-foot easement is included around the property for moorage of deep draft vessels. No Coast Guard input is required for this development and no safeguards against suit will be in place to protect the Coast Guard from suit.

EXHIBIT “C”

Holland & Knight

701 Brickell Avenue, Suite 3000 | Miami, FL 33131 | T 305.374.8500 | F 305.789.7799
Holland & Knight LLP | www.hklaw.com

Memorandum

Date: March 13, 2017

To: Jon Paul Perez
Steve Kohler

From: Tracy R. Slavens

Re: Nuisance Claims and Waiver of Right to Quiet Enjoyment

You have asked us to analyze whether the condominium owners (the "Condo Owners") of the proposed residential tower in Terminal Island (the "Tower" and, each condominium unit, the "Property") may, at any time after closing on a unit, bring suit against the Developer, the United States Coast (the "USCG"), or the City of Miami Beach (the "City") based on a claim that the existing uses located adjacent to the Tower disrupt the Condo Owners' quiet enjoyment of their Property. The USCG owns and operates its Miami Base to the east of the channel abutting the Tower (the "USCG Base") and the City owns and operates its existing Fleet Management and Sanitation Department facilities directly to the west of the Tower (portions of which will be incorporated into the Tower structure) (the "City Facility"). All Condo Owners will be required to execute a waiver to forgo their right to quiet enjoyment of their Property. It is recommended that all future tenants of the Tower execute the same waiver instrument. Based upon the plain text of the case law, the execution of such a waiver will preclude Condo Owners (and tenants) from bringing suit against the City and the USCG in connection with the USCG Base or City Facility operations.

Background

The Tower will be located on that certain ±3.71 acre parcel of land located on the southeastern tip of Terminal Island at 120 MacArthur Causeway (the "Tower Parcel"). The Tower will consist of luxury 90 unit multi-family residential building, mega-yacht moorage, and portions of the new City Facility. The parcel of land located at 140 MacArthur Causeway is owned by the City and will also include City Facility uses. The USCG Base is located east of the abutting channel on a ±17.52 acre parcel of land. The majority of Terminal Island is designated as Urban Light Industrial (I-1) and the City-owned parcel is designated as Government Use (GU) on the City's zoning map.

The existing City Facility is used in connection with the City's sanitation and recycling operations, fleet management operations, and other City vehicle servicing activities. The USCG Base is an industrial support facility and operational base serving Coast Guard operations in Florida and the

Caribbean. The USCG Base operations include an industrial facility providing ship maintenance and repair as well as support for shore infrastructure. This work requires the use of industrial equipment such as grinders, needle guns, sand blasting and welding equipment which generates significant noise and emissions into the air. Operationally, the USCG Base provides emergency response and law enforcement services that require rapid departures with large wakes, sirens and flashing lights. Large and small patrol cutters along with Aids to Navigation vessels are homeported or call at the USCG Base. These vessels conduct operations at the dock both day and night. Helicopters are also able to land at the USCG Base. The USCG Base uses amplified sound equipment to broadcast information around the facility. Both the City Facility and the USCG Base engage in intensive industrial and/or institutional uses 24 hours per day, 365 days a year.

Nuisance

Although the operation of a U.S. Coast Guard Base or a fleet management and sanitation facility are not, per se, nuisances because both are legal uses of the premises, the Condo Owners may claim that their respective operations interfere with their right to quiet enjoyment of their Property, thus invoking a nuisance claim. Generally, a nuisance consists of using one's property so as to injure the land or some incorporeal right of one's neighbor. *See* Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956); Reaver v. Martin Theatres of Fla., 52 So. 2d 682 (Fla. 1951). The mere presence of an existing nuisance does not automatically preclude an adjacent property owner from making a claim for damages.

In an action for damages on the theory of private nuisance, the defense of "coming to the nuisance" has long been rejected in Florida. *See* Lawrence v. Eastern Air Lines, 81 So. 2d 632 (Fla. 1955); Department of Transp. v. Burnette, 384 So. 2d 916, 922 (Fla. Id DCA 1980). The fact that a complained-of business was fully established before the development of the community is not a defense to an action to enjoin it as a private nuisance, although it may be a factor the court considers when determining injunctive relief. *See* Pizio v. Babcock, 76 So. 2d 654, 655 (Fla. 1954). Thus, even though the City Facility and the USCG Base have been in existence for many years and were already in place when the Condo Owners bought the property will not be a viable defense, and will simply be a factor the court will take into account. In order to preclude such a claim, further action on the part of the developer will be required.

Waiver

A strong tool to avoid any suits by Condo Owners based on the operations of the City Facility and the USCG Base is the implementation of the requirement by the developer to require each of the Condo Owners (and any future owners and/or tenants) to execute a waiver that expressly waives the right of the Condo Owner to quiet enjoyment of their Property based on the proximity to the adjacent industrial uses. The waiver requirement should additionally be recorded as a notice on the Property, included in the condominium association documents, and provided as a deed restriction for each unit. Unlike the "coming to the nuisance" doctrine, waivers have been long recognized in Florida. *See* Richards v. Dodge, 150 So. 2d 477, 481 (Fla. 2d DCA 1963). In Florida, a waiver is accepted as "the voluntary and intentional relinquishment of a known right." Clear Channel Metroplex, Inc. v. Sunbeam Television Corp., 922 So.2d 229, 232 (Fla. 3d DCA 2005). The Supreme Court of Florida has also recognized that where the facts and circumstances

indicate the possibility of a waiver, it is error for the court to preclude the consideration of such defense. *See* Macina v. Magurno, 100 So. 2d 369, 372 (Fla. 1958).

The general presumption in Florida is that an individual is free to knowingly and intelligently forego a right which is intended to protect only the property rights of the individual who chooses to make the waiver. In some circumstances, individuals can even waive fundamental constitutional rights that protect their liberty as well as their property. *See* Petersen v. Florida Bar, 720 F. Supp. 2d 1351 (M.D. Fla. 2010) (applying Florida law). Since the right of quiet enjoyment is essentially the right to the undisturbed use and enjoyment of real property, it qualifies as a right subject to waiver in Florida.

The following elements are essential to a legally binding waiver:

1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived;
2) the actual or constructive knowledge thereof; and
3) an intention to relinquish the right.

Thus, waiver may not occur unless knowledge of a known right is express or implied. Furthermore, the waiving party must possess all of the material facts for its representations to constitute a waiver. *See, e.g.*, Chick-Fil-A, Inc. v. CFT Dev., LLC, 652 F. Supp. 2d 1252, 1261 (M.D. Fla. 2009), aff'd, 370 Fed. Appx. 55 (11th Cir. 2010). Although this standard is mainly applied in family courts, in the abundance of caution, the waiver language must be such that interpretation of the agreement as a whole can lead to no other conclusion but that a waiver was intended. *See, e.g.*, Sasnett v. Sasnett, 683 So. 2d 177 (Fla. Dist. Ct. App. 2d Dist. 1996). Additionally, in order to waive any privilege or right, the person for whose benefit it was intended must be of full age and capacity. Alexander v. State, 380 So. 2d 1188 (Fla. 5th DCA 1980).

To ensure the Condo Owners have possession of all the material facts in connection with the operations of the City Facility and the USCG Base and, as such, are able to have express or implied knowledge that they are intentionally giving up their right to peacefully enjoy their Property without interference, we recommend that all Condo Owners (and tenants) sign a waiver, substantially in the form attached hereto as Exhibit "A." As noted above, we also recommend that the waiver is included in all pertinent condominium documents, purchase agreements for Property, and deeds in order to further demonstrate that the waiver establishes a clear case of relinquishment.

Conclusion

Although the "coming to the nuisance" doctrine is not accepted in Florida, a waiver by the Condo Owners will be enforceable and will provide protection to the City Facility and USCG Base from nuisance related law suits. Through the execution and recordation of an express waiver for each unit, not only will the Condo Owners be bound to the relinquishment of its right to quiet enjoyment, but third parties will also be given notice of the uses and operations that surround the Tower.

For your convenience, a copy of the applicable Florida case law referenced herein has been attached as Exhibit "B."

Should you have any questions regarding the foregoing or would like to discuss any of the issues raised, please do not hesitate to contact our office.

EXHIBIT "A"

FORM OF WAIVER

This Instrument was Prepared by:

Name: Tracy R. Slavens, Esq.
Address: Holland & Knight LLP
701 Brickell Avenue
Suite 3300
Miami, Florida 33131

(Space Reserved for Clerk of the Court)

NOTIFICATION, ACKNOWLEDGMENT, WAIVER AND RELEASE OF PROXIMITY TO INDUSTRIAL AND INSTITUTIONAL USES

The purchasers (their heirs, successors, assigns), lessees, occupants and residents (hereinafter jointly and severally, the "Covenanters") of that certain real property located in the county of Miami-Dade, State of Florida, more particularly described on Exhibit A attached hereto (the "Property") are hereby advised and hereby acknowledge, agree and covenant as follows:

The Property is located in proximity to the City of Miami Beach (the "City") maintenance facility (the "Maintenance Facility") and United States Coast Guard Base Miami Beach (the "USCG Base"), both of which engage in 24-hour intensive industrial and/or institutional uses as further described below.

City Maintenance Facility. The Maintenance Facility is used in connection with the City's sanitation and recycling operations, fleet management and other City vehicle servicing activities. The Maintenance Facility operates 24 hours per day, 365 days per year. Said operations include, but are not limited to, (i) parking areas for various City vehicles, including, but not limited to oversized vehicles pending repairs, dump trucks, fuel tanker trucks, heavy duty equipment, police vehicles and other light duty vehicles; (ii) fueling island(s); (iii) air, water, vacuum self-service island(s); (iv) air compression room(s); (v) warehouse(s); (vi) car wash rack(s); (vii) repair and service area(s); and (viii) storage facilities for containers, large equipment and other maintenance related purposes, including, but not limited to, waste tires, used oil filters, waste batteries, lubricant and diesel exhaust.

United States Coast Guard Station. The USCG Base is a 24 hours per day, 365 days per year industrial support facility and operational base serving Coast Guard operations in Florida and the Caribbean. The USCG Base is an industrial facility providing ship maintenance and repair as well as support for shore infrastructure. This work requires the use of industrial equipment such as grinders, needle guns, sand blasting and welding equipment which generates significant noise and emissions into the air. Operationally, the USCG Base provides emergency response and law enforcement services that require rapid departures with large wakes, sirens and flashing lights. Large and small patrol cutters along with Aids to Navigation vessels are homeported or call at the USCG Base. These vessels conduct operations at the dock both day and night. Helicopters are

also able to land at the USCG Base. The USCG Base uses amplified sound equipment to broadcast information around the facility.

The Covenanters agree that they do not object to the presence of the Maintenance Facility or the USCG Base, or their respective operations. The Covenanters agree that they waive and shall not raise any objection to the continued operation of the Maintenance Facility or the USCG Base. Further, the Covenanters waive and release the City and the United States Coast Guard from any and all liability for any past, present or future claims, and the Covenanters hereby agree not to file any claim or action against Miami-Dade County or the operator(s) of the Maintenance Facility and the USCG Base, pertaining to or arising out of the current operations or ancillary uses of the Maintenance Facility or the USCG Base. This waiver and release includes, but is not limited to, both non-constitutional and constitutional claims and actions (including, but not limited to, inverse condemnation, takings and nuisance), of any kind or other constitutional or non-constitutional claims of any kind or nature whatsoever. In the event that any paragraph of portion of this notice is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, it shall affect no other provision of this Notification, Acknowledgment, Waiver and Release ("Notice"), and the remainder of this Notice shall be valid and enforceable in accordance with its terms.

[SIGNATURE ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this instrument has been executed on the _____ day of _____, _____.

Witnesses:

_____
Signature

_____
Print Name

_____
Signature

_____
Print Name

OWNER

By: _____

Name: _____

STATE OF _____]
] SS
COUNTY OF _____]

The foregoing instrument was acknowledged before me this _____ day of _____, _____ by _____;
who is personally known to me or has produced _____
as identification.

(Notary Seal)

_____
Notary Public
STATE OF _____
My Commission Expires _____

EXHIBIT "A"

LEGAL DESCRIPTION FOR THE PROPERTY:

COMMENCING AT A POINT 1580 FEET NORTH AND 2015 FEET WEST FROM THE SOUTHEAST CORNER OF SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, SAID POINT BEING AT THE INTERSECTION OF THE CENTERLINE OF THE ROADWAY OF THE ORIGINAL MIAMI COUNTY CAUSEWAY VIADUCT AND THE FACE OF THE WEST BRIDGE ABUTMENT, RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE CENTERLINE OF SAID ROADWAY PRODUCED, A DISTANCE OF 58.70 FEET TO A POINT; THENCE RUN SOUTH 31 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 64.75 FEET TO A POINT, SAID BEING THE POINT OF BEGINNING (1); THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 117.78 FEET TO THE POINT OF BEGINNING OF CUT-OUT PARCEL OF LAND HEREIN DESCRIBED,

FROM SAID POINT OF BEGINNING; THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SAID SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 40.43 FEET; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 06 DEGREES 15 MINUTES 30 SECONDS AND A RADIUS OF 243.86 FEET, A DISTANCE OF 26.64 FEET TO A POINT; SAID POINT BEING THE POINT OF COMPOUND CURVATURE OF A CIRCULAR CURVE; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, AND HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 01 DEGREES 25 MINUTES 44 SECONDS AND A RADIUS OF 1,566.95 FEET, A DISTANCE OF 39.08 FEET TO A POINT; THENCE RUN SOUTH 31 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 403.80 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 97.46 FEET TO A POINT; THENCE RUN NORTH 64 DEGREES 31 MINUTES 00 SECONDS WEST A DISTANCE OF 120.00 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 100.00 FEET TO A POINT; THENCE RUN SOUTH 64 DEGREES 31 MINUTES 00 SECONDS EAST, ALONG A LINE PARALLEL TO THE MUNICIPAL CHANNEL A DISTANCE OF 832.55 FEET (RECORD AND LEGAL DESCRIPTION) 832.55 FEET (CALCULATE) TO A POINT; THENCE RUN NORTH 31 DEGREES 43 MINUTES 00 SECONDS WEST A DISTANCE OF 583.57 FEET; THENCE SOUTH 58 DEGREES 17 MINUTES 00 SECONDS WEST FOR A DISTANCE OF 175.85 FEET; THENCE NORTH 32 DEGREES 27 MINUTES 12 SECONDS WEST FOR A DISTANCE OF 59.61 FEET; THENCE NORTH 32 DEGREES 00 MINUTES 10 SECONDS WEST FOR A DISTANCE OF 61.22 FEET; THENCE NORTH 31 DEGREES 57 MINUTES 07 SECONDS WEST FOR A DISTANCE OF 59.87 FEET; THENCE NORTH 31 DEGREES 45 MINUTES 47 SECONDS WEST FOR A DISTANCE OF 99.47 FEET; THENCE NORTH 32 DEGREES 00 MINUTES 04 SECONDS WEST FOR A DISTANCE OF 109.79 FEET; THENCE NORTH 58 DEGREES 01 MINUTES 56 SECONDS EAST FOR A DISTANCE OF 19.00 FEET TO THE POINT OF CURVE OF A NON TANGENT CURVE TO THE RIGHT, OF WHICH THE RADIUS POINT LIES NORTH 87 DEGREES 07 MINUTES 46 SECONDS EAST, A RADIAL DISTANCE OF 71.65 FEET; THENCE NORTHERLY ALONG THE ARC, THROUGH A CENTRAL ANGLE OF 43 DEGREES 56 MINUTES 24 SECONDS, A DISTANCE OF 54.95 FEET; THENCE NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST FOR A DISTANCE OF 10.00 FEET, TO THE SOUTHEASTERLY CORNER OF AN EXISTING ONE-STORY C.B.S. BUILDING; THENCE CONTINUE NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST, NORTHWESTERLY ALONG THE FACE OF THE SAID EXISTING C.B.S. BUILDING LINE, A DISTANCE OF 39.60 FEET, TO THE NORTHEASTERLY CORNER OF SAID EXISTING ONE-STORY C.B.S. BUILDING; THENCE CONTINUE NORTHWESTERLY, NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST, FOR A DISTANCE OF 30.28 FEET, TO THE POINT OF BEGINNING OF THE CUT OUT PARCEL OF LAND.

CONTAINING 161,716 SQUARE FEET OR 3.71 ACRES, MORE OR LESS.

LYING AND BEING IN SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, CITY OF MIAMI BEACH, MIAMI-DADE COUNTY, FLORIDA.

EXHIBIT "B"

APPLICABLE CASE LAW

85 So.2d 552
Supreme Court of Florida, Special Division A.

John C. BECKMAN and Katherine B. Beckman, his wife, and Richard C. Beckman and Patricia Beckman, his wife, Appellants,
v.
Francis J. MARSHALL and Ann M. Marshall, his wife, Appellees.

Feb. 15, 1956.

Action was brought to enjoin operation of a day nursery, on ground that it was a private nuisance, and to recover damages. The Circuit Court, Volusia County, Herbert B. Frederick, J., entered a decree in favor of the plaintiffs, and the defendants appealed. The Supreme Court, Dickinson, A. J., and Drew, C. J., held that where day nursery, which was operated between 8:00 o'clock in the morning and 5:00 o'clock in the afternoon, was located in a neighborhood where there were traffic signal lights, filling stations, four-lane highway with trucking traffic, and railroad immediately to the rear, and the nursery was as well supervised as it could be, operation of the nursery would not be enjoined on ground that it was a private nuisance.

Decree reversed with instructions to dismiss case.

West Headnotes (9)

[1] Nuisance
Nature and elements of private nuisance in general

"Nuisance," in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor.

1 Cases that cite this headnote

[2] Injunction
Factors Considered in General

As respects right to injunctive relief, an act, which is wrongful in itself, may be adjudged wrongful before it is committed, as well as afterwards, but an act which is in itself rightful, and may become wrongful only because of some effect which it produces, is generally not proved wrongful by a priori reasoning.

Cases that cite this headnote

[3] Nuisance
Nature and elements of private nuisance in general

The law of nuisance plys between the antithetical principles that every person is entitled to use his property for any purpose that he sees fit, and that every one is bound to use his property in such a manner as not to injure the property or rights of his neighbor.

1 Cases that cite this headnote

[4] Nuisance
Nature and elements of private nuisance in general

No one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of the neighbor's property, but such rule does not prohibit all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property, but rather prohibits a use which constitutes injury to a legal right of the neighbor.

1 Cases that cite this headnote

[5] Nuisance
Nature and elements of private nuisance in general

Nuisance
Nature and extent of injury or danger

Whether a particular use constitutes a private nuisance generally turns on whether use is reasonable under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material,

physical discomfort, and not merely a tendency to injure, or an injury resulting merely in trifling annoyance, inconvenience, or discomfort.

2 Cases that cite this headnote

[6] **Nuisance**
Exercise of legal right

The test of the permissible use of one's own land is not whether the use causes injury to neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is whether the act or use was a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

5 Cases that cite this headnote

[7] **Nuisance**
Nuisances subject to abatement or injunction

In suit to enjoin day nursery on ground that it constituted a private nuisance, question whether operation of the nursery was offensive and annoying to plaintiffs, who were elderly persons, was not a proper test.

2 Cases that cite this headnote

[8] **Nuisance**
What Constitutes Nuisance in General

Nuisance
Noise and pollution of atmosphere in general

In determining whether something constitutes a nuisance, the test is not what the effect of the matters complained of would be on persons of delicate or dainty habits of living, or of fanciful or fastidious tastes, or on persons who are invalids, afflicted with disease, bodily ills, or abnormal physical conditions, or on persons who are of a nervous temperament, or peculiarly sensitive to annoyance or disturbance of the character complained of, or on persons who use their land for purposes which require exceptional freedom from deleterious influences.

3 Cases that cite this headnote

[9] **Nuisance**
Nuisances subject to abatement or injunction

Where day nursery, which was operated between 8:00 o'clock in the morning and 5:00 o'clock in the afternoon, was located in a neighborhood where there were traffic signal lights, filling stations, four-lane highway with trucking traffic, and railroad immediately to the rear, and the nursery was as well supervised as it could be, operation of the nursery would not be enjoined on ground that it was a "private nuisance".

2 Cases that cite this headnote

Attorneys and Law Firms

***553** Alfred E. Hawkins, Hawkins & Orfinger, and Horn & Ossinsky, Daytona Beach, for appellants.

Walter A. Shelley, Daytona Beach, for appellees.

Opinion

DICKINSON, Associate Justice, and DREW, Chief Justice.

This is a squabble between two neighbors.

Plaintiffs below, operators of a guest house on Ridgewood Avenue in Daytona Beach (four-land U. S. Highway No. 1) brought this action against the four defendants alleging that they were maintaining a private nuisance on their property in that they were conducting a day nursery thereon five days a week for children from two to six years of age from about 8:00 a. m. to about 5:00 p. m. Voluminous testimony (some 800 pages) was taken by all the parties below and the chancellor, in a very sweeping decree, enjoined the defendants from operating their nursery entirely, and then further enjoined them from doing certain specific acts in relation thereto, and awarded

damages and costs against defendants. An appeal has been taken to this Court from this decree and plaintiffs' cross-appeal on the denial of damages for loss of value in plaintiffs' property.

***554** From the voluminous testimony taken we glean that plaintiffs bought this property in 1940 and have operated it as a guest house ever since. It is located on U. S. Highway No. 1 just one-half a block south of its intersection tersection with U. S. Highway No. 92. U. S. Highway No. 1 is a four-lane highway between Jacksonville and Miami. U. S. Highway No. 92 is the Federal highway between Daytona Beach and DeLand. In the block here involved, in addition to the nursery school complained of, are three filling stations, a thirty-room hotel, a doctor's office, an insurance and real estate agency, several guest houses, of which plaintiffs' is one, and only one private home. No one other than the plaintiff is complaining. As a matter of fact, the owner of the guest house on the other side of defendants' nursery testified that she was not annoyed by it. Plaintiffs are elderly people. The Florida East Coast Railway station and main line tracks are immediately to the rear of the properties involved, less than one block away. There is no zoning ordinancne prohibiting the use of such property for such purposes. Hence the matter boils down to whether this is a private nuisance or not.

From the testimony it appears that these children begin to arrive about 8:00 a. m. and leave about 5:00 p. m., taking a nap after being fed their lunch. The school here is well supervised by the defendant and an assistant, that is as well supervised as an institution of this kind can be. The playing of the children outside is limited and supervised. Their actions and singing inside is supervised and everything that can be done is being done to minimize the noise. Since this is an unrestricted area so far as zoning against schools is concerned, the school would have to qualify as a private nuisance for equity to intervene. True, the children make a certain amount of noise, but there must be some relationship of their noise to the surrounding noises for equity to act. It is inconceivable to see how, in the neighborhood of this four-lane highway with its trucking traffic, the railroad immediately to the rear, three filling stations, traffic signal lights on the corner, the pitter patter of little feet and the noises of children singing and at play, even though there may be twenty-five of them, can become a nuisance to plaintiffs and be enjoinable in a court of equity.

[1] [2] [3] [4] [5] [6] The following language from the case of Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752, 758, which we hereby adopt and approve, is particularly applicable and we think largely determinative of the questions involved in this case:

'Nuisance, in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor. An act which is wrongful in itself may be adjudged wrongful before it is committed, as well as afterwards. But an act which is in itself rightful, and may become wrongful only because of some effect which it produces, is generally not proved wrongful by a priori reasoning. Even when it appears that a given act or acts done in a certain way are wrongful, it does not follow that some part of the act or acts may not be rightfully done, or even that the entire operation may not be later done in such a way as to be rightful. It is often found that the damage to the defendant which the interference of a court, through injunction, would cause, will be out of all proportion to the damage to the plaintiff or to the public in general.

'The law of nuisance plys between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.

***555** 'The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of his property. This rule has sometimes been erroneously interpreted as a prohibition of all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property. The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is 'an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort,

and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort.' * * *

'It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort, or injury to his neighbor, which are damnum absque injuria * * *.

"The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? Having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.' * * *

'All systems of jurisprudence recognize the requirement of compromises in the social state. Members of society must submit to annoyances consequent upon the reasonable use of property. 'Sic Utere tuo ut alienum non laedas' is an old maxim which has a broad application. If such rule were held to mean that one must never use his own property in such a way as to do any injury to his neighbor or his property, it could not be enforced in civilized society. People who live in organized communities must of necessity suffer some damage, inconvenience and annoyance from their neighbors. For these annoyances, inconveniences and damages, they are generally compensated by the advantages incident to living in a civilized state.'

[7] **[8]** We are not unmindful of the fact that this record does show the operation of the nursery to be offensive and annoying to the appellees. This, however, is not the test. Obviously the appellees, so to speak, are simply allergic to children and the noises they make. In dealing with the question of what constitutes a nuisance, the characteristics and temperament of the affected person or persons must be taken into consideration. The test to be applied is the effect of the condition complained of on ordinary persons with a reasonable disposition in ordinary health and possessing the average and normal sensibilities. It is a well-settled principle of law that:
'The test is not what the effect of the matters complained of would be on persons of delicate or dainty habits of living, or of fanciful or fastidious tastes; or on persons who are delicate, or invalids, afflicted with disease, bodily ills, or abnormal physical conditions; or on persons who are of nervous temperament, or peculiarly sensitive to annoyance or disturbance of the character complained of; or on persons who use their land for purposes which require exceptional freedom from deleterious influences.' 66 C.J.S., Nuisances, s 18(c), p. 765.

Moreover, the time that the noises or other offensive actions took place is important. In the instant case, all such events took ***556** place between 8:00 o'clock in the morning and 5:00 o'clock in the afternoon. What well might be a private nuisance at 3:00 o'clock in the morning would not be one in the day time or earlier in the evening. See Mayflower Holding Company v. Warrick, 143 Fla. 125, 196 So. 428; 66 C.J.S., Nuisances, s 22(b), p. 775; Bartlett v. Moats, 120 Fla. 61, 162 So. 477.

[9] Measured by the above standards, the decree appealed from is erroneous and is hereby reversed with instructions to dismiss the cause at the cost of the plaintiffs below.

TERRELL and THORNAL, JJ., concur.

All Citations

85 So.2d 552

52 So.2d 682
Supreme Court of Florida, Division B.

REAVER et al.
v.
MARTIN THEATRES OF FLORIDA, Inc.

May 29, 1951.

Suit by John P. Reaver, doing business as Skyland Airport against Martin Theatres of Florida, Inc., a Florida corporation to enjoin defendant from constructing a driven-in theater on realty contiguous to plaintiff's airport on ground that it would constitute a nuisance and hazard to plaintiff and to public generally. The Circuit Court for Bay County, E. Clay Lewis, J., rendered a decree for defendant and plaintiff appealed. The Supreme Court, Roberts, J., held that the operation of a drive-in theater would not per se a nuisance and in absence of any showing of invasion of plaintiff's physical rights or that construction of screen by defendant would add to hazards which already existed or that lights used in operating theater would unreasonably interfere with operation of airport or that traffic problem created by ingress and egress of patrons of theater would constitute a public nuisance, plaintiff was not entitled to injunctive relief.

Decree affirmed.

West Headnotes (5)

[1] **Adjoining Landowners**
Use of premises affecting adjoining land

A property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive 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 law will pronounce a nuisance, and reasonableness of such use must be determined according to circumstances of each case and in accordance with established legal and equitable principles.

11 Cases that cite this headnote

[2] **Nuisance**
Games and entertainments

The operation of a drive-in theater is not, per se, a nuisance.

Cases that cite this headnote

[3] **Aviation**
Flying Over Another's Land
Trespass
Trespass to Real Property

The operator of an airplane is privileged to enter the airspace above land in possession of another, so long as he does so in a reasonable manner, at such a height as is in conformity with legislative requirements, and without interfering unreasonably with possessor's enjoyment of surface of earth and airspace above it.

Cases that cite this headnote

[4] **Aviation**
Flying Over Another's Land
Trespass
Trespass to Real Property

Privilege of an airplane to invade airspace above land in possession of another is coequal with owner's right to lawful and reasonable use of such airspace, with balance, if any, in favor of landowner.

1 Cases that cite this headnote

[5] **Aviation**
Obstructions and hazards
Injunction
Airports and aviation

Airport operator was not entitled to enjoin theater corporation from constructing drive-in theater on land owned by it contiguous to airport, in absence of showing that construction of theater would unreasonably interfere with operation of airport or that traffic problems created by ingress and egress

of patrons of theater would constitute a public nuisance.

Cases that cite this headnote

Attorneys and Law Firms

***683** Joseph E. Price, Jr., Warren L. Fitzpatrick and Isler & Welch, all of Panama City, for appellant.

Thomas Sale, Panama City, for appellee.

Opinion

ROBERTS, Justice.

The plaintiff-appellant has owned and operated a small private airport in the City of Panama City for four years. The defendant-appellee recently purchased a tract of land north of plaintiff's airport, a portion of which (some 160 feet) is contiguous to the northern terminus of plaintiff's landing strip, for the purpose of constructing a drive-in theatre. Upon learning of defendant's intention, the plaintiff filed suit to enjoin the defendant from constructing the theatre, on the ground that it would constitute a nuisance and hazard to the plaintiff and to the public generally. The defendant answered, alleging that the operation of a drive-in theatre was a legitimate use of its property, that its proposed construction would not violate any of the regulations of the Civil Aeronauties Administration respecting hazards near an airport, and that there already existed hazards, in the form of light poles, power lines, and a fire tower, which were at least as hazardous as the construction proposed for the drive-in theatre. Trial was had before the Court, and final decree was entered in favor of defendant, from which plaintiff has appealed.

The general question of whether or not the owner of an airport can enjoin an adjoining landowner from using his property in a manner hazardous to the operation of the airport, but which use would not be hazardous to the operation of any other business, has not heretofore been presented to this court.

[1] Under the familiar maxim 'Sic utere tuo ut alienum non laedas,' 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. 39 Am.Jur., Nuisances, Sec. 16, p. 296; 1 Am.Jur., Adjoining Landowners, Sec. 3, p. 505; Cason v. Florida Power Company, 74 Fla. 1, 76 So. 535, L.R.A.1918A, 1034. The 'reasonableness' of such use must be determined according to the circumstances of each case, and in accordance with established legal and equitable principles. Cason v. Florida Power Co., supra.

[2] **[3]** The operation of a drive-in theatre is not, per se, a nuisance; it is as legal a use of his premises by the defendant as is the operation of an airport by the plaintiff. There is no physical invasion of the plaintiff's premises by the defendant. In fact, the 'invasion', if any, is of the defendant's premises by the plaintiff, although it appears to be established that the operator of an airplane is 'privileged' to enter the airspace above land in the possession of another, so long as he does so in a reasonable manner, at such a height as is in conformity with legislative requirements, and without interfering unreasonably with the possessor's enjoyment of the surface of the earth and the airspace above it. See Restatement of Torts, Vol. 1, Section 194; also, Comment f of Section 159, ibid.

[4] Counsel for plaintiff has cited no case, and our independent research has revealed none, where the 'privilege' of an airplane to invade the airspace above land in the possession of another has been ***684** held superior to the lawful and reasonable use of such airspace by the owner of the land. It appears that their rights are generally held to be co-equal, with the balance, if any, in favor of the landowner.

Thus, in Guith v. Consumers Power Co., D.C., 36 F.Supp. 21, 23, in which the operators of an airport sought to enjoin the defendant from erecting an electric transmission line consisting of pole structures and wires, and in which such relief was denied, the court said; 'The coming of the airplane has not taken away any of the rights of the landowner to the use and enjoyment of his land and the air space above it. The privilege or right of airplanes to fly through the air space recognized by the common law and in the statutory law of Michigan is limited to that portion of the air space which the landowner does not need or want and the use of which does not interfere with the use, occupation or enjoyment of the land or the air space above it by the landowner.' And in Smith v. New England Aircraft Co., 270 Mass. 511, 528, 170 N.E. 385,

392, 69 A.L.R. 300, it was stated that 'Aerial navigation, important as it may be, has no inherent superiority over the landowner where their rights and claims are in actual conflict.' See also Air Terminal Properties v. City of New York, 172 Misc. 945, 16 N.Y.S.2d 629, where the court denied an injunction seeking to restrain the planting of trees on a city street adjacent to the plaintiff's airport on the ground that the trees would interfere to some extent with the operation of the airport; and Capitol Airways v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E.2d 776, in which the owner of an airport was denied the right to recover damages for the alleged interference with and destruction of his established business caused by the defendant's constructing a power line, consisting of steel towers about 90 feet in height and electric wires, along the boundary of the airport.

While the placing of obstructions near the property line of an airport solely for the purpose of harassing the owner thereof, and without relation to any reasonable use which the adjoining landowner might wish to make of his property, might well be held to be a nuisance, that is not the case here. It is unquestioned that the defendant intends to use its premises for a drive-in theatre, which is a legitimate business, and one which is permitted in that area of Panama City where the defendant intends to operate it.

[5] Moreover, aside from the legal question involved, this case also presented questions of fact, which could properly have been resolved against the plaintiff. There was ample evidence to prove that the construction of a screen by defendant would not measurably add to the hazards which already existed; that the lights to be used by defendant in operating its theatre would not unreasonably interfere with the operation of the airport by plaintiff; and that the traffic problem created by the ingress and egress of patrons of the theatre would not constitute a public nuisance.

No error having been made to appear, the final decree of dismissal should be and it is hereby.

Affirmed.

SEBRING, C. J., and CHAPMAN and ADAMS, JJ., concur.

All Citations

52 So.2d 682, 25 A.L.R.2d 1451

81 So.2d 632
Supreme Court of Florida, Division B.

Franklyn LAWRENCE and Muriel Lawrence, his wife, Appellants,
v.
EASTERN AIR LINES, Inc., a Delaware corporation, and Town of Miami Springs, amunicipal corporation of the State of Florida, Appellees.

July 20, 1955.

Action for damages for private nuisance in respect to diversion of natural flow of water onto plaintiffs' land. The Circuit Court, Dade County, Pat Cannon, J., dismissed complaint, and plaintiffs appealed. The Supreme Court, Hobson, J., held that complaint was sufficient.

Reversed and remanded.

West Headnotes (4)

[1] Water Law
Pleading

Landowners' complaint against airline and against town to recover damages for private nuisance in respect to defendants' alleged diversion of natural flow of waters onto land was sufficient.

3 Cases that cite this headnote

[2] Water Law
Artificial drainage or discharge in general

No person has the right to gather surface waters that would naturally flow in one direction, by drainage, ditches, dams or otherwise, and divert them from their natural course and cast them upon lands of lower owner to his injury.

1 Cases that cite this headnote

[3] Water Law
Rights of action and defenses in general

Landowners could recover damages for diversion of natural flow of waters notwithstanding that some of alleged acts of defendants had antedated landowners' acquisition of property.

1 Cases that cite this headnote

[4] Pretrial Procedure
Misjoinder

Even if defendants who were joined in action for damages for diversion of natural flow of water were not joint tort-feasors, such alleged misjoinder was not ground for dismissal. F.S.A. Rules of Civil Practice, rule 1.18.

Cases that cite this headnote

Attorneys and Law Firms

***633** Van Buren Vickery, Miami, for appellants.

Dixon, DeJarnette, Bradford & Williams, Miami, for Eastern Air Lines, Inc.

Anderson & Nadeau, Miami, for Town of Miami Springs.

Opinion

HOBSON, Justice.

Plaintiff-appellants, Franklyn and Muriel Lawrence sued Eastern Air Lines, Inc., and the Town of Miami Springs at law to recover damages for a private nuisance. Each defendant filed a motion to dismiss the complaint for failure to state an actionable claim. Appeal is taken from an order granting these motions and final judgment consequent upon such order, dismissing the complaint with prejudice.

The complaint alleged in substance that plaintiffs are the owners of certain described property within the corporate limits of the defendant Town of Miami Springs; that they reside thereon and make it their homestead; that they acquired the property on May 18, 1951 and have resided on it since that time; that shortly before they acquired the property the defendant Eastern Air Lines, which owned a large parcel of land situated immediately to the east of plaintiffs' land (separated therefrom only by a road 40

wide), filled in and substantially raised the elevation of its land and caused it to be paved; that by reason of these activities, and by reason of failing to provide for adequate drainage facilities, the 'defendant Eastern Air Lines, Inc. did change the natural flow of surface waters that occur during periods of rain, and has thereby caused the said surface waters from said land of the defendant and from land surrounding same to flow westward across the street to be discharged upon the lands of the plaintiffs; that on several different occasions each year and during each period of rain during each year, since the defendant's acts aforesaid, the said surface waters have been discharged in such great quantity on the plaintiff's land that it was flooded to a depth of several inches for many days at a time.'

Plaintiffs allege that injuries to their land include the following:

> '(T)he foundations of the plaintiffs' house have settled, causing the walls and plaster to crack; the floors have buckled and warped to such an extent that they must be replaced; the walls have sagged so that the doorways and windows are off-plumb and won't shut; the constant moisture under the house causes a health menace, and has rotted out the floor joists; large holes have been washed in the lawn, and the shrubbery and plants have been ruined; the furniture and furnishings in the house have been damaged.'

As for the defendant Town of Miami Springs, plaintiffs allege that during the summer of 1952 it raised the elevation of a street which borders plaintiffs' property to the north, further obstructing the natural flow of surface water and increasing the quantity of water standing on plaintiffs' land by virtue of that acts of Eastern Air Lines and increasing the injuries done thereby, and that 'the acts of the defendant Town of Miami Springs were negligently performed by reason of tis failure to make any provision for allowing the surface waters to follow the natural flow northward away from the land of the plaintiffs.'

Finally, plaintiffs allege that the acts of defendants 'constitute a continuing wrong ***634** against the plaintiffs,' that their property has been damaged in the amount of $7,500; and that although demand has been made for such sum, it has been met with refusal.

[1] **[2]** This was not a model complaint, but we think it was sufficient under our liberal system of pleading to withstand a motion to dismiss. See Hotel & Restaurant Employees, etc., v. Boca Raton Club, Inc., Fla., 73 So.2d 867. In Davis v. Ivey, 93 Fla. 387, 112 So. 264, we held that persons changing or restraining the flow of water must provide against the consequences which will result from extraordinary rainfall. And in Brumley v. Dorner, 78 Fla. 495, 83 So. 912, a much-cited case in the field of nuisances from accumulation of water, we held the applicable rule to be that 'No person has the right to gather surface waters that would naturally flow in one direction by drainage, ditches, dams, or otherwise, and divert them from their natural course and cast them upon the lands of the lower owner to his injury.' See also Dade County v. South Dade Farms, 133 Fla. 288, 182 So. 858, and Panama City v. York, 157 Fla. 425, 26 So.2d 184, wherein we reaffirmed this rule. We think the rule is broad enough and the facts alleged herein sufficiently similar to those in the Brumley case to sustain the instant complaint.

As for the fact that an instrumentality of government is involved, we said in the Brumley case:

> '(T)his court is of the opinion that (neither) the board of county commissioners, nor any other power under the state, has the right to so conduct its affairs as to destroy the property of the complainant so that it would be useless for the purpose for which it is naturally used.'

See also Panama City v. York, supra, 26 So.2d 184, Gonzalez v. City of Pensacola, 65 Fla. 241, 61 So. 503, and State Road Department v. Tharp, 146 Fla. 745, 1 So.2d 868.

[3] We have no difficulty with the point that the acts of Eastern Air Lines, or some of them, are alleged to have antedated plaintiffs' acquisition of the property. As Sir John Salmond observed, it is no defense to an action of this character that the plaintiff 'came to the nuisance,' for 'the maxim Volenti non fit injuria is capable of no such application.' Salmond on Torts, 4th Ed., p. 219, citing Elliotson v. Feetham, 2 Bing.N.C. 134, and Bliss v. Hall, 4 Bing.N.C. 183. The same rule is general in this

country. Campbell v. Seaman, 63 N.Y. 568, 20 Am.Rep. 567; Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718; Risher v. Acken Coal Co., 147 Iowa 459, 124 N.W. 764; Harper on Torts, Sec. 193, p. 395; Prosser on Torts, Sec. 75, pp. 599-600.

[4] Appellee Town of Miami Springs seeks to justify the order of the trial court by arguing that the parties defendant were not joint tort-feasors, because they performed different acts at different times. But assuming, without deciding, that this contention is correct, it is immediately answered by reference to the clear mandate of Rule 1.18, Florida Rules of Civil Procedure (in effect when this suit was filed) that 'Misjoinder of parties shall not be ground for dismissal of an action.'

Reversed and remanded for further proceedings not inconsistent with this opinion.

DREW, C. J., and THOMAS and THORNAL, JJ., concur.

All Citations

81 So.2d 632

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384 So.2d 916
District Court of Appeal of Florida, First District.

DEPARTMENT OF TRANSPORTATION, Appellant,
v.
William B. BURNETTE et al., Appellees.

No. NN-91.
|
June 11, 1980.

Department of Transportation appealed from judgment of the Circuit Court, Madison County, Declan O'Grady, J., enjoining it within 90 days either to condemn owner's tract of 100 acres, held unconstitutionally taken without compensation, or to end water drainage which effected the taking. The District Court of Appeal, Robert P. Smith, Jr., J., held that: (1) where the land was permanently "taken," if at all, some years before owner assembled it, owner had no claim in inverse condemnation without assignments of his predecessors' claims; (2) the state was properly to be enjoined from continuing its tortious conduct of diverting the natural drainage onto owner's property; and (3) the Department acquired no prescriptive right, before legislature's waiver of sovereign immunity, to continue using any part of owner's property as a terminus for the revised drainage system.

Judgment, as modified, affirmed.

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

West Headnotes (3)

[1] Eminent Domain
Nature and grounds in general

Landowner, who acquired 100-acre tract in two separate parcels prior to construction of drainage system by the Department of Transportation which reversed natural and previous flow of drainage and diverted such flow onto the property, and who was prevented from developing low-density housing on the property due to potential flooding allegedly caused by such drainage diversion, had no claim in inverse condemnation without assignments of his predecessors' claims and, since the lands had been taken, if at all, when they were separate tracts, they could not be considered as unified for purposes of inquiring whether owner's injury was such as to constitute a "taking." West's F.S.A.Const. art. 10, § 6(a).

9 Cases that cite this headnote

[2] Water Law
Injunction

The state was to be enjoined from continuing tortious conduct of intermittently and wrongfully damaging owner's property by water which the Department of Transportation cast down upon it in various quantities and intervals, depending on rainfall, by means of a drainage system which reversed natural and previous flow and, as such diversion of drainage was a continuing tort rather than a permanent "taking" of all lands affected by it, injunctive relief was proper notwithstanding that owner assembled the subject property long after the Department established the offending drainage pattern.

7 Cases that cite this headnote

[3] Water Law
By and against whom prescriptive rights may be acquired

Department of Transportation, which constructed drainage system which reversed natural and previous flow and diverted such flow onto owner's property, acquired no prescriptive right, before legislature's waiver of sovereign immunity, to continue using any part of the property as a terminus for the revised drainage system.

1 Cases that cite this headnote

Attorneys and Law Firms

***917** H. Reynolds Sampson, Gen. Counsel, and Margaret-Ray Kemper, Tallahassee, for appellant.

Cary A. Hardee, of Davis, Browning & Hardee, Madison, for appellees.

Opinion

ROBERT P. SMITH, Jr., Judge.

The Department appeals from a circuit court judgment enjoining it within 90 days either to condemn appellee Burnette's Madison County tract of 100 acres, held unconstitutionally taken without compensation,[1] or to end the water drainage which effected the taking. The trial court found the Department took Burnette's land by draining water down upon it from a point on State Road 10, north of the property, where for years previously pipes and culverts carried drainage in the opposite direction. We find that Burnette failed to prove that the undoubted damage to this land amounts to a taking of it, for which the whole must be condemned and paid for; but we affirm judgment insofar as it enjoins the Department's continued burdening of Burnette's property.

On conflicting evidence the trial court found that the natural drainage path for land immediately surrounding State Road 10 (U.S. Highway 90), within a half-mile ***918** west of Madison,[2] was and is northward under the highway and across property now occupied by North Florida Junior College. Years ago drainage was carried under the highway by a clay pipe culvert, which was replaced in 1923 by a larger concrete culvert. In 1956 that section of the highway was rebuilt slightly to the south, and two pipes were placed under the new highway segment to continue draining water from south of the highway northward through the old culvert in the old pattern. Sometime between 1956 and 1969, those northward drainage courses were plugged with concrete, apparently to permit the building of North Florida Junior College, where drainage previously flowed. That action stopped the northward drainage and caused ponding immediately south of the highway. Then, in 1969, the Department completed and systematized the 180*o* reversal of drainage by ditching an easement from the highway 500 feet south toward the northern boundary of the subject property. During the same project the Department added more drainage to this system through a 416-foot long 54-inch concrete culvert along the south side of State Road 10, which carries the runoff from 103 acres of improved land in municipal Madison.

Appellee Burnette couched his complaint against the Department in terms of a constitutional "taking."[3] The final judgment of the circuit court likewise is predicated on a finding that the diversion of drainage in such substantial quantities "constitutes a permanent taking . . . without full compensation."[4] The characteristics of such a "taking" are variously stated by the authorities as "a permanent invasion of land amounting to an appropriation," different in degree or character from "damage to property," and substantially depriving the owner of the land's beneficial use, as contrasted with "merely impair(ing) its use." See Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 669 (Fla.1979); Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925); Kendry v. State Road Department, 213 So.2d 23, 27 (Fla. 4th DCA 1968), cert. den., 222 So.2d 752 (Fla.1969); Elliott v. Hernando County, 281 So.2d 395 (Fla. 2d DCA 1973); Thompson v. Nassau County, 343 So.2d 965 (Fla. 1st DCA 1977); Poe v. State Road Department, 127 So.2d 898 (Fla. 1st DCA 1961); City of Jacksonville v. Schumann, 167 So.2d 95 (Fla. 1st DCA 1964), cert. den., 172 So.2d 597 (Fla.1965).

There is no doubt that the Department's reversal of the drainage flow from north to south imposes a substantial burden on the subject property. As the trial court said in part, supra fn. 4, the drainage "has interfered with the intended use or uses of the premises." But the question is not whether these 100 acres are damaged or reduced in potential usage, but whether they have been permanently taken. On that issue, the evidence is that half of Burnette's 100 acres are low and relatively more susceptible to collecting water after a heavy rain; half the acreage is high. This evidence is significant ***919** because Burnette assembled these 100 acres in order to build "a multi-family type townhouse development" called Country Club Villas, consisting of 376 townhouse units, some with a good view of the Madison Country Club and Golf Course to the west. Burnette wished to build 47 structures, each containing 8 townhouse units and producing a developed density of .29 acres per unit. But, he said, the potential flooding of half his acreage prevents development of Country Club Villas because development standards require construction above the

reach of surface water which will rise once every 25 years, on the average, as the result of a "25-year six-hour storm". In such a storm, Burnette's engineer testified, an estimated 14 million gallons of water from the City of Madison will be introduced into the drainage system now including Burnette's land. In such conditions, the 50 low acres will be flooded and access to the 50 acres of high land will be limited. Thus, said Burnette, "I have been advised by my engineer to go no further with the project in any way whatsoever with that 50 acres gone."

Burnette's claim that his 100 acres is unconstitutionally "taken," entitling him to full compensation in the light of the highest and best use of his property, is rendered problematic by the stark fact that Burnette did not own any of this property when, years ago, the drainage system carried surface water across lands to the north now occupied by North Florida Junior College; nor when the old pipes and culverts were plugged, before 1969, and the Department failed to relieve the blockage; nor in 1969, when the Department completed the drainage turnabout, extended it southward, and increased its volume. Burnette did not assemble this potential Country Club Villas until 1977. In May 1972 he bought 25 of these acres from Albert Coody, who previously fished and farmed his property; and in September 1977 Burnette took the remaining 75 acres from Fish and Game Improvement, Inc., a private corporation, in satisfaction of a money judgment which apparently was unrelated to this property.

[1] Appellee Burnette thus assembled the Country Club Villas tract eight years after the Department began the construction which Burnette says effected a taking, and some five years after that construction was completed. Burnette made no investigation of drainage patterns before buying the Coody tract or before accepting title to the Fish and Game Improvement, Inc. tract in satisfaction of a judgment. Burnette's assembly of this 100-acre tract in the face of the circumstances of which he now complains has these countervailing effects upon his claim that, by constitutional standards, his 100 acre tract has been "taken" and he should be wholly compensated for its aggregate value:

First, it appears that this land was permanently "taken," if at all, some years before Burnette assembled it in September 1977. Burnette does not here claim that the 25 acres previously owned by Coody can no longer be used for fishing and farming, as Coody used them, nor that the 75 acre tract cannot now be used for similar purposes, or for whatever purposes (not shown) they were put to all those years, or indeed for low-density residential purposes. The premise for Burnette's claim of a "taking" is that he is unable to develop his 100 acres, conceived of by him as economically indivisible ("I have been advised by my engineer to go no further with the project in any way whatsoever with that 50 acres gone") as a relatively high density "multi-family type townhouse development." Having failed to show that the property is permanently deprived of beneficial uses to which it was put at the time of the acts constituting the taking, Burnette renders inapplicable such decisions as State Road Dept. v. Tharp, 146 Fla. 745, 1 So.2d 868 (1941), in which the Supreme Court liberalized the "taking" test as necessary to protect the owner's entitlement to undiminished use of, or full compensation for, a water mill which had been in use for more than 70 years when Department construction increased the water in the millrace, reducing the mill's capacity by 50 percent. See also Kendry v. State Road Dept., supra, in which the court sustained an inverse condemnation action ***920** to protect or to secure full compensation for the taking of land rendered useless for existing residential purposes. Those and other like decisions do not stand for the proposition that governmental action which damages private property by eliminating one of many potential uses, but no existing use, constitutes a permanent taking of that property.

Second, Burnette's premise of an indivisible 100-acre development, the frustration of which constitutes the "taking," is faulty because the two components a 25-acre parcel and a 75-acre parcel were separate, not assembled, when the acts constituting the taking occurred and had the permanent effect Burnette contends they had. See Petroleum Products Corp. v. Clark, 248 So.2d 196 (Fla. 4th DCA 1971). To regard those parcels as hypothetically assembled when separately "taken," so enriching every acre of the whole with the potential of its use in a larger, unified tract, violates the familiar principle that it is improper in eminent domain proceedings to speculate on what might be done to make land more valuable, but was not done at the time of taking, and then attribute that greater value to the land so hypothetically improved. Yoder v. Sarasota County, 81 So.2d 219 (Fla.1955); Coral-Glade Co. v. Board of Pub. Instr. of Dade County, 122 So.2d 587 (Fla. 3d DCA 1960). These lands having been taken, if at all, when they were separate tracts, they

cannot be considered as unified for purposes of inquiring whether the injury was such as to constitute a taking.

And third, since the Department acts and omissions affecting the asserted taking occurred before 1972, when Burnette acquired the 25-acre tract, and long before 1977, when he acquired the 75-acre tract, it appears that the asserted taking was not from Burnette at all, but from the two prior owners, Coody and Fish and Game Improvement, Inc. It is they who were deprived of rights in property, if anyone was, and it is to them that the Constitution secures full compensation for the taking. Burnette, the subsequent purchaser and grantee, has no claim in inverse condemnation without assignments of his predecessors' claims, which are not shown here. Marianna & B. R. R. Co. v. Maund, 62 Fla. 538, 544, 56 So. 670, 672 (1911). [5] See also Pinellas Packing Co. v. Clearwater Citrus Growers' Assn., 65 Fla. 340, 61 So. 625 (1913); Florida Power Corp. v. McNeely, 125 So.2d 311, 318 (Fla. 2d DCA 1960). The reason for this rule is as stated by the Minnesota Supreme Court in Brooks Inv. Co. v. City of Bloomington, 305 Minn. 305, 315-16, 232 N.W.2d 911, 918 (1975):

> The rationale behind this rule seems to be simple and logical. When the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a "taking" in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost a part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule were otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer. In this case that was the real estate less the street unlawfully taken by the city.

***921** In the case before us Burnette acquired the 75-acre tract from Fish and Game Improvement, Inc., in satisfaction of a judgment, long after that property had been deprived (he alleges) of its development potential as an inseparable part of Country Club Villas.

The inverse condemnation remedy for unconstitutional "takings" has been broadened over the years by pressures for relief against State-caused damage or impairment of land use. Although the Supreme Court adheres to the letter of the rule that the Florida Constitution affords no compensation for land damaged and impaired in use, but not permanently encroached upon and taken, Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 669 (Fla.1979), decisions emanating from State Road Dep't v. Tharp, supra, have afforded relief where suits previously were thought forbidden by the doctrine of sovereign immunity. Concerning the State's liability to suit for faulty management of surface waters, compare Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422 (1925), and Poe v. State Road Dep't, 127 So.2d 898, 901 (Fla. 1st DCA 1961), [6] with Kendry v. State Road Dep't, 213 So.2d 23 (Fla. 4th DCA 1968), cert. den., 222 So.2d 752 (Fla.1969), and Elliott v. Hernando County, 281 So.2d 395 (Fla. 2d DCA 1973).

Tharp, which is understood as holding that the State unconstitutionally "took" the water mill, though the opinion catalogued other theories of liability including implied contract, [7] and Kendry, which read Tharp as finding the mill was only half damaged, not destroyed, but nevertheless "taken," [8] reflect the stresses to which "taking" concepts were subjected during years in which sovereign immunity was regarded as barring more direct judicial remedies for damage by the State's drainage trespasses and nuisances. See also Faison v. Division of Administration, Dep't of Transportation, 299 So.2d 629 (Fla. 1st DCA 1974), cert. den., 305 So.2d 201 (Fla.1974); State Road Dep't v. Darby, 109 So.2d 591 (Fla. 1st DCA 1959). But even as courts became more wont to find that serious damage or impairment of an existing use constitutes a "taking" of property, so justifying judicial intervention, it was plain that the real object of intervening was not to require the State to buy the "taken" land here, 100 unimproved acres but was rather, sovereign immunity notwithstanding, to exact damages for the land's loss of utility and value, [9] or to enjoin the State to cease its burdensome conduct. [10]

***922** **[2]** It is unnecessary in this case that we further attenuate the "taking" concept by finding a (compensable) taking rather than (incompensable) damage, as by holding that this raw acreage is "permanently" appropriated because it is indivisible in Burnette's development scheme and half of it will be flooded by a storm occurring once in 25 years. Burnette's 100 acre tract is not permanently appropriated. Instead it is and will continue to be intermittently and wrongfully damaged by water which the Department casts down upon it in various quantities and intervals, depending on rainfall, by means of a drainage system which reverses the natural and previous flow. The State is properly to be enjoined from continuing this tortious conduct.

[3] It is a simple proposition, whose soundness does not depend upon linkage with inverse condemnation concepts, that "no person has the right to gather surface waters that would naturally flow in one direction by drainage, ditches, dams, or otherwise, and divert them from their natural course and cast them upon the lands of the lower owner to his injury." Brumley v. Dorner, 78 Fla. 495, 501, 83 So. 912, 914 (1919); Dade County v. South Dade Farms, 133 Fla. 288, 296, 182 So. 858, 861 (1938). If the sovereign's immunity was ever a serious impediment to a suit for injunction to secure relief from action by the State having that effect but see Jones v. Brown, 82 So.2d 889 (Fla.1955) [11] it is no longer. Every remedy which would be available against an individual for such a repeated trespass or continuing nuisance, including an injunction to prevent a multiplicity of damage suits, is now available against the State. Section 768.28, Florida Statutes (1979). As for the fact that the statute was not fully effective until January 1975, Chapter 74-235, Fla. Laws, we have held at the Department's urging that it did not previously "take" these 100 acres; certainly we must now correspondingly hold that the Department acquired no prescriptive right, before the legislature's waiver of sovereign immunity, to continue using any part of this acreage as a terminus for the revised drainage system. See Town of Miami Springs v. Lawrence, 102 So.2d 143 (Fla.1958).

Treating the Department's diversion of drainage as a continuing tort, rather than as a permanent "taking" of all lands affected by it, enables us to sustain the circuit court's injunctive relief notwithstanding that Burnette assembled the subject property long after the Department established the offending drainage pattern. It is no defense to this action, so conceived, that the drainage system was already in place when Burnette bought this acreage and so "came to the nuisance." Lawrence v. Eastern Air Lines, Inc., 81 So.2d 632, 634 (Fla.1955); Prosser, Law of Torts (4th ed.), Section 91 at p. 611:

> The prevailing rule is that in the absence of a prescriptive right the defendant cannot condemn the surrounding premises to endure the nuisance, and that the purchaser is entitled to the reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of a vexatious lawsuit.

Accordingly, the circuit court's judgment is excised of its conclusion, found to be erroneous and unnecessary, that Burnette's 100 acres have been "taken" and must be purchased as in eminent domain; and we shall affirm the judgment which as modified enjoins the Department's continued use of the State Road 10 drainage system in such a way as to burden this land. This is ***923** not to say that the Department's use of its eminent domain powers is foreclosed. Quite possibly the Department is unable to restore the old northward drainage pattern without casting unmanageable water on North Florida Junior College. Condemnation of some land or easements may be appropriate to manage this drainage in compliance with the injunction, but the manner and method of so relieving Burnette's land are for the Department to determine in the exercise of its lawful powers. The judgment, as modified, is

AFFIRMED.

ERVIN, J., concurs.

BOOTH, J., concurs in part and dissents in part with opinion.

BOOTH, Judge, concurring in part, dissenting in part:
The judgment below correctly awards the alternative relief prayed and should be affirmed without modification. The majority assumes that the judgment requires the State to condemn the fee in 100 acres, the entire tract owned by plaintiff. Not so. The order enjoins flooding of the tract or, in the alternative, requires institution of condemnation

proceedings.[1] What has been determined at this point is that there has been a taking of property with respect to the identified tract of land. The amount of property taken, as well as the value thereof and severance damages, if any, remain to be determined in separate condemnation proceedings should the State so elect.[2] Such proceeding is instituted by the filing of petition and declaration of taking, which determines both the amount of, and estate in, the property taken.[3] The basic principle of eminent domain applies, which requires that the State condemn no more than is necessary for the stated public purpose.[4] Here the majority's decision reaches substantially the same result as the trial court's order, in that it affirms the award of injunctive relief and leaves to the State the option of instituting condemnation proceedings. I concur in that result.

I agree with the majority that the reversal of natural drainage caused by DOT's construction "imposes a substantial burden on the subject property" and that injunctive relief is appropriate. I dissent from the holding that there has been no taking of the property in the constitutional sense and, therefore, no basis for required institution of condemnation awarded as alternative relief. The record shows that the Department of Transportation is responsible for diverting the surface waters drained from 103 acres of the City of Madison, which waters are carried via ditches and culverts constructed by DOT, to be poured onto the land of the plaintiff at the rate of 14 million gallons in a six-hour period during a ***924** "25-year" rainstorm.[5] This does not mean, as the majority suggests, that there will be flooding only every 25 years. Even the State concedes the evidence shows some flooding will occur each year. In effect, the storm sewer system of the City of Madison now terminates on plaintiffs' 100-acre tract. The condition of flooding is not permanent in the sense that the water is forever present, but it is permanent in the sense that rain is a condition reasonably expected to occur and reoccur in the future. The evidence is that, without the excess water diverted onto the property, plaintiffs' land is appropriate for residential use.

The trial court's determination that there has been a taking of property is supported by the evidence and in accord with the law of this State. The majority, in rejecting that determination, echoes the dissenting opinion in State Road Department v. Darby, 109 So.2d 591, 593 (Fla. 1st DCA 1957), and rejects the line of cases beginning with State Road Department v. Tharp.[6] The basis for this rejection of prior precedent is that sovereign immunity has been waived, and suits against the State for damages are now available.[7] Suit for damage, an available alternative at the election of the owner for wrongs committed to property, is not a substitute for condemnation, which requires valuation by a 12-person jury without the monetary limitations imposed by Florida Statutes s 768.14 on suits for damages.

The majority holds that plaintiffs' claim in inverse condemnation is "problematical" because he acquired the property after the construction along U.S. 90, which resulted in the diversion of surface waters onto his property. Under the rule cited by the majority, the owner of the property at the time of the taking is entitled to the condemnation award and remains so entitled unless he has expressly assigned the claim to the subsequent owner. This rule was not asserted below nor made an issue on appeal. The record is silent as to the nonexistence of an assignment to the plaintiff. Nevertheless, since the majority bases its holding on the plaintiffs' failure to comply with this rule, it must be pointed out that the rule does not apply in inverse condemnation proceedings in the absence of a showing that the plaintiff and his predecessor in title were aware of the existence of a cause of action at the time title was transferred.[8] Here, it was not until the 1978 drainage study that the change in the natural drainage due to the State's construction along U.S. 90 was discovered. Thus, plaintiff was the owner of the property at the time the injury was revealed and cause thereof discovered. Those cases cited by the majority, which apply the rule to bar recovery by a subsequent purchaser, involve visible construction on the land.[9] Under such circumstances, consideration of the burden or easement is assumed to have been a factor in ***925** the purchase price paid, and the purchaser's consent to the continued burden may be implied.

The Department contends that portions of the property were wetlands before construction; and, therefore, the diversion of additional water from the City of Madison onto the property is not a taking. Further, the Department contends that, since the landowner purchased land known to have moist areas and "gambled" that he would be able to drain it for development for residential use, he cannot now complain of the drainage condition. These arguments, which are made in connection with

the affirmative defense of laches by the Department, are devoid of merit. The existence of natural water or wet areas on property does not thereby give the Department the right to flood it, nor does it require the landowner to accept millions of gallons of water drained from other lands. [10] Where the activities of the State have rendered the property unfit for residential development and of questionable value for any purpose, present or potential, other than rice paddies, nipa huts or duck ponds, there has been substantial deprivation of property and a taking within the purview of Article X, s 6, Florida Constitution.

I would affirm the judgment below.

All Citations

384 So.2d 916

Footnotes

1 Article X, Section 6(a), Florida Constitution:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.

2 The beginning point of the offending drainage pattern is described in the judgment as between Stations 735 to 745 on State Road 10 (U.S. Highway 90) as shown on Department maps for Project 35010-3505, fiscal year 1969.

3 The amended complaint alleged in part:

> 6. The diversion of surface waters as described . . . above prevents the Plaintiffs from using their respective property and the action of the Defendant, DEPARTMENT OF TRANSPORTATION, amounts to an actual taking of said real property without paying compensation therefor.
>
> 7. The alleged taking of property without compensation served as a substantial ouster depriving Plaintiffs of all beneficial use of the land affected.
>
> 8. The taking was permanent in nature.
>
> 9. That the heretofore described real property has never been and is not presently the subject of any eminent domain proceeding instituted by the Defendant, or any public body vested with the power of eminent domain under the Laws of the State of Florida.

4 The court's full finding on the subject was:

> That the diversion of surface waters in the quantities described in the testimony has interfered with the intended use or uses of the premises owned by the Plaintiff and constitutes a permanent taking by the DEPARTMENT OF TRANSPORTATION without full compensation.

5 The Court stated, in Marianna :

> In 15 Cyc. (Eminent Domain) p. 795, it is said: “Damages for the taking of land, or for injury to land not taken, belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land, except by a provision to that effect in the deed, or by assignment.”

6 Poe, in language which was in part quoted with approval by the Supreme Court in Village of Tequesta, stated:

> . . . Acts of a public agency in the construction of a public improvement which results in recurrent but temporary flooding of adjacent lands owned by private individuals has been held to be only a consequential damage, and not a taking of the flooded properties within the meaning of the Constitution which prohibits the taking of private property without the payment of just compensation. It is universally recognized that injury by the condemnor to remaining land caused by obstructing, diverting or increasing the flow of surface waters, but which do not amount to a permanent deprivation by the owner of the use of such remaining lands, is a consequential damage resulting from the taking in an eminent domain proceeding, and must be recovered in that proceeding, if at all.

7 The idea that the State impliedly contracts to pay for its torts was rejected in State ex rel. Division of Administration v. Oliff, 350 So.2d 484 (Fla. 1st DCA 1977).

8 Kendry, 213 So.2d at 27, said Tharp held that:

> . . . to constitute a taking, the flooding need not completely destroy all value in the property flooded. It will be recalled that the flooding which was the subject of consideration then before the Court merely reduced the mill's capacity by about fifty percent.

This would seem a misreading of Tharp's facts and a corresponding exaggeration of its holding. In Village of Tequesta the Supreme Court stated, 371 So.2d at 669, that the water in Tharp “raised the level of a millrace to such an extent as to destroy the use of plaintiff's grist mill.” A half-efficient mill is scarcely better than none.

9 E. g., Pinellas County v. Austin, 323 So.2d 6, 9 (Fla. 2d DCA 1975): "(T) he Austins are entitled to be compensated for the loss suffered by the vacation of the streets in question."

10 Although Tharp's principal holding has been read as pertaining to the "taking" of property, not as authorizing injunctions against injurious State modifications of water courses, the principal prayer of Tharp's complaint was for an injunction against the "continual trespass." The Court stated: "In lieu of" injunctive relief, "the defendant was granted the privilege of exercising the right of eminent domain . . . ." 146 Fla. at 747, 1 So.2d 869. Subsequent decisions have similarly employed alternative remedies of an injunction to desist or condemn. E. g., State Road Dep't v. Bender, 147 Fla. 15, 2 So.2d 298 (1941); Downing v. Bird, 100 So.2d 57 (Fla.1958); City of Pompano Beach v. Beatty, 177 So.2d 261 (Fla. 2d DCA 1965).

11 In Jones v. Brown, through an opinion by Mr. Justice Terrell, the author of Tharp and other decisions expanding the "taking" concept, the Supreme Court, without troubling to invoke "taking" concepts, sustained an injunction against the State's drainage system notwithstanding a plea of sovereign immunity.

1 Final Judgment, in part:

> ORDERED and ADJUDGED that the prayer for a restraining order against the DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, is hereby granted and the Defendant, DEPARTMENT OF TRANSPORTATION, is enjoined and restrained from allowing surface waters to flow onto the real property belonging to the Plaintiff, WILLIAM M. BURNETTE. . . .
>
> ORDERED and ADJUDGED that the DEPARTMENT OF TRANSPORTATION OF STATE OF FLORIDA is hereby Ordered to immediately begin condemnation proceedings of the real property owned by WILLIAM M. BURNETTE which is more particularly described as follows:
>
> . . . . (description of entire tract)
>
> Further ORDERED and ADJUDGED that the DEPARTMENT OF TRANSPORTATION, STATE OF FLORIDA, is hereby granted ninety (90) days from the date hereof to comply with this Final Judgment either by commencing condemnation proceedings or by changing the course of said surface waters pursuant to the restraining order above.

2 State Road Department v. Harvey, 142 So.2d 773, 775 (Fla. 2d DCA 1962); State Road Department v. Darby, 109 So.2d 591, 593 (Fla. 1st DCA 1959).

3 Florida Statutes, ss 73.021, 74.031 (1979); Tosohatchee Game Preserve, Inc. v. Central and Southern Florida Flood Control District, 265 So.2d 681 (Fla.1972).

4 Canal Authority v. Miller, 243 So.2d 131 (Fla.1970); Ball v. City of Tallahassee, 281 So.2d 333 (Fla.1973); Knappen v. DOT, 352 So.2d 885 (Fla. 2d DCA 1977).

5 A storm occurring with "average frequency" every 25 years. Residential design criteria and "ponding" requirements are based on the amounts of rainfall generated within a six-hour period during such a storm.

6 146 Fla. 745, 1 So.2d 868 (1941); Kendry v. State Road Department, 213 So.2d 23 (Fla. 4th DCA 1968), cert. denied 222 So.2d 752 (Fla.1969); Thompson v. Nassau County, 343 So.2d 965 (Fla. 1st DCA 1977); Pinellas County v. Austin, 323 So.2d 6 (Fla. 2d DCA 1975); Elliott v. Hernando County, 281 So.2d 395 (Fla. 2d DCA 1973); City of Jacksonville v. Shumann, 167 So.2d 95 (Fla. 1st DCA 1964); State Road Department v. Darby, 109 So.2d 591 (Fla. 1st DCA 1959).

7 This idea is not original. See, e. g. Kermetz v. Cook-Johnson Realty Corp., 54 Ohio App.2d 220, 376 N.E.2d 1357 (1977).

8 Cox Enterprises v. Phillips Petroleum, 550 P.2d 1324 (Okl.1976); See, 6A Nichols, Eminent Domain, s 28.3 at 28, 89, 90 (3d Ed. 1979); 27 Am.Jur.2d, Eminent Domain, s 501 at 457.

9 Brooks Investment Co. v. City of Bloomington, 305 Minn. 305, 232 N.W.2d 911 (1975) (street illegally constructed across land prior to sale of property, held owner at time of construction rather than subsequent owner entitled to recover); Marianna & B. R. Co. v. Maund, 62 Fla. 538, 56 So. 670 (1911) (railroad track laid across land without compensation, held suit dismissed without prejudice were assignment of claim to subsequent owner was attained after suit filed.

10 2A, Nichols, Eminent Domain, s 6.4441(8), in part:

> (A) system of drainage collecting surface water from the streets of an entire section of a city and turning it by artificial channels upon private land to which it would not naturally have flowed could not be constructed without compensation to the owner of the land affected. Such an injury would not reasonably be contemplated when the street in front of such land was laid out, . . . and . . . would be such a severe and direct invasion of property as to constitute a taking in the constitutional sense.

76 So.2d 654
Supreme Court of Florida, Division A.

James V. PIZIO and Arthur W. Hammond
d/b/a Pizio's Drive-In, Appellants,
v.
Melvin BABCOCK and Mabel
J. Babcock, his wife, Appellees.

Dec. 21, 1954.

Suit to enjoin defendants from operating a drive-in restaurant near plaintiffs' motel and apartment house in such a manner as to constitute a nuisance. From a decree of the Circuit Court for Broward County, George W. Tedder, J., enjoining defendants, from 10 P.M. until 7 A.M. from operating a juke box or radio, emptying garbage during the late hours of the night and early hours of the morning, engaging in or permitting loud and boisterous talking, hollering and yelling, blowing of horns, loud playing of automobile radios and slamming of automobile doors, and operating or permitting operation on their premises of hot rod automobiles, racing motors, with mufflers cut out, slamming brakes and screeching tires, defendants appealed. The Supreme Court, Terrell, J., held that the injunctive order was not sufficiently clear and certain as to the paragraphs respecting the emptying of garbage and loud and boisterous talking, hollering and yelling.

Decree reversed in part and remanded with directions.

West Headnotes (4)

[1] Nuisance
Evidence

In injunction suit, evidence sustained finding that defendants' operation and maintenance of drive-in restaurant constituted a nuisance.

Cases that cite this headnote

[2] Nuisance
Judgment or decree, and enforcement thereof in general

An order enjoining owners of drive-in restaurant from 10:00 p. m. until 7:00 a. m. from operating juke box or radio, emptying garbage during late hours of night and early hours of morning, engaging in or permitting loud and boisterous talking, hollering and yelling, blowing of horns, operation of hot rod automobiles, etc., was not sufficiently clear and sufficient to apprise defendants of what they were required to do with respect to paragraphs forbidding emptying of garbage and loud and boisterous talking, etc.

1 Cases that cite this headnote

[3] Injunction
Specificity, vagueness, overbreadth, and narrowly-tailored relief

Injunctive order should be confined within reasonable limitations and cast in such terms that they can, with certainty, be complied with and one against whom order is directed should not be left in doubt about what he is to do.

11 Cases that cite this headnote

[4] Nuisance
Judgment or decree, and enforcement thereof in general

Parties acquiring motel and apartment house near to or bordering on federal highway which was heaviest traveled highway in state with all its accompanying noise were put on notice and situation was a factor to be considered in entering injunctive order, in their suit to enjoin operation of nearby drive-in restaurant in manner constituting nuisance.

Cases that cite this headnote

Attorneys and Law Firms

***654** McCune, Hiaasen & Kelley and Albert E. Barrs, Jr., Fort Lauderdale, for appellants.

Welcom H. Watson, Fort Lauderdale, for appellees.

Opinion

TERRELL, Justice.

Appellees own and operate a motel and apartment house on Southeast 15th Street in the City of Fort Lauderdale. Appellants own and operate a drive-in restaurant on Southeast 15th Street in the same city. Both properties are on the same side of the street, are separated by a vacant lot and are near or adjacent to U. S. Highway Number One, sometimes called the Federal Highway.

May 26, 1954, predicated on a complaint filed November 12, 1953, appellees secured a permanent injunction against appellants, the pertinent part of which is as follows:
'It is ordered, adjudged and decreed that the said defendants James V. ***655** Pizio and Arthur W. Hammond, doing business as Pizio's Drive In, are hereby enjoined and restrained from the hour of 10:00 p. m. until the hour of 7:00 a. m.,

'1. From operating a phonograph, juke box, or radio broadcasting loud noises therefrom.

'2. From emptying garbage during the late hours of the night and early hours of the morning, using metal receptacles and causing a great deal of noise therefrom, and from the slamming of doors.

'3. From engaging in or permitting loud and boisterous talking, hollering and yelling, the blowing of horns, the loud playing of automobile radios, and slamming of automobile doors.

'4. From operating, or permitting to be operated on the premises, 'hot rod automobiles,' racing motors, with mufflers cut out, slamming brakes and screeching tires.'

We are confronted with an appeal from said final decree. It is contended (1) that appellees did not allege and prove that appellants operated their business in such a manner as to be a nuisance, (2) the permanent injunction appealed from is not so definite as to apprise appellants of what they are required to do. It is in fact so indefinite, say appellants, that they are in doubt as to what steps they should take to comply with it.

[1] In response to the first question, it is sufficient to say that the complaint alleges a cause of action. As to the proof, it is evident that all the allegations of the complaint were not proven but the chancellor found that while there were conflicts in the proof there was 'ample evidence to sustain the allegations that the operation and maintenance of the said drive-in restaurant constituted a nuisance.' In reaching this conclusion the chancellor had the parties before him, he lived in the same community and there is no showing whatever of an abuse of discretion. To reverse him on this point under the circumstances would amount to substituting our judgment for his which we are not authorized to do.

[2] As to the challenge to the clarity and certainty of the injunctive order, we think there is a basis for grievance. There are four paragraphs in the injunctive order, each defining different categories of acts that may constitute a nuisance. The chancellor may have intended the operation of the injunctive order from the 'hour of 10:00 p. m. until the hour of 7:00 a. m.' to apply to each category and to inhibit them during said hours. If this were the intent of the injunctive order it is in conflict with the time element in the second category of nuisances which forbids 'emptying garbage during the late hours of the night and early hours of the morning,' etc. There should be some qualification as to what is contemplated by 'late hours of the night' and 'early hours of the morning.' Like qualifications as to time and degree should be specified as to 'loud and boisterous talking, hollering and yelling,' etc., in the third category. Palm Corporation v. Walters, 148 Fla. 527, 4 So.2d 696.

[3] **[4]** Injunctive orders like this should be confined within reasonable limitations and cast in such terms as they can, with certainty, be complied with. The one against whom it is directed should not be left in doubt about what he is to do. Even when these specifications are observed the chancellor will often be confronted with a difficult problem in casting the injunctive order. In this case his task is further complicated by the fact that the properties involved are near to or border on the Federal Highway, said to be the heaviest traveled highway in the State, with all its accompanying noise and disquiet. Appellee was on notice of this when he acquired his property and as to that he cannot complain. It is, however, a factor that may be considered in entering the injunctive order.

If follows that as to question two the cause is reversed and remanded with directions ***656** to modify the injunctive order in compliance with the views expressed in this opinion.

Reversed and remanded.

ROBERTS, C. J., and SEBRING and MATHEWS, JJ., concur.

All Citations

76 So.2d 654

150 So.2d 477
District Court of Appeal of Florida, Second District.

Marie RICHARDS, Appellant,
v.
Elizabeth DODGE and James Dodge a/k/a R. J. Dodge, d/b/a Prospect Hall School, Appellees.

No. 3177.
|
Feb. 13, 1963.
|
Rehearing Denied March 15, 1963.

Action for unpaid rent under lease. From an adverse judgment of the Court of Record, Broward County, Raymond J. Hare, J., the lessor appealed. The District Court of Appeal, Allen, J., held that lessees of apartment house to be used as living quarters for girls attending lessees' school had duty to notify lessor of their objection to male tenant who, after commencement of lease, rented apartment occupied by lessor at time lease was executed and expressly excepted from lease, and failure to notify lessor of such objection constituted waiver of lessees' right to assert constructive eviction in action by lessor for rent.

Reversed.

West Headnotes (22)

[1] **Equity**
Decision

Trial
Duty to Make in General

Trial judge who hears and decides equity suit or non-jury law case is not required to make findings of fact and conclusions of law, but inclusion of such findings and conclusions is of estimable aid to appellate court.

1 Cases that cite this headnote

[2] **Landlord and Tenant**
Questions for jury in general

Questions of constructive eviction and waiver are questions of fact determinable by trier of fact in light of appropriate principles of law.

2 Cases that cite this headnote

[3] **Appeal and Error**
Same effect as verdict

Appeal and Error
Total failure of proof

In cases tried without jury, lower court's findings are entitled to weight of jury verdict and will not be disturbed unless there is total lack of substantial evidence to support trial judge's findings.

6 Cases that cite this headnote

[4] **Appeal and Error**
Rulings on questions of law

Misinterpretation of legal effect of facts found by trial judge in non-jury case may result in reversible error.

1 Cases that cite this headnote

[5] **Appeal and Error**
Extent of Review

Although, when no findings of fact are made, appellate court must accept facts most shown by evidence to be favorable to prevailing party below, appellate court is not required to disregard uncontroverted evidence favorable to appellant.

1 Cases that cite this headnote

[6] **Landlord and Tenant**
Interference with beneficial use or enjoyment of premises

Constructive eviction, as distinct from actual eviction, is act which, though not amounting to actual eviction, is done with express or implied intent of essentially interfering with

tenant's use and enjoyment of premises, and requisite intent can be implied or presumed from act's effect.

3 Cases that cite this headnote

[7] **Landlord and Tenant**
Necessity of abandonment by tenant

Generally, abandonment of premises within reasonable time after landlord's wrongful act is necessary element of constructive eviction.

3 Cases that cite this headnote

[8] **Landlord and Tenant**
What constitutes breach of covenant

Constructive eviction may constitute breach of covenant of quiet enjoyment implied in lease.

2 Cases that cite this headnote

[9] **Estoppel**
Persons Estopped

Doctrines of waiver and estoppel are applicable against either party to lease.

2 Cases that cite this headnote

[10] **Estoppel**
Estoppel by conduct

Conduct sufficient to create estoppel or waiver consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in certain state of things by which such other person is or may be induced to act to his prejudice.

5 Cases that cite this headnote

[11] **Estoppel**
Estoppel by conduct

Acts or conduct required to create estoppel or waiver need not be positive, but can consist of failure to act or failure to speak when under duty to speak.

3 Cases that cite this headnote

[12] **Landlord and Tenant**
Act or Omission of Landlord

Fact that lessor, who leased apartment house to be used as living quarters for girls attending lessees' school, allegedly violated parol agreement to act as housemother, did not constitute constructive eviction of lessees, in view of evidence that lessees were dissatisfied with lessor's activities as housemother and secured replacement for her prior to time that lessor vacated her apartment.

2 Cases that cite this headnote

[13] **Landlord and Tenant**
Waiver by tenant

Any rights that lessees may have had to assert that lessor's breach of oral agreement to act as housemother constituted constructive eviction under lease of apartment house to be used as living quarters for girls attending lessees' school were waived by conduct of lessees in securing replacement before lessor vacated her apartment and ceased activities as housemother.

2 Cases that cite this headnote

[14] **Covenants**
Conditions precedent

Notice of breach and demand of performance are not required of covenantee in order to entitle him to action against covenantor upon breach of covenant, unless event upon which action accrues is mainly or exclusively within knowledge of covenantee.

2 Cases that cite this headnote

[15] **Covenants**
Demand of performance in general

Demand for performance is necessary prerequisite to breach in so far as affirmative covenants are concerned.

3 Cases that cite this headnote

[16] **Landlord and Tenant**
Necessity of demand

Landlord cannot declare forfeiture for non-payment of rent prior to demanding payment.

2 Cases that cite this headnote

[17] **Landlord and Tenant**
Breach by lessor

Tenant cannot declare termination of lease for breach of covenant to make repairs unless landlord is notified of need for repairs.

1 Cases that cite this headnote

[18] **Landlord and Tenant**
Right of landlord to notice that maintenance or repairs are necessary

Where landlord has covenanted to make repairs, notice of need for repair is requisite to liability for breach of covenant.

1 Cases that cite this headnote

[19] **Landlord and Tenant**
Evidence

Although notice of pendency of suit for breach of covenant of quiet enjoyment by reason of adverse title, paramount to that of landlord, is not prerequisite to cause of action for breach, tenant is precluded from asserting adverse judgment and must prove paramount title in subsequent suit for breach of covenant, unless landlord was notified of adverse claim.

1 Cases that cite this headnote

[20] **Landlord and Tenant**
Demand

Notice of and opportunity to rectify conditions allegedly constituting constructive eviction are prerequisite to action based on alleged eviction.

1 Cases that cite this headnote

[21] **Landlord and Tenant**
Eviction

Lessees of apartment house to be used as living quarters for girls attending lessees' school had duty to notify lessor of their objection to male tenant who, after commencement of lease, rented apartment occupied by lessor at time lease was executed and expressly excepted from lease, and failure to notify lessor of such objection constituted waiver of lessees' right to assert constructive eviction in action by lessor for rent.

Cases that cite this headnote

[22] **Landlord and Tenant**
Eviction

Tenant who alleges constructive eviction by virtue of acts which fall short of actual eviction, which are not patently immoral or illegal, which are not expressly forbidden by terms of lease, and which are susceptible to remedy, should and must give timely notice to landlord of objectionable act and demand rectification, and failing in such duty, tenant cannot be heard to complain of acts in defense to action for rent.

3 Cases that cite this headnote

Attorneys and Law Firms

***479** R. T. Shankweiler and Wynne M. Casteel, Jr., Flort Lauderdale, for appellant.

Marvin L. Lessne, Rassner & Lessne, Fort Lauderdale, Max A. Goldfarb, Winter & Goldfarb, Miami, for appellees.

Opinion

ALLEN, Judge.

Appeal is brought by the plaintiff from a final judgment entered against her on her complaint for unpaid rent

under a lease. Said judgment was in favor of plaintiff on defendants' counterclaim for breach of covenant. There was, however, no cross-assignment of error by defendant-appellees and only the judgment against plaintiff-appellant is of concern on appeal.

Plaintiff sued the defendants for nonpayment of rent pursuant to a written lease entered into between them for the period September 1, 1960, to August 1, 1961. The leased premises, an apartment house, were to be used as living quarters for girls attending the schoold owned by defendants. A two bedroom apartment, occupied by plaintiff at the time the lease was executed, was expressly excepted from the lease and reserved to plaintiff.

It was stipulated in advance of trial that rental payments for the months of May, ***480** June and July, 1961, totaling $3,270.00 were unpaid. Execution of the lease was also stipulated.

In response to plaintiff's complaint defendants affirmatively raised breach of covenant in the answer, alleging that plaintiff breached the lease in several particulars. Specifically, defendant alleged a constructive eviction and consequent breach of a covenant of quiet enjoyment by plaintiff's leasing her apartment to a male tenant. Defendants further alleged breach of the duty to repair and render habitable and a failure to provide linens as provided in the lease. Counsel for both parties in their briefs and arguments on appeal seem to have concluded that the first alleged breach was the basis for the judgment, a conclusion which the record on appeal indicates is entirely correct. Accordingly, the questions on appeal all revolve about the vacating and leasing of plaintiff's apartment as a breach of covenant.

It is undisputed that defendants executed the lease, went into possession of the premises and continued in possession until May 1, 1961. On that date they vacated the premises, although three months remained during which they were obligated under the lease. In answering the complaint for the unpaid rent for these three months, defendants alleged and attempted to prove that plaintiff, in vacating her apartment in January, 1961, violated a parol agreement to act as a 'housemother' and, in leasing her apartment to a male tenant, constructively evicted defendants and breached the implied covenant of quiet enjoyment.

Plaintiff denied the existence of a parol agreement and contended that there had been no breach of covenant, or, if there was, that defendants were estopped to complain by virtue of the fact that the male tenant went into possession in early February, 1961, but that defendants continued to pay rent through April and did not complain that the male tenant was offensive or give any notice of dissatisfaction until April 13, 1961—a little more than two weeks before vacating. Even this notice, a letter from defendants' attorney, merely announced defendants' unilateral rescission of the lease and did not state with any particularity the facts constituting the supposed breach of covenant. Apparently, after receiving the letter, plaintiff did ascertain by phone that the male tenant's presence was the cause of rescission.

On complaint, answer and counterclaim, the case went to trial before the judge without a jury. Judgment was entered for defendants on plaintiff's complaint. Plaintiff's motion for new trial, or amended judgment, was denied and this appeal taken.

[1] Since the trial judge did not, in his judgment, make any findings of fact or conclusions of law—the inclusion of which, though not required, is of estimable aid to an appellate court, Dworkis v. Dworkis, Fla.App.1959, 111 So.2d 70, 72 A.L.R.2d 1189—it must be assumed that he found, as a matter of fact and law, that there had been a breach of covenant or constructive eviction and that there had been no waiver of rights by failure to give notice. It must further be assumed that he found there to have been an enforceable parol agreement and a breach thereof. The validity of these findings and the consequent holdings and judgment constitute the subject matter of this appeal.

The appellees raise certain procedural errors which we have studied and determine are without merit. Accordingly, the motion to dismiss is denied.

[2] **[3]** **[4]** **[5]** Turning to the merits of the appeal, it appears that two real issues are presented, the validity of the finding of a constructive eviction and the validity of the finding that defendants had not waived their rights arising from the breach of covenant occasioned by the constructive eviction. At the outset, it should be noted that the questions of constructive eviction and waiver are questions of fact determinable by the trier of fact in light of the appropriate principles of law. ***481** Adelhelm v. Dougherty, 1937, 129 Fla. 680, 176 So. 775; Stephenson v. Stephenson, Fla.1951, 52 So.2d 684; Carner and Sobel v. Shapiro, FlaApp.1958, 106 So.2d 87; 52 C.J.S. Landlord and Tenant § 460 (1947); 32 Am.Jur., Landlord and Tenant, § 246 (1955). In cases like the instant case, tried

without a jury, the lower court's findings are entitled to the weight of a jury verdict and will not be disturbed unless there is a total lack of substantial evidence to support the trial judge's findings. Ross v. Florida Sun Life Insurance Co., Fla.App.1960, 124 So.2d 892. However, misinterpretation of the legal effect of the facts so found can result in reversible error. Holland v. Gross, Fla.1956, 89 So.2d 255, 63 A.L.R.2d 920. Finally, while it is true that when no findings of fact are made the appellate court must accept the facts most shown by the evidence to be favorable to the prevailing party below, Coble v. Agnew, Fla.App.1961, 128 So.2d 158, this does not mean that the appellate court must disregard uncontroverted evidence favorable to the appellant.

[6] **[7]** **[8]** As indicated earlier, the lower court apparently found that plaintiff-appellant, in vacating her apartment and/or leasing it to a male tenant, constructively evicted defendant-appellees. A 'contructive eviction,' as distinct from actual eviction, is an act, which, though not amounting to actual eviction, is done with the express or implied intent of essentially interfering with the tenant's use and enjoyment of the premises. The requisite intent can be implied or presumed from the act's effect. Hankins v. Smith, 1931, 103 Fla. 892, 138 So. 494. Generally, abandonment of the premises within a reasonable time after the landlord's wrongful act is a necessary element of constructive eviction. See 32 Am.Jur., Landlord and Tenant, §§ 245–264 (1955); 52 C.J.S. Landlord and Tenant §§ 455–459 (1947); Annot. 75 A.L.R. 1114 (1931). Constructive eviction can constitute a breach of the covenant of quiet enjoyment implied in a lease. Hankins v. Smith, supra; 20 Fla.Jur., Landlord and Tenant, § 51 (1958); Annots. 62 A.L.R. 1257 (1929), 172 A.L.R. 18 (1948), 41 A.L.R.2d 1414 (1955).

[9] Having found a constructive eviction, the court apparently found that defendants had not waived any rights against plaintiff arising from the eviction and consequent breach of covenant. The doctrines of waiver and estoppel have long been recognized in Florida, Masser v. The London Operating Co., 1932, 106 Fla. 474, 145 So. 75; Steen v. Scott, 1940, 144 Fla. 702, 198 So. 489, and are applicable against either party to a lease. Farmers' Bank and Trust Co. v. Palms Publishing Co., 1923, 86 Fla. 371, 98 So. 143; Macina v. Magurno, Fla.1958, 100 So.2d 369.

In the latter case, the Supreme Court of Florida said:

'In Masser v. London Operating Co., 1932, 106 Fla. 474, 145 So. 72, 79, this court said that while waiver, being the intentional relinquishment of a known right, does not arise from forebearance for a reasonable time, it might be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived. Further, it was said that where the conduct of the party is such as to create an estoppel no consideration for the waiver is necessary.' (100 So.2d at 373.)

[10] **[11]** The 'conduct * * * such as to create an estoppel * * *' necessary to a waiver consists of willful or negligent words and admissions, or conduct, acts and acquiescence causing another to believe in a certain state of things by which such other person is or may be induced to act to his prejudice. Coogler v. Rogers, 1889, 25 Fla. 853, 7 So. 391. Steen v. Scott, 1940, 144 Fla. 702, 198 So. 489. The acts or conduct need not be positive, but can consist of failure to act or, more particularly, failure to speak when under some duty to speak. Thomas v. Dickinson, 1947, 158 Fla. 819, 30 So.2d 382. See 12 Fla.Jur., Estoppel and Waiver, 997, 42–46 (1957).

***482** Examining the facts adduced on trial in light of the above enunciated legal concepts of 'constructive eviction' and 'waiver' the conclusion that the lower court erred in entering judgment of defendants is inescapable.

[12] Insofar as plaintiff's alleged violation of a parol agreement to act as housemother is concerned, it seems clear that this, as a matter of fact or law, could not constitute a constructive eviction as heretofore defined—and that such rights as may have accrued to defendants by virtue of the alleged violation were unquestionably waived.

The record reveals that defendants were dissatisfied with plaintiff's activities as housemother, felt her incompetent in this respect and secured a replacement even before plaintiff vacated her apartment. This replacement continued in the capacity of housemother after the premises were vacated and new quarters secured. Accordingly, it would seem clear that plaintiff's alleged failure did not so impair the use of the premises as to constitute constructive eviction. The record further reveals that at some time after the replacement was secured, defendants and plaintiff reached an agreement whereby the monthly rent was reduced to offset defendants' expenses in securing maid and cleaning service. The record

does not indicate that defendants objected to plaintiff's vacating her apartment or complained of this until this suit was filed.

[13] In light of defendants' activity prior to plaintiff's vacating her apartment, their agreement with her after that time and he absence of complaint to her vacating, such rights as may have accrued were waived.

Insofar as plaintiff's leasing her vacant apartment to a male tenant is concerned, the evidence and reasonable inferences therefrom are conflicting as to this having so impaired defendants' use of the premises as to constitute constructive eviction. In finding a constructive eviction, the lower court apparently resolved any conflict in defendants' favor. Similarly, the reasonableness of the 3 month delay in defendants' vacating was resolved in defendants' favor. These are essentially and entirely questions of fact and the lower court's findings are accepted when supported by substantial evidence. In light of the disposition of other and controlling issues, it is unnecessary to pursue inquiry as to the substantiality of the evidence and the findings of constructive eviction can be assumed correct.

There remains for consideration the apparent holding that the defendants had not waived the right to complain of constructive eviction by reason of the male tenant's presence. Recapitulating, waiver, insofar as the instant case is concerned, would consist of defendant's relinquishment of a known right by failure to act while under a duty to act, thereby causing plaintiff to act to her prejudice.

Assuming for the moment that there existed knowledge of the right, a duty to act and a failure to act, it is clear that plaintiff was caused to act to her prejudice. The specific prejudicial act was the continued maintenance of the male tenant in the vacant apartment—an act which was the basis for the allegation of breach was the covenant and the abandonment of and loss of rent for the apartments.

Similarly, it is clear the the requisite knowledge on the part of the defendants existed. Although the testimony conflicts as to when the defendants learned of the male tenant's presence and though defendants' answer indicates they were only aware of the tenant's presence in April, 1961, it is clearly established that the male tenant took possession in early February and that the housemother employed by defendants knew of his presence in February. Since the housemother was employed for the express purpose of supervising the premises, such knowledge as she had concerning the premises—and their suitability for use—is imputed to her employer. ***483** Breeding's Dania Durg Co. v. Runyon, 1941, 147 Fla. 123, 2 So.2d 376.

The third element of the waiver, a failure to act, is equally apparent. During the period from February to April, 1961, while the male tenant's presence was allegedly rendering the premises unusable, defendants never communicated their objection to his presence to plaintiff. Notwithstanding the fact that they forwarded the rent at appointed times, they never, as part of that transaction or otherwise, indicated objection to the male tenant. Indeed, plaintiff did not learn of defendants dissatisfaction until after they had rescinded the lease and announced an intention to seek reimbursement for alleged damages. The evidence is uncontroverted—and it is admitted—that plaintiff learned of defendants' dissatisfaction only upon making inquiry herself and only after defendants rescinded. Although defendants seem to insist that a letter of April 13, 1961, informing plaintiff that defendant rescinded and a letter of April 24, 1961, announcing the date at which the premises would be vacated, served as notice of defendants' objection to the male tenant—neither letter mentions the male tenant or the effect of his presence.

In summary, not only does the evidence demonstrate the existence of the requisite knowledge, failure to act and consequent prejudice, but there is no substantial evidence to the contrary. Apparently and necessarily the lower court's decision turned on the fourth element of waiver, the existence of a duty on defendants' part to act, to notify plaintiff on their objection to the male tenant's presence.

In attempting to determine if a duty to notify the landlord existed, it should be kept in mind that the defendants claim constructive and not actual eviction and that they claim bereach of an implied covenant and not an express covenant. It should be noted too that defendants and the court below felt that the nature of the covenant and rights under it were ambiguous and ascertainable only by parol evidence.

[14] **[15]** While no case precisely on point has been discovered, persuasive authority in analogous areas impel the conclusion that a duty to notify the plaintiff landlord existed. The general rule concerning demand for performance as a prerequisite to an action for breach of

covenant is set forth in 21 C.J.S. Covenants § 88 (1940) as follows:

'Notice of breach and demand of performance are *not required* of the covenantee in order to entitle him to action against the covenantor upon breach of his covenant, *unless the event upon which the action accrues is mainly or exclusively within the knowledge of the covenantee* * * *.' (Emphasis added.)

Similarly, although with respect to covenants running with the land, it is apparently the accepted rule that no cause of action for breach arises until notice or demand for performance is given. This is stated in 14 Am.Jur., Covenants, Conditions and Restrictions, § 37 (1938) as follows:

'* * * Covenants which are continuing in their character, such as a covenant to keep a retaining wall in repair * * * are not affected by the statute of limitations until after the covenantor refuses to repair or renew as the case may be.'

Demand for performance is a necessary prerequisite to breach insofar as affirmative covenants are concerned. 14 Am.Jur., Covenants, Conditions and Restrictions, § 37 (1938, suppl. 1962); 17 A.L.R.2d 1252–1256 (1951).

[16] **[17]** With regard to particular breaches of covenant, notice and demand for performance are usually necessary. Thus, a landlord can not declare a forfeiture for non-payment of rent prior to demanding payment. Baker v. Clifford-Mathew Investment Co., 1930, 99 Fla. 1229, 128 So. 827; see 20 Fla.Jur., Landlord and Tenant, § 133 (1958). Conversely, a tenant cannot declare termination of a lease ***484** for breach of covenant to make repairs unless the landlord is notified of the need for repairs. See Tedstrom v. Puddephat, 1911, 99 Ark. 193, 137 S.W. 816, Ann.Cas.1913A 1092. See too 51 C.J.S. Landlord & Tenant §§ 113, 114 (1947).

[18] When a landlord has covenanted to make repairs, notice of the need for repair is requisite to liability for breach of the covenant. 32 Am.Jur., Landlord and Tenant, § 710 (1955). As the author of the latter encyclopedia explains:

> 'This rule, requiring a tenant to give notice to the landlord of the want of repair * * * springs from the special knowledge which the tenants occupancy of the premises is presumed to give him, coupled with the state of ignorance in which the absence of such occupancy is presumed to leave the landlord.'

An examination of recent Florida cases discloses no departure from this rule. See Propper v. Kesner, Fla.1958, 104 So.2d 1; Wallace v. Schrier, Fla.App.1958, 107 So.2d 755; Wiley v. Dow, Fla.App.1958, 107 So.2d 166; Moore v. O'Conner, Fla.App., 1958, 106 So.2d 606.

[19] The factor of notice is also significant in cases involving breach of the covenant of quiet enjoyment by reason of an adverse title, paramount to that of the landlords. While notice of the pendency of the suit is not a prerequisite to a cause of action for breach, the tenant is precluded from asserting the adverse judgment and must prove the paramount title in the subsequent suit for breach of covenant, unless the landlord was notified of the adverse claim. See 21 C.J.S. Covenants §§ 89–92 (1940); 14 Am.Jur., Covenants, Conditions and Restrictions, § 65 (1938); 32 Am.Jur., Landlord and Tenant, § 286 (1941). The rationale of this rule is simply that the landlord cannot be bound, in an action for breach, by adverse facts of which he had no knowledge and against which he was not able to defend.

[20] Finally, there is ample authority for the rule that notice of and an opportunity to rectify conditions allegedly constituting constructive eviction are a prerequisite for any action based on the alleged eviction. 32 Am.Jur., Landlord and Tenant, §§ 259, 263, 264 (1941 suppl. 1962); 51 C.J.S. Landlord and Tenant § 323c(1) (1947); 52 C.J.S. Landlord and Tenant § 458 (1947). Accordingly, notice to the landlord has been found to be an essential element of constructive eviction by reason of failure to repair; Tedstrom v. Puddephat, 1911, 99 Ark. 193, 137 S.W. 816; failure to provide heat, Russell v. Olson, 1911, 22 N.D. 410, 133 N.W. 1030, 37 L.R.A.,N.S., 1217; failure to provide electricity or water, Curry v. Coyle, 1921, 115 Misc. 422, 189 N.Y.S. 65; failure to rid premises of vermin, California Bldg. Co. v. Drury, 1918, 103 Wash. 577, 175 P. 302; Wainwright v. Helmer, N.Y.App.1922, 193 N.Y.S. 653; and of failure to abate offensive, illegal or immoral conduct by other tenants, Cushman & Co. v. Thompson, 1908, 58 Misc. 539, 109 N.Y.S. 757; Central Home Trust Co. v. Walsh Bakeries and Restaurants, 1933, 11 N.J.Misc. 161, 165 A. 107.

Indeed, the one case found which held that the tenant had no duty to notify the landlord of the offensive fact, Milheim v. Baxter, 1909, 46 Colo. 155, 103 P. 376, qualified this holding by pointing out that the landlord could not have failed to know of the immoral purposes for which the adjacent premises were used—accordingly notice would be superfluous.

[21] The foregoing authority and the reason underlying the requirement of notice or demand compel the conclusion that the defendant-appellees in the instant appeal had a duty to notify plaintiff-appellant of their objection to the male tenant.

[22] A tenant who alleges constructive eviction by virtue of acts which fall short of actual eviction, are not patently immoral or illegal, are not expressly forbidden by ***485** the terms of the lease, and are susceptible to remedy, should and must give timely notice to the landlord of the objectionable act and demand rectification. Failing in this duty, the tenant cannot be heard to complain of the acts in defense to an action for rent.

Defendant-appellees having so failed, the trail judge's entry of judgment for them was error, and is reversed for entry of judgment in favor of the plaintiff-appellant.

Reversed.

SHANNON, C. J., and HORTON, MALLORY, Associate Judge, concur.

All Citations

150 So.2d 477

922 So.2d 229
District Court of Appeal of Florida,
Third District.

CLEAR CHANNEL METROPLEX, INC.; Clear Channel Broadcasting Licenses, Inc.; and GFS Corporation, Appellants/Cross-Appellees,
v.
SUNBEAM TELEVISION CORPORATION, Appellee/Cross-Appellant.

Nos. 3D04-1834, 3D04-1750, 3D04-2476.
|
Dec. 28, 2005.
|
Rehearing and Rehearing En Banc Denied March 17, 2006.

Synopsis

Background: Owner of western half of peninsula, which operated television station, brought declaratory judgment action against owner of eastern half of peninsula, which formerly operated radio station there, seeking to prevent construction of condominium project on eastern half by proposed purchaser of eastern half. Proposed purchaser intervened in the action. The Circuit Court, Miami-Dade County, Michael Chavies, J., after a bench trial, entered judgment in favor of owner of western half, finding that contract between owner of western half and owner of eastern half precluded the condominium project. Owner of eastern half and proposed purchaser appealed.

Holdings: The District Court of Appeal, Schwartz, Senior Judge, held that:

[1] contractual provision forbidding certain use restrictions did not limit use of the properties to broadcasting, but

[2] owner of western half did not waive its right to enforce provision requiring its consent to construction of anything on southern portion of peninsula.

Affirmed.

Green, J., filed opinion concurring in part and dissenting in part.

West Headnotes (6)

[1] Covenants
Nature and Operation in General

Provision of contract between owner of western half of peninsula, which operated television station, and owner of eastern half of peninsula, which formerly operated radio station, that parties would not "impose any restrictions discriminating in the use of" their respective properties, except as might be necessary to the continued use of the properties for their present purposes, did not limit use of properties to broadcasting and, thus, did not preclude construction of condominium project on the eastern half of the peninsula; provision simply required parties not to interfere with each other, and did not refer to broadcasting, much less mandate it.

1 Cases that cite this headnote

[2] Contracts
Rewriting, Remaking, or Revising Contract

A trial court cannot vary the terms of a written agreement to achieve what it may believe is a desirable result.

1 Cases that cite this headnote

[3] Covenants
Nature and Operation in General

Any contractual restriction on one's use of her property must be very strictly construed.

1 Cases that cite this headnote

[4] Covenants
Waiver of Breach

Owner of western half of peninsula, which operated television station, did not waive its

right to enforce provision in contract with owner of eastern half of peninsula, which formerly operated radio station, requiring a party to obtain the other's consent before constructing anything on the southern portion of the peninsula, even though owner of western half constructed a jointly-used parking lot and other facilities in the southern portion of peninsula; owner of western half obtained the consent of owner of eastern half before constructing such facilities.

Cases that cite this headnote

[5] Estoppel

Nature and Elements of Waiver

"Waiver" is the voluntary and intentional relinquishment of a known right.

3 Cases that cite this headnote

[6] Estoppel

Questions for Jury

Waiver is ordinarily an issue for the finder of fact.

2 Cases that cite this headnote

Attorneys and Law Firms

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Colson Hicks Eidson and Joseph M. Matthews, Coral Gables; Milledge & Iden and Allan Milledge, Miramar, for appellee/cross-appellant.

Before COPE, C.J., and GREEN, J., and SCHWARTZ, Senior Judge.

Opinion

SCHWARTZ, Senior Judge.

This appeal concerns an oblong peninsula extending in a north-south direction into Biscayne Bay on the north side of the east-west 79th Street Causeway in North Bay Village. For more than forty years, the eastern half of the property has been owned by the appellants Clear Channel Metroplex, Inc., and Clear Channel Broadcasting Licenses, Inc. [collectively "Clear Channel"], and its predecessors, which until 1995 was the location of radio station WIOD. [1] The appellee Sunbeam Television Corporation owns the western half of the property, the site of a TV station, WSVN.

In 2002, Clear Channel reached a tentative agreement with GFS Corporation to sell its "radio" half for the construction of a condominium project. Sunbeam, however, objected to the proposed use of Clear Channel's property and brought the present action for a declaratory judgment against Clear Channel, in which GFS intervened, claiming that the project was forbidden by two provisions of an agreement entered into in 1962, when both stations were in active operation there, concerning the shared use of the entire parcel. Specifically, Sunbeam claimed:

(1) Under paragraph 4, Clear Channel (or, for that matter, Sunbeam itself) could not use any part of the area for anything but "broadcasting purposes." That provision states:

> The parties hereto ... agree not to impose any restrictions discriminating in the use of said facilities except as such restrictions shall be reasonably necessary to the continued proper use of said ***231** facilities for their present purposes and any such restrictions shall apply uniformly to the Officers, employees, business invitees and visitors of both the television and radio broadcasting facilities[;]

and that

(2) Under paragraph 5 of the agreement, neither party could construct any building on what was roughly the southern half of the parcel without the prior consent of the other which, in this case, Sunbeam refused to give. That provision states:

> the parties agree that no further buildings, drives, parking areas or

> other improvements will be made on the southerly 314.25 feet of the property without the joint consent of the parties; except that Biscayne may install a sidewalk ... without the necessity of obtaining the consent of Sunbeam.

Sunbeam also claimed the right to an irrevocable license over Clear Channel's half of the property to use a parking lot and helicopter pad, which had been constructed on Clear Channel's property, for so long as Sunbeam owned and broadcasted from a television station on its half.

In the final judgment now before us, rendered after a non-jury trial, the court found in favor of Sunbeam as to both arguments concerning the restrictions on the use of Clear Channel's property, holding that (1) "paragraph 4 of the Biscayne Agreement imposes a valid use restriction on both parcels, limiting them to either broadcast uses or uses reasonably necessary to their continued broadcast uses"; and (2) paragraph 5 remains a valid prohibition on improvements to the southern portion of the property without joint consent of the parties. On Clear Channel and GFS Corporation's appeal from those determinations, we agree that the first is erroneous, but affirm as to the second. We also affirm the court's ruling on Sunbeam's cross-appeal concerning its application for an irrevocable license.

I.

[1] **[2]** **[3]** We find little difficulty in concluding that the trial court's determination that the paragraph 4 restriction on the use of the property to "broadcast purposes" is erroneously in conflict with the basic rule that a trial court cannot vary the terms of a written agreement to achieve what it may believe is a desirable result. See *Home Dev. Co. of St. Petersburg, Inc. v. Bursani,* 178 So.2d 113 (Fla.1965); *AT & T Wireless Servs. of Fla., Inc. v. WCI Cmtys., Inc.,* 932 So.2d 251, 2005 WL 2140234 (Fla. 4th DCA Nos. 4D04-3285 & 4D04-3286, opinion filed, Sept. 7, 2005)[30 Fla. L. Weekly D2130]; *Hurtado v. Spanish Broad. Sys. of Del., Inc.,* 904 So.2d 459 (Fla. 3d DCA 2005); *Nat'l Health Labs. Inc. v. Bailmar, Inc.,* 444 So.2d 1078 (Fla. 3d DCA 1984), *review denied,* 453 So.2d 43 (Fla.1984). Paragraph 4 seems to us to be simply and solely a mutual non-aggression pact between the parties not to employ the facilities, see *Aramark Unif. & Career Apparel, Inc. v. Easton,* 894 So.2d 20, 27 (Fla.2004)(" 'Facility' is defined as 'something that is built, installed, or established to serve a particular purpose.' "), they each maintain on the property to interfere with or discriminate against the other.[2] (There is no evidence that the proposed condominium ***232** use would violate such an understanding.) There is simply nothing which even refers to "broadcasting," much less imposes a limitation upon the parties' use of their own property to that endeavor. It is of course clear that any restriction on one's use of her property must be very strictly construed. See *Washingtonian Apartment Hotel v. Schneider,* 75 So.2d 907 (Fla.1954); *Moore v. Stevens,* 90 Fla. 879, 106 So. 901 (1925); *WCI Cmtys., Inc.,* 932 So.2d at ----, 2005 WL 2140234; [30 Fla. L. Weekly at D2130]; *Shields v. Andros Isle Prop. Owners Ass'n, Inc.,* 872 So.2d 1003, 1006 (Fla. 4th DCA 2004). Particularly with, but even without, considering this rule of construction [sic], the trial court's limitation on the use of the property cannot stand.

II.

[4] **[5]** We reach a different result as to the declaration that paragraph 5 of the agreement is valid, extant and enforceable. The appellants essentially do not, as they could not, claim that the agreement is unclear or invalid on its face. See *Sinclair Ref. Co. v. Watson,* 65 So.2d 732, 733 (Fla.1953), *cert. denied,* 346 U.S. 872, 74 S.Ct. 121, 98 L.Ed. 381 (1953); *Publix Super Markets, Inc. v. Wilder Corp. of Del.,* 876 So.2d 652 (Fla. 2d DCA 2004), *review denied,* 892 So.2d 1015 (Fla.2004); *Cottrell v. Miskove,* 605 So.2d 572, 573 (Fla. 2d DCA 1992); *Norwood-Norland Homeowners' Ass'n v. Dade County,* 511 So.2d 1009 (Fla. 3d DCA 1987), *review denied,* 520 So.2d 585 (Fla.1988). They seem to contend, however, that Sunbeam has waived the right to rely on the provision because it constructed a jointly-used parking lot and other facilities in the southern "no build zone" during the years after 1962. Because, among other things, the record shows that in each such instance Sunbeam secured the consent of Clear Channel as the agreement provides, we cannot agree, in accordance with the classic definition of waiver as "the voluntary and intentional relinquishment of a known right," *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla.2005), that Sunbeam has waived its *own* right to insist upon its agreement with Clear Channel's proposal. See

Gilman v. Butzloff, 155 Fla. 888, 22 So.2d 263, 265 (1945); *Miracle Ctr. Assocs. v. Scandinavian Health Spa, Inc.,* 889 So.2d 877, 879 (Fla. 3d DCA 2004), *review denied,* 914 So.2d 954 (Fla.2005); *Woodlands Civic Ass'n, Inc. v. David W. Darrow, D.C., P.A.,* 765 So.2d 874, 877 (Fla. 5th DCA 2000); *Mizell v. Deal,* 654 So.2d 659, 663 (Fla. 5th DCA 1995); *State v. Belien,* 379 So.2d 446, 447 (Fla. 3d DCA 1980).

[6] Especially considering the rule that waiver is ordinarily an issue for the finder of fact, see *Rutig v. Lake Jem Land Co.,* 155 Fla. 420, 20 So.2d 497, 499 (1945); *Anthony v. Gary J. Rotella & Assocs., P.A.,* 906 So.2d 1205, 1208 (Fla. 4th DCA 2005); *Popular Bank of Fla. v. R.C. Asesores Financieros, C.A.,* 797 So.2d 614, 619 (Fla. 3d DCA 2001); *Dumor Avionics, Inc. v. Hangar One, Inc.,* 319 So.2d 95, 97 (Fla. 3d DCA 1975), we approve the court's resolution of this issue below. [3]

***233** III.

Finally, we reject the contention on cross-appeal that Sunbeam had established a right to an irrevocable license. See *Dance v. Tatum,* 629 So.2d 127 (Fla.1993); *Seaboard Air Line Ry. Co. v. Dorsey,* 111 Fla. 22, 149 So. 759 (1932); *Albrecht v. Drake Lumber Co.,* 67 Fla. 310, 65 So. 98 (1914), receded from on other grounds by *Dance v. Tatum,* 629 So.2d 127 (Fla.1993); *Brevard County v. Blasky,* 875 So.2d 6 (Fla. 5th DCA 2004), *review denied,* 889 So.2d 71 (Fla.2004).

Affirmed in part, reversed in part.

COPE, C.J., concurs.

GREEN, J. (dissenting in part, concurring in part).
Although it professes not to, I believe that the majority opinion has in fact wrongfully rewritten the parties' agreement by finding that paragraph 4 does not provide a use restriction on the property. Accordingly, I dissent from that section of the opinion.

Paragraph 4 of the 1962 agreement prohibits any restriction on the use of the property *unless* "reasonably necessary to the continued proper use of said facilities *for their present purposes* [.]" (Emphasis added). This restrictive covenant, as are all restrictive covenants, is clothed with a presumption of validity. *See Cottrell v. Miskove,* 605 So.2d 572, 573 (Fla. 2d DCA 1992) ("Restrictions are clothed with a very strong presumption of validity because each property owner has adequate notice of the restrictions and purchases his property knowing of, accepting, and relying upon them."). As such, these covenants should not be invalidated unless they are clearly ambiguous, arbitrary, unreasonable, or violative of public policy or a fundamental constitutional right. *Constellation Condo. Ass'n, Inc. v. Harrington,* 467 So.2d 378, 379 (Fla. 2d DCA 1985). *Moreover,* where, as here, the terms of the covenant are unambiguous, courts will, and should, enforce the restriction according to the intent of the parties as expressed by the ordinary meaning of its terms. *Norwood-Norland Homeowners' Assn., Inc. v. Dade County,* 511 So.2d 1009, 1014 (Fla. 3d DCA 1987).

In this case, it is uncontroverted that prior to the 1962 agreement, the property in question was solely owned by Biscayne Television Corporation ("Biscayne"), which operated both a television and radio station on the property. In 1962, the Federal Communications Commission took the television station license from Biscayne and gave it to Sunbeam. Cox Broadcasting, an affiliate of Biscayne and Clear Channel's predecessor, assumed ownership of the radio station and its portion of the property. By virtue of the 1962 agreement, Sunbeam bought the television station building and the real estate on which it was situated. The opening of the agreement provides:

> WHEREAS, because of the location of the various buildings, driveways, antennas and other facilities composing said *Radio Station and Television Station* upon said property, it is essential that the *parties reach an agreement as to the* ***234** *joint use,* operation and maintenance of said real property and the improvements and facilities located thereon.

(Emphasis added). Historically, and by the agreement's own terms, in 1962, the purpose of the property was clearly to run and house both a radio station and a television station.

Therefore, the present purpose referred to in paragraph 4 could clearly be nothing other than the running and housing of both a television station and a radio station.

Accordingly, I believe that pursuant to the expressed intent of the parties to the 1962 agreement, we must affirm the trial court's determination that paragraph 4 restricts the use of the property to "broadcast purposes" only. To do otherwise is to impermissibly do that which the majority accuses the trial court of erroneously doing: varying the terms of the written agreement to achieve its desired result. As the case law cited by the majority illustrates, rewriting the parties' agreement is violative of Florida caselaw. I, therefore, respectfully dissent to that portion of the majority's opinion.

All Citations

922 So.2d 229, 31 Fla. L. Weekly D78

Footnotes

1 WIOD continues to transmit its radio signal from towers on the property, but has moved its studios to Miramar, Florida.

2 It should be noted that such an understanding was particularly appropriate in light of the fact that Clear Channel was simultaneously granted an easement to maintain an antenna on Sunbeam's half of the property. In addition, the agreement also acknowledged that the electrical power transformer vault was located in the Clear Channel building and provided that Clear Channel would not interfere with the power supply to Sunbeam's property.

3 We do not understand the appellants to have contended below, or to argue directly here, that Sunbeam's refusal to consent to the condominium constitutes a breach of the duty to exercise good faith in the performance of a contractual provision like the one here requiring mutual consent. See *Publix Super Markets, Inc. v. Wilder Corp. of Del.,* 876 So.2d 652 (Fla. 2d DCA 2004), *review denied,* 892 So.2d 1015 (Fla.2004); *Fernandez v. Vazquez,* 397 So.2d 1171 (Fla. 3d DCA 1981). To the extent that it has not foregone this contention, we could not interfere with any conclusion that no bad faith has been demonstrated. See *Berges v. Infinity Ins. Co.,* 896 So.2d 665, 680 (Fla.2004)(bad faith is issue of fact); *Quirch v. Coro,* 842 So.2d 184 (Fla. 3d DCA 2003) (same); *Cox v. CSX Intermodal, Inc.,* 732 So.2d 1092, 1097-98 (Fla. 1st DCA 1999)(same), *review denied,* 744 So.2d 453 (Fla.1999); *Fernandez,* 397 So.2d at 1174 (same); *Whitman v. Pet Inc.,* 335 So.2d 577 (Fla. 3d DCA 1976)(same), *cert. dismissed,* 348 So.2d 951 (Fla.1977). These observations do not preclude a subsequent request for Sunbeam to consent to a Clear Channel request for construction on its part of the "no build zone." Our holding concerning the permitted use of the property may or may not be pertinent to the reasonableness of such a request or the arbitrariness of its possible refusal.

100 So.2d 369
Supreme Court of Florida.

Alfred MACINA and John Follo, trading and d/b/a Court Square Auto Parts, Appellants,
v.
James F. MAGURNO and Elsie A. Magurno, his wife, Appellees.

Feb. 14, 1958.

Suit for specific performance of provision in lease that lessees should furnish complete audit of lessees' business on premises by certified public accountant showing gross amount of sales and that if audit revealed that stated percentage of sales exceeded monthly rental payments, lessees should pay additional rents. The Circuit Court, Pinellas County, John Dickinson, J., entered order requiring lessees to furnish audit without opportunity to be heard and to prove their direct and affirmative defenses, and lessees appealed. The Supreme Court, O'Connell, J., held that allegations in lessees' answer that lessors had accepted checks for balance of rent for three years and that continuation of lessees' accounting system, even if system were inadequate, was due to acceptance of annual audit submitted by them to lessors, raised substantial fact issues as to estoppel, waiver and laches, precluding summary decree against lessees.

Reversed and remanded with directions.

West Headnotes (5)

[1] Judgment
Specific performance cases

In suit for specific performance of provision in lease that lessees should furnish complete audit of their business on premises by reputable certified public accountant showing gross amounts of sales, issue of fact as to whether sufficiency of lessees' audit to meet terms of lease precluded summary decree for lessees, even though lessors filed no affidavits controverting or in opposition.

3 Cases that cite this headnote

[2] Specific Performance
Issues, proof, and variance

In suit for specific performance of provision in lease that lessees should furnish complete audit of their business on premises by reputable certified public accountant showing gross amount of sales, wherein lessors raised question as to whether lessees' audit was complete, and parties were at variance as to meaning of provision and construction of provision was fundamental to settling dispute, construction of provision by chancellor was not error even though no specific or pointed issue was made of necessity for construing provision in the pleadings.

1 Cases that cite this headnote

[3] Landlord and Tenant
Sales

Provision in lease that lessees should furnish to lessors audit of lessees' business on premises by certified public accountant showing gross sales during preceding rental year, required lessees to furnish lessors with document in which certified public accountant set forth that he made a complete audit in accordance with accepted accounting practices, and computation of sales tickets written by lessees was insufficient, but unless accountant should find it to be necessary to do so, document need not contain any other information concerning lessees' business.

3 Cases that cite this headnote

[4] Estoppel
Reliance on adverse party

Estoppel
Acts done or omitted, and change of position

One of the essential elements of estoppel is that party asserting it must show reliance on conduct of the other and change of position in reliance thereon.

4 Cases that cite this headnote

[5] Judgment

Specific performance cases

In suit for specific performance of provisions in lease that lessees should furnish complete audit of lessees' business on premises by certified public accountant showing gross amount of sales and that if audits revealed that stated percentage of sales exceeded monthly rental payments, lessees should pay additional rent, allegations in lessees' answer that lessors had accepted checks for balance of rent for three years, that continuation of lessees' accounting system, even if system were inadequate, was due to acceptance of annual audit submitted, raised substantial fact issues as to estoppel, waiver, and laches, precluding summary decree against lessees.

4 Cases that cite this headnote

Attorneys and Law Firms

***370** William J. Castagna, Clearwater, for appellants.

Victor O. Wehle of Askew, Wehle, Earle & Holley, St. Petersburg, for appellees.

Opinion

O'CONNELL, Justice.

Appellants, Alfred Macina and John Follo, doing business as Court Square Auto Parts, were defendants in the trial court, and James F. Magurno and Elsie A. Magurno, appellees here, were plaintiffs.

The suit was for specific performance of a provision, regarding rent payments, contained in a five year lease executed by the parties in August 1950. The lease was effective November 1, 1950. The plaintiffs were lessors, the defendants lessees. Defendants operated an automobile parts supply business and a machine shop in the leased premises.

The lease provided that lessees would make minimum monthly rent payments in amount of $160 and at the end of each year that:

'* * * Lessees, at their expense, shall furnish to Lessors a complete audit by a reputable Certified Public Accountant showing the gross amount of sales made by Lessees during the preceding rental year in the business conducted by Lessees on the above described premises, * * *' (Emphasis supplied) and if the audit revealed that 4 ½% per cent of the said gross sales in any such year exceeded the monthly rental payments, that Lessees would pay the difference as additional rent. The construction of the italicized portion of the above lease provision is the principal bone of contention between the parties to the suit.

The plaintiffs' complaint in effect was that although defendants had paid the monthly rental payments and had also paid some additional monies, that defendants had failed to furnish annually 'a complete audit by a reputable certified public accountant showing the gross amount of sales' as required by the lease, and that they believed such an audit would show they were entitled to substantial additional sums for rent under the percentage provision of the lease. The plaintiffs asked the court to require the defendants to provide such an audit and to pay any additional sums found to be due.

In their answer, among other things, the defendants denied that they had failed to provide annual audits as required by the lease, alleged that they had furnished annual audits for the years 1951, 1952, 1953 and 1954, prepared by reputable certified public accountants or by a tax consultant specifically approved by the plaintiffs, and that the audit for 1955 was not yet due. They alleged that plaintiffs had in fact established the amounts due them for rent and had accepted payment thereof without question.

The defendants also asserted, as affirmative defenses, that by accepting the annual audits presented to them by defendants without expressing any dissatisfaction prior to filing of the instant suit and by accepting from defendants the sums shown to be due by said audits:

(1) Plaintiffs had waived and abandoned strict compliance with the lease provisions and therefore in equity were estopped from asserting any further claim;

(2) Plaintiffs were guilty of laches in presenting their claims; and

(3) Defendants having made payments to plaintiffs in good faith based on said audits, and plaintiffs having accepted such payments in full and complete settlement of rent due plaintiffs by their acceptance were estopped to assert any further claim.

***371** To their answer, defendants attached what they contend is an audit made by a Certified Public Accountant, covering the entire four year period. This audit on its face was only an addition, by the Certified Public Accountant, of all defendants' sales tickets for the four years, together with a schedule of missing sales tickets which the C.P.A. presumed to have been mutilated and voided.

Defendants made a motion for summary final decree on the theory that the relief sought by plaintiffs, i. e., an audit, had been made and was attached to the answer, and that since all sums due under the audit had been paid, there was no issue to be decided by the court. The plaintiffs filed no affidavits in opposition to the defendants' motion.

Depositions of one of the plaintiffs and one of the defendants were before the court when the motion for summary final decree came on to be heard by the chancellor.

In his 'opinion and order' entered after the hearing, the court denied the defendants' motion for summary final decree, found that the audit furnished by the defendants was not '* * * a complete audit * * * showing the gross amount of sales made by lessees * * *' as required by the lease, found that there was '* * * no material issue as to the insufficiency of the audit in the mind of the court * * *' and directed defendants to furnish plaintiffs a '* * * complete audit of their business for the years in question * * * which audit will show, among other things, the gross amount of sales for the years indicated * * *' In his order, the Chancellor did not dispose of the defendants' affirmative defenses.

It is the foregoing order from which this appeal is taken.

Defendants contend (1) that since plaintiffs filed no affidavits controverting or in opposition to their motion and affidavit, there was no genuine issue of material fact and therefore their motion for summary decree should have been granted; (2) the Chancellor erred in construing as he did the lease provision as to the audit; (3) the Chancellor erred in entering sua sponte a final decree for plaintiffs without taking testimony or giving defendants the opportunity to be heard on their direct and affirmative defenses: and (4) that the order of the Chancellor was so vague, ambiguous and uncertain that it was impossible of compliance. This last point need not be treated by us as will become obvious from the remainder of this opinion.

[1] As to the defendants' first contention, we agree with the Chancellor that defendants were not entitled to a summary final decree as a matter of law on the basis of the record as then before the Chancellor. It is true that if it be conceded that the audit furnished by defendants complies with the lease, and it not being denied that plaintiffs have been paid all sums shown to be due by the audit furnished by them, not only would there have been no genuine issue of material fact, but they would have been entitled to a judgment as a matter of law.

But it is clear that the real issue in this case is the sufficiency of the audit to meet the terms of the lease above set forth, and it would have been error the Chancellor to have entered a decree for the defendants.

This brings us to defendants' second contention which we understand to be that it was not only error for the Chancellor to construe the subject provision of the lease as he did, but that it was error for him to construe it at all since the issue of the construction of the pertinent lease provision was not raised by the pleadings. It is true that no specific or pointed issue is made of the necessity for construing the provision, but the plaintiff did raise the question as to whether the audit was complete. It is obvious, too, that the parties are at variance as to its meaning and it is equally obvious that the construction of the provision is fundamental to settling the dispute in issue, ***372** unless the plaintiff be found, on equitable principles, to have made it immaterial for the years which had already passed.

[2] We therefore hold that it was not error for the Chancellor to have considered and construed the lease provision, nor do we disagree with his construction thereof, except in one particular as hereinafter set forth.

The Chancellor in his order, in effect, found that the audit provided for in the lease meant something more than a compilation of sales tickets written by defendants. It is true that an addition of sales tickets, if accurately and honestly made and kept as to each sale made, would accurately reveal gross sales, and we do not herein intend

to indicate that the defendants did not accurately and honestly make and keep such records. But there are methods which those of the accounting profession, using accepted accounting practices and procedures, can with reasonable accuracy prove and determine the correctness or incorrectness of reported sales in a business, provided of course that there are available basic records with which to work. Among these methods is a comparison of total cash receipts as deposited in banks or otherwise disposed of with reported total sales. Another is to compare cost of goods sold, plus markup customary to the individual business or to the trade, against total reported sales. The result of requiring such an audit in determining gross sales was to give plaintiffs the assurance that a reputable member of an honorable and learned profession would, using methods and procedures used by that profession, determine and verify the amount of gross sales, rather than merely relying upon figures furnished by defendants.

[3] We therefore agree with the Chancellor that the lease required defendants to have made annually a complete audit of their records and that based upon said audit they should furnish plaintiffs with a document, call it by any name, in which the Certified Public Accountant who made the audit should set forth that he made a complete audit in accordance with accepted accounting practices, detailing the procedure followed and the records checked, and that based upon such audit the gross sales were a figure named therein. The document should be certified by the C.P.A.

Unless the C.P.A. should find it to be necessary to do so, the document presented to the plaintiffs need not contain any other information concerning the defendants' business. It is on this point alone that we differ with the Chancellor. As we construe the lease provision, the plaintiffs are rightfully entitled to know only the amount of gross sales of defendants. They are however, entitled to know that the figure presented as representing gross sales was determined and verified by a reputable Certified Public Accountant, after a complete audit of the defendants' records.

Defendants' third question is that the Chancellor erred in entering the order requiring them to make and furnish a complete audit without giving the defendants an opportunity to be heard on and to prove their direct and affirmative defenses. We think there is merit to this contention.

Defendants, in their answer, asserted the affirmative defenses of waiver, estoppel and laches.

[4] Plaintiffs argue that defendants have not and cannot asserts and prove that the actions of the plaintiffs in receiving the purported audits and accepting rentals based thereon have in any way harmed the defendants or benefited the plaintiffs. Unquestionably one of the essential elements of estoppel is that the party asserting it must show reliance on conduct of the other and change of position in reliance thereon. L. B. Price Mercantile Co. v. Gay, Fla.1950, 44 So.2d 87, 90; Robertson v. Robertson, Fla.1952, 61 So.2d 499, 504; Gross v. City of Miami, Fla.1953, 62 So.2d 418, 419.

However, it is entirely possible that the defendants may be able to prove the elements of estoppel here. They have already ***373** been put to the expense of making annual audits, plus the one attached to their answer. They say that to be required to prepare another one now would be an unwarranted expense to them. They point out that, prior to commencement of this litigation, plaintiffs did not object either to the nature of the audit furnished them or to the amount of the rents paid under said audits. Checks for balance of rent offered by defendants and accepted by plaintiffs for years 1952, 1953 and 1954 had thereon language indicating payment of balance of rent and payment in full for the periods covered.

Further, the depositions indicate that defendants' accounting system was not the best and it may well be that it is impossible to ascertain by audit the correctness or incorrectness of the sales tickets. If this be found to be the case, it might be shown that the continuance by defendants of an inadequate accounting system, i. e., inadequate for purposes of making a complete audit, was due to the acceptance by plaintiffs of the purported audit furnished to them annually by the defendants, instead of earlier forcing defendants to render a proper audit.

It is entirely possible that the defendants might have shown the plaintiffs to be estopped to now ask for a document showing the gross amount of sales determined and verified by a complete audit as we have held they were entitled to under the lease.

In Masser v. London Operating Co., 1932, 106 Fla. 474, 145 So. 72, 79, this court said that while waiver, being the intentional relinquishment of a known right, does not arise from forbearance for a reasonable time, it might

be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived. Further, it was said that where the conduct of the party is such as to create an estoppel no consideration for the waiver is necessary. While it seems that proof of an estoppel would give the defendants the same result, nevertheless, it may be possible for them to prove a waiver by plaintiffs.

Defendants might also have proved that the plaintiffs were guilty of laches in not sooner asserting their rights under the subject lease provision.

[5] We cannot say as a matter of law that the defenses of estoppel, waiver or laches as pleaded by the defendants, considering the record before the Chancellor, were so incredible as to be unworthy of acceptance by reasonable minds, on the one hand, or on the other, would be without legal probative force, if true, so as to justify the Chancellor in entering a summary decree against the defendants. Johnson v. Studstill, Fla.1954, 71 So.2d 251. Defendants should be given the opportunity to prove their defenses.

Accordingly, this cause is reversed and remanded with directions that further proceedings be had in accordance with this opinion.

THOMAS, Acting C. J., and ROBERTS, THORNAL and DREW, JJ., concur.

All Citations

100 So.2d 369

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720 F.Supp.2d 1351
United States District Court,
M.D. Florida.

Robin PETERSEN, Plaintiff,
v.
The FLORIDA BAR, et al., Defendants.

Case No. 6:10–CV–86–ORL–WHS–BWN.
|
June 28, 2010.

Synopsis

Background: Licensed Florida attorney brought § 1983 action against numerous defendants, including Florida Bar, Florida Bar's executive director, and more than four dozen individual members of Florida Bar Board of Governors, in their official capacities, alleging ongoing deprivations of his constitutional rights relating to Florida Bar's utilization of peer review criterion in evaluating attorney applications for recertification in particular legal specialties, as well as its refusal to disgorge unfavorable peer review materials to him in connection with his application for recertification as elder law specialist. Defendants moved to dismiss for failure to state claim.

Holdings: The District Court, William H. Steele, Chief Judge, held that:

[1] bald assertion in amended complaint that without signing recertification application, including its waiver provision, attorney could not apply for recertification as elder law specialist was insufficient to overcome motion to dismiss;

[2] even if waiver of right to access peer review materials was mandatory requirement for recertification, such fact, without more, neither rendered attorney's signing of application involuntary nor otherwise negated waiver;

[3] waiver was product of free and deliberate choice, rather than intimidation, coercion, or deception;

[4] attorney did not have fundamental property right in recertification that was protected by substantive due process;

[5] peer review rules and standards did not purport to punish, regulate, restrain, or chill any protected speech, as would violate First Amendment;

[6] peer review rules and standards were not unconstitutionally overbroad as applied to attorney; and

[7] peer review rules and standards were not unconstitutionally vague as applied to attorney.

Motion to dismiss granted.

West Headnotes (24)

[1] Estoppel
Nature and elements of waiver

Under Florida law, as elsewhere, a "waiver" is defined as the voluntary and intentional relinquishment of known right.

Cases that cite this headnote

[2] Constitutional Law
Waiver in general

With respect to waivers of constitutional rights, Florida courts perform two inquiries; first, court must determine if waiver was voluntary in sense that it was product of free and deliberate choice rather than intimidation, coercion, or deception and, second, court must determine whether waiver was executed with full awareness of nature of rights being abandoned and consequences of their abandonment.

Cases that cite this headnote

[3] Constitutional Law
Waiver in general

Under Florida law, validity of waiver of constitutional rights must be ascertained by consideration of totality of circumstances.

Cases that cite this headnote

[4] **Constitutional Law**
Waiver in general

Under Florida law, there is no doubt that parties may waive fundamental constitutional rights that protect their liberty as well as their property.

Cases that cite this headnote

[5] **Civil Rights**
Particular Causes of Action

Licensed Florida attorney's bald assertion in his amended complaint that without signing Florida Bar's application for recertification in particular legal specialty, including provision in application in which an applicant agreed to waive his right to obtain confidential peer review information, he could not apply for recertification, was insufficient to overcome motion to dismiss attorney's § 1983 claims against Bar, among others, arising from denial of his application for recertification as elder law specialist, absent allegations that attorney inquired of Bar about necessity of waiver provision or that any Bar representative ever informed him that waiver was mandatory condition of application. 42 U.S.C.A. § 1983; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c); Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[6] **Contracts**
Unreasonable or Oppressive Contracts

Contracts
Signing in ignorance of contents in general

Under Florida law, a party is not permitted to avoid consequences of contract freely entered into simply because he or she elected not to read and understand its terms before executing it, or because, in retrospect, bargain turns out to be disadvantageous; to sanction such result would be to render contracts worthless as tool of commerce.

1 Cases that cite this headnote

[7] **Attorney and Client**
Certificate or license

Even if language in Florida Bar's application for recertification in particular legal specialty stating that by applying for recertification, an applicant agreed to waive his right to obtain confidential peer review information, was mandatory requirement for recertification, such fact, without more, neither rendered attorney's signing of application for recertification as elder law specialist, which was ultimately rejected, involuntary nor otherwise negated waiver. West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[8] **Contracts**
Unreasonable or Oppressive Contracts

Under Florida law, contract terms are not automatically stripped of validity when drafter proffers them on take-it-or-leave-it basis.

1 Cases that cite this headnote

[9] **Attorney and Client**
Certificate or license

Under Florida law, attorney's waiver of his right to obtain peer review information in connection with his application for recertification as elder law specialist was product of free and deliberate choice, rather than intimidation, coercion, or deception, as would render waiver invalid; application was itself free and voluntary choice on attorney's part, as certification was not required in order to practice law, or even attorney's chosen specialty of elder law, in Florida, and even if waiver was unpalatable to attorney at time of his application, and even if application would have been summarily rejected without waiver, attorney still had choice to sign application and forego his right to access peer review materials or refrain from applying for

recertification. West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[10] **Constitutional Law**
Waiver in general

Florida courts deem waiver of constitutional right voluntary if totality of circumstances shows that it was product of free and deliberate choice rather than intimidation, coercion, or deception.

Cases that cite this headnote

[11] **Contracts**
Unreasonable or Oppressive Contracts

In assessing whether contract signee had "meaningful choice," Florida courts consider such factors as whether complaining party had realistic opportunity to bargain and whether he or she had reasonable opportunity to understand terms of contract.

Cases that cite this headnote

[12] **Administrative Law and Procedure**
Determination of validity; presumptions
Constitutional Law
Facial invalidity

Law is clear that when a plaintiff mounts facial challenge to statute or regulation, plaintiff bears burden of proving that law could never be applied in constitutional manner.

Cases that cite this headnote

[13] **Constitutional Law**
Rights and interests protected; fundamental rights

As general proposition, concept of substantive due process is designed to protect those rights that are "fundamental," that is, rights that are implicit in concept of ordered liberty. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[14] **Constitutional Law**
Substantive Due Process in General

Scope of substantive due process is quite narrow. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[15] **Attorney and Client**
Certificate or license
Constitutional Law
Attorneys

Licensed Florida attorney did not have fundamental property right or liberty interest in recertification as elder law specialist that was protected by substantive due process; any property right attorney had in recertification would have been created by Florida law, not by the Constitution, and there was nothing objectively, deeply rooted in history and tradition of United States about a licensed attorney's interest in receiving specialized certification that could enhance his income-earning capacity as lawyer. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[16] **Constitutional Law**
Rights and interests protected; fundamental rights

For liberty interest to be "fundamental" for substantive due process purposes, it must be objectively, deeply rooted in nation's history and tradition. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[17] **Constitutional Law**
Substantive Due Process in General

Assuming that substantive due process claims can be brought in absence of fundamental right, law is quite clear that, under any

circumstances, it is absolute prerequisite for substantive due process claim that the plaintiff show deprivation of protectable interest in life, liberty or property. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[18] **Attorney and Client**
Certificate or license
Constitutional Law
Attorneys

To extent that substantive due process challenge could be asserted as to Florida Bar's peer review rules and standards governing its voluntary recertification and specialization program even without fundamental right or protectable constitutional interest at all, rules and regulations were not arbitrary and capricious and passed muster under highly deferential "rational basis" test; there was obviously rational basis for Bar's desire to collect and consider wide-ranging peer review information on certification applicants pertaining to their competence in specialty field and their professionalism and ethics in practice of law, and rational basis for Bar to believe that rules and regulations would further that purpose. U.S.C.A. Const.Amend. 14; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[19] **Attorney and Client**
Certificate or license
Constitutional Law
Attorneys, Regulation of

Peer review rules and standards governing Florida Bar's voluntary recertification and specialization program did not purport to punish, regulate, restrain, or chill any protected speech, as would violate First Amendment; rather, rules and standards were directed at conduct by an officer of the court bearing on his or her expertise, and his or her professionalism and ethics in practice of law. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[20] **Constitutional Law**
Attorneys, Regulation of

A lawyer's right to free speech is tempered by his or her obligation to both the courts and the bar. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] **Attorney and Client**
Certificate or license
Constitutional Law
Attorneys, Regulation of

Peer review rules and standards governing Florida Bar's voluntary recertification and specialization program, which were, by their very terms, confined to "solicit information and assess competence in the specialty field, and professionalism and ethics in the practice of law," were not overbroad as applied to attorney who was denied certification as elder law specialist, as would violate attorney's First Amendment rights; even if Bar's inquiries during recertification process reached modicum of protected speech, they plainly would not punish substantial amount of protected free speech relative to rules' plainly legitimate sweep of not certifying attorneys who practiced law in manner below highest standards of professionalism and ethics, as those terms were commonly understood in legal profession. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[22] **Constitutional Law**
Prohibition of substantial amount of speech

Before invoking "strong medicine" of invalidation of statute or regulation on overbreadth grounds, a plaintiff must demonstrate that statute punishes

"substantial" amount of protected free speech not only in absolute sense, but also relative to scope of law's plainly legitimate applications. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] Attorney and Client
Certificate or license

Constitutional Law
Particular Issues and Applications

Peer review rules and standards governing Florida Bar's voluntary recertification and specialization program, which were, by their very terms, confined to "solicit information and assess competence in the specialty field, and professionalism and ethics in the practice of law," were not so vague as to be inscrutable to class of attorneys to whom they applied, as would violate First Amendment rights of attorney who was denied certification as elder law specialist, particularly given commonly understood meanings of such terms within legal profession, where attorneys received both law school training and continuing legal education in very fields of professionalism and ethics. U.S.C.A. Const.Amend. 1; West's F.S.A. Bar Rules 6–3.5(c)(6), 6–3.6(a), 6–20.4(c).

Cases that cite this headnote

[24] Constitutional Law
Prohibition of substantial amount of speech

In order for First Amendment vagueness challenge to prevail, alleged vagueness must pose real and substantial threat to protected expression such that substantial amount of legitimate speech will be chilled. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***1354** Douglas R. Beam, Leslie Allyn Davis, Douglas R. Beam, PA, Melbourne, FL, for Plaintiff.

Barry Scott Richard, Bridget Kellogg Smitha, Greenberg Traurig, LLP, Tallahassee, FL, for Defendants.

ORDER

WILLIAM H. STEELE, Chief Judge.

This matter comes before the Court on Defendants' Motion to Dismiss Amended Complaint (doc. 35). The Motion has been briefed and is now ripe for disposition.

I. Background.

Plaintiff, Robin Petersen, is a licensed Florida attorney who commenced this action for declaratory and injunctive relief against numerous defendants, including the Florida Bar, the Florida Bar's executive director John F. Harkness, Jr., and more than four dozen individual members of the Florida Bar Board of Governors in their official capacities. This dispute, in which Petersen alleges ongoing deprivations of his constitutional rights, relates to the Florida Bar's utilization of a peer review criterion in evaluating attorney applications for recertification in particular legal ***1355** specialties, as well as its refusal to disgorge unfavorable peer review materials to Petersen in connection with the denial of his application for recertification as an elder law specialist.

According to the well-pleaded facts in the Amended Complaint (doc. 27),[1] Petersen has been certified in Florida as an elder law specialist since 1998. That certification is beneficial to Petersen's law practice in attracting clients and obtaining referrals. Without that certification, his practice would be, in his words, "diminished." (Doc. 27, at 6.) It is not, however, mandatory for Petersen to maintain a certification as an elder law specialist in order to practice elder law in the state of Florida. To the contrary, the Rules Regulating the Florida Bar unambiguously provide that "[n]o lawyer shall be required to be certified before practicing law in any particular area" and that "[p]articipation in the [certification] plan shall be on a voluntary basis." Rule 6–3.4(b),(d). Thus, with or without certification,

Petersen remains a licensed Florida attorney who is free to engage in the unfettered practice of his specialty of elder law throughout Florida, representing any clients and appearing before any courts in the state as he may see fit with no substantive restrictions on his ability to practice law. The difference is, apparently, that the certification is useful to Petersen in marketing himself, developing clients, and attracting referrals.

By its terms, the Florida elder law certification lapses every five years, at which time the attorney must apply for recertification if he or she wishes to obtain board certification for another term.[2] In May 2008, Petersen completed and submitted his second Florida elder law recertification application (having previously been recertified once in or about 2003). On the final page of that application, just above the signature and notary blocks, was a preprinted, four-paragraph section bearing the heading "Release." One paragraph was set apart from the others, and stated in large, bold-faced, all-capitalized type the following language:

> "**I FURTHER UNDERSTAND THAT THE PEER REVIEW PROCESS IS UNABLE TO SERVE ITS PURPOSE UNLESS THE INDIVIDUALS FROM WHOM INFORMATION IS REQUESTED ARE GUARANTEED COMPLETE CONFIDENTIALITY. BY APPLYING FOR RECERTIFICATION, I EXPRESSLY AGREE TO THE CONFIDENTIALITY OF THE PEER REVIEW PROCESS AND EXPRESSLY WAIVE ANY RIGHT TO REQUEST ANY INFORMATION OBTAINED THROUGH PEER REVIEW AT ANY STAGE OF THE CERTIFICATION PROCESS.**"
>
> (Doc. 35, Exh. A, at 4.)[3]

The exhibit reflects that Petersen signed the application form, as presented ***1356** and without modifying or deleting any of its terms. (*Id.*) Petersen does not allege that his signature is not genuine, that defendants unduly pressured him to sign the document, that he did not have a full and fair opportunity to read it, or that he was in any way rushed or impaired during the application process. Similarly, the Amended Complaint is devoid of allegations that Petersen balked at this waiver provision, that he did not understand it, or that he attempted to negotiate with the Florida Bar over its inclusion in his recertification application. To be sure, the Amended Complaint includes a conclusory allegation that "[w]ithout signing the application, including this 'waiver' clause, Mr. Petersen could not apply for recertification" (doc. 27, at 6); however, this bald assertion, unsupported by any specific factual allegations, constitutes just the kind of self-serving, unwarranted deduction of fact that federal courts do not accept as true for purposes of a Rule 12(b)(6) motion. There are no allegations that Petersen inquired of the Florida Bar about the necessity of this waiver provision, that any representative of the Florida Bar ever informed him that the waiver was a mandatory condition of his recertification application, or the like. By all appearances, then, the statement in the Amended Complaint that Petersen could not apply for recertification without submitting to the waiver clause amounts to nothing more than his own unadorned surmise and conjecture, untethered to any discernable facts pertaining to defendants' actions or statements. Accordingly, this allegation need not and will not be credited for purposes of the Motion to Dismiss.[4]

The peer review requirement referenced in the waiver language was prescribed by Rule 6–20.4(c) of the Rules Regulating the Florida Bar, which provides that, to be eligible for recertification as an elder law specialist, an applicant must submit to peer review. That peer review process requires the applicant to name five other attorneys outside his or her law firm "who can attest to the applicant's special competence and substantial involvement in the field of elder law," and authorizes Florida bar officials to "make such additional inquiries as they deem appropriate to complete peer review." Rule 6–20.3(d). Those same rules explain that the purpose of peer review is "to solicit information to assess competence in the specialty field, and professionalism and ethics in the practice of law." Rule 6–3.5(c)(6). Notably, while the rules are clear that peer review is "mandatory for all applicants," *id.,* they nowhere specify that waiver of the right to obtain such materials is likewise mandatory. At any rate, from a fair reading of the rules, it is evident that the peer review process is not a mere formality; to the contrary, the rules state that "[a]n applicant otherwise qualified may be denied certification on the basis of peer review." *Id.* That is precisely what happened here.

***1357** The well-pleaded allegations of the Amended Complaint reflect that the Florida Bar's Elder Law Certification Committee recommended in June 2009 that Petersen's recertification application be denied, solely on the basis of unfavorable peer review information,

which included "poor" and "below average" ratings as to his reputation in the legal community for ethical conduct and professionalism. (Doc. 27, at 9–10.) In July 2009, the Florida Bar Board of Legal Specialization and Education affirmed the Certification Committee's recommendation and denied Petersen's application for recertification, again based exclusively on negative peer review. Petersen apparently pursued and continues to pursue administrative appeals of that determination, but has not succeeded in overturning that denial. At all stages of the process, Petersen has requested that Florida Bar authorities provide him with peer review materials used in the recertification decision, and has insisted that his unambiguous written waiver of his right to obtain such materials is invalid because he did not execute it voluntarily. In express reliance on his waiver, however, Florida Bar authorities have steadfastly refused to furnish confidential peer review materials to Petersen during his administrative appeals. As a result, Petersen does not know who made negative peer review comments about him during the recertification process, much less the specific contents of those comments.

Based on the foregoing factual allegations, Petersen brought this § 1983 action, asserting violations of a host of his constitutional rights, including procedural due process under the Fourteenth Amendment, substantive due process under the Fourteenth Amendment, freedom of speech under the First and Fourteenth Amendments, and access to the courts under the First and Fourteenth Amendments. A brief synopsis of the stated rationale for each claim will help frame the analysis of defendants' Rule 12(b)(6) motion. In his procedural due process claim (Count 1), Petersen maintains that defendants' failure to provide him with negative peer review materials, despite their reliance on those materials to deny him recertification, effectively deprives him of due process in his administrative challenge of that recertification denial. (Doc. 27, at 12–14.) Petersen's substantive due process claim (Count 2) reiterates his complaint about the confidentiality of peer review materials, but also objects that the peer review criterion utilized in the recertification process "is so vague that it is arbitrary" because concepts such as "reputation for professionalism" are subjective, mushy and standardless. (*Id.* at 14–16.) In the free speech claim (Count 3), Petersen maintains that the peer review criterion is unconstitutionally vague and overbroad, such that virtually any communicative speech or conduct could become the subject of negative, secret peer review. (*Id.* at 17–19.) It appears from the Amended Complaint that Petersen is contending that his free speech rights are violated by the very existence of a peer review element to the recertification process, as well as by the confidentiality of the peer review materials collected in this case. Finally, in his claim for denial of the right of court access (Count 4), Petersen maintains that he has potentially viable claims against those persons who provided negative peer review statements about him. According to Petersen, he may wish to sue those individuals for saying unflattering things about him to Bar officials; however, defendants' refusal to divulge details about the identities of peer reviewers and the substance of their comments has effectively stymied his efforts to do so because Petersen cannot discern whom to hale into court or what specific negative comments were made about him.

***1358** Defendants have now moved to dismiss the Amended Complaint in its entirety for failure to state a claim upon which relief can be granted.

II. Analysis.

As noted, several of Petersen's constitutional claims relate to defendants' refusal to furnish negative peer review materials to him on grounds of confidentiality. Indeed, as pleaded in the Amended Complaint, Petersen's procedural due process claim (Count 1) turns entirely on the secrecy of the peer review materials utilized by the Florida Bar to deny his recertification application. Likewise, Petersen's access to courts claim (Count 4) rests exclusively on defendants' refusal to turn over peer review materials to him, thereby blocking his efforts to identify and initiate court proceedings against those who made unfavorable statements about him to the Florida Bar. Although his substantive due process (Count 2) and free speech (Count 3) claims challenge the validity of the peer review criterion generally (*i.e.,* that the Florida Bar should not condition recertification decisions on a purportedly vague, standardless and overbroad peer review assessment), Petersen's Amended Complaint also discusses defendants' failure to turn over peer review information in the context of those claims, such that the nondisclosure of those materials is a component of Counts 2 and 3, as well.

A. Validity and Effect of Waiver.

Insofar as Petersen seeks to transform the Florida Bar's withholding of confidential peer review materials from him into constitutional violations, defendants argue that

his claims should be dismissed on principles of waiver. The recertification application that Petersen signed included a prominent, unambiguous waiver of his right to obtain that information. In particular, Petersen "expressly agree[d] to the confidentiality of the peer review process and expressly waive[d] any right to request any information obtained through peer review at any stage of the certification process." (Doc. 35, Exh. A, at 4.) Defendants maintain that Petersen's waiver is binding and effective to bar all of his claims predicated on the withholding of peer review information. Petersen retorts that this waiver is unenforceable and ineffectual because he entered into it involuntarily.

[1] **[2]** **[3]** **[4]** Under Florida law, as elsewhere, a waiver is defined as "the voluntary and intentional relinquishment of a known right." *Raymond James Financial Services, Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla.2005). With respect to waivers of constitutional rights,[5] Florida courts perform two inquiries. "First, the court must determine if the waiver was voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception.... Second, the court must determine whether the waiver was executed with a full awareness of the nature of the rights being abandoned and the consequences of their abandonment." *Sliney v. State,* 699 So.2d 662, 668 (Fla.1997) (citations omitted); *see also Hunter v. Moore,* 304 F.3d 1066, 1071 (11th Cir.2002) ("Waiver of a constitutional right will only be found if the record discloses its intentional relinquishment or abandonment.") (citation and internal quotation ***1359** marks omitted). The validity of a waiver must be ascertained by consideration of the totality of the circumstances. *See Jean–Louis v. Forfeiture of $203,595.00 in U.S. Currency,* 767 So.2d 595, 598 (Fla. 4th DCA 2000).

[5] **[6]** The critical question presented is whether Petersen's waiver was voluntary.[6] He insists that it was not. In the Amended Complaint, Petersen alleges as follows: "As Plaintiff was required to sign a 'waiver' of any right to request peer review information as a condition of his recertification application, Plaintiff did not voluntarily waive or relinquish his constitutionally protected rights." (Doc. 27, at 12.) There are two glaring weaknesses with this contention. First, as already discussed *supra,* the Amended Complaint alleges no specific facts demonstrating that signing the waiver was a mandatory precondition to Petersen's application; rather, the pleading simply alleges that the waiver was "required" as a conclusory, unwarranted deduction of fact. That allegation is too flimsy and devoid of substance to prevent dismissal under Rule 12(b)(6). Even taking the well-pleaded factual allegations of the Amended Complaint in the light most favorable to Petersen, we have no inkling what the Florida Bar would have said if Petersen had asked that the waiver provision be deleted or reworded. More to the point, there is no suggestion that he ever made such a request. Further, there are no factual allegations in the Amended Complaint that defendants informed Petersen that his application would be summarily rejected in the absence of a waiver, that Petersen unsuccessfully attempted to negotiate a modification to the waiver language, or even that Petersen was opposed to, unhappy with, or mildly troubled by the waiver language at the time he signed the application. Simply put, the specific allegations in the pleading provide no factual basis for the conclusory statement that execution of the waiver was "required" at all costs.

[7] **[8]** Second, and more fundamentally, even if the Amended Complaint did set forth factual allegations that the waiver language was presented to Petersen as a mandatory requirement for certification, his voluntariness argument would nonetheless fail. The law is quite clear that contract terms are not automatically stripped of validity when the drafter proffers them on a take-it-or-leave-it basis. To the contrary, Florida courts have routinely upheld and enforced waivers contained in such agreements in analogous circumstances. *See, e.g., VoiceStream Wireless Corp. v. U.S. Communications, Inc.,* 912 So.2d 34, 40 (Fla. 4th DCA 2005) (fact that wireless provider drafted contract containing waiver of jury trial right, with no ability for dealer to negotiate terms, did not render ***1360** waiver procedurally unconscionable where dealer could have decided to go elsewhere for products to support its commercial endeavors); *Ware Else, Inc. v. Ofstein,* 856 So.2d 1079, 1082 (Fla. 5th DCA 2003) ("In reality, however, the vast majority of employment agreements are 'take-it-or-leave-it' propositions. The fact is, if Ms. Ofstein did not like the terms of the agreement, she could indeed have left it."); *Allyn v. Western United Life Assur. Co.,* 347 F.Supp.2d 1246, 1254 n. 38 (M.D.Fla.2004) (observing that "waiver clauses have been held valid even in contracts containing 'take it or leave it' terms"); *Winiarski v. Brown & Brown, Inc.,* 2008 WL 1930484, *2–3 (M.D.Fla. May 1, 2008) ("The mere fact that an employee signs an employment

agreement containing a jury trial waiver in a 'take it or leave it' situation does not make the waiver unenforceable or unconscionable," especially where "the moving party had an alternative to signing the agreement such as to remain in a current position rather than resign"); *La Torre v. BFS Retail and Commercial Operations, LLC,* 2008 WL 5156301, *4 (S.D.Fla. Dec. 8, 2008) (rejecting argument that waiver of jury right was involuntary even though employer insinuated that employee must sign it as condition of further employment); *Wisthle Inv. Group, LLC v. CR Hancock Bridge, LLC,* 2008 WL 2686963, *3 (M.D.Fla. June 30, 2008) ("Plaintiff's consent to the waiver would not automatically be considered involuntary simply because it was part of a standardized contract."); *Milsap v. Cornerstone Residential Management, Inc.,* 2007 WL 965590, *2 (S.D.Fla. Mar. 28, 2007) ("Toolen's consent was not involuntary simply because the provision was part of a standard form contract or contained boilerplate language."); *see generally Seaboard Lumber Co. v. United States,* 903 F.2d 1560, 1564 (Fed.Cir.1990) ("bare fact that the contracts in question are 'take it or leave it' offers by the government is not controlling on the dispute resolution provision's validity"). The sum total of Petersen's waiver argument appears to be that defendants required him to sign a standardized form containing a waiver during the application process. As the foregoing cases demonstrate, however, such a fact, without more, neither equates to involuntariness nor otherwise negates the waiver. [7]

[9] **[10]** **[11]** As noted, Florida courts deem a waiver of a constitutional right voluntary if the totality of the circumstances shows that "it was the product of free and deliberate choice rather than intimidation, coercion, or deception." *Sliney,* 699 So.2d at 668 (Fla.1997); *see also Gainesville Health Care Center, Inc. v. Weston,* 857 So.2d 278, 287 (Fla. 1st DCA 2003) (in context of procedural unconscionability argument, looking to circumstances surrounding transaction to determine whether complaining party had a "meaningful choice" when contract was executed). [8] Even accepting ***1361** the factual allegations of the Amended Complaint at face value, there is no basis for concluding that Petersen lacked a meaningful choice as to the waiver. There is no indication whatsoever that defendants engaged in tactics of intimidation, duress, coercion, or deception. At best, Petersen's theory is that he had to agree to the waiver if he wanted to apply for recertification. But the application for recertification was itself a free and voluntary choice on Petersen's part. Certainly, certification is not required in order to practice law, or even Petersen's chosen specialty of elder law, in the State of Florida. The Rules Regulating the Florida Bar make clear that "[p]articipation in the [certification] plan shall be on a voluntary basis." Rule 6–3.4(b),(d). No alleged facts suggest otherwise. Even if the waiver of his right to see peer review materials was unpalatable to Petersen at the time of his application (which he has not alleged in his pleading), and even if his recertification application would have been summarily rejected without a waiver (which he has not alleged any specific facts to demonstrate), Petersen still had a choice: (A) sign the recertification application and forego his right to access the peer review materials, or (B) refrain from applying for recertification, and continue to earn a living practicing law without a certification just as thousands of other lawyers in the State of Florida do successfully every single day. Just because Petersen may not have been thrilled with these options does not imply that he lacked meaningful choice. [9] Ultimately, Petersen elected the first option, rather than the second, without any hint of interference or undue influence from anybody. Therefore, his waiver of his right to obtain peer review information was the product of free and deliberate choice, rather than intimidation, coercion or deception.

For all of the foregoing reasons, the Court rejects as a matter of law Petersen's argument that his waiver of right of access to peer review materials was invalid. The well-pleaded factual allegations of the Amended Complaint do not support a reasonable inference that Petersen was forced to sign the waiver against his will on a take-it-or-leave-it basis as a condition of his recertification application. Even if Petersen had pleaded such allegations (which he has not), the mere fact that signing the waiver was a condition of recertification, without more, does not automatically render the waiver involuntary, as a matter of well-established Florida law. [10] ***1362** Petersen alleges no intimidation, coercion or deception by defendants, and he clearly had a meaningful choice, to-wit: He could have elected to practice law without a recertification, just as untold numbers of his Florida attorney colleagues do. Petersen does not get to retract his deliberate, conscious choice to move forward with the recertification process, knowing that he was waiving his right to learn what his peers might have to say (whether good or ill) about him, merely because, in hindsight, he wishes he had made a different choice.

[12] Accordingly, the Court finds that the Motion to Dismiss is due to be **granted** insofar as it rests on the defense of waiver. Because Petersen waived his right to obtain adverse peer review materials, the entirety of his procedural due process claim (Count 1) and his right of access to courts claim (Count 4), as well as the portions of his substantive due process (Count 2) and free speech (Count 3) claims that relate to the confidentiality or nondisclosure of peer review materials, are **dismissed with prejudice** pursuant to Rule 12(b)(6), Fed.R.Civ.P., for failure to state a claim upon which relief can be granted. [11]

1363** ***B. Constitutional Claims Concerning Rules' Peer Review Criterion.

The findings that Petersen's challenge to the validity of his waiver is meritless, and that his knowing and voluntary waiver precludes his constitutional claims pertaining to defendants' refusal to share adverse peer review materials with him, are not dispositive of the Amended Complaint in its entirety. Rather, a pair of outstanding issues remain. Petersen has brought two claims that do not hinge on defendants' refusal to disclose peer review information to him. In particular, his substantive due process cause of action (Count 2) asserts that "[t]he peer review 'criterion,' needed for re-certification, in its current form, is so vague that it is arbitrary" and that defendants "have violated ... Plaintiff's constitutionally protected substantive due process rights by applying a vague and standardless criterion to Plaintiff in his re-certification matter." (Doc. 27, ¶¶ 42, 46.) Similarly, in his First Amendment free speech claim, Petersen alleges that the peer review criterion "is so vague that it is impossible to determine what communicative speech or conduct will subject an applicant to negative peer review and to a denial of recertification," and that said criterion "is overbroad and is unconstitutional in every conceivable application." (*Id.*, ¶¶ 50, 51.) These constitutional challenges to the peer review component of the recertification process are entirely divorced from the secrecy or confidentiality of those materials; therefore, such challenges are not negated by Petersen's waiver of his right to obtain peer review materials.

1. Substantive Due Process Claim.

[13] **[14]** As a general proposition, the concept of substantive due process "is designed to protect those rights that are fundamental—rights that are implicit in the concept of ordered liberty." *Dacosta v. Nwachukwa,* 304 F.3d 1045, 1048 (11th Cir.2002) (citation and internal quotation marks omitted); *see also Coventry First, LLC v. McCarty,* 605 F.3d 865 (11th Cir.2010) (affirming denial of plaintiff's motion to amend complaint to add substantive due process claim because right in question is "not a fundamental right"); *Busse v. Lee County, Fla.,* 317 Fed.Appx. 968, 973 (11th Cir.2009) ("Substantive due process protects only those rights that are 'fundamental,' a description that applies only to those rights created by the United States Constitution."). The scope of substantive due process is quite narrow, and federal appellate courts have "cautioned against the open-ended judicial expansion of other unenumerated rights" in substantive due process jurisprudence. *Dacosta,* 304 F.3d at 1048. [12]

[15] **[16]** Petersen would apparently contend in the first instance that his alleged property and liberty interests in recertification are "fundamental" for substantive due process purposes. Such an argument is mistaken. [13] Any property ***1364** right Petersen may have in recertification would be created by Florida law, not by the Constitution. The Eleventh Circuit has taken a decidedly dim view of attempts to expand substantive due process protections to embrace state-created property rights, reasoning that such property rights are not fundamental because they were not created by the Constitution. *See, e.g., Lewis v. Brown,* 409 F.3d 1271, 1273 (11th Cir.2005) ("areas in which substantive rights are created only by state law are not subject to substantive due process protection") (citation omitted); *Greenbriar Village, L.L.C. v. Mountain Brook, City,* 345 F.3d 1258, 1262 (11th Cir.2003) ("to the extent that Greenbriar predicates its substantive due process claim directly on the denial of its state-granted and - defined property right in the permit, no substantive due process claim is viable"); *Busse,* 317 Fed.Appx. at 973 (affirming dismissal of plaintiff's substantive due process claims because plaintiff "could not bring a viable substantive due process claim based on the alleged denial of a state-defined property right"). Furthermore, for a liberty interest to be "fundamental" for substantive due process purposes, it "must be objectively, deeply rooted in this Nation's history and tradition." *Tinker v. Beasley,* 429 F.3d 1324, 1327 (11th Cir.2005) (citations and internal quotation marks omitted). There is nothing objectively, deeply rooted in the history and tradition of the United States about a licensed attorney's interest in receiving a

specialized certification that may enhance his income-earning capacity as a lawyer. *See generally Kirkpatrick v. Shaw,* 70 F.3d 100, 103 (11th Cir.1995) ("[t]he right to practice law is not a fundamental right"). It is thus quite clear that Petersen's substantive due process cause of action does not invoke a fundamental right.

[17] **[18]** As a fallback position, Petersen maintains that, even in the absence of infringement of a fundamental right, he can prevail on a substantive due process theory as long as he shows that he was subjected to arbitrary government action. As grounds for this theory, Petersen cites without comment or elaboration a single 16–year old decision from the Ninth Circuit. However, the above-cited Eleventh Circuit authorities do not appear to support that proposition, and there is additional, abundant authority containing language suggesting that violation of a fundamental right is necessary to establish a substantive due process claim. [14] That principle in itself would negate ***1365** Petersen's substantive due process cause of action. Moreover, assuming that substantive due process claims can be brought in the absence of a fundamental right, the law is quite clear that, under any circumstances, it is an absolute prerequisite for a substantive due process claim that the plaintiff show deprivation of a protectable interest in life, liberty or property. [15] For reasons already stated in footnote 13, *supra,* the undersigned is of the opinion that Petersen has failed to allege any liberty or property interest in recertification as an elder law specialist that might be subject to protection under the substantive due process doctrine. [16]

1366** ***2. Free Speech Claim.

The only remaining cause of action is Petersen's claim that the Florida Bar's rules governing use of peer review information in the recertification process "are vague and overbroad and violate Plaintiff's free speech rights guaranteed under the First Amendment to the United States Constitution." (Doc. 27, at 17.) According to Petersen, the peer review rules unconstitutionally burden his free speech rights because they are so fuzzy and far-reaching that "it is impossible to determine what communicative speech or conduct will subject an applicant to negative peer review" and that "virtually any communicative speech or conduct" can result in "loss of specialty certification." (*Id.*) Petersen takes this argument a step further in his briefing, where he insists that "[t]he peer review criterion specifically targets an applicant's protected speech in the guise of 'character, ethics and reputation for professionalism,' " and that it has a "chilling effect on constitutionally protected expression" by placing an attorney's political and religious views and other protected speech firmly within the crosshairs of matters that may be used to disqualify him or her under the pretense of examining the attorney's "reputation for professionalism." (Doc. 38, at 16.)

[19] **[20]** As an initial matter, it must be emphasized that the peer review rules and standards governing the Florida Bar's voluntary recertification and specialization program do not purport to punish, regulate, restrain or chill any protected speech. At most, they simply provide that a lawyer who chooses to apply for recertification must submit to peer review, which is conducted for the stated purpose of "assess[ing] competence in the specialty field, and professionalism and ethics in the practice of law." Rule 6–3.5(c)(6). Thus, these rules are directed not at speech, *per se,* but at conduct by an officer of the court bearing on his or her expertise as an elder lawyer, and his or her professionalism and ethics in the practice of law. Plainly, these rules have no more than a remote and conjectural impact on speech protected by the First Amendment. Petersen's argument to the contrary is so speculative and attenuated that it strains credulity. [17]

This lack of a substantial nexus to protected speech is itself fatal to Petersen's free speech cause of action. *See generally City of Chicago v. Morales,* 527 U.S. 41, 52–53, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (gang loitering ordinance that does not prohibit speech "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional"). Indeed, courts have routinely rejected arguments such as Petersen's in the context of analogous state bar requirements concerning "moral character," "general fitness for admission," and the like that may have some remote or incidental effect on attorney or bar applicant speech. *See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154, 159, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971) (finding no First Amendment infirmity in requirements of character and general fitness for admission to state bar, despite appellants' argument that very existence of these standards works a chilling effect on applicants' speech); *Kirkpatrick,* 70 F.3d at 104 (rejecting plaintiff's claim that Florida bar ***1367** rules

chill speech of qualified applicants pending favorable outcome of character investigation, and expressly finding no First Amendment violations in challenged rules). [18]

[21] **[22]** The foregoing principles are dispositive of plaintiff's strained First Amendment challenge to the peer review criterion. Nonetheless, it bears noting that Petersen's specific overbreadth and vagueness challenges are devoid of merit for additional reasons, too. Fundamentally, plaintiff overlooks the fact that the peer review provisions to which he objects are, by their very terms, confined "to solicit information to assess competence ***in the specialty field,*** and professionalism and ethics ***in the practice of law.***" Rule 6–3.5(c)(6) (emphasis added). The persons called upon to provide peer review are individuals "who can attest to the applicant's special competence and substantial involvement ***in the field of elder law.***" Rule 6–20.3(d) (emphasis added). Before invoking the "strong medicine" of invalidation of a statute or regulation on overbreadth grounds, a plaintiff "must demonstrate that the statute punishes a 'substantial' amount of protected free speech ... not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Frazier ex rel. Frazier v. Winn,* 535 F.3d 1279, 1284 (11th Cir.2008) (citations and internal quotation marks omitted). Even if Petersen were correct that the Florida Bar's inquiries into his "professionalism and ethics in the practice of law" during the recertification process might reach a modicum of protected speech, they plainly would not punish a substantial amount of protected free speech relative to the rules' plainly legitimate sweep of not certifying attorneys who practice law in a manner below the highest standards of professionalism ***1368** and ethics, as those terms are commonly understood in the legal profession. Accordingly, the overbreadth objection fails on its face.

[23] **[24]** As for vagueness, the Court finds that the terms "professionalism and ethics in the practice of law" are not so vague as to be inscrutable to the class of attorneys to whom they apply, particularly given the commonly understood meanings of such terms within the legal profession, where attorneys receive both law school training and continuing legal education in the very fields of professionalism and ethics. *See, e.g., Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1310 (11th Cir.2009) (statute is unconstitutionally vague if it "either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning") (citation omitted); *Howell v. State Bar of Texas,* 843 F.2d 205, 208 (5th Cir.1988) (denying vagueness challenge to attorney disciplinary rule because "[t]he regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the lore of the profession") (citation and internal quotation marks omitted). [19] Besides, in order for a First Amendment vagueness challenge to prevail, "the alleged vagueness must pose a real and substantial threat to protected expression such that a substantial amount of legitimate speech will be chilled." *McEntee v. Merit Systems Protection Bd.,* 404 F.3d 1320, 1333 (Fed.Cir.2005). It is frankly inconceivable that the Florida Bar's rules providing for inquiry into a board certification applicant's "professionalism and ethics in the practice of law" will chill a substantial amount of legitimate speech; therefore, the objected-to rules and regulations are not void for vagueness.

In short, the elder law certification rules challenged by Petersen do not have a sufficiently substantial impact on conduct protected by the First Amendment to render them unconstitutional, they are not overbroad because they do not punish a substantial amount of protected free speech relative to their legitimate sweep, and they are not so vague that attorneys of common intelligence could not understand their meaning or that a substantial amount of free speech would be chilled. For all of these reasons, defendants' motion to dismiss is **granted** as to Petersen's First Amendment challenges to the peer review rules.

III. Conclusion.

In light of the foregoing, the Court concludes that Defendants' Motion to Dismiss Amended Complaint (doc. 35) is due to be, and the same hereby is, **granted.** This ***1369** action is **dismissed with prejudice** pursuant to Rule 12(b)(6), Fed.R.Civ.P. All other pending motions are **moot.** A separate judgment will enter.

All Citations

720 F.Supp.2d 1351

Footnotes

1 Because this matter comes before it on a Rule 12(b)(6) motion, this Court will "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff [ ]," subject to the caveat that it is not "required to accept the labels and legal conclusions in the complaint as true." *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1291 (11th Cir.2010); *see also Oxford Asset Management, Ltd. v. Jaharis,* 297 F.3d 1182, 1188 (11th Cir.2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal" under Rule 12(b)(6)). To survive a motion to dismiss for failure to state a claim, "the factual allegations in the complaint must possess enough heft to set forth a plausible entitlement to relief." *Edwards,* 602 F.3d at 1291 (citations and internal quotation marks omitted).

2 Rule 6–3.6(a) of the Rules Regulating the Florida Bar expressly provides that no certificate of legal specialization shall last for a period longer than five years.

3 The quoted language was not recited in the Amended Complaint; however, the text of the application form is properly considered at this time because it is referenced in and central to the Amended Complaint, and its contents are not in dispute. *See, e.g., Harris v. Ivax Corp.,* 182 F.3d 799, 802 n. 2 (11th Cir.1999) (on a Rule 12(b)(6) motion, "a document central to the complaint that the defense appends to its motion to dismiss is also properly considered, provided that its contents are not in dispute"); *Brooks v. Blue Cross and Blue Shield of Florida, Inc.,* 116 F.3d 1364, 1369 (11th Cir.1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal").

4 *See, e.g., Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (complaint that "tenders naked assertions devoid of further factual enhancement" cannot survive motion to dismiss) (citation and internal quotation marks omitted).

5 There is no doubt that parties may "waive fundamental constitutional rights that protect their liberty as well as their property." *Hartwell v. Blasingame,* 564 So.2d 543, 545 (Fla. 2nd DCA 1990); *see also Chames v. DeMayo,* 972 So.2d 850, 861 (Fla.2007) (recognizing "trend toward allowing waivers of constitutional rights"); *Infinity Design Builders, Inc. v. Hutchinson,* 964 So.2d 752, 755 (Fla. 5th DCA 2007) ("As with any other constitutional right, the right of access to the courts may be relinquished."). Petersen does not suggest otherwise.

6 The other prong of the waiver analysis is not at issue here. Petersen has not contended and—given his legal training and the prominent, straightforward nature of the waiver language—could not plausibly contend that the waiver is invalid on grounds that he did not understand the nature of the rights he was waiving and the consequences to him of such relinquishment. Furthermore, it would be no defense to the waiver argument for Petersen to argue that he never read the release/waiver provision before signing it. A party is not "permitted to avoid the consequences of a contract freely entered into simply because he or she elected not to read and understand its terms before executing it, or because, in retrospect, the bargain turns out to be disadvantageous." *Gainesville Health Care Center, Inc. v. Weston,* 857 So.2d 278, 288 (Fla. 1st DCA 2003). "To sanction such a result would be to render contracts worthless as a tool of commerce." *Id.* Because the sole issue presented as to the validity of Petersen's waiver is whether he signed it voluntarily, the Court need not separately address whether Petersen failed to read or understand the waiver, or to comprehend the eminently foreseeable consequences of his acquiescence to same.

7 In this regard, it bears noting that even if Petersen did not individually negotiate the terms of the recertification application, this document was prepared internally by the Florida Bar, a self-regulating association of attorneys of which Petersen is a member. In a sense, Petersen was the beneficiary of the collective bargaining power of his fellow Florida attorneys in the drafting of this document even if he himself did not negotiate its terms. *See generally Amon v. Norwegian Cruise Lines, Ltd.,* 2002 WL 32851545, *2 (S.D.Fla. Sept. 26, 2002) (finding waiver in employment contract enforceable even though plaintiff—a Philippine seaman—possessed no bargaining power, because organization representing Philippine seamen had negotiated that agreement). On that basis, any suggestion by Petersen that he lacked bargaining power as to the recertification application form would be incorrect when that form was prepared and negotiated by an association of Florida attorneys of which he is a member, for the benefit of such members.

8 In assessing whether a contract signee had a "meaningful choice," Florida courts consider such factors as "whether the complaining party had a realistic opportunity to bargain ... and whether he or she had a reasonable opportunity to understand the terms of the contract." *Tropical Ford, Inc. v. Major,* 882 So.2d 476, 479 (Fla. 5th DCA 2004).

9 This rationale also applies to criminal cases, where courts have rejected defendants' after-the-fact efforts to characterize their guilty pleas as involuntary because they were faced with suboptimal alternatives. *See, e.g., Stinson v. State,* 839

So.2d 906, 909 (Fla. 5th DCA 2003) ("the fact that a defendant is presented with unpleasant alternatives does not render a guilty plea involuntary").

10 Were Petersen's position to be an accurate reflection of the law, a wide variety of waivers into which persons routinely enter in commercial, employment, criminal justice and other settings would be worthless. For example, a prospective employee's waiver of his or her right to a jury trial, or the right to read employment references, in a preprinted form employment agreement would be subject to invalidation on the theory that the person had to sign the form waiver to get the job he or she wanted, so the waiver must have been involuntary. Likewise, a criminal defendant's waiver of certain appeal rights in a prosecutor's form plea agreement could be undone on the theory that he or she did not really want to waive those rights, but had to do so in order to receive the benefits of pleading guilty. Case after case has held that the mere existence of these kinds of tradeoffs does not render a waiver involuntary. Waivers are commonly executed in circumstances where the waiving party wants to obtain a certain benefit, but must agree to forego some right as a *quid pro quo* for that benefit. This kind of bargain is not inherently involuntary, coerced, improper or invalid; to the contrary, such arrangements are routinely upheld by the courts. Petersen's strained application of the involuntariness doctrine to his circumstances would sweep countless voluntary waivers within its ambit, allowing a party who later regretted the bargain he or she had struck to negate a waiver by saying that he or she agreed to it only because the waiver was necessary to get what he or she wanted at the time. This is precisely what Petersen has attempted to do here.

11 The foregoing analysis is, by its nature, addressed to Petersen's "as-applied" constitutional challenges. In other words, the Court has not made findings as to whether the Florida Bar's nondisclosure of peer review materials to applicants who sign waivers and are denied recertification does or does not pass muster as a general proposition. Instead, the Court has explained why Petersen's voluntary waiver of his right to request such materials bars his constitutional challenges, such that the Florida Bar's practices are not unlawful as applied to Petersen. That said, although the parties' briefs on the Rule 12(b)(6) motion omit any reference to it, the undersigned recognizes that Petersen's Amended Complaint characterizes certain of his claims as both "facial" and "as-applied." For example, in Count 1, Petersen requests that this Court "issue an order declaring that the provisions of The Rules Regulating The Florida Bar and the BLSE policies pertaining to the confidentiality of peer review materials in re-certification matters ***either facially violate the Due Process Clause or are unconstitutional as applied to Plaintiff.***" (Doc. 27, at 13 (emphasis added).) Similarly, in Count 3, Petersen requests an order declaring that these same rules "either facially violate the First and Fourteenth Amendments or are unconstitutional as applied to Plaintiff." (*Id.* at 19.) However, any attempt by Petersen to mount a facial challenge to defendants' practice of maintaining confidential peer review materials when applicants waive their right of access to same must fail. The law is clear that "when a plaintiff mounts a facial challenge to a statute or regulation, the plaintiff bears the burden of proving that the law could never be applied in a constitutional manner." *DA Mortg., Inc. v. City of Miami Beach,* 486 F.3d 1254, 1262 (11th Cir.2007). But the Court has already concluded that defendants' confidentiality practices concerning peer review materials have been applied constitutionally to Petersen (who signed a voluntary waiver and was thereafter deprived of access to peer review documents); therefore, any facial challenge to those practices would necessarily fail because the challenged practices can be, and have been, applied in a constitutional manner in this very case. *See generally CAMP Legal Defense Fund, Inc. v. City of Atlanta,* 451 F.3d 1257, 1271 (11th Cir.2006) (even where a plaintiff brings an facial challenge to a statute or ordinance, "the plaintiff still must allege a distinct and palpable injury to himself") (citations and internal quotation marks omitted). "[I]f the statute is constitutional as applied to the individual asserting the challenge, the statute is facially valid." *United States v. Dang,* 488 F.3d 1135, 1141 (9th Cir.2007).

12 *See also Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ("the Court has always been reluctant to expand the concept of substantive due process"); *Belcher v. Norton,* 497 F.3d 742, 753 (7th Cir.2007) ("The Supreme Court of the United States has made clear ... that the scope of substantive due process is very limited.").

13 As a threshold matter, no such property or liberty interests are present in this case. *See generally Zisser v. Florida Bar,* Case No. 3:09–cv–503–J–34JRK, —— F.Supp.2d ——, ——, 2010 WL 4282103, at *22 (M.D.Fla. Mar. 29, 2010) *(slip op.),* at 39 ("applicants for board certification or recertification have neither a protected property interest nor a protected liberty interest in obtaining such certification"). After all, nothing was taken away from Petersen; rather, his prior certification lapsed by its own terms. Because he was not entitled to automatic recertification under state law or contract, there is a compelling argument that Petersen lacked a protectable property interest in obtaining recertification. *See, e.g., Todorov v. DCH Healthcare Authority,* 921 F.2d 1438, 1462–64 (11th Cir.1991) (physician who was denied additional staff privileges lacked property interest in those privileges, where he had no entitlement to them under state law or contract, his ability to engage in private practice was not seriously impaired, and mere fact that additional staff privileges had expected economic value to him does not create a property interest); *Gilder–Lucas v. Elmore County*

Bd. of Educ., 186 Fed.Appx. 885, 887 (11th Cir.2006) (nontenured teacher had no property interest in her job because she was not entitled to re-employment or renewal of contract). Moreover, the circumstances presented here appear vastly different than those in which federal courts have recognized a viable liberty interest. *See, e.g., Martin v. Memorial Hosp. at Gulfport,* 130 F.3d 1143, 1148–49 (5th Cir.1997) (to constitute deprivation of liberty interest, employment-related state action must effectively foreclose plaintiff from practicing in the area through stigma, denial of license, or denial of credentials necessary for pursuing occupation); *Todorov,* 921 F.2d at 1462–64 (physician who was denied additional staff privileges lacked liberty interest in them, where his ability to engage in private practice was not seriously impaired, and his retention of employment and lack of evidence of stigma negate claim that he was denied a liberty interest). Petersen has not alleged that, without certification, he is grievously stigmatized in the legal community and/or unable to retain his employment.

14 *See, e.g., Coventry First,* 605 F.3d at 865 (affirming denial of plaintiff's motion to amend complaint to add substantive due process claim because the right in question is "not a fundamental right"); *Behrens v. Regier,* 422 F.3d 1255, 1264 (11th Cir.2005) (district court did not err in dismissing plaintiff's substantive due process claim where plaintiff "has failed to allege the deprivation of any fundamental right"); *Wright v. Lovin,* 32 F.3d 538, 540 (11th Cir.1994) ("The substantive component of the Due Process Clause protects only those rights that are fundamental."); *Akins v. Epperly,* 588 F.3d 1178, 1183 (8th Cir.2009) ("To establish a substantive due process violation, Akins must demonstrate that a fundamental right was violated...."); *Idris v. City of Chicago, Ill.,* 552 F.3d 564, 566 (7th Cir.2009) (rejecting notion that "if a law is arbitrary or capricious, then the absence of a fundamental right does not matter," and construing Supreme Court authority as adamantly holding that "only state action that impinges on fundamental rights is subject to evaluation under substantive due process"); *Gikas v. Washington School Dist.,* 328 F.3d 731, 733 (3rd Cir.2003) ("a property interest must be fundamental under the United States Constitution to be subject to substantive due process protection"). In that regard, it bears noting that the Eleventh Circuit has resisted arguments that the arbitrary or irrational deprivation of state-created rights gives rise to a substantive due process claim, which is effectively a procedural due process claim in disguise. As one panel explained, "[c]laiming that the interest was deprived arbitrarily or irrationally is equivalent to claiming that no fair, unbiased, and meaningful procedures were used for the deprivation. That type of inquiry falls squarely within what we have defined (and clarified explicitly in *McKinney* [*v. Pate*, 20 F.3d 1550 (11th Cir.1994)]) as a procedural due process claim." *Greenbriar,* 345 F.3d at 1263 n. 4. The Court is aware that the Eleventh Circuit has distinguished between "legislative" and "non-legislative" acts in the substantive due process analysis; however, Petersen has neither invoked these authorities nor made any effort to apply them by advancing any arguments as to the legislative or non-legislative character of the government action at issue here. The Court will not develop these arguments for him.

15 *See Clark v. Boscher,* 514 F.3d 107, 112 (1st Cir.2008) ("In order to assert a valid substantive due process claim, Appellants have to prove that they suffered the deprivation of an established life, liberty, or property interest, *and* that such deprivation occurred through governmental action that shocks the conscience."); *Teigen v. Renfrow,* 511 F.3d 1072, 1078 (10th Cir.2007) (to prevail on a substantive due process claim, "a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest" or liberty interest) (citations omitted); *Brittain v. Hansen,* 451 F.3d 982, 991 (9th Cir.2006) ("As a threshold matter, to establish a substantive due process claim a plaintiff must show a government deprivation of life, liberty, or property.") (citation omitted); *County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 165 (3rd Cir.2006) ("To prevail on a substantive due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of a protected property interest.") (citation omitted).

16 In any event, to the extent that a substantive due process challenge can be asserted as to the Florida Bar's peer review regulations even without a fundamental right or a protectable constitutional interest at all, the Court readily finds that those regulations are not arbitrary and capricious and that they pass muster under the highly deferential "rational basis" test. *See, e.g., United States v. Plummer,* 221 F.3d 1298, 1308–09 (11th Cir.2000) ("Under our substantive due process jurisprudence, a statute or regulation will be upheld so long as it is rationally related to a lawful government purpose and is not unlawfully arbitrary or discriminatory."). There is obviously a rational basis for the Florida Bar's desire to collect and consider wide-ranging peer review information on certification applicants pertaining to their competence in the specialty field and their professionalism and ethics in the practice of law, and a rational basis for the Bar to believe that the challenged regulations would further this purpose.

17 Petersen's position also disregards the well-established principle that "[a] lawyer's right to free speech is tempered by his or her obligation to both the courts and the bar." *In re Comfort,* 284 Kan. 183, 159 P.3d 1011, 1027 (2007).

18 *See also Howell v. State Bar of Texas,* 843 F.2d 205, 208 (5th Cir.1988) (district court did not err in rejecting First Amendment vagueness and overbreadth challenges to state bar regulation forbidding attorneys from engaging in conduct prejudicial to administration of justice, given application of regulation to attorneys in their function as officers of the court

and fact that attorneys have guidance provided by case law, court rules and "lore of the profession" in discerning rule's meaning); *Canatella v. Stovitz,* 213 Fed.Appx. 515, 517–18 (9th Cir.2006) (denying First Amendment vagueness and overbreadth challenges to attorney disciplinary rules, where plaintiff failed to prove that provisions in question punish substantial amount of protected speech, or that the provisions he attacked involve anything other than terms of common understanding); *Roe v. State Bar of Michigan,* 74 Fed.Appx. 490 (6th Cir.2003) (law students' First Amendment challenge to state bar requirement that they prove "good moral character" as a condition of admission to practice was denied because nothing in the requirement speaks to individuals' rights to free speech and expression, there is no authority for proposition that practicing law is itself a protected First Amendment activity, and plaintiffs failed to demonstrate realistic danger that statute will be applied to compromise their First Amendment rights); *Comfort,* 159 P.3d at 1011 (denying vagueness and overbreadth challenges to attorney disciplinary provisions that used words with commonly understood meanings and that regulated conduct, not speech); *In re Converse,* 258 Neb. 159, 602 N.W.2d 500, 506 (1999) (opining that law is "clear that a bar commission is allowed to consider speech and conduct in making determinations of an applicant's character, and that is precisely what has occurred in the instant case"); *Attorney Grievance Com'n v. Alison,* 317 Md. 523, 565 A.2d 660, 667 (1989) (state bar rule prohibiting attorneys from conduct prejudicial to administration of justice held to be neither vague nor overbroad); *In re Charges of Unprofessional Conduct Against N.P.,* 361 N.W.2d 386, 395 (Minn.1985) (rejecting vagueness challenge to rules of professional responsibility for lawyers because "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney ... ought to be removed," such that "necessarily broad standards of professional conduct" are constitutionally permissible) (citations omitted).

19 Petersen speculates that the professionalism inquiry in the recertification process is so vague that it could be used to reject his application because of his "membership in a particular place of worship," his expressions of "distaste for a group's discriminatory practices," his "stand on particular political issues," or "the style of clothes he or she wears." (Doc. 38, at 16.) This "parade of horribles" argument is irreconcilable with the facts. On their face, the rules provide that peer review "shall be used to solicit information to assess competence in the specialty field, and professionalism and ethics ***in the practice of law.***" Rule 6–3.5(c)(6) (emphasis added). Petersen does not explain what an attorney's style of dress or religious or political affiliation could possibly have to do with his "professionalism and ethics in the practice of law," which are the criteria that the peer review process is expressly used to assess. Moreover, the Supreme Court has explained that such "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (citation omitted). Such is the case here.

652 F.Supp.2d 1252
United States District Court,
M.D. Florida,
Ocala Division.

CHICK–FIL–A, INC., Plaintiff,
v.
CFT DEVELOPMENT, LLC, Panda Restaurant Group, Inc., and Panda Express, Defendants.

Case No. 5:07–cv–501–Oc–10GRJ.
|
Sept. 3, 2009.

Synopsis

Background: Covenantee brought action to enforce restrictive covenant.

Holdings: The District Court, William Terrell Hodges, J., held that:

[1] restaurant that covenantor intended to construct and operate was "quick-service restaurant" within meaning of covenant;

[2] covenant was clearly intended to prohibit operation of quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken;

[3] covenantee did not waive enforcement of covenant;

[4] covenantee's non-enforcement of other restrictive covenants was insufficient to establish estoppel;

[5] restaurant that covenantor intended to construct and operate was quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken; and

[6] threatened injury to covenantee outweighed damage to covenantor from permanent injunction.

Ordered accordingly.

West Headnotes (12)

[1] **Federal Courts**
Evidence

Judicial admissions are considered procedural in nature, and thus are governed in diversity proceedings in federal court by the Federal Rules of Evidence.

Cases that cite this headnote

[2] **Evidence**
Pleadings

Evidence
Pleadings

Admissions in pleadings are deemed judicial admissions, binding on the party who makes them.

3 Cases that cite this headnote

[3] **Covenants**
Particular occupations;nuisances

Restaurant that covenantor intended to construct and operate was "quick-service restaurant" within meaning of restrictive covenant that prohibited covenantor's property from being used as site of quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken, despite contention that covenantor operated "fast casual restaurant"; covenantor repeatedly admitted in pleadings, briefs, and affidavits in covenantee's action to enforce covenant that covenantor operated quick-service Chinese restaurants, and fast casual classification was of relatively recent origin such that at the time of creation and filing of covenant, as well as at time of covenantor's acquisition of property, covenantor understood itself to be quick-service restaurant.

Cases that cite this headnote

[4] **Covenants**

Particular occupations;nuisances

Under Florida law, restrictive covenant was clearly intended to prohibit covenantor's property from being used as site of quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken, and covenant was thus valid and enforceable by covenantee which owned adjoining lot on which covenantee operated quick service restaurant selling fried chicken-breast sandwiches, where routine practice in restaurant industry was to include covenants in leases and purchase agreements that restricted construction and operation of other restaurants whose operation was perceived to be potentially detrimental to the restaurant benefited by the covenant.

Cases that cite this headnote

[5] **Covenants**

Covenants which may run with land in general

Under Florida law, while covenants that run with the land must be strictly construed in favor of the free and unrestricted use of real property, a restriction which sufficiently evidences the intent of the parties and which is unambiguous will be enforced according to its terms.

1 Cases that cite this headnote

[6] **Estoppel**

Nature and elements of waiver

To establish waiver under Florida law, a party must prove that: (1) there was the existence of a right at the time of the waiver; (2) there was actual or constructive knowledge of the right; and (3) there was an intention to relinquish the right.

Cases that cite this headnote

[7] **Covenants**

Waiver of breach

Under Florida law, covenantee did not waive enforcement of restrictive covenant prohibiting covenantor from operating quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken on property adjacent to site of covenantee's chicken-sandwich quick-service restaurant, where there was no written amendment or waiver of covenant signed by parties as required by covenant's amendment provision, nor did covenantee relinquish its rights either orally, in writing, or otherwise through behavior.

1 Cases that cite this headnote

[8] **Estoppel**

Essential elements

To prove estoppel under Florida law a party must show: (1) a representation by the party to be estopped made to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance on it.

Cases that cite this headnote

[9] **Covenants**

Waiver of breach

Under Florida law, covenantee's non-enforcement of other restrictive covenants was insufficient to establish estoppel preventing enforcement of covenant prohibiting covenantor from operating quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken on property adjacent to site of covenantee's chicken-sandwich quick-service restaurant; upon learning of covenantor's plans to construct quick-service Chinese restaurant on adjacent property, covenantee repeatedly notified covenantor that operation of covenantor's restaurant would violate covenant at issue and that covenantee intended to enforce all of covenantee's rights and remedies.

1 Cases that cite this headnote

[10] Covenants

Particular occupations;nuisances

Under Florida law, restaurant that covenantor intended to construct and operate was quick-service restaurant that derived 25 percent or more of its gross sales from sale of chicken, and covenantor was therefore prohibited from constructing proposed restaurant by restrictive covenant benefiting covenantee which operated quick-service restaurant serving fried chicken-breast sandwich on adjacent lot; 25% of total sales in dollars generated by covenantor's proposed restaurant would be attributable to chicken, even if revenue attributable to non-chicken ingredients in chicken menu items was deducted or backed out.

Cases that cite this headnote

[11] Injunction

Covenants as to Use of Property

Under Florida law, where a party seeks an injunction to prevent the violation of a restrictive covenant, the party need not allege or show irreparable injury; appropriate allegations showing the violation of the covenant are sufficient and the violation itself amounts to irreparable injury.

1 Cases that cite this headnote

[12] Injunction

Business, commercial, or industrial uses

Under Florida law, injury threatened to covenantee by breach of covenant outweighed damage to covenantor which would be caused by permanent injunction enforcing restrictive covenant prohibiting operation of covenantor's proposed quick service restaurant on lot adjacent to covenantee, which operated quick service restaurant serving fried chicken breast sandwiches; covenantor could easily have avoided hardship from injunction because covenantor understood that its proposed restaurant would derive more than 25 percent of gross sales from chicken and had actual knowledge of covenant that prohibited operation of such restaurant but nevertheless purchased adjacent lot.

2 Cases that cite this headnote

Attorneys and Law Firms

***1254** Adriana Riviere–Badell, Courtney Anne Caprio, Hunton & Williams, LLP, Miami, FL, Kelly Campanella, Matthew J. Calvert, Hunton & Williams, LLP, Atlanta, GA, Robert Quentin Williams, Williams, Smith & Summers, PA, Tavares, FL, for Plaintiff.

Jeffrey E. Appleang, John J. Agliano, Daniel Paul Dietrich, Williams, Schifino, Mangione & Steady, PA, Tampa, FL, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WILLIAM TERRELL HODGES, District Judge.

This is an action to enforce a restrictive covenant in a chain of title to real property. The property involved is located in Mount Dora, Lake County, Florida. The law of Florida supplies the rule of decision and the Court has jurisdiction due to the parties' diversity of citizenship.

The case was tried without a jury, has been fully briefed, and is ready for decision.

The Plaintiff, Chick–fil–A, Inc., operates a chain of quick service restaurants specializing in the sale of fried chicken breast sandwiches. The Defendants—collectively referred to as Panda or Panda Express—also operate a chain of quick service restaurant establishments specializing in Chinese food consisting of a number of menu items in most of which the primary ingredient is chicken.

The parties own adjacent properties in Mount Dora. Chick–fil–A acquired its site in 2005 and opened a Chick–fil–A restaurant in 2006. Panda Express acquired its site in 2007 with intent to operate one of its restaurants on the premises. [1] At that time, as Panda was aware, Chick–fil–

A enjoyed the benefit of a restrictive covenant prohibiting the Panda property from being used as the site of:

> "A quick service restaurant deriving twenty five percent (25%) or more of its gross sales from the sale of chicken."

Panda Express resists the enforcement of this covenant against it on the grounds that: (1) its stores are not "quick service" restaurants as that term is used in the industry and in the covenant; (2) the covenant is void or unenforceable due to vagueness and uncertainty; (3) a typical Panda Express restaurant does not derive 25% or more of its gross sales from the sale of chicken; and (4) Chick–fil–A has waived and/or should be estopped from enforcing the covenant.

With respect to these issues, Panda argues that it is now a part of the evolving "fast casual" segment of the food service industry, not a "quick service" establishment, and should be excluded from the ambit of the covenant by its own terms. The Court finds, however, that at the time of the events involved in this case, according to the understanding of the parties themselves, both were in the business of operating "quick service" restaurants as ***1255** that term is used in the covenant. Similarly, while the covenant in question might be vague or of doubtful meaning as applied in other hypothetical contexts, its plain meaning in relation to the facts of this case forecloses the operation of a typical Panda Express restaurant on the site in question, and it was clearly understood in that way by the principals of Panda Express when the property was purchased and they began dealing with Chick–fil–A in an effort to secure a waiver of its restriction. Finally (a) by any reasonable measure, a typical Panda Express restaurant derives 25% or more of its gross sales from the sale of chicken; and (b) other dealings between the parties at different locations concerning the same or similar restrictive covenants do not operate as a waiver by, or estoppel against, Chick-fil–A at *this* location in Mount Dora.

Thus, upon due consideration of the evidence and the argument of counsel, the Court has concluded, based upon a preponderance of the evidence, and the law of Florida, that the Plaintiff is entitled to a declaratory decree and to enforcement of the covenant through the injunctive relief it seeks; and, in support of that conclusion, the Court now makes the following, more specific—

FINDINGS OF FACT

A. *The Parties*

1. Plaintiff Chick–fil–A, Inc. is a Georgia corporation with its principal place of business at 5200 Buffington Road, Atlanta, Georgia 30349. Chick–fil–A is registered to conduct business in the State of Florida. Chick–fil–A develops and franchises quick-service restaurants throughout the United States specializing in boneless breast of chicken sandwiches and other chicken items.

2. Defendant CFT Developments, LLC is a California corporation with its principal place of business at 1683 Walnut Grove Avenue, Rosemead, California 91770. Defendant Panda Restaurant Group, Inc. is a California corporation with its principal place of business at 1683 Walnut Grove Avenue, Rosemead, California 91770. Panda Restaurant Group is the privately held parent company of Defendant Panda Express, Inc., a California corporation with its principal place of business at 1683 Walnut Grove Avenue, Rosemead, California 91770. Panda Express operates Panda Express "Chinese" restaurants throughout the United States, including several in Florida, serving predominantly chicken entrees. The Defendants will be referred to collectively as Panda or Panda Express.

B. *The Mt. Dora Site and the Restrictive Covenant*

3. On or about November 7, 2005, Chick–fil–A acquired fee simple title to property located in Lake County, Florida at 17420 U.S. Highway 441, Mount Dora, Florida 32757 ("Outlot # 2"). Chick–fil–A remains the fee simple owner of Outlot # 2.

4. Chick–fil–A purchased Outlot # 2 for purposes of constructing a Chick–fil–A restaurant. A Chick–fil–A restaurant was built on the site and has been in operation since April 20, 2006. The Mt. Dora Chick–fil–A restaurant is operated by a franchisee. Chick–fil–A's fees and income from the operation of that restaurant are directly related to its sales.

5. On or about July 20, 2005 and before Chick–fil–A purchased Outlot # 2, Citrus Grove Limited Partnership ("Citrus Grove"), the owner and developer of the property that included Outlot # 2, executed a Declaration of Restrictions and Covenants and caused it to be recorded

in the public records of Lake County, Florida on or about October 6, 2005. Chick–fil–A took title subject to and under the protection of the Declaration.

***1256** 6. The Declaration establishes restrictions and covenants that govern the use and development of three parcels of land or "Outlots." Outlots # 1 and # 3 adjoin the Chick–fil–A parcel, Outlot # 2. Outlot # 1 is currently a Target store.

7. For the benefit of Outlot # 2 the Declaration provides at Paragraph 3.02 (the "Mt. Dora Covenant" or the "Covenant") that:

> **3.02** ***Use Restriction Benefitting Outlot # 2***
>
> (a) Outlot # 1 and Outlot # 3 are prohibited from having any of the following constructed, existing, leased or operated thereon:
>
> (i) a quick-service restaurant deriving twenty-five percent (25%) or more of its gross sales from the sale of chicken; or,
>
> (ii) any of the following specified establishments: Wendy's, Arby's, Boston Market, Kenny Roger's, Kentucky Fried Chicken, Popeye's, Church's, Bojangle's, Mrs. Winner's, Tanner's, Chicken Out, Willie May's Chicken, Biscuitville, Zaxby's or Ranch One.
>
> (b) The restrictions in Article 3.02 may be enforced or waived only by the fee simple owner of Outlot # 2. The restrictions in this Article 3.02 shall run with the land, burdening Outlot # 1 and Outlot # 3 and benefitting Outlot # 2, and the successors, heirs and assigns thereof.

8. The Declaration further provides, at Paragraph 4.02, that a violation of the covenant or restriction shall entitle the injured party to a preliminary and permanent injunction and other equitable relief, as well as any remedies available under the laws of Florida.

9. When it purchased Outlot # 2, Chick–fil–A relied upon the Mt. Dora Covenant to protect its legitimate business interests and the value of its investment in that property. The Mt. Dora Covenant was part of the bundle of property rights that Chick–fil–A received in exchange for the purchase price of Outlot # 2.

10. Chick–fil–A negotiated for and included the protections of the Mt. Dora Covenant in its agreement to purchase Outlot # 2 because of the potential adverse impact caused by the operation of a prohibited restaurant on Outlot # 3 and the difficulty of quantifying the sales that might be diverted from Chick–fil–A by such a restaurant.

C. *The Defendants' Purchase and Intended Use of Outlot # 3*

11. Panda acquired actual knowledge of the Mt. Dora Covenant before it purchased Outlot # 3. That knowledge was acquired around December 2006 when Panda began considering the purchase of Outlot # 3 from A & W Restaurants, Inc.

12. On or about April 11, 2007, Panda received from its title insurer a commitment listing the Mt. Dora covenant as an "exception" to potential title coverage.

13. On or about June 21, 2007, Panda purchased Outlot # 3 from A & W Restaurants, Inc. pursuant to a Special Warranty Deed that was recorded on July 10, 2007 in the public records of Lake County, Florida. Panda remains the current owner of that property.

14. In October 2007, Chick–fil–A learned of Panda's plans to construct a Panda Express restaurant on Outlot # 3. By letter dated October 29, 2007, Chick–fil–A notified Panda that it believed the planned construction and operation of a Panda Express restaurant on Outlot # 3 would violate the Mt. Dora covenant and that Chickfil–A intended to enforce all of its rights and remedies.

15. Panda responded by letter dated November 20, 2007, confirming its intention ***1257** to lease Outlot # 3 for purposes of operating a Panda Express restaurant, but denying any violation of the Mt. Dora Covenant.

16. Chick–fil–A reiterated in letters to Panda dated November 30, 2007 and December 7, 2007 that the operation of a Panda Express restaurant on Outlot # 3 would violate the Mt. Dora Covenant. Chick–fil–A emphasized its intention to enforce its legal rights if Panda did not suspend development and construction of the proposed Panda Express restaurant. Panda refused to do so.

17. Chick–fil–A then commenced this action on December 12, 2007.

18. After the Court entered a preliminary injunction on January 7, 2008, Panda constructed a building on Outlot # 3 comprised of six separate rental spaces or units, one of which is intended for a Panda Express restaurant. Panda has not proceeded with the Panda Express restaurant, however, due to the injunction and pending the outcome of this litigation.

D. *Nature of Panda Express as a Quick Service Restaurant*

19. Throughout this litigation Panda Express has repeatedly admitted in pleadings, briefs, and affidavits that it operates quick-service Chinese restaurants or "QSR's."

20. Numerous Panda witnesses testified in depositions that Panda Express operates quick-service restaurants, including: Thomas Davis, PRG's Chief Executive Officer; David Feng Luo, CFT's Director of Development; David Landsberg, Former Vice President of Business Planning; Frank Miller, Former Vice President of Real Estate; Steve Moukabaa, Former Manager of Financial Planning; Eddie Wang, PRG's Regional Director of Operations.

21. Panda Express has issued numerous press releases, including one as recently as October 22, 2008, that describe Panda Express restaurants as Chinese "quick service restaurants."

22. In restaurant industry custom and usage, the term quick-service restaurant is generally understood to mean restaurants that have "counter service," rather than waiter or waitress service, and which serve food that is prepared and paid for in advance. Panda Express is such a restaurant.

23. At trial, Panda Express offered evidence that at least one major consultant in the food service/restaurant industry now recognizes, as a separate segment of the industry, a category of establishments known as "fast casual restaurants" as distinguished from "quick service restaurants." Fast casual restaurants are said to be typified, among other things, by better quality furnishings than a quick service restaurant; higher total bills for a meal or meals; food designed to appeal to mature customers rather than young adults and children; more beverages, including alcoholic beverages, are usually available; and the menu offerings normally consist of fresh ingredients prepared on the premises often in the view of the customers.

24. Panda Express thus contends that it is not covered by the terms of the Mt. Dora restrictive covenant because it is a "fast casual" and not a "quick service" restaurant. The Court finds, however, that the "fast casual" classification of restaurants in the food service industry is an evolving concept of relatively recent origin (the last five years or so); and, at the time of the creation and filing of the Mt. Dora Covenant, as well as the time Panda Express acquired title to Outlot # 3, and thereafter up to and beyond the filing of this action, Panda Express was—and understood itself to be—a "quick service restaurant" as that term is used in the Covenant.

***1258** E. *Panda Express Menu Offerings*

25. Panda Express sells protein-based dishes that it offers as entrees with starch or vegetable-based side orders.

26. Panda Express offers a "standard" menu comprised of "core" entrees that are (or should be) served at all Panda Express restaurants nationwide. Panda Express intends that each new restaurant use the standard menu.

27. Panda Express offers a "standard" menu in its nationwide chain of Chinese quick-service restaurants in order to meet customer menu expectations, achieve consistency in service and maintain the integrity of the Panda Express brand. The standard menu also facilitates employee training, promotes operational efficiencies and assists Panda Express in projecting profitability and costs.

28. Anna Nero, Panda's 30(b)(6) witness regarding Panda Express core menu items and pricing, characterized Panda Express's business as the sale of entrees. Orange Chicken, the most popular Panda Express entree, constitutes approximately 38 percent of all entree sales. Panda's various chicken entrees as a whole comprise over 70 percent of all Panda Express entree sales.

29. By representing that several specific Panda Express restaurants with standard menus, including two in Florida, reflect the chicken sales percentage and overall product mix that would be expected at the proposed Mt. Dora restaurant, Panda Express has confirmed its

intention to utilize the "standard" Panda Express menu at that restaurant.

30. Panda Express sells several "combo meals," including a Panda Bowl (one entree and one side), a Two–Item Combo (two entrees and one side), a Three–Item Combo (three entrees and one side), and a Panda Feast. Panda Express also sells entrees and side orders separately a la carte.

31. Panda's cost of goods is much higher for chicken than it is for side orders, such as rice. For example, in late 2006 when Panda established its current a la carte pricing structure, the cost to Panda of its most popular entree, Orange Chicken, was $1.32 for 16 ounces. In comparison, 16 ounce side orders cost Panda much less: $.35 for vegetable chow mein, $.22 for fried rice and $.08 for steamed rice.

F. *Percentage of Panda Gross Sales Derived from the Sale of Chicken*

32. To aid the Court in determining the percentage of Panda Express gross sales derived from the sale of chicken, each party offered expert testimony. Chick–fil–A offered the testimony of Robert J. Taylor, IV, a certified public accountant. Panda offered the testimony of an accountant, Robert T. Patterson, and its employees Huntley Castner and Steve Moukabaa.

33. Mr. Taylor opined that the proposed Mt. Dora Panda Express would derive approximately 34 percent of its gross sales from chicken (assuming "non-chicken ingredients" were excluded or "backed out" of chicken entrees) and approximately 46.3 percent, if not. If the Covenant were interpreted to mean that "non-chicken ingredients" should be backed out of chicken entree sales, Mr. Taylor opined that the relative cost of the ingredients in chicken entrees (not the relative weight of ingredients) should be the basis for that allocation. If that were done, Mr. Taylor testified that the percentage of gross sales derived from the sale of chicken would be 34 percent.

34. In contrast to Mr. Taylor, Mr. Patterson testified that combo meal sales should be allocated to entrees and side orders based upon the relative volume (or weight) in ounces of the servings of entrees ***1259** and side orders. The Court finds, however, that the volume allocation methodology completely disregards Panda's actual food costs and the relative a la carte pricing Panda Express established for entrees and side orders, and has no support in the fundamental principles of accounting relative to a determination of "gross sales" which contemplates dollars and cents, not weight or volume.

35. The Court finds and concludes in fact, therefore, even assuming that non-chicken ingredients should be "backed out" of the determination of "gross sales," the Panda Express standard menu that Panda intends to implement at its proposed Mt. Dora location would result in more than 25% of the restaurant's gross sales being attributable to the sale of chicken.

36. This factual conclusion is also supported by Panda's own understanding and belief prior to the commencement of this litigation. Mr. Landsberg, an officer of Panda, reached that conclusion in October 2004. Mr. Lopez, Director of Financial Planning, reached that conclusion in February 2005. Ms. Mamula admitted to Mr. Dominguez in e-mails or letters dated October 29, 2004, December 14, 2004 and February 22, 2005 that Panda Express chicken sales exceed 25 percent.

37. Similarly, Panda Express represented to the landlord of the Seminole, Florida site that it would change the menu at that restaurant to avoid violating the 25 percent Chick–fil–A restriction, offering further evidence of Panda's understanding that a restaurant using the standard Panda Express menu will derive 25 percent or more of its gross sales from chicken.

G. *The Seminole and Other Sites*

38. Before the events giving rise to this action involving the Mt. Dora site, similar confrontations between these parties occurred at other locations, but none resulted in litigation. In 2004, for example, in Seminole, Florida, Panda explored—and ultimately proceeded with—the opening of a Panda Express restaurant on a site adjacent to a Chick–fil–A restaurant and subject to a restrictive covenant substantially identical to the Mt. Dora covenant involved in this case. Panda attempted, unsuccessfully, to secure a waiver of the covenant; and, after Chick–fil–A failed to answer two letters from Panda asserting that the covenant was inapplicable to it, Panda ultimately decided to open the restaurant and circumvent the issue by changing its menu at the Seminole location. No action was ever taken by Chick–fil–A to attempt to enforce the covenant at Seminole.

39. Since the events at Seminole, Panda has opened three other restaurants (one in North Carolina, one in Texas, and one in Clearwater, Florida) in the neighborhood of existing Chick–fil–A restaurants enjoying the benefit of restrictive covenants, two of which are substantially similar to the Mt. Dora Covenant, and Chick-fil–A has not taken legal action to enforce the covenants.

40. The Court does not find as a fact, however, that any of the transactions or events described in paragraphs 38 and/or 39 operate—or should operate—to work an estoppel against, or to constitute a waiver of, Chick–fil–A's right to seek enforcement of the Mt. Dora Covenant. Whatever the factual or legal result might be arising out of the events and relationships of the parties at other locations concerning their rights and obligations *at those locations,* respectively, there is no evidence that would support a finding of waiver or estoppel at the Mt. Dora site. On the contrary, Chick–fil–A consistently refused to waive or bargain away its rights under the Mt. Dora Covenant, and it affirmatively acted in a timely manner to enforce those rights by instituting this litigation.

*1260 *CONCLUSIONS OF LAW*

A. *Jurisdiction, Venue and Choice of Law*

41. The Court has personal jurisdiction over the parties and subject matter jurisdiction over the claims for relief in this action.

42. Venue is proper in the United States District Court, Middle District of Florida, Ocala Division.

43. The legal issues raised in this action regarding the enforceability of the Mt. Dora Covenant, the availability of injunctive and declaratory relief, and the substantive issues raised by the parties' pleadings are governed by the substantive laws of the State of Florida.

44. All procedural and evidentiary issues raised in this action are governed by Federal Rules of Civil Procedure and the Federal Rules of Evidence.

45. To bring a declaratory judgment action, there must be a bona fide dispute between parties and an actual, present need for a declaration. *Britamco Underwriters, Inc. v. Central Jersey Investments, Inc.,* 632 So.2d 138, 139 (Fla. 4th DCA 1994). Such a dispute exists in this case.

B. *Defendants have Judicially Admitted that Panda Express is a QSR*

[1] 46. Judicial admissions are considered procedural in nature, and thus are governed in federal court by the Federal Rules of Evidence. *American Title Ins. Co. v. Lacelaw Corp.,* 861 F.2d 224, 226 (9th Cir.1988).

[2] 47. "[A]dmissions in pleadings[s] are deemed judicial admission[s], binding on the party who makes them." *Lofton v. Kearney,* 157 F.Supp.2d 1372, 1375 n. 3 (S.D.Fla.2001) (fact in answer had effect of judicial admission) (citing *Missouri Hous. Dev. Comm'n v. Brice,* 919 F.2d 1306, 1314 (8th Cir.1990)); *Ferguson v. Neighborhood Hous. Servs. of Cleveland, Inc.,* 780 F.2d 549, 550–51 (6th Cir.1986); *see also Continental Ins. Co. of N. Y. v. Sherman,* 439 F.2d 1294, 1298 (5th Cir.1971) ("the pleading of a party made in another ... or the same action are admissible as admissions of the pleading party to the facts alleged therein.").

[3] 48. Defendants' Answer (Doc. 32) ¶ 4, dated January 2, 2008; Defendants' Counterclaim (Doc. 31) ¶ 8, dated January 9, 2008; and Defendants' Amended Counterclaim (Doc. 60) ¶ 8, dated November 26, 2008; all contain judicial admissions that Panda Express restaurants are "quick-service restaurants." That admission, together with the Court's Findings of Fact, establish conclusively that the proposed Mt. Dora Panda Express would be a "quick service restaurant" within the meaning of the Mt. Dora Covenant.

C. *Florida Law Recognizes the Validity and Enforceability of Restrictive Covenants that Run with the Land*

[4] 49. As this Court recognized in entering a preliminary injunction, property owners have certain rights under Florida law to impose covenants that run with the land and create restrictions on the use of property. *See Fiore v. Hilliker,* 993 So.2d 1050, 1053 (Fla. 2d DCA 2008); *Hagan v. Sabal Palms, Inc.,* 186 So.2d 302, 307 (Fla. 2d DCA 1966).

[5] 50. This Court is guided by a long series of Florida cases addressing restrictive covenants in the context of real estate. "While covenants that run with the land must be strictly construed in favor of the free and unrestricted use of real property, a restriction which sufficiently evidences

the intent of the parties and which is unambiguous will be enforced according to its terms." *Eckerd Corp. v. Corners Group, Inc.,* 786 So.2d 588, 590–91 (Fla. 5th DCA 2000). As in the case of contract construction ***1261** generally, a restrictive covenant is not ambiguous unless it is susceptible to more than one reasonable interpretation. Restrictive covenants "should never be construed in a manner which would defeat the plain and obvious purpose and intent of the restriction." 786 So.2d at 591. Thus, a term or provision in a covenant that might be of doubtful meaning in other contexts or other hypothetical factual situations will not defeat application of the covenant where it is clear, under the facts at hand, that the covenant was intended to apply to those facts and was so understood by the parties. *See Triple E Development Co. v. Floridagold Citrus Corp.,* 51 So.2d 435, 439 (Fla.1951); *Multitech Corp. v. St. Johns Bluff Investment Corp.,* 518 So.2d 427, 430 (Fla. 1st DCA 1988). *See also State v. Brake,* 796 So.2d 522, 526 (Fla.2001). Such is the case here.

51. Restrictive covenants are common in the context of developments such as shopping centers and are aids to attracting and ensuring the financial success of businesses which lease or purchase properties in such developments. *See Winn–Dixie Stores, Inc. v. Dolgencorp,* 964 So.2d 261, 263 (Fla. 4th DCA 2007). Restrictive covenants are common in the restaurant industry, as demonstrated by the fact that Panda Express, Chick–fil–A and numerous other restaurants routinely include covenants in shopping center leases and purchase agreements that restrict the construction and operation of other restaurants whose operation is perceived to be potentially detrimental to the restaurant benefitted by the covenant.

52. The restrictions and covenants created by the Mt. Dora Covenant run with the land as a burden upon each outlot and for the benefit of the fee simple owner of Outlot # 2. Under Florida law, therefore, Chick–fil–A is entitled to the full protection afforded by the Mt. Dora Covenant.

D. *No Waiver*

[6] **[7]** 53. To establish waiver under Florida law, a party must prove that: (1) there was the existence of a right at the time of the waiver; (2) there was actual or constructive knowledge of the right; and (3) there was an intention to relinquish the right. *Kirschner v. Baldwin,* 988 So.2d 1138, 1142 (Fla. 5th DCA 2008); *Mizell v. Deal,* 654 So.2d 659, 663 (Fla. 5th DCA 1995).

54. The Declaration states in Paragraph 4.01 that it can be amended or waived only in a writing signed by all persons having rights thereunder. There is no evidence of such a written amendment or waiver of the Mt. Dora Covenant. Nor is there any other evidence that Chick–fil–A intended to relinquish or did relinquish its rights under the Mt. Dora Covenant either orally or in writing, or otherwise through behavior. Accordingly, Panda has not shown that Chick–fil–A waived the enforcement of the Mt. Dora Covenant.

E. *No Estoppel*

[8] **[9]** 55. To prove estoppel under Florida law a party must show: (1) a representation by the party to be estopped made to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and the reliance on it. *Mobile Med. Indus. v. Quinn,* 985 So.2d 33, 35–36 (Fla. 1st DCA 2008).

56. Panda has not shown that Chick–fil–A made any "representation" that would estop it from enforcing the Mt. Dora Covenant.

***1262** 57. Any inaction by Chick–fil–A or non-enforcement of restrictive covenants other than the Mt. Dora Covenant is insufficient to establish an estoppel to enforce that covenant. While silence or inaction may form the basis of an estoppel where there is a duty to speak out or take some action, *see Travelers Ins. Co. v. Spencer,* 397 So.2d 358, 361 (Fla. 1st DCA 1981); *Pasco County v. Tampa Dev. Corp.,* 364 So.2d 850 (Fla. 2d DCA 1978), Chick–fil–A was not silent or inactive in respect to the Mt. Dora Covenant. In purchasing the Mt. Dora Outlot # 3 Panda did not reasonably rely on any silence or inaction of Chick–fil–A.

58. Accordingly, Chick–fil–A is not estopped from enforcing the Mt. Dora Covenant.

F. *The Mt. Dora Covenant is Unambiguous, Valid, and Enforceable Against the Defendants*

[10] 59. Whether Chick–fil–A and Panda Express are "direct" or "indirect" competitors because of any difference in cuisine or style of preparing chicken

is immaterial to the enforceability of the Mt. Dora Covenant. Paragraph 3.02(a)(i) plainly and simply prohibits any quick-service restaurant that derives 25 percent or more of its gross sales from the sale of chicken. The relevant issue is chicken sales.

60. The term "gross sales" is unambiguous and its meaning is free from doubt as used in the Mt. Dora Covenant. "Gross sales" means the total sales in dollars generated by a restaurant on Outlot # 3.

61. The term "its" is unambiguous and free from doubt as used in the Mt. Dora Covenant. The relevant restaurant for purposes of this case is the proposed Mt. Dora Panda Express.

62. The Mt. Dora Covenant is not ambiguous or of doubtful meaning simply because it does not prescribe a period of time for calculating gross sales. The Court construes the covenant to require a reasonable or representative time period for calculating the percentage of gross sales derived from the sale of chicken. *De Cespedes v. Bolanos, et al.,* 711 So.2d 216, 218 (Fla. 3d DCA 1998) ("The general Florida rule is that when a contract does not expressly fix the time period for performance of terms, the law will imply a *reasonable time."*) (emphasis added).

63. The phrase derived "from the sale of chicken" is unambiguous and free from doubt as used in the Mt. Dora Covenant. As applied to this case, chicken simply means chicken, as listed on Panda Express's menu. As applied to the facts of this case, the Court interprets the Covenant to mean that all sales derived from chicken entrees are derived "from the sale of chicken." Such is the plain, common sense meaning of the language. It would be unreasonable to construe the Covenant to require that some percentage of chicken entree sales be excluded or "backed out" to account for "non-chicken ingredients," such as sauces, spices or breading, when calculating Panda's percentage of gross sales derived from the sale of chicken. Nevertheless, even if any revenue attributable to non-chicken ingredients is deducted or "backed out" of the calculation of gross sales in this instance, the Panda Express standard menu that Panda intends to implement in Mt. Dora would result in more than 25% of the restaurant's gross sales being attributable to chicken. (See paragraphs 33–37, *supra.*)

64. Because Panda has judicially admitted that Panda Express is a quick-service restaurant, the Court need not consider extrinsic evidence to determine the meaning of that term as used in the Mt. Dora Covenant. Assuming extrinsic evidence were appropriately considered for that purpose, however, the Court concludes ***1263** that the Mt. Dora Covenant invokes the term "quick-service restaurant" as commonly understood and used in the restaurant industry; and; based on the Findings of Fact at Paragraphs 19–24, *supra,* the Court now concludes as a matter of law that the proposed Mt. Dora Panda Express would be a quick-service restaurant within the meaning of the Mt. Dora Covenant.

65. The Court concludes that the Mt. Dora Covenant is valid, applies to, and is enforceable against Panda Express restaurants and the Defendants.

G. *Declaratory Judgment*

66. Having concluded that the Mt. Dora Covenant is valid and enforceable, that Panda Express restaurants are quick-service restaurants within the meaning of the Covenant, and that the proposed Panda Express restaurant would derive 25 percent or more of its gross sales from the sale of chicken, Chick–fil–A is entitled to the declaratory judgment it has requested. The Court declares that the Mt. Dora Covenant precludes the construction, leasing or operation of a Panda Express restaurant on Outlot # 3. (See paragraph 73, *infra.*). The declaratory relief requested by the Defendants in their Amended counterclaim is denied.

H. *Permanent Injunction*

[11] **[12]** 67. Under Florida law, where a party seeks an injunction to prevent the violation of a restrictive covenant, the party need not allege or show irreparable injury. "Appropriate allegations showing the violation are sufficient and ... [the] violation [itself] amounts to irreparable injury." *Jack Eckerd Corp. v. 17070 Collins Avenue Shopping Center, Ltd.,* 563 So.2d 103, 105 (Fla. 3d DCA 1990) (citing *Stephl v. Moore,* 94 Fla. 313, 114 So. 455 (1927)). Florida courts have held that the rule excusing proof of irreparable harm also avoids the need for the party seeking to enforce a restrictive covenant to demonstrate the absence of an adequate remedy at law. *See Autozone Stores, Inc. v. Northeast Plaza Venture, LLC,* 934 So.2d 670, 673 (Fla. 2d DCA 2006); *Daniel v. May,* 143 So.2d 536, 538 (Fla. 2d DCA 1962).

68. Chick–fil–A has appropriately alleged and proved that the proposed Panda Express restaurant would violate the Mt. Dora Covenant. Therefore, Chick–fil–A need not provide independent proof of irreparable harm and the absence of a remedy at law. *Daniel,* 143 So.2d at 538.

69. This Court also concludes that the threatened injury to Chick–fil–A, including the violation of its property rights and potential loss of sales, outweighs whatever damage a permanent injunction may cause to Panda Express. This conclusion is also reinforced by the fact that Panda understood and believed as early as 2004 that Panda Express restaurants derive more than 25 percent of their sales from chicken and that Panda had actual knowledge of the Mt. Dora Covenant before purchasing Outlot # 3. Nevertheless, the Defendants proceeded with plans to acquire Outlot # 3 for purposes, among others, of constructing a Panda Express. Whatever hardship may accrue to Defendants by virtue of a permanent injunction could easily have been avoided. In addition CFT may lease the units in the building constructed on Outlot # 3 to other retailers and mitigate any financial hardship.

70. Restrictive covenants serve a valid public purpose by enabling purchasers of property to control the development and use of property and to protect property owners' interest in land. *Wood v. Dozier,* 464 So.2d 1168, 1170 (Fla.1985). Therefore a permanent injunction in favor of Chick–fil–A would not be contrary to the public interest.

71. Chick–fil–A's claim for permanent injunction is ripe for adjudication. Chick– ***1264** fil–A is not required to wait for the actual violation of the Mt. Dora Covenant before seeking the aid of the courts. *See Bolen Intern., Inc. v. Medow,* 191 So.2d 51, 53 (Fla. 3d DCA 1966).

72. This Court concludes, as a matter of fact and law, that Chick–fil–A is entitled to and is hereby awarded an injunction, making permanent the preliminary injunction entered on January 7, 2008.

73. Given the Court's conclusion (paragraph 63, *supra*) that in calculating Panda's gross sales in dollars derived from the sale of chicken, the proceeds from the sale of any chicken entree should be treated as so derived without deducting or "backing out" any portion of the sale as attributable to other ingredients such as starches, spices or breading, it would not seem probable—or even possible—that Panda Express could (or would) alter its menu offerings in such a way as to comply with the 25% restriction as so construed without a drastic, fundamental departure from its standard or core menu featuring chicken. The injunction, therefore, as did the Preliminary Injunction, will simply prohibit the operation of a Panda Express restaurant on Outlot # 3. If Panda Express desires to open and operate a restaurant at that location not involving the sale of chicken in a manner that would violate the Mt. Dora Covenant as construed by the Court, it may always apply for an amendment of the injunction.

74. A separate Final Judgment will be entered granting Chick–fil–A's request for declaratory judgment, issuing a permanent injunction and denying the Defendants' Counterclaim. Chick–fil–A may seek the assessment of costs according to law.

IT IS SO ORDERED.

All Citations

652 F.Supp.2d 1252

Footnotes

1 The property was actually acquired by the Defendant CFT Developments, LLC, ("CFT") which constructed a building comprised of six retail units or spaces, one of which is intended for lease to Panda Express. The Court issued a preliminary injunction on January 7, 2008, so the proposed lease was not executed, awaiting the outcome of this litigation.

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Sibug v. State, Md., November 25, 2015

380 So.2d 1188
District Court of Appeal of Florida, Fifth District.

Frank ALEXANDER, Appellant,
v.
STATE of Florida, Appellee.

No. 78-1557/T4-156.
|
March 12, 1980.

Postconviction proceeding was brought by party seeking to set aside his conviction. The Circuit Court, Orange County, Frederick T. Pfeiffer, J., denied relief, and petitioner appealed. The District Court of Appeal, Orfinger, J., held that party who had been adjudicated incompetent and had never been adjudicated competent could not waive competency hearing and could not be convicted without such hearing.

Reversed and remanded.

West Headnotes (9)

[1] Mental Health
Mental Disorder Subsequent to Determination

A person adjudged to be insane is presumed to continue insane until it is shown that his sanity has returned.

4 Cases that cite this headnote

[2] Criminal Law
Operation and Effect

Presumption, that an accused who has been adjudicated insane remains insane continues until it is shown that his sanity has returned, may be overcome by proof that accused was of sufficiently sound mind and conscience at time of commission of crime to realize character and consequences of his act.

1 Cases that cite this headnote

[3] Mental Health
Mental Disorder at Time of Trial

Fact that prior adjudication of incompetency was not known either to court or counsel at time of trial did not alter legal impediment to trial since an accused cannot be tried while insane and ignorance or good faith of court and prosecuting officers did not serve to validate a proceeding conducted in violation of such precept.

Cases that cite this headnote

[4] Estoppel
Waiver Distinguished

A privilege or right may be waived by person for whose benefit they were intended, provided he is sui juris.

Cases that cite this headnote

[5] Criminal Law
Waiver or Objection by Defendant

A defendant who is presumptively incompetent is not sui juris until so declared by court, so he cannot waive competency hearing. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(a)(1).

9 Cases that cite this headnote

[6] Criminal Law
Insanity or Incompetency at Time of Proceedings

Legal status of a defendant cannot be adjudicated from incompetent to competent without a hearing. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(a)(1).

5 Cases that cite this headnote

[7] Criminal Law
Conduct of Trial or Hearing

Question of defendant's sanity is legal question and not medical question, although based upon medical and other evidence, and it must be legally decided. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(a)(1).

2 Cases that cite this headnote

[8] Criminal Law

Insanity or Incompetency at Time of Proceedings

Defendant who had been adjudicated incompetent and had not been adjudicated competent could not be tried on criminal charge without a hearing as to his competency even though defense counsel, after court orally advised counsel of doctors' oral statements that defendant was competent, stated that defendant did not want to go ahead with an evidentiary hearing. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.210(a)(1).

6 Cases that cite this headnote

[9] Criminal Law

Determination;Acquittal

Court need not make written order as to competency of accused but may make verbal order based on record. 33 West's F.S.A. Rules of Criminal Procedure, rules 3.210, 3.210(a)(1, 3); F.S.1969, §§ 917.01, 917.01(2).

1 Cases that cite this headnote

Attorneys and Law Firms

***1188** Judith A. Ginn, Orlando, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Benedict P. Kuehne, Asst. Atty. Gen., West Palm Beach, for appellee.

Opinion

ORFINGER, Judge.

Alexander appeals from an order denying post-conviction relief after an evidentiary ***1189** hearing. He contends that the trial court erred in refusing to set aside his conviction when it learned that he had previously been adjudicated incompetent, that his competency had never been restored and without a hearing to determine his competency, although the trial court had a reasonable doubt as to his competency to stand trial. We agree and reverse.

Appellant was tried and convicted for larceny of a dwelling while armed with a knife. The motion for post-conviction relief was addressed to this charge and also a conviction about a month earlier, and requested that both convictions be set aside because appellant had been adjudicated incompetent in Orange County, Florida, on April 9, 1971, his competency had never been restored and consequently he was not competent to stand trial for either charge.

Prior to the first trial appellant had written to the judge who presided in both cases about the " . . . voices I am hearing, they go on all day and all night." The judge wrote that he should consult with his lawyer about that. Nothing further was done about it in the first case, but on the day prior to trial in the case sub judice, the appellant was examined by a psychiatrist, and he was also examined by another psychiatrist on the morning of the trial. Just before the trial commenced, both doctors reported to the judge by telephone that appellant was competent. Written reports were filed later. When the trial judge reported the phone conversations to counsel, the record reflects that appellant's counsel stated: " . . . I do not choose to go ahead with the evidentiary hearing. The doctors' oral statements are at (sic) value here, and we will proceed to trial." The case then proceeded to trial.

In the order on the combined motions to vacate the judgments, the court set aside the conviction in the first trial because of appellant's incompetency, but denied the motion in this case because he found that appellant, through counsel, had waived the evidentiary hearing and could not therefore complain that his rights had been violated. This appeal followed. We are asked to decide if an incompetent can waive a formal competency hearing.

[1] [2] It has long been the law of this state, as well as at common law, that a person adjudged to be insane is presumed to continue insane until it is shown that his sanity has returned. Corbin v. State, 129 Fla. 421, 176 So. 435 (1937). The presumption is not conclusive, but may be overcome by proof that the accused was of sufficiently

sound mind and conscience at the time of the commission of the crime to realize the character and consequences of his act. Wells v. State, 98 So.2d 795 (Fla.1957).

[3] It appears without contradiction that the prior adjudication of incompetency was not known either to the court or to counsel at the time of the trial. This does not alter the legal impediment to a trial, because an accused cannot be tried while insane and the ignorance or good faith of the court and prosecuting officers does not serve to validate a proceeding conducted in violation of this precept. Horace v. Culver, 111 So.2d 670 (Fla.1959). We must therefore make this inquiry as we would if the court knew about the prior adjudication of incompetency.

Even without the knowledge of the prior adjudication, the trial court had some reasonable doubt as to the appellant's competency, because he appointed two psychiatrists to examine him. Former Rule 3.210(a)(1), Fla.R.Crim.P., 1972, required the Court to immediately fix time for a hearing to determine a defendant's mental condition if there was reasonable ground to believe that the defendant was insane. [1]

***1190** The State recognizes the presumption that follows an adjudication of incompetency and its obligation to rebut the same, but it says that the appellant waived the necessity for a hearing, citing Fowler v. State, 255 So.2d 513 (Fla.1971); Bolius v. State, 319 So.2d 85 (Fla. 2nd DCA 1975) and Hatchell v. State, 328 So.2d 874 (Fla. 1st DCA 1976). It is noted however, that in all three cases the defendant had never been adjudicated incompetent, so there was no continuing presumption of incompetency. Rather, there was a presumption that he was competent until proven otherwise. In Fowler, supra, the Supreme Court held that where the parties and the judge agree, the trial court may decide the issue of competency on the basis of written reports alone. The Court went on to find, however, that the parties had not agreed and that the defendant had insisted on a formal hearing, so a formal hearing was required.

[4] **[5]** **[6]** **[7]** **[8]** A privilege or right may be waived by the person for whose benefit they were intended, provided he is sui juris. 12 Fla.Jur. Estoppel and Waiver, s 6. A defendant who is presumptively incompetent is not sui juris until so declared by the court, so he cannot waive a competency hearing. A similar problem was discussed in Parks v. State, 290 So.2d 562 (Fla. 4th DCA 1974). There the defendant had been adjudged incompetent and had been committed for treatment. Thereafter without a hearing, the defendant was deemed to be competent based on receipt of an ex parte letter from a doctor at the Florida State Hospital. He was brought to trial and then convicted. It was there held, and we agree, that the legal status of a defendant cannot be adjudicated from incompetent to competent without a hearing. The question of a defendant's sanity is a legal question and not a medical question, although based upon medical and other evidence, and it must be "legally" decided. Butler v. State, 261 So.2d 508 (Fla. 1st DCA 1972.)

[9] One further point warrants discussion. Appellant contends that in any event, there was no legal or judicial decision made as to his competency because the Court never entered a written order. Appellant relies on Emerson v. State, 294 So.2d 721 (Fla. 4th DCA 1974), which does indeed construe former Rule 3.210, Fla.R.Crim.P., 1972, as requiring a written order of competency, in turn relying on Rodriguez v. State, 241 So.2d 194 (Fla. 3rd DCA 1970) as authority for that proposition. Reliance on Rodriguez, however, is misplaced, because Rodriguez merely holds that in a competency hearing the court is required to enter a "formal adjudication" of competency pursuant to s 917.01, Fla.Stat., (1969), which controlled those proceedings at that time. [2] And so also, in Marshall v. State, 351 So.2d 88 (Fla. 2nd DCA 1977), the Court held that under former Rule 3.210, Fla.R.Crim.P., (1972), a written order of competency was required, and again cited Emerson, supra. A fair reading of former s 917.01, Fla.Stat. (1969), and of former Rule 3.210, Fla.R.Crim.P., (1972), fails to reveal any requirement for a written order. Both the Statute and the Rule require a "decision" and the form of the order is not mentioned. In fact, Section (a)(3) of the former Rule specifically calls for written reports under certain circumstances, so it would appear that if the Supreme Court had required written orders, it would have said so. An analogous situation can be found in the requirement that a court first make a decision on the voluntariness of a confession before it can be admitted into evidence. It has been held that the court's conclusion and finding of voluntariness must appear in the record with "unmistakable clarity" but it has also been held that the court need not make formal findings of fact or write an opinion. Sims v. Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); McDole v. State, 283 So.2d 553 (Fla.1973). If the court can make ***1191** a verbal finding on the record on a matter as important as the

voluntariness of a confession, it would seem that the court can also make a verbal finding on the record that an accused is competent. We find no legal requirement for a written order so long as the record accurately reflects the court's findings.

For the reasons expressed, the order appealed from is reversed, with directions to the trial court to set aside the judgment of conviction and to grant the appellant a new trial, after first determining in a formal hearing the matter of defendant's competency.

REVERSED and REMANDED.

DAUKSCH, C. J., and COBB, J., concur.

All Citations

380 So.2d 1188

Footnotes

1 3.210(a)(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The defendant shall designate his attorney to serve as his representative under Fla.Stat. s 394.459(11), F.S.A., in the event the defendant is found mentally incompetent. The court may appoint not exceeding three disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

2 917.01, F.S.1969: (2) "If the court, after the hearing decides that the defendant is sane, it shall proceed with the trial. If, however, it decides that the defendant is insane, it shall take proper steps to have the defendant committed to the proper institution. . . . "

683 So.2d 177
District Court of Appeal of Florida,
Second District.

Mary Ann SASNETT, Appellant,
v.
Odell O. SASNETT, Appellee.

No. 95-02603.
|
Nov. 15, 1996.

In action for dissolution of marriage, the Circuit Court, Hillsborough County, Ralph Steinberg, J., found that pretrial agreement between parties concerning temporary relief was final determination on issues of attorney's fees and costs. Wife appealed. The District Court of Appeal, Quince, J., held that pretrial agreement did not constitute waiver of wife's right to pursue additional fees and costs.

Reversed and remanded.

West Headnotes (2)

[1] Divorce
Stipulations and agreements

Parties' agreement concerning temporary relief prior to trial in action for dissolution of marriage, by which parties agreed to divide marital funds held by wife for purposes of normal living expenses and attorney's fees, was not waiver of wife's right to pursue additional attorney's fees or costs; oral agreement as to temporary relief indicated interim or short-term nature of relief, and no language in agreement indicated intent to waive right to have trial court determine issues of fees and costs.

1 Cases that cite this headnote

[2] Divorce
Construction and Operation

To find that waiver of rights has occurred in connection with dissolution of marriage, language used in agreement must clearly and unambiguously express waiver or language must be such that interpretation of agreement as whole can lead to no other conclusion but waiver.

3 Cases that cite this headnote

Attorneys and Law Firms

***177** W. Dale Gabbard of Guito & Gabbard, Tampa, for Appellant.

Earl McMillin, Cape Canaveral, for Appellee.

Opinion

QUINCE, Judge.

Mary Ann Sasnett challenges the trial court's ruling in a dissolution proceeding which found that a pretrial agreement between the parties concerning temporary relief was a final determination on the issues of attorney's fees and costs. We reverse because the trial court's ruling is not supported by substantial, competent evidence.

On or about March 28, 1994, the parties appeared before the trial court on the wife's motion for temporary relief and the husband's motion for temporary injunction. At that time the wife had in her possession $122,328.58 of marital funds. The parties agreed to divide the funds for purposes of normal living expenses and attorney's fees. The trial court affirmed this agreement in an order dated April 5, 1994, which provided, in pertinent part, that, "[T]he parties have entered into a temporary arrangement without prejudice to either party, and that the matter is being resolved by a division of marital funds currently in the possession of the Wife.... That said funds may be utilized by the parties for their normal living expenses and payment of attorney's fees."

The final judgment of dissolution of marriage, entered by the court on October 28, 1994, retained jurisdiction to consider the matter of attorney's fees and costs. Thereafter, the trial court denied the former wife's motion to tax costs and attorney's fees, finding the issue had been resolved by the parties' oral stipulation on March 28, 1994. The order denying the motion to tax costs and ***178** attorney's fees was entered on April 20, 1995, the same day the court entered an amended order, *nunc pro tunc* to

April 5, 1994, on the motion for temporary injunction and motion for temporary relief. The amended order added a provision that the monies divided by the parties would also be used for payment of costs.

[1] Mr. Sasnett argued and the trial court agreed that the agreement reached by the parties on March 28, 1994, should be construed as a waiver by Mrs. Sasnett of her claim to any additional attorney's fees or costs. We disagree. The terms of the stipulation do not clearly demonstrate an intent to waive future rights to attorney's fees and costs.

At the hearing on March 28, 1994, the former husband's counsel outlined the oral agreement as follows, "Judge ... [w]e have agreed that on a temporary basis, this is without prejudice to either side, that they would go ahead and split it.... The money will not be dissipated except to pay for their normal living expense and paying fees and costs of their attorneys in this action so far or up to the final hearing." Both counsel's statement to the court concerning the agreement and the court's order use the terms "temporary" and "without prejudice." These terms suggest the interim or short-term nature of the relief rather than a final determination.

[2] In order to find that a waiver of rights has occurred, the language used in the agreement must clearly and unambiguously express waiver or the language must be such that an interpretation of the agreement as a whole can lead to no other conclusion but waiver. *Vargas v. Vargas,* 654 So.2d 963 (Fla. 5th DCA 1995). In *Agliano v. Agliano,* 605 So.2d 597 (Fla. 2d DCA 1992), this court found a waiver of any future entitlement to modification of alimony where the marital settlement agreement provided in unequivocal terms that the parties "irrevocably waive any and all modification entitlement." Similarly, in *Bassett v. Bassett,* 464 So.2d 1203 (Fla. 3d DCA 1984), *review denied,* 476 So.2d 672 (Fla.1985), the third district found a waiver where the language of a marital settlement agreement permanently enjoined the parties from making any claims against each other. There is no language, express or implied, in the agreement before us that can be construed as an intent to waive the right to have the trial court determine the issues of attorney's fees and costs.

Since it cannot be said that a waiver was intended by the parties' agreement, the trial court erred in denying the former wife's motion to tax costs and attorney's fees on that ground. We remand this case to the trial court for reconsideration of the issues of costs and attorney's fees.

RYDER, A.C.J. and LAZZARA, J., concur.

All Citations

683 So.2d 177, 21 Fla. L. Weekly D2466

EXHIBIT “D”

Holland & Knight

701 Brickell Avenue, Suite 3000 | Miami, FL 33131 | T 305.374.8500 | F 305.789.7799
Holland & Knight LLP | www.hklaw.com

Memorandum

Date: April 10, 2017

To: Jon Paul Perez
Steve Kohler

From: Tracy R. Slavens

Re: Nuisance Easement

You have asked us to analyze whether nuisance easements are enforceable in Florida. In particular, we have analyzed whether a nuisance easement will protect the United States Coast Guard (the "USCG") against liability for any nuisance caused by its operations (i.e., the impact of noise, fumes, and vibration) on the "use and quiet enjoyment" of the properties within the proposed development in Terminal Island, Miami Beach (collectively the "Property").

Background

As noted in the previous memo, the USCG owns and operates its Miami Base to the east of the channel abutting Terminal Island (the "USCG Base"). The USCG Base operations include an industrial facility providing ship maintenance and repair as well as support for shore infrastructure. Industrial equipment such as grinders, needle guns, sand blasting and welding equipment which generates significant noise and emissions into the air are commonly used in the USCG Base. The USCG Base also uses amplified sound equipment to broadcast information around the facility. A crucial part of the USCG operations is the ability to provide emergency response and law enforcement services that require rapid departures with large wakes, sirens and flashing lights. In addition, helicopters are able to land at the USCG Base and large and small patrol cutters along with Aids to Navigation vessels are homeported or called at the USCG Base. These vessels conduct operations at the dock both day and night. Overall, the USCG Base engages in intensive industrial and/or institutional uses 24 hours per day, 365 days a year.

Nuisance Easement

An easement is a legally enforceable use of property by someone other than the owner. *See* One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC, 884 So.2d 1039, 1044 (Fla. 5th DCA 2004) (citing Black's Law Dictionary 527 (Bryan A. Garner ed., 7th ed. West 1999)). Easements are most commonly granted to public utilities or government agencies for uses that benefit the public at

large. Generally, easements run with the land.[1] Therefore, easements are enforceable against all succeeding owners of the property.

The concept of nuisance easements is widely recognized by the courts. In fact, the United Sates Supreme Court held that noise can be a nuisance and that such nuisance can give rise to an easement, and that such noise may come straight down from above, or from some other direction. *See* United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, and Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). Avigation easements are a common form of nuisance easements used by Airports to protect against liability for any nuisance caused by airplanes using the airport, including, but not limited to, noise, fumes and vibration. In recent years, the Federal Aviation Administration (FAA) has promoted the imposition of avigation easements as a condition of approval of subdivisions or other new development near airports. These impositions are intended to eliminate the airport's liability for nuisance claims due to noise or fumes. Nuisance easements are enforceable in Florida and a person who grants such an easement does not have a valid legal cause of action related to the nuisance. *See e.g.*, City of Jacksonville v. Schumann, 199 So. 2d 727, 728 (Fla. 1st DCA 1967) (Court entered summary judgments against Plaintiffs that had given avigation easements over their respective properties).

Conclusion

In light of the foregoing, recording a nuisance easement (substantially in the form attached hereto as "Exhibit A") in favor of the USCG would allow the USCG to continue to conduct its operations on the USCG Base without encroaching or depriving any adjacent Property owners of the use of their property due to noise, vibrations, fear, anxiety, fumes, residue and other related impacts that the USCG operations may cause. An easement on the land to the USCG and the USCG Base will allow the creation of certain nuisances such as noise that would otherwise be challengeable under a common law claim of nuisance. Such a grant would be appurtenant to the land and remain with the land through further transfer.

For your convenience, a copy of the applicable Federal and Florida specific case law referenced herein has been attached as Exhibit "B."

Should you have any questions regarding the foregoing or would like to discuss any of the issues raised, please do not hesitate to contact our office.

[1] In Florida, "if the performance of a covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to enhance the value of the property or renders it more convenient and beneficial to owner, it is a covenant running with the land." *See* PGA N. II of Florida, LLC v. Div. of Admin., State of Florida Dept. of Transp., 126 So. 3d 1150, 1151 (Fla. 4th DCA 2012).

EXHIBIT “A”

NUISANCE EASEMENT

Instrument prepared by:

Tracy R. Slavens, Esq.
Holland & Knight, LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131

User department: _____

EASEMENT

This **GRANT OF PERPETUAL NON-EXCLUSIVE EASEMENT** ("**Easement**") dated _____ by and between Miami Beach Port, LLC, a Florida limited liability company (the "**Developer**") and the United States Coast Guard (the "**USCG**"). "Developer" means Miami Beach Port, LLC and its parent, affiliates, contractors, subcontractors, working interest owners, joint venturers, officers, directors, employees, agents, attorneys, representatives, insurers, reinsureres, assigns, and successors-in-interest.

Recitals

A. The Developer is the owner of that certain ±3.71 acre parcel of land located on the southeastern tip of Terminal Island at 120 MacArthur Causeway, as legally described in that certain deed recorded in Official Records Book 28620 at Page 3512 of the Public Records of Miami-Dade County (the "**Developer Property**").

B. The USCG is the owner of the ±17.52 acre parcel to the east of the channel abutting the Developer Property (the "**USCG Property**").

C. The USCG utilizes the USCG Property for a variety of activities including, without limitation, the operation of (i) an industrial facility providing ship maintenance and repair as well as support for shore infrastructure; (ii) industrial equipment such as grinders, needle guns, sand blasting and welding equipment; (iii) helicopter take-off, landing, and maintenance, (iv) sound amplification systems to communicate information across the USCG Property at amplified volume, (v) a high traffic marine facility providing dockage and maintenance for USCG vessels providing emergency response, protection of the borders of the United States of America and surrounding areas (which activities involve the loading, unloading and maintenance of live armaments), (vi) explosives storage and transfer, and (vii) various future activities as the USCG may see fit (items (i) through (vi) are collectively hereinafter referred to as the "**USCG Operations**").

D. The Developer desires to construct on the Developer Property a development which may consist of one or more of the following: (i) a residential tower with approximately 90 multi-family dwelling units and associated amenities, (ii) offices, (iii) a yacht moorage, and (iv) a fleet management and sanitation city facility (the "**Development**").

E. Developer acknowledges that the USCG Operations may from time to time interfere and infringe on the unfettered use and enjoyment of the Developer Property and, as a result of such infringement and interference, on the terms and conditions set forth herein, Developer desires to grant an easement to USCG to permit any such infringement and interference that occurs as a result of any USCG Operations occurring now or in the future, all as more particularly set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions contained herein, together with other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Developer hereby voluntarily grants and conveys a perpetual Easement for and in favor of the USCG upon the Developer Property which shall run with the land and be binding upon the Developer and the USCG, their successors and assigns.

Agreement

1. Easement. The Developer hereby grants a perpetual non-exclusive easement over the Developer Property running in favor of the USCG as follows:

(a) Avigation and Navigation. The Developer reserves unto itself, its successors and assigns, for the use and the benefit of the public, and hereby grants and conveys to the USCG a non-exclusive easement and right-of way for the free and unobstructed performance of the USCG Operations, including flight, navigation, sail, passage and effects thereof of all types of aircraft and vessels. For the purpose of this Easement, (i) "aircraft" shall mean any contrivance now known or hereafter invented, used or designated for the navigation of, or flight in or through the air (i.e., airplane, helicopter, drone, etc.), and (ii) "vessel" shall mean any contrivance now known or hereafter invented, used or designated for the navigation of, or sail on or over the water (i.e., boat, ship, raft, etc.).

(b) Operational. The Developer reserves unto itself, its successors and assigns, for the use and the benefit of the public, and hereby grants and conveys to the USCG a non-exclusive easement and right of way over and above the Developer Property for the noise, vibrations, dust, light, smoke, odors, fumes, vapors, fuel particles, soot or other air pollution, vibrations, fear, interference with sleep, use and enjoyment, and communications and any and all other effects as may be alleged to be incident to or caused by the USCG Operations.

2. Construction. Notwithstanding the foregoing, the Developer reserves unto itself, its successors and assigns, the right to perform such activities on the Developer Property as the Developer may deem reasonably necessary or desirable in connection with the design, engineering, and construction, maintenance, repair and redevelopment of the Developer Property and the Development.

3. Covenants Running with Land. This Easement shall run with the lands described herein, and shall be binding upon the Developer and the USCG and shall inure to and be for the benefit of the Developer and the USCG and their respective successors and assigns. The provisions of this instrument shall become effective upon their recordation in the public records of Miami-

Dade County, Florida. This Easement shall run with the land of the Developer Property and shall be binding upon the Developer, its heirs and assigns and shall inure to the USCG, its successors and assigns forever.

4. Attorney's Fees. In the event that any party brings an action to enforce its rights hereunder, the prevailing party in such action shall be entitled to receive all costs and reasonable attorney's fees in addition to any damages to which it is due by reason of such action.

5. Notices. Any demands or notice allowed or required hereunder shall be deemed to have been properly given or served when delivered personally or deposited with the United States Postal Service, as registered or certified mail, postage prepaid and addressed as follows:

If to USCG: United States Coast Guard
[_____]
[_____]
[_____]

and a copy to: [_____]
[_____]
[_____]

If to Developer: Miami Beach Port, LLC
315 S. Biscayne Blvd.
Miami, FL 33131

and a copy to: Tracy R. Slavens. Esq.
Holland & Knight, LLP
701 Brickell Avenue, Suite 3300
Miami, FL 33131

Any party may change his, her or its address for notice by giving the other parties hereto at least fifteen (15) days' prior written notice of any such change of address.

6. Amendments. This Easement may not be changed, modified, released or amended in whole or in part except by a written and recorded instrument, executed by the then record fee owners of the Developer Property and USCG Property.

7. No USCG Obligation to Exercise. Nothing herein shall be construed as obligating the USCG to exercise any of its easement rights herein, and the USCG may determine whether to exercise all or any portion of its easements rights herein, in its sole discretion.

8. Severability. If any portion contained herein shall be held to be invalid or to be unenforceable or not to run with the land, such holding shall not affect the validity or enforceability of the remainder of this instrument.

IN WITNESS WHEREOF, the Developer has caused this instrument to be executed and delivered as of the date and year first written above.

_____
Developer

STATE OF FLORIDA)
) SS:
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this ___ day of _____, 2017, by _____, as _____ of Miami Beach Port, LLC, a Florida limited liability company, on behalf of said company, who is personally known to me or has produced _____ as identification.

My Commission Expires:

_____
Notary Public – State of Florida

_____
Printed Name

EXHIBIT "B"

APPLICABLE CASE LAW

KeyCite Yellow Flag - Negative Treatment
Distinguished by Giller v. Giller, Fla.App. 3 Dist., April 27, 2016

884 So.2d 1039
District Court of Appeal of Florida,
Fifth District.

ONE HARBOR FINANCIAL
LIMITED COMPANY, Appellant,
v.
HYNES PROPERTIES, LLC, Appellee.

No. 5D03-3629.
|
Oct. 15, 2004.

Synopsis
Background: Landowner brought action to quiet title to property seeking to eliminate purported easement. The Circuit Court, Brevard County, John Dean Moxley, Jr., J., found that easement was void ab initio and that neighboring landowner failed to establish implied easement or easement by prescription. Neighboring landowner appealed.

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

[1] individual, who was previously fee simple owner of parcels of land currently owned by landowner and neighboring landowner, lacked legal right to grant easement;

[2] easement would not be implied; and

[3] easement by prescription was not established.

Affirmed.

West Headnotes (15)

[1] Tenancy in Common
Nature and Incidents of Cotenancy

Estate in fee simple can only be held in severalty.

Cases that cite this headnote

[2] Easements
Merger

Merger doctrine did not apply in landowner's action to quiet title in which landowner sought to eliminate purported easement, where prior owner of both landowner's property and neighboring landowner's property were initially conveyed to prior owner in fee simple and it could not be said that either parcel of land was servient to other because alleged easement was not formed until several years after land was conveyed to prior owner.

Cases that cite this headnote

[3] Easements
Merger

Merger doctrine is applied to separate parcels of land owned by same individual in same right where there is existing easement that creates both dominant and servient estate.

Cases that cite this headnote

[4] Easements
Merger

Otherwise valid easement may be extinguished as matter of law through doctrine of merger when ownership of dominant and servient estates becomes united in one person.

Cases that cite this headnote

[5] Trusts
Constitutional and Statutory Provisions

Purpose of statute governing conveyances of land and declarations of trust is to protect persons who rely upon public land records to ascertain title to real property when beneficiary's interest is not disclosed in grantor/grantee index by either deed transferring title or recorded declaration of trust. West's F.S.A. § 689.07.

3 Cases that cite this headnote

[6] Trusts
Form and Contents

Trusts
Recording and Registration

Individual owned two parcels of property in fee simple absolute, rather than as trustee, where declaration of trust was never recorded and deeds used in conveyance of parcels did not identify trust, name trust beneficiaries, or state nature or purpose of trust. West's F.S.A. § 689.07.

3 Cases that cite this headnote

[7] Easements
Subject-Matter and Parties in General

Individual, who was fee simple owner of two adjoining parcels of land, lacked legal right to grant easement across one parcel allowing ingress and egress to other parcel, and thus, easement was void ab initio.

Cases that cite this headnote

[8] Easements
Nature and Elements of Right

"Easement" is right to use land owned by another.

1 Cases that cite this headnote

[9] Easements
Severance of Ownership of Dominant and Servient Tenements

Easement would not be implied, where agreement in which prior landowner, who simultaneously owned fee simple title to two adjoining parcels of land, attempted to create easement over one parcel in favor of other parcel was invalid on its face.

2 Cases that cite this headnote

[10] Frauds, Statute Of
Creation of Easements

Easement is real property interest subject to statute of frauds, and apart from prescription, requires writing for its creation.

Cases that cite this headnote

[11] Easements
By Express Grant or Reservation

Documents that convey easements are subject to same rules of construction as other contracts and should be interpreted using contract principles.

3 Cases that cite this headnote

[12] Contracts
Contravention of Law in General

Right to contract is subject to limitation that agreement must be legal.

Cases that cite this headnote

[13] Contracts
Enforcement of Contract in General

In general, courts are under no obligation to discern intent of parties from language contained within illegal contract.

Cases that cite this headnote

[14] Equity
Equity Follows the Law

Courts of equity have no power to issue rulings which they consider to be in best interest of justice without regard to established law.

Cases that cite this headnote

[15] Easements
Use of 20 Years or More

Easement by prescription was not established, where it was uncontested that use of easement began on specified date, which was not 21 years before filing of instant action to quiet

title, as required to establish easement by prescription.

1 Cases that cite this headnote

Attorneys and Law Firms

***1041** David G. Larkin and Jesse L. Kabaservice of Fallace & Larkin, L.C., Melbourne, for Appellant.

Alfred A. Lasorte, Jr., of Shutts & Bowen LLP, West Palm Beach, for Appellee.

Opinion

PETERSON, J.

One Harbor Financial Limited Company, ("One Harbor"), appeals a final judgment quieting title to property owned by Hynes Properties, LLC, ("Hynes").

One Harbor and Hynes own title to adjoining parcels of land and deraign title from the same remote grantor, Paul M. Hoffenberg. Hoffenberg had acquired the two parcels by separate deeds in which his name appeared as grantee followed by the words "as trustee" or "trustee."

At some time prior to August 19, 1986, Hoffenberg constructed a 75,000 square foot building on the parcel now owned by One Harbor. In an attempt to meet the then-existing zoning regulations which required thirteen additional parking spaces to that available on the parcel, on August 19, 1986, Hoffenberg "individually and as trustee," executed an easement agreement, ("Agreement"), that purported to convey a perpetual, non-exclusive easement for thirteen parking spaces along with a twenty-foot strip of land to be used for ingress and egress, from the adjacent New Haven Avenue to those parking spaces upon the property now owned by Hynes in favor of the property now owned by One Harbor. In the Agreement, Hoffenberg was identified as both the grantor and grantee. Two days later, on August 21, 1986, Hoffenberg "individually and as trustee" conveyed the parcel now owned by Hynes to Curtis Hendrix without making any reference to the easement. [1] The Agreement was duly recorded on August 29, 1986 [2] and use of the easement began on or about August 21, 1986, and has continued ever since.

Through subsequent conveyances, Hynes acquired title to the parcel purported to be encumbered by the easement. Aware of the easement, Hynes purchased the property on the advice of counsel that the underlying Agreement was invalid and the easement unenforceable. Hynes then filed a quiet title action seeking to eliminate the easement from its title so that it could construct a building that would encroach upon the area described in the Agreement. The complaint alleged that the Agreement was invalid because title to the dominant estate (currently owned by One Harbor), and the servient estate (currently owned by Hynes) were held by the ***1042** same person (Hoffenberg) at the time of the creation of the easement, rendering the Agreement void under Florida law.

One Harbor's answer admitted that Hoffenberg owned both properties "individually and as trustee" at the time the Agreement was executed, but asserted that the easement was valid because the grantee and grantor did not maintain the same indicia of title and ownership as to both properties. Additionally, One Harbor argued that even if the Agreement was deemed invalid as drafted, an easement over Hynes' property existed as the result of an implied reservation from a pre-existing use. Because all predecessors in interest to Hynes and One Harbor acknowledged the existence of the easement over Hynes' property, One Harbor further asserted that Hynes is equitably estopped from denying the validity of the easement because Hynes purchased the parcel with full knowledge of the Agreement regarding the easement and was aware that One Harbor claimed an interest in Hynes' property. One Harbor also counterclaimed seeking to quiet title to the easement and alleging that as a result of Hoffenberg's pre-existing use, One Harbor acquired an easement by implied reservation and that as a result of continued use by One Harbor and its predecessors in interest, One Harbor acquired an easement by prescription.

[1] [2] [3] [4] The trial court specifically found that Hoffenberg took title to each parcel "individually and as trustee," that no trust or beneficiary was identified in any conveyance of either parcel, and that there was no evidence that a trust relating to either parcel was ever recorded. The trial court applied the provisions of section 687.07, Florida Statutes (1959), and concluded, *inter alia,* that Hoffenberg was the fee simple "individual" owner of each parcel at the time that the Agreement was executed. [3]

The trial court also found that at the time the Agreement was recorded Hoffenberg owned both parcels of land.[4] Because the Agreement purported to convey an easement from Hoffenberg, as both grantor and grantee, the trial court held that Hoffenberg's attempt to create an easement over his own property was void ***1043** *ab initio.* The trial court further held that One Harbor neither proved the establishment of an easement by prescription nor an implied easement because the equitable arguments raised were not supported by the facts, the record or the law. We agree with the trial court's findings.

APPLICATION OF SECTION 687.07, FLORIDA STATUTES

In reaching its decision, the trial court applied section 689.07, Florida Statutes (1959).[5] Section 689.07 provides:

> (1) Every deed or conveyance of real estate heretofore or hereafter made or executed in which the words "trustee" or "as trustee" are added to the name of the grantee, and in which no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date, shall grant and is hereby declared to have granted a fee simple estate with full power and authority in and to the grantee in such deed to sell, convey, and grant both the legal and beneficial interest in the real estate conveyed, unless a contrary intention shall appear in the deed or conveyance; provided, that there shall not appear of record at the time of recording of such deed or conveyance, a declaration of trust by the grantee so described declaring the purposes of such trust, if any, declaring that the real estate is held other than for the benefit of the grantee.

[5] The purpose of section 689.07 is to protect persons who rely upon the public land records to ascertain title to real property when a beneficiary's interest is not disclosed in the grantor/grantee index by either the deed transferring title or a recorded declaration of trust. *In re Schiavone,* 209 B.R. 751 (Bkrtcy.S.D.Fla.1997). The statute prevents "secret trusts" that impede the exchange of marketable title by vesting both the legal and beneficial interest in the trustee, unless a contrary intention appears in the deed or conveyance, or a declaration of trust is recorded. The statute also permits any person to record a declaration of trust before or after the recordation of the deed.[6]

[6] Because the deeds used in the initial conveyance of the parcel to Hoffenberg did not identify either trust, name the trust beneficiaries or state the nature or purpose of either trust, and because a declaration of trust was never recorded under section 689.07, the trial court was correct in finding that Hoffenberg owned each parcel in fee simple absolute. *See, e.g., Zosman v. Schiffer,* 697 So.2d 1018 (Fla. 3d DCA 1997) (recognizing language referring to the owners as trustees did not change the nature of the transaction); *Terry v. Zaffran,* 483 So.2d 526 (Fla. 5th DCA 1986) (holding that without a declaration of trust being recorded or any beneficiary specifically named, the words "as trustee" in an instrument of conveyance do not encumber or effect a grantee's individual ownership of real estate); *Glusman v. Warren,* 413 So.2d 857 (Fla. 4th DCA 1982) (holding that where grantee was named as trustee without identification of the beneficiaries or the nature and purposes of the trust and no trust agreement ***1044** of record was identified, the grantee received fee simple title).

AGREEMENT VOID *AB INITIO*

[7] Under *Hensel v. Aurilio,* 417 So.2d 1035 (Fla. 4th DCA 1982), Hoffenberg never had the legal ability to grant an easement over his own property. In *Hensel,* the appellant acquired title to lots A, B, C and D. Appellant later sold lots B, C and D to appellee. Thereafter, the parties entered into a written contract which provided that lot B was to be repurchased by appellant. As originally drawn, that contract provided for an easement to be retained by appellee over a portion of lot B. At appellant's insistence, that provision was deleted prior to execution of the contract. However, on the day of the closing, appellee secretly prepared an easement subjecting lot B to an easement in favor of lot D, and subsequently recorded the deed. The court held that appellee could not, while owner of both the dominant estate (lot D) and servient estate (lot B), carve out an easement by grant to himself. No other reported Florida case has specifically addressed the issue of whether one who owns adjoining, unencumbered parcels in the sameright, may create an easement over one parcel in favor of the other, but several other state and federal courts have disapproved of such action. *See, e.g., Mattos v. Seaton,* 839 A.2d 553 (R.I.2004) (holding no easement can be created over a section of land in favor of another adjoining parcel when one owner owns both

properties); *Mikels v. Rager,* 232 Cal.App.3d 334, 284 Cal. Rpt. 87 (Cal.App. 4 Dist.1991) (holding one cannot grant an easement to oneself; one can only reserve such interest in land granted to another); *Hayes v. Moreau,* 104 N.H. 124, 180 A.2d 438 (1962) (recognizing that while all of the tract was in common ownership of a single owner, no easement could arise in favor of one lot in tract over another lot); *Hidalgo County Water Control and Imp. Dist. No. 16 v. Hippchen,* 233 F.2d 712 (C.A.5 Tex.1956) (recognizing that for an easement to exist the dominant and servient estates must be held by different owners); *Marshall v. Callahan,* 241 Mo.App. 336, 229 S.W.2d 730 (1950) (recognizing that to acquire an easement there must be a dominant and a servient estate and they must not be lodged in the same person); *Goldstein v. Beal,* 317 Mass. 750, 59 N.E.2d 712 (1945) (holding that where there is common ownership of two parcels, there could be no easement in favor of one lot operating as a burden to the other); *Magnolia Petroleum Co. v. Caswell,* 1 S.W.2d 597 (Tex.Com.App.1928) (recognizing that one cannot have an easement in his own land); *Bales v. Butts,* 309 Mo. 142, 274 S.W. 679 (1925) (recognizing that as long as the lots belonged to the same owner, there could be no easement in favor of one lot, or servitude upon the other).

[8] An easement, by definition, is the right to use land owned by another. *Black's Law Dictionary* 527 (Bryan A. Garner ed., 7th ed. West 1999). This court made clear that that right exists in one *other than the owner of the land* to use land for some particular purpose or purposes. (Emphasis added.) *Dean v. MOD Properties, Ltd.,* 528 So.2d 432, 433 (Fla. 5th DCA 1988). Hoffenberg, as fee simple owner of both parcels, did not possess the legal right to grant an easement over his own property. Accordingly, the Agreement was void *ab initio.*

IMPLIED EASEMENT

[9] **[10]** An easement is a real property interest subject to the statute of frauds, and apart from prescription, requires a writing for its creation. *Dotson v. Wolfe,* 391 So.2d 757, 759 (Fla. 5th DCA 1980). The Florida Supreme Court has recognized ***1045** only two circumstances where an easement will be implied. *See Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc.,* 489 So.2d 22 (Fla.1986) (adopting Judge Cowart's dissent in *Moorings Ass'n, Inc. v. Tortoise Island Communities, Inc.,* 460 So.2d 961 (Fla. 5th DCA 1984)). The first circumstance implies an easement from terms contained in a "duly executed" writing that is ambiguous, but otherwise valid. *Id.* The second circumstance implies an easement from a factual situation giving rise to the creation of a way of necessity as a matter of public policy and is not an issue in the instant case. *Id.*

One Harbor asserts that if the Agreement is deemed invalid, it still maintains an easement over Hynes' property by implied reservation through a pre-existing use. Under the holding in *Tortoise Island,* to imply such an easement, the implication must arise from a "duly-executed" writing. It necessarily follows that the writing from which such an easement is implied must itself be a valid legal instrument.

[11] **[12]** **[13]** Documents that convey easements are subject to the same rules of construction as other contracts and should be interpreted using contract principles. *See, e.g., Los Angeles County v. Wright,* 107 Cal.App.2d 235, 236 P.2d 892 (1951); *Percy A. Brown & Co. v. Raub,* 357 Pa. 271, 54 A.2d 35 (1947); *U.S. v. Sea Gate, Inc.,* 397 F.Supp. 1351 (D.C.N.C.1975). The right to contract is subject to the limitation that the agreement must be legal. In general, Florida courts are under no obligation to discern the intent of the parties from language contained within an illegal contract. *E.g., Katz v. Woltin,* 765 So.2d 279 (Fla. 4th DCA 2000) (recognizing that where a contract is illegal, no action may be brought on it, whether in law or in equity); *Castro v. Sangles,* 637 So.2d 989 (Fla. 3d DCA 1994) (holding that no action may be maintained on an illegal agreement). Here, the Agreement is invalid on its face because it attempts to create an easement over one parcel in favor of an adjacent parcel, the titles to which were simultaneously owned by Hoffenberg.

One Harbor's reliance on this court's ruling in *Martin v. Kavanagh,* 773 So.2d 1250, 1253 (Fla. 5th DCA 2000), is misplaced because a valid writing sufficient to satisfy the statute of frauds was present in that case. Similarly, One Harbor's reliance on *Williams Island Country Club, Inc. v. San Simeon at the California Club, Ltd.* 454 So.2d 23 (Fla. 3d DCA 1984), is misplaced because in implying an easement by reservation from a pre-existing use, the court interpreted ambiguous terms contained in an otherwise valid contract. We agree that if the Agreement were otherwise valid but contained ambiguous terms, this court could interpret its terms to give effect to the express intent of the parties. But invalidity, not ambiguity, is the issue. Both parties agree, and the trial court specifically found

that the Agreement was intended to create the easement. With no other valid instrument from which to infer the intent of the parties, this court cannot create an easement by implication, notwithstanding the temptation to do so in view of the circumstances involved in this case.

[14] One Harbor urges this court to employ its equitable powers to give effect to the intent of the parties in view of fifteen years of uncontested use of the property, and to declare the easement valid, but such remedy is beyond this court's power. Courts of equity simply have no power to issue rulings which they consider to be in the best interest of justice without regard to established law. *E.g., Flagler v. Flagler,* 94 So.2d 592 (Fla.1957); *see also Florida High School Athletic Ass'n v. Melbourne* ***1046** *Central Catholic High School,* 867 So.2d 1281 (Fla. 5th DCA 2004) (recognizing that courts of equity do not have any right or power to issue such orders as they consider to be in the best interest of "social justice" at the particular moment without regard to established law). We share the trial court's reservations regarding the fairness of its ruling but the law compels such a result.

EASEMENT BY PRESCRIPTION

[15] It is uncontested that use of the easement began on August 21, 1986 and has continued ever since. Because the statutory twenty-year period required to obtain an easement by prescription had not run prior to the filing of this action on June 18, 2001, no easement arose through prescription. *See, e.g., Downing v. Bird,* 100 So.2d 57 (Fla.1958); *Crigger v. Florida Power Corp.,* 436 So.2d 937 (Fla. 5th DCA 1983).

One Harbor has exhausted its inventory of theories to establish the validity of the attempt by Hoffenberg to establish an easement, and we agree with the trial court that none of those theories can support its position. Therefore, we must affirm the judgment quieting title.

AFFIRMED.

THOMPSON, J., and SMITH, C. M., Associate Judge, concur.

All Citations

884 So.2d 1039, 29 Fla. L. Weekly D2298

Footnotes

1 The record does not disclose whether Hendrix had or did not have notice of the easement when he acquired title and the concept of the bona fide purchaser for value without notice is not an issue in this appeal.

2 The record is unclear as to when the Agreement was recorded. Appellant's initial brief indicates that the Agreement was recorded on August 20, 1986. During a hearing on January 4, 2002, counsel for the Appellant stated that the Agreement was recorded on August 29, 1986. The Agreement appears to be date stamped on August 29, 1986.

3 An estate in fee simple can only be held in severalty. *See* 4 *Thompson on Real Property* § 1770 (1979) (citing *In re Sullivan's Estate,* 121 Colo. 494, 218 P.2d 1064 (1950)). There can be but one estate in fee simple to a particular described tract of land. *See* 28 Am. Jur 2d *Freehold Estates* § 13 (2000) (citing *Humphreys-Mexia Co. v. Gammon,* 113 Tex. 247, 254 S.W. 296 (1923)). Accordingly, we note that the use of the term "individual" is redundant and unnecessary in the order on appeal.

4 The trial judge also held that Hoffenberg was the owner of the fee simple title of each parcel at the time that the Agreement was executed, yet noted that the properties had merged upon their initial conveyance to Hoffenberg. One Harbor disagrees, stating that because the properties were never owned under a common deed, and were acquired at different times, under different documents, the properties did not merge. One Harbor is correct, but for the wrong reason. The merger doctrine is applied to separate parcels owned by the same individual in the same right where there is an existing easement that creates both a dominant and a servient estate. *See, e.g., Lacy v. Seegers,* 445 So.2d 400 (Fla. 5th DCA 1984). An otherwise valid easement may be extinguished as a matter of law through the doctrine of merger when ownership of the dominant and servient estates becomes united in one person. *Id.* Here, it cannot be said as a matter of law that either of the parcels initially conveyed to Hoffenberg were a "greater estate" or a "lesser estate," as both were initially conveyed to Hoffenberg in fee simple. Nor can it be said that one parcel was servient to the other because the alleged easement was not formed until several years after the land was conveyed to Hoffenberg. Accordingly, we do not believe that the application of the merger doctrine in this case was appropriate.

5 The trial court likely reviewed the statute as amended in 1959. The 1959 amendment added sections (2) through (5) and provided the grantee with the additional authority in section (1) to "encumber" the legal and beneficial interest. Prior to the amendment, the proviso now in section (1) required the declaration of trust to "appear of record." The provision was expanded by the amendment to read "appear of record among the public records of the county in which the real property is situated."

6 § 689.07(4), Fla. Stat. (2003).

66 S.Ct. 1062
Supreme Court of the United States

UNITED STATES
v.
CAUSBY et ux.

No. 630.
|
Argued May 1, 1946.
|
Decided May 27, 1946.

Action by Thomas Lee Causby and wife, Tinie Causby, against the United States, to recover for the alleged taking by defendant of plaintiffs' home and chicken farm which was adjacent to a municipal airport leased by the defendant. To review a judgment of the Court of Claims in favor of the plaintiffs, 60 F.Supp. 751, the United States brings certiorari.

Reversed and remanded.

Mr. Justice BLACK and Mr. Justice BURTON dissenting.

On Writ of Certiorari to the Court of Claims.

Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

West Headnotes (14)

[1] **Armed Services**
Relation of Military to Civil Authority
Aviation
Rules and regulations

Military airplanes are subject to rules of Civil Aeronautics Board where there are no army or navy regulations to the contrary.

1 Cases that cite this headnote

[2] **Eminent Domain**
Taking Entire Tract or Piece of Property

The owner's loss, and not the taker's gain, is the measure of value of condemned property. U.S.C.A. Const.Amend. 5.

19 Cases that cite this headnote

[3] **Eminent Domain**
Taking Entire Tract or Piece of Property
Eminent Domain
Value for special use

Market value fairly determined is the normal measure of recovery in condemnation proceeding, and that value may reflect the use to which the property could readily be converted as well as the existing use. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[4] **Eminent Domain**
Easements and other rights in real property

Where federal Government permitted its airplanes to fly so low over plaintiffs' land which adjoined municipal airport in North Carolina leased by federal Government as to deprive plaintiffs of use and enjoyment of their land for purpose of raising chickens, there was a "taking", so as to entitle plaintiffs to recover just compensation. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5; G.S.N.C. §§ 63–11 to 63–13.

77 Cases that cite this headnote

[5] **Eminent Domain**
Easements and other rights in real property

The fact that path of glide taken by airplanes in taking off and landing over plaintiffs' land, which adjoined municipal airport leased by federal Government, was

approved by Civil Aeronautics Authority, did not prevent the flights over plaintiffs' land from constituting a "taking" entitling plaintiffs to just compensation, since the path of glide is not the "minimum safe altitude of flight" prescribed by Civil Air Regulations as the downward reach of navigable air space placed within public domain by Congress. Air Commerce Act of 1926, § 10, 49 U.S.C.A. § 180; U.S.C.A. Const.Amend. 5.

262 Cases that cite this headnote

[6] Property

Ownership and incidents thereof

Landowner owns at least as much of the air space above the ground as he can occupy or use in connection with the land, and fact that he does not occupy it in a physical sense by erection of buildings and the like is not material.

33 Cases that cite this headnote

[7] Eminent Domain

Statutory Provisions and Remedies

The meaning of "property" as used in Fifth Amendment prohibiting the taking of private property for public use without just compensation, is a "federal question," but it will normally obtain its content by reference to local law. U.S.C.A. Const.Amend. 5.

29 Cases that cite this headnote

[8] Eminent Domain

Statutory Provisions and Remedies

A holding that flights by airplanes at low levels over plaintiffs' land, which adjoined municipal airport in North Carolina leased by federal Government, deprived plaintiffs of use and enjoyment of their land and constituted a "taking," so as to entitle them to just compensation, was not inconsistent with local law of North Carolina governing land owner's claim to immediate reaches of the superadjacent air-space. G.S.N.C. §§ 63–11 to 63–13; U.S.C.A. Const.Amend. 5.

157 Cases that cite this headnote

[9] Eminent Domain

Easements and other rights in real property

Flights by airplanes of federal Government over private lands are not a "taking", so as to entitle owner to just compensation, unless they are so low and so frequent as to be direct and immediate interference with the enjoyment and use of the land. Air Commerce Act of 1926, §§ 1 et seq., 6(a), 10 as amended 49 U.S.C.A. §§ 171 et seq., 176(a), 180; Civil Aeronautics Act of 1938, §§ 1 et seq., 1(3), 3, 49 U.S.C.A. §§ 401 et seq., 401(3), 403; U.S.C.A. Const.Amend. 5.

152 Cases that cite this headnote

[10] United States

Takings claims

A claim for taking of private land by federal Government is a "claim founded upon the Constitution" and within jurisdiction of the Court of Claims to determine. Jud.Code, § 145(1), 28 U.S.C.A. § 1491; U.S.C.A. Const.Amend. 5.

60 Cases that cite this headnote

[11] Federal Courts

Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, deficiency in findings of fact by Court of Claims cannot be rectified by statements in its opinion. 28 U.S.C.A. § 1255.

13 Cases that cite this headnote

[12] Federal Courts

Review of specialized federal courts

On certiorari from United States Supreme Court to Court of Claims, Supreme Court would not examine evidence to determine whether it would support a finding of fact,

if such finding had been made by Court of Claims. 28 U.S.C.A. § 1255.

16 Cases that cite this headnote

[13] Federal Courts

Review of specialized federal courts

In action against federal Government for alleged taking of plaintiffs' chicken farm, which was adjacent to municipal airport leased by federal Government as result of Government permitting its airplanes to fly so low over land as to destroy plaintiffs' use and enjoyment thereof, where Court of Claims held that an easement was taken, but its findings of fact contained no description as to whether the easement taken was permanent or temporary, it would be premature for Supreme Court to consider whether amount of award made by Court of Claims was proper. 28 U.S.C.A. § 1255; U.S.C.A. Const.Amend. 5.

38 Cases that cite this headnote

[14] Eminent Domain

Value for special use

Market value to which owner of condemned land is entitled may reflect not only use to which property is presently devoted but also that use to which it may be readily converted.

6 Cases that cite this headnote

Attorneys and Law Firms

****1064** ***257** Mr. Walter J. Cummings, Jr., of Washington, D.C., for petitioner.

Mr. William E. Comer, of Greensboro, N.C., for respondent.

Opinion

***258** Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a case of first impression. The problem presented is whether respondents' property was taken within the meaning of the Fifth Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes. The Court of Claims held that there was a taking and entered judgment for respondent, one judge dissenting. 60 F.Supp. 751. The case is here on a petition for a writ of certiorari which we granted becuase of the importance of the question presented.

[1] Respondents own 2.8 acres near an airport outside of Greensboro, North Carolina. It has on it a dwelling house, and also various outbuildings which were mainly used for raising chickens. The end of the airport's northwest-southeast runway is 2,220 feet from respondents' barn and 2,275 feet from their house. The path of glide to this runway passes directly over the property—which is 100 feet wide and 1,200 feet long. The 30 to 1 safe glide angle[1] approved by the Civil Aeronautics Authority[2] passes over this property at 83 feet, which is 67 feet above the house, 63 feet above the barn and 18 feet above the highest tree.[3] The use by the United States of this airport is pursuant to a lease executed in May, 1942, for a term commencing June 1, 1942 and ending June 30, 1942, with a provision for renewals until June 30, 1967, or six ***259** months after the end of the national emergency, whichever is the earlier.

Various aircraft of the United States use this airport—bombers, transports and fighters. The direction of the prevailing wind determines when a particular runway is used. The north-west-southeast runway in question is used about four per cent of the time in taking off and about seven per cent of the time in landing. Since the United States began operations in May, 1942, its four-motored heavy bombers, other planes of the heavier type, and its fighter planes have frequently passed over respondents' land buildings in considerable numbers and rather close together. They come close enough at times to appear barely to miss the tops of the trees and at times so close to the tops of the trees as to blow the old leaves off. The noise is startling. And at night the glare from the ****1065** planes brightly lights up the place. As a result of the noise, respondents had to give up their chicken business. As many as six to ten of their chickens were killed in one day by flying into the walls from fright. The total chickens lost in that manner was about 150. Production also fell off. The result was the destruction of the use of

the property as a commercial chicken farm. Respondents are frequently deprived of their sleep and the family has become nervous and frightened. Although there have been no airplane accidents on respondents' property, there have been several accidents near the airport and close to respondents' place. These are the essential facts found by the Court of Claims. On the basis of these facts, it found that respondents' property had depreciated in value. It held that the United States had taken an easement over the property on June 1, 1942, and that the value of the property destroyed and the easement taken was $2,000.

***260** I. The United States relies on the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. s 171 et seq., 49 U.S.C.A. s 171 et seq., as amended by the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. s 401 et seq., 49 U.S.C.A. s 401 et seq. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 U.S.C. s 176(a), 49 U.S.C.A. s 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce[4] through the navigable air space of the United States.' 49 U.S.C. s 403, 49 U.S.C.A. s 403. And 'navigable air space' is defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. And it is provided that 'such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation.' Id. It is, therefore, argued that since these flights were within the minimum safe altitudes of flight which had been prescribed, they were an exercise of the declared right of travel through the airspace. The United States concludes that when flights are made within the navigable airspace without any physical invasion of the property of the landowners, there has been no taking of property. It says that at most there was merely incidental damage occurring as a consequence of authorized air navigation. It also argues that the landowner does not own superadjacent airspace which he has not subjected to possession by the erection of structures or other occupancy. Moreover, it is argued that even if the United States took airspace owned by respondents, no compensable damage was shown. Any damages are said to be merely consequential for which no compensation may be obtained under the Fifth Amendment.

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—Cujus ***261** est solum ejus est usque ad coelum.[5] But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

[2] **[3]** But that general principle does not control the present case. For the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment. It is the owner's loss, not the ****1066** taker's gain, which is the measure of the value of the property taken. United States v. Miller, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, 147 A.L.R. 55. Market value fairly determined is the normal measure of the recovery. Id. And that value may reflect the use to which the land could readily be converted, as well as the existing use. United States v. Powelson, 319 U.S. 266, 275, 63 S.Ct. 1047, 1053, 87 L.Ed. 1390, and cases cited. If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete.[6] It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.

[4] We agree that in those circumstances there would be a taking. Though it would be only an easement of flight ***262** which was taken, that easement, if permanent and not merely temporary, normally would be the equivalent of a fee interest. It would be a definite exercise of complete dominion and control over the surface of the land. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. It would not be a case of incidental damages arising from a legalized nuisance such as was involved in Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088, L.R.A.1915A, 887. In that case property owners whose lands adjoined a railroad line were denied recovery for damages resulting from the noise, vibrations, smoke and the like, incidental to the operations of the trains. In the supposed case the line of flight is over the land. And the land is appropriated as directly and completely as if it were used for the runways themselves.

There is no material difference between the supposed case and the present one, except that here enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would limit the utility of the land and cause a diminution in its value. [7] That was the philosophy of ***263** Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. In that case the petition alleged that the United States erected a fort on nearby land, established a battery and a fire control station there, and fired guns over petitioner's land. The Court, speaking through Mr. Justice Holmes, reversed the Court of Claims which dismissed the petition on a demurrer, holding that 'the specific facts set forth would warrant a finding that a servitude has been imposed.' [8] ****1067** 260 U.S. at page 330, 43 S.Ct. at page 137, 67 L.Ed. 287. And see Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E.2d 245, 140 A.L.R. 1352. Cf. United States v. 357.25 Acres of Land, D.C., 55 F.Supp. 461.

[5] The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61, ss 61.7400, 61.7401, Code Fed.Reg.Cum.Supp., Tit. 14, ch. 1) and from 300 to 1000 feet for ***264** other aircraft depending on the type of plane and the character of the terrain. Id., Pt. 60, ss 60.350-60.3505, Fed.Reg.Cum.Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

[6] We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. [9] The landowner owns at least as much of the space above the ground as the can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F.2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected ***265** an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. [10] The reason is that there would be ****1068** an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface. [11]

In this case, as in Portsmouth Harbor Land & Hotel Co. v. United States, supra, the damages were not merely consequential. They were the product of a direct invasion of respondents' domain. ***266** As stated in United States v. Cress, 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746,

'* * * it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.'

[7] **[8]** We said in United States v. Powelson, supra, 319 U.S. at page 279, 63 S.Ct. at page 1054, 87 L.Ed. 1390, that while the meaning of 'property' as used in the Fifth Amendment was a federal question, 'it will normally obtain its content by reference to local law.' If we look to North Carolina law, we reach the same result. Sovereignty in the airspace rests in the State 'except where granted to and assumed by the United States.' Gen.Stats. 1943, s 63-11. The flight of aircraft is lawful 'unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.' Id., s 63-13. Subject to that right of flight, 'ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.' Id. s 63-12. Our holding that there was an invasion of respondents' property is thus not inconsistent with the local law governing a landowner's claim to the immediate reaches of the superadjacent airspace.

[9] The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are. Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court ***267** of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

[10] II. By s 145(1) of the Judicial Code, 28 U.S.C. s 250(1), 28 U.S.C.A. s 250(1), the Court of Claims has jurisdiction to hear and determine 'All claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States.'

We need not decide whether repeated trespasses might give rise to an implied contract. Cf. Portsmouth Harbor Land & Hotel Co. v. United States, supra. If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction ****1069** of the Court of Claims to hear and determine. See Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 67, 5 S.Ct. 717, 721, 28 L.Ed. 901; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637; Yearsley v. W. A. Ross Construction Co., 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554. Thus, the jurisdiction of the Court of Claims in this case is clear.

[11] **[12]** III. The Court of Claims held, as we have noted, that an easement was taken. But the findings of fact contain no precise description as to its nature. It is not described in terms of frequency of flight, permissible altitude, or type of airplane. Nor is there a finding as to whether the easement taken was temporary or permanent. Yet an accurate description of the property taken is essential, since that interest vests in the United States. United States v. Cress, supra, 243 U.S. 328, 329, 37 S.Ct. 385, 386, 61 L.Ed. 746, and cases cited. It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion. United States v. Esnault-Pelterie, 299 U.S. 201, 205, 206, 57 S.Ct. 159, 161, 162, 81 L.Ed. 123; United States v. Seminole Nation, 299 U.S. 417, 422, 57 S.Ct. 283, 287, 81 L.Ed. 316. Findings of fact on every 'material issue' are a statutory ***268** requirement. 53 Stat. 752, 28 U.S.C. s 288, 28 U.S.C.A. s 288. The importance of findings of fact based on evidence is emphasized here by the Court of Claims' treatment of the nature of the easement. It stated in its opinion that the easement was permanent because the United States 'no doubt intended to make some sort of arrangement whereby it could use the airport for its military planes whenever it had occasion to do so.' (60 F.Supp. 758.) That sounds more like conjecture rather than a conclusion from evidence; and if so, it would not be a proper foundation for liability of the United States. We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. United States v. Esnault-Pelterie, supra, 299 U.S. at page 206, 57 S.Ct. at page 162, 81 L.Ed. 123.

[13] Since on this record it is not clear whether the easement taken is a permanent or a temporary one, it would be premature for us to consider whether the amount of the award made by the Court of Claims was proper.

The judgment is reversed and the cause is remanded to the Court of Claims so that it may make the necessary findings in conformity with this opinion.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

The Fifth Amendment provides that 'private property' shall not 'be taken for public use, without just compensation.' The Court holds today that the Government has 'taken' respondents' property by repeatedly flying Army bombers directly above respondents' land at a height of eighty-three feet where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed. Since the effect of the Court's decision is ***269** to limit, by the imposition of relatively absolute Constitutional barriers, possible future adjustments through legislation and regulation which might become necessary with the growth of air transportation, and since in my view the Constitution does not contain such barriers, I dissent.

The following is a brief statement of the background and of the events that the Court's opinion terms a 'taking' within the meaning of the Fifth Amendment: Since 1928 there has been an airfield some eight miles from Greensboro, North Carolina. In April, 1942, this airport was taken over by the Greensboro-High Point Municipal Airport Authority and it has since then operated as a municipal airport. In 1942 the Government, by contract, obtained the right to use the field 'concurrently, ****1070** jointly, and in common' with other users. Years before, in 1934, respondents had bought their property, located more than one-third of a mile from the airport. Private planes from the airport flew over their land and farm buildings from 1934 to 1942 and are still doing so. But though these planes disturbed respondents to some extent, Army bombers, which started to fly over the land in 1942 at a height of eighty-three feet, disturbed them more because they were larger, came over more frequently, made a louder noise, and at night a greater glare was caused by their lights. This noise and glare disturbed respondents' sleep, frightened them, and made them nervous. The noise and light also frightened respondents' chickens so much that many of them flew against buildings and were killed.

The Court's opinion seems to indicate that the mere flying of planes through the column of air directly above respondents' land does not constitute a 'taking'. Consequently, it appears to be noise and glare, to the extent and under the circumstances shown here, which make the government a seizer of private property. But the allegation ***270** of noise and glare resulting in damages, constitutes at best an action in tort where there might be recovery if the noise and light constituted a nuisance, a violation of a statute, [1] or were the result of negligence. [2] But the Government has not consented to be sued in the Court of Claims except in actions based on express or implied contract. And there is no implied contract here, unless by reason of the noise and glare caused by the bombers the Government can be said to have 'taken' respondents' property in a Constitutional sense. The concept of taking property as used in the Constitution has heretofore never been given so sweeping a meaning. The Court's opinion presents no case where a man who makes noise or shines light onto his neighbor's property has been ejected from that property for wrongfully taking possession of it. Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property. Even the one case in this Court which in considering the sufficiency of a complaint gave the most elastic meaning to the phrase 'private property be taken' as used in the Fifth Amendment, did not go so far. ***271** Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287. I am not willing, nor do I think the Constitution and the decisions authorize me, to extend that phrase so as to guarantee an absolute Constitutional right to relief not subject to legislative change, which is based on averments that at best show mere torts committed by Government agents while flying over land. The future adjustment of the rights and remedies of property owners, which might be found necessary because of the flight of planes at safe altitudes, should, especially in view of the imminent expansion of air navigation, be left where I think the Constitution left it, with Congress.

Nor do I reach a different conclusion because of the fact that the particular circumstance which under the Court's opinion makes the tort here absolutely actionable,

**1071 is the passing of planes through a column of air at an elevation of eighty-three feet directly over respondents' property. It is inconceivable to me that the Constitution guarantees that the airspace of this Nation needed for air navigation, is owned by the particular persons who happen to own the land beneath to the same degree as they own the surface below.[3] No rigid Constitutional rule, in my judgment, commands that the air must be considered as marked off into separate compartments by imaginary metes and bounds in order to synchronize air ownership with land ownership. I think that the Constitution entrusts Congress with full power to control all navigable airspace. Congress has already acted under that power. It has by statute, 44 Stat. 568, 52 Stat. 973, provided that 'the United States of America is * * * to possess and exercise complete and exclusive national sovereignty in the *272 air space (over) the United States.' This was done under the assumption that the Commerce Clause of the Constitution gave Congress the same plenary power to control navigable airspace as its plenary power over navigable waters. H. Rep. No. 572, 69th Cong., 1st Sess., p. 10; H. Rep. No. 1162, 69th Cong., 1st Sess., p. 14; United States v. Commodore Park, Inc., 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017. To make sure that the airspace used for air navigation would remain free, Congress further declared that 'navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation,' and finally stated emphatically that there exists 'a public right of freedom of transit * * * through the navigable airspace of the United States.' Congress thus declared that the air is free, not subject to private ownership, and not subject to delimitation by the courts. Congress and those acting under its authority were the only ones who had power to control and regulate the flight of planes. 'Navigable air-space' was defined as 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. s 180, 49 U.S.C.A. s 180. Thus, Congress has given the Civil Aeronautics Authority exclusive power to determine what is navigable airspace subject to its exclusive control. This power derives specifically from the Section which authorizes the Authority to prescribe 'air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.' 49 U.S.C.A. s 551. Here there was no showing that the bombers flying over respondents' land violated any rule or regulation of the Civil Aeronautics Authority. Yet, unless we hold the Act unconstitutional, at least such a showing would be necessary before the courts could act without interfering with the exclusive authority which Congress gave to the administrative agency. Not even a *273 showing that the Authority has not acted at all would be sufficient. For in that event, were the courts to have any authority to act in this case at all, they should stay their hand till the Authority has acted.

The broad provisions of the Congressional statute cannot properly be circumscribed by making a distinction as the Court's opinion does between rules of safe altitude of flight while on the level of cross-country flight and rules of safe altitude during landing and taking off. First, such a distinction can not be maintained from the practical standpoint. It is unlikely that Congress intended that the Authority prescribe safe altitudes for planes making cross-country flights, while at the same time it left the more hazardous landing and take-off operations unregulated. The legislative history, **1072 moreover, clearly shows that the Authority's power to prescribe air traffic rules includes the power to make rules governing landing and take-off. Nor is the Court justified in ignoring that history by labeling rules of safe altitude while on the level of cross-country flight as rules prescribing the safe altitude proper and rules governing take-off and landing as rules of operation. For the Conference Report explicitly states that such distinctions were purposely eliminated from the original House Bill in order that the Section on air traffic rules 'might be given the broadest construction by the * * * (Civil Aeronautics Authority) * * * and the courts.'[4] In construing the statute narrowly the Court *274 thwarts the intent of Congress. A proper broad construction, such as Congress commanded, would not permit the Court to decide what it has today without declaring the Act of Congress unconstitutional. I think the Act given the broad construction intended is constitutional.

No greater confusion could be brought about in the coming age of air transportation than that which would result were courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free. Old concepts of private ownership of land should not be introduced into the field of air regulation. I have no doubt that Congress will, if not handicapped by judicial interpretations of the Constitution, preserve the freedom of the air, and at the same time, satisfy the just claims of aggrieved persons. The noise of newer, larger, and more powerful planes may grow louder and louder and disturb people more and more. But the solution of the

problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid Constitutional restraints formulated and enforced by the courts. What adjustments may have to be made, only the future can reveal. It seems certain, however, ***275** the courts do not possess the techniques or the personnel to consider and act upon the complex combinations of factors entering into the problems. The contribution of courts must be made through the awarding of damages for injuries suffered from the flying of planes, or by the granting of injunctions to prohibit their flying. When these two simple remedial devices are elevated to a Constitutional level under the Fifth Amendment, as the Court today seems to have done, they can stand as obstacles to better adapted techniques that might be offered by experienced experts and accepted by Congress. Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital and national problems. In my opinion ****1073** this case should be reversed on the ground that there has been no 'taking' in the Constitutional sense.

Mr. Justice BURTON joins in this dissent.

All Citations

328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206

Footnotes

1 A 30 to 1 glide angle means one foot of elevation or descent for every 30 feet of horizontal distance.

2 Military planes are subject to the rules of the Civil Aeronautics Board where, as in the present case, there are no Army or Navy regulations to the contrary. Cameron v. Civil Aeronautics Board, 7 Cir., 140 F.2d 482.

3 The house is approximately 16 feet high, the barn 20 feet, and the tallest tree 65 feet.

4 'Air commerce' is defined as including 'any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.' 49 U.S.C. s 401(3), 49 U.S.C.A. s 401(3).

5 1 Coke, Institutes, 19th Ed. 1832, ch. 1, s 1(4a); 2 Blackstone, Commentaries, Lewis Ed. 1902, p. 18; 3 Kent, Commentaries, Gould Ed. 1896, p. 621.

6 The destruction of all uses of the property by flooding has been held to constitute a taking. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L.Ed. 557; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A.,N.S., 385, 19 Ann.Cas. 680.

7 It was stated in United States v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390, 'The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.' The present case falls short of the General Motors case. This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes.
Cf. Warren Township School Dist. v. Detroit, 308 Mich. 460, 14 N.W.2d 134; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575.

8 On remand the allegations in the petition were found not to be supported by the facts. 64 Ct.Cl. 572.

9 Baten's Case, 9 Coke R. 53b; Meyer v. Metzler, 51 Cal. 142; Codman v. Evans, 7 Allen 431, 89 Mass. 431; Harrington v. McCarthy, 169 Mass. 492, 48 N.E. 278, 61 Am.St.Rep. 298. See Ball, The Vertical Extent of Ownership in Land, 76 U.Pa.L.Rev. 631, 658—671.

10 It was held in Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716, 11 L.R.A.,N.S., 920, 116 Am.St.Rep. 563, 9 Ann.Cas. 858, that ejectment would lie where a telephone wire was strung across the plaintiff's property, even though it did not touch the soil. The court stated pages 491, 492 of 186 N.Y., page 718 of 79 N.E.: '* * * an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed.'

11 See Bouve, Private Ownership of Navigable Airspace Under the Commerce Clause, 21 Amer.Bar Assoc.Journ. 416, 421—422; Hise, Ownership and Sovereignty of the Air, 16 Ia.L.Rev. 169; Eubank, The Doctrine of the Airspace Zone of Effective Possession, 12 Boston Univ.L.Rev. 414.

1 Neiswonger v. Goodyear Tire & Rubber Co., D.C., 35 F.2d 761.

2 As to the damage to chickens, Judge Madden, dissenting from this judgment against the Government said, 'When railroads were new, cattle in fields in sight and hearing of the trains were alarmed, thinking that the great moving objects would turn aside and harm them. Horses ran away at the sight and sound of a train or a threshing machine engine. The farmer's chickens have to get over being alarmed at the incredible racket of the tractor starting up suddenly in the shed adjoining the chicken house. These sights and noises are a part of our world, and airplanes are now and will be to a greater degree, likewise a part of it. These disturbances should not be treated as torts, in the case of the airplane, any more than they are so treated in the case of the railroad or public highway.'

3 The House in its report on the Air Commerce Act of 1926 stated: 'The public right of flight in the navigable air space owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of adjacent or subjacent soil'. House Report No. 572, 69th Congress, First Session, page 10.

4 The full statement read: 'The substitute provides that the Secretary shall by regulation establish air traffic rules for the navigation, protection, and identification of all aircraft, including rules for the safe altitudes of flight and rules for the prevention of collisions between vessels and aircraft. The provision as to rules for taking off and alighting, for instance, was eliminated as unnecessary specification, for the reason that such rules are but one class of air traffic rules for the navigation and protection of aircraft. Rules as to marking were eliminated for the reason that such rules were fairly included within the scope of air rules for the identification of aircraft. No attempt is made by either the Senate bill or the House amendment to fully define the various classes of rules that would fall within the scope of air traffic traffic rules, as, for instance, lights and signals along airways and at air-ports and upon emergency landing fields. In general, these rules would relate to the same subjects as those covered by navigation laws and regulations and by the various State motor vehicle traffic codes. As noted above, surplusage was eliminated in specifying particular air traffic rules in order that the term might be given the broadest possible construction by the Department of Commerce and the courts.' House Report No. 1162, 69th Congress, 1st Session, p. 12.

That the rules for landing and take-off are rules prescribing 'minimum safe altitudes of flight' is shown by the following further statement in the House Report: '* * * the minimum safe altitudes of flight * * * would vary with the terrain and location of cities and would coincide with the surface of the land or water at airports.' Id. at p. 14.

82 S.Ct. 531
Supreme Court of the United States

Thomas N. GRIGGS, Petitioner,
v.
COUNTY OF ALLEGHENY, PENNSYLVANIA.

No. 81.
|
Argued Jan. 16, 1962.
|
Decided March 5, 1962.
|
Rehearing Denied April 16, 1962.

See 369 U.S. 857, 82 S.Ct. 931.

Action by property owner against county for an alleged appropriation of his property resulting from take-off and landing of aircraft at county airport. The Court of Common Pleas, Allegheny County, dismissed exceptions taken by both parties and both parties appealed. The Pennsylvania Supreme Court, 402 Pa. 411, 168 A.2d 123, reversed the order dismissing county's exceptions and dismissed the property owner's appeal, and the United States Supreme Court granted the property owner's petition for writ of certiorari. The Supreme Court, Mr. Justice Douglas, held that where noise from aircraft landing and taking off made a home located off the end of the runway unbearable for residential use, there was a 'taking' of an air easement over the property, and county, which had designed airport for public use in conformity with rules and regulations of Civil Aeronautics Administration, and not the Civil Aeronautics Board or airlines using the airport, was liable to property owner.

Reversed.

Mr. Justice Black and Mr. Justice Frankfurter dissented.

West Headnotes (1)

[1] Eminent Domain
Easements and other rights in real property

Eminent Domain
Corporations and persons liable for compensation

Where noise from airplanes landing and taking off made a home located off end of runway unbearable for residential use, there was a "taking" of an air easement over the property, and county, which had designed airport for public use in conformity with rules and regulations of Civil Aeronautics Administration and not the Civil Aeronautics Board or airlines using airport, was liable to property owner. Federal Airport Act, §§ 1 et seq., 3(a), 4(a), 5, 6, 9 and (d) (1), 10, 13(a) (2), 49 U.S.C.A. §§ 1101 et seq., 1102(a), 1103, 1104, 1105, 1108 and (d), 1109, 1112(a) (2); Federal Aviation Act of 1958, § 101(24), 49 U.S.C.A. § 1301(24); U.S.C.A.Const. Amend. 14.

296 Cases that cite this headnote

Attorneys and Law Firms

****531** ***84** William A. Blair, Pittsburgh, Pa., for petitioner.

Maurice Louik, Pittsburgh, Pa., for respondent.

Opinion

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari to the Supreme Court of Pennsylvania which we granted (366 U.S. 943, 81 S.Ct. 1672, 6 L.Ed.2d 854) because its decision (402 Pa. 411, 168 A.2d 123) seemed to be in conflict with United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206. The question is whether respondent ***85** has taken an air easement

over petitioner's property for which it must pay just compensation as required by the Fourteenth Amendment. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979. The Court of Common Pleas, pursuant to customary Pennsylvania procedure, appointed a Board of Viewers to determine whether there had been a 'taking' and, if so, the amount of compensation due. The Board of Viewers met upon the property; it held a hearing, and in its report found that there had been a 'taking' by respondent of an air easement over petitioner's property and that the compensation payable (damages suffered) was $12,690. The Court of Common Pleas dismissed the exceptions of each party to the Board's report. On appeal, the Supreme Court of Pennsylvania decided, by a divided vote, that if ****532** there were a 'taking' in the constitutional sense, the respondent was not liable.

Respondent owns and maintains the Greater Pittsburgh Airport on land which it purchased to provide airport and air-transport facilities. The airport was designed for public use in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the National Airport Plan provided for in 49 U.S.C. s 1101 et seq., 49 U.S.C.A. s 1101 et seq. By this Act the federal Administrator is authorized and directed to prepare and continually revise a 'national plan for the development of public airports.' s 1102(a). For this purpose he is authorized to make grants to 'sponsors' for airport development. ss 1103, 1104. Provision is made for apportionment of grants for this purpose among the States. s 1105. The applications for projects must follow the standards prescribed by the Administrator. s 1108.

It is provided in s 1108(d) that: 'No project shall be approved by the Administrator with respect to any airport unless a public agency holds good title, satisfactory to the Administrator, to the landing area of such airport or the site therefor, or gives assurance satisfactory ***86** to the Administrator that such title will be acquired.' The United States agrees to share from 50% to 75% of the 'allowable project costs,' depending, so far as material here, on the class and location of the airport. s 1109.

Allowable costs payable by the Federal Government include 'costs of acquiring land or interests therein or easements through or other interests in air space * * *.' s 1112(a)(2).

Respondent executed three agreements with the Administrator of Civil Aeronautics in which it agreed, among other things, to abide by and adhere to the Rules and Regulations of C.A.A. and to 'maintain a master plan of the airport,' including 'approach areas.' It was provided that the 'airport approach standards to be followed in this connection shall be those established by the Administrator'; and it was also agreed that respondent 'will acquire such easements or other interests in lands and air space as may be necessary to perform the covenants of this paragraph.' The 'master plan' laid out and submitted by respondent included the required 'approach areas'; and that 'master plan' was approved. One 'approach area' was to the northeast runway. As designed and approved, it passed over petitioner's home which is 3,250 feet from the end of that runway. The elevation at the end of that runway is 1,150.50 feet above sea level; the door sill at petitioner's residence, 1,183.64 feet; the top of petitioner's chimney, 1,219.64 feet. The slope gradient of the approach area is as 40 is to 3,250 feet or 81 feet, which leaves a clearance of 11.36 feet between the bottom of the glide angle and petitioner's chimney.

The airlines that use the airport are lessees of respondent; and the leases give them, among other things, the right 'to land' and 'take off.' No flights were in violation of the regulations of C.A.A.; nor were any flights ***87** lower than necessary for a safe landing or take-off. The planes taking off from the northeast runway observed regular flight patterns ranging from 30 feet to 300 feet over petitioner's residence; and on let-down they were within 53 feet to 153 feet.

On take-off the noise of the planes is comparable 'to the noise of a riveting machine or steam hammer.' On the let-down the planes make a noise comparable 'to that of a noisy factory.' The Board of Viewers found that 'The low altitude flights over plaintiff's property caused the plaintiff and occupants of his property to become nervous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use.' Judge Bell, dissenting below, accurately ****533** summarized the uncontroverted facts as follows: 'Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household (depending

on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.'' 402 Pa. 411, 422, 168 A.2d 123, 128—129.

***88** We start with United States v. Causby, supra, which held that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking', in the constitutional sense, of an air easement for which compensation must be made. At the time of the Causby case, Congress had placed the navigable airspace in the public domain, defining it as 'airspace above the minimum safe altitudes of flight prescribed' by the C.A.A. 44 Stat. 574. We held that the path of the glide or flight for landing or taking off was not the downward reach of the 'navigable airspace.' 328 U.S. at 264, 66 S.Ct. 1062. Following the decision in the Causby case, Congress redefined 'navigable airspace' to mean 'airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.' 72 Stat. 739, 49 U.S.C. s 1301(24), 49 U.S.C.A. s 1301(24). By the present regulations [1] the 'minimum safe altitudes' within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, '(e)xcept where necessary for takeoff or landing.' But as we said in the Causby ***89** case, the use of land presupposes the use of some of the airspace above it. 328 U.S. at 264, 66 S.Ct. 1062. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.' 328 U.S. at 265, 66 S.Ct. at 1068.

It is argued that though there was a 'taking,' someone other than respondent was the taker—the airlines or the ****534** C.A.A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor [2] of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport vel non, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan. For, as we have already noted, Congress provided in 49 U.S.C. s 1109, 49 U.S.C.A. s 1109, for the payment to the owners of airports, whose plans were approved by the Administrator, of a share of 'the allowable project costs' including the 'costs of acquiring land or interests therein or easements through or other interests in air space.' s 1112(a)(2). A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessry for the ***90** approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable. For respondent agreed with the C.A.A. that it would operate the airport 'for the use and benefit of the public,' that it would operate it 'on fair and reasonable terms and without unjust discrimination,' and that it would not allow any carrier to acquire 'any exclusive right' to its use.

The glide path for the northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. See United States v. Virginia Electric Co., 365 U.S. 624, 630, 81 S.Ct. 784, 5 L.Ed.2d 838. As stated by the Supreme Court of Washington in Ackerman v. Port of Seattle, 55 Wash.2d 400, 401, 413, 348 P.2d 664, 671, 77 A.L.R.2d 1344, '* * * an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed * * *.' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

Reversed.

Mr. Justice BLACK, with whom Mr. Justice FRANKFURTER concurs, dissenting.

In United States v. Causby,[1] the Court held that by flying its military aircraft frequently on low landing and takeoff flights over Causby's chicken farm the United States had so disturbed the peace of the occupants and so frightened the chickens that it had 'taken' a flight easement from Causby for which it was required to pay 'just compensation' under the Fifth Amendment. Today the ***91** Court holds that similar low landing and take-off flights, making petitioner Griggs' property 'undesirable and unbearable for * * * residential use,' constitute a 'taking' of airspace over Griggs' property—not, however, by the owner and operator of the planes as in Causby, but by Allegheny County, the owner and operator ****535** of the Greater Pittsburgh Airport to and from which the planes fly. Although I dissented in Causby because I did not believe that the individual aircraft flights 'took' property in the constitutional sense merely by going over it and because I believed that the complexities of adjusting atmospheric property rights to the air age could best be handled by Congress, I agree with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and enjoyment of petitioner's property as to amount to a 'taking' of it under the Causby holding. I cannot agree, however, that it was the County of Allegheny that did the 'taking.' I think that the United States, not the Greater Pittsburgh Airport, has 'taken' the airspace over Griggs' property necessary for flight.[2] While the County did design the plan for the airport, including the arrangement of its takeoff and approach areas, in order to comply with federal requirements it did so under the supervision of and subject to the approval of the Civil Aeronautics Administrator of the United States.[3]

Congress has over the years adopted a comprehensive plan for national and international air commerce, regulating in minute detail virtually every aspect of air transit —from construction and planning of ground facilities to ***92** safety and methods of flight operations.[4] As part of this overall scheme of development, Congress in 1938 declared that the United States has 'complete and exclusive national sovereignty in the air space above the United States'[5] and that every citizen has 'a public right of freedom of transit in air commerce through the navigable air space of the United States.'[6] Although in Causby the Court held that under the then existing laws and regulations the airspace used in landing and take-off was not part of the 'navigable airspace' as to which all have a right of free transit, Congress has since, in 1958, enacted a new law, as part of a regulatory scheme even more comprehensive than those before it, making it clear that the 'airspace needed to insure safety in take-off and landing of aircraft' is 'navigable airspace.'[7] Thus Congress has not only appropriated the airspace necessary for planes to fly at high altitudes throughout the country but has also provided the low altitude airspace essential for those same planes to approach and take off from airports. These airspaces are so much under the control of the Federal Government that every take-off from and every landing at ***93** airports such as the Greater Pittsburgh ****536** Airport is made under the direct signal and supervisory control of some federal agent.[8]

In reaching its conclusion, however, the Court emphasizes the fact that highway bridges require approaches. Of course they do. But if the United States Highway Department purchases the approaches to a bridge, the bridge owner need not. The same is true where Congress has, as here, appropriated the airspace necessary to approach the Pittsburgh airport as well as all the other airports in the country. Despite this, however, the Court somehow finds a congressional intent to shift the burden of acquiring flight airspace to the local communities in 49 U.S.C. s 1112, 49 U.S.C.A. s 1112, which authorizes reimbursement to local communities for 'necessary' acquisitions of 'easements through or other interests in air space.' But this is no different from the bridge-approach argument. Merely because local communities might eventually be reimbursed for the acquisition of necessary easements does not mean that local communities must acquire easements that the United States has already acquired. And where Congress has already declared airspace free to all—a fact not denied by the Court—pretty clearly it need not again be acquired by an airport. The 'necessary' easements for which Congress authorized reimbursement in s 1112 were those 'easements through or other interests in air space' necessary for the clearing and protecting of 'aerial approaches' from physical 'airport hazards'[9] —a duty explicitly placed on the local communities by the statute (s 1110) and by their contract with the Government. ***94** There is no such duty on the local community to acquire flight airspace. Having taken the airspace over Griggs' private property

for a public use, it is the United States which owes just compensation.

The construction of the Greater Pittsburgh Airport was financed in large part by funds supplied by the United States as part of its plan to induce localities like Allegheny County to assist in setting up a national and international airtransportation system. The Court's imposition of liability on Allegheny County, however, goes a long way toward defeating that plan because of the greatly increased financial burdens (how great one can only guess) which will hereafter fall on all the cities and counties which til now have given or may hereafter give support to the national program. I do not believe that Congress ever intended any such frustration of its own purpose.

Nor do I believe that Congress intended the wholly inequitable and unjust saddling of the entire financial burden of this part of the national program on the people of local communities like Allegheny County. The planes that take off and land at the Greater Pittsburgh Airport wind their rapid way through space not for the peculiar benefit of the citizens of Allegheny County but as part of a great, reliable transportation system of immense advantage to the whole Nation in time of peace and war. Just as it would be unfair to require petitioner and others who suffer serious and peculiar injuries by reason of these transportation flights to bear an unfair proportion of the burdens of air commerce, so it would be unfair to make Allegheny County bear expenses wholly out of proportion to the advantages it can receive from the national transportation system. ****537** I can see no justification at all for throwing this monkey wrench into Congress' finely tuned national transit mechanism. I would affirm the state court's judgment holding that the County of Allegheny has not 'taken' petitioner's property.

All Citations

369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585, 1 ERC 1058

Footnotes

1 Regulation 60.17, entitled 'Minimum safe altitudes, provides:
'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:
'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;
'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. * * *
'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. * * *' (Emphasis supplied except in catch lines.) 14 C.F.R. s 60.17.

2 In circumstances more opaque than this we have held lessors to their constitutional obligations. See Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45.

1 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206.

2 We are not called on to pass on any question of 'taking' under the Pennsylvania Constitution or laws.

3 60 Stat. 174—176, as amended, 49 U.S.C. ss 1108, 1110, 49 U.S.C.A. ss 1108, 1110. The duties of the Civil Aeronautics Administrator have since been transferred to the Federal Aviation Agency Administrator. 72 Stat. 806—807.

4 The Federal Aviation Agency Administrator is directed to prepare and maintain a 'national plan for the development of public airports in the United States' taking 'into account the needs of both air commerce and private flying, the probable technological developments in the science of aeronautics, (and) the probable growth and requirements of civil aeronautics.' 49 U.S.C. s 1102, 49 U.S.C.A. s 1102. The detailed features of the federal regulatory and development scheme are found in 49 U.S.C. cc. 14 (Federal-aid for Public Airport Development), 15 (International Aviation Facilities) and 20 (Federal Aviation Program).

5 52 Stat. 1028, 49 U.S.C. s 1508, 49 U.S.C.A. s 1508.

6 52 Stat. 980, 49 U.S.C. s 1304, 49 U.S.C.A. s 1304.

7 Section 101(24) of the Federal Aviation Act of 1958 provides: "Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft.' 72 Stat. 739, 49 U.S.C. s 1301(24), 49 U.S.C.A. s 1301(24).

8 14 CFR s 60.18. The Administrator of the Federal Aviation Agency is directed to control 'the use of the navigable airspace of the United States.' 49 U.S.C. s 1303(c), 49 U.S.C.A. s 1303(c).

9 The term ‘airport hazard’ means ‘any structure or object of natural growth * * * or any use of land * * * which obstructs the air space * * * or is otherwise hazardous to * * * landing or taking off of aircraft.’ 49 U.S.C. s 1101(a)(4), 49 U.S.C.A. s 1101(a)(4).

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199 So.2d 727
District Court of Appeal of Florida, First District.

CITY OF JACKSONVILLE, a municipal corporation under the laws of Florida, Appellant,
v.
George SCHUMANN et ux. et al., Appellees.
CITY OF JACKSONVILLE, a municipal corporation under the laws of Florida, Appellant,
v.
Edwin H. BRAIN et ux. et al., Appellees.

Nos. 1-144, 1-142.
|
June 15, 1967.
|
Rehearing Denied July 10, 1967.

Proceeding by property owners to compel city to institute eminent domain proceedings. From a decree of the Circuit Court, Duval County, Charles A. Luckie, J., in consolidated cases, directing city to institute such proceedings, the city appealed. The District Court of Appeal, Johnson, J., held that landowner has right to be free from unreasonable interference caused by noises, and if such noise and/or intense vibration produced by low flying aircraft deprives owner of essential element in his relationship to his land, compensation therefor should be made by public authority responsible, and it makes no difference whether public or condemning authority is movant or landowner through process of inverse condemnation.

Decree affirmed.

West Headnotes (3)

[1] Nuisance
Noise and Pollution of Atmosphere in General

Noise can constitute nuisance which can give rise to easement, and such noise may come straight down from above or from some other direction.

Cases that cite this headnote

[2] Eminent Domain
Effect of Smoke, Foul Odors, Noise, or Vibration

Landowner has right to be free from unreasonable interference caused by noise, and if such noise and/or intense vibration produced by low flying aircraft deprives owner of essential element in his relationship to his land, compensation therefor should be made by public authority responsible, and it makes no difference whether public or condemning authority is movant or landowner through process of inverse condemnation. F.S.A.Const. Declaration of Rights, §§ 4, 12.

2 Cases that cite this headnote

[3] Eminent Domain
Weight and Sufficiency

Evidence sustained determination directing city to institute eminent domain proceedings as to property allegedly interfered with by noise from low flying aircraft.

4 Cases that cite this headnote

Attorneys and Law Firms

***728** William M. Madison, Claude L. Mullis, and William Lee Allen, Jacksonville, for appellant.

Duss, Butler, Nelson & Marees, and Jones, Foerster & Hodge, Jacksonville, for appellees.

Opinion

JOHNSON, Judge.

This is an appeal from a decree of the Circuit Court of Duval County, wherein the case George Schumann, et al. v. City of Jacksonville, in one case and Edwin H. Brain, et al. v. City of Jacksonville, in the other case, were consolidated for trial and on this appeal.

From an order directing the City to institute eminent domain proceedings in accordance with the prayer of the complaints, the City, appellant herein, appeals. The same order or decree was entered in each of the two cases.

The basic question before us now is whether there was sufficient evidence before the trial court to support the allegations of the complaint. The trial court took testimony for about three days. At the conclusion thereof, he determined that certain plaintiffs, five in number, had given avigation easements over the surface of their respective properties in contemplation of the defendant's extension of one of its runways, and therefore summary judgments were entered against them. Others had years earlier given certain avigation easements, also, but prior to changes made in the operation and extension of the airport which could not have been reasonably expected at the time of giving such easements. As to these properties and plaintiffs, the trial court made special limitation as to their damages, if any, by limiting them to the unexpected new aggravations and new easements taken.

This cause has been before this court previously on an interlocutory appeal [1] from an order denying a motion to dismiss the amended complaint on the primary ground ***729** that said complaint failed to state a cause of action. This court, speaking through Honorable Donald K. Carroll, in said case, gave a very comprehensive review of the basic question involved in that cause, which is of course the same as here. This court determined that the complaint stated a cause of action for inverse condemnation, but pointed out further that under other provisions of our constitution, that regardless of what it was called, [2] the damaged property owner was entitled to compensation when his property was taken or its beneficial use to such owner destroyed.

In view of the decision by this court, supra, we are, as pointed out earlier, confronted only with the factual situation as it appears from the testimony and whether the trial judge, before whom the testimony was taken, without a jury, rendered a proper determination based thereon.

We think the trial court did an excellent job in deciphering all the evidence, some of which tended to be conflicting, and rendered a decision in which we cannot find fault and with which we agree.

In arriving at our conclusion, we point out that not all plaintiffs may receive compensation. The amount of damages must be determined by a jury in another proceeding in circuit court. The trial court herein only determined that the plaintiffs, except those against whom summary judgment had been rendered, each had a valid legal cause of action for damages under the allegations of the complaint and the evidence in support thereof, properly leaving the question of amount, if any, due each plaintiff to be fixed by the jury in the subsequent trial of this issue.

[1] **[2]** While the issue of inverse condemnation in airport and aviation projects was a novel one in Florida, at the time this court rendered its decision in the former appearance of this case before this court (167 So.2d 95, supra), we think the issue has now been settled by that decision, in which the Supreme Court of Florida denied certiorari, and which committed Florida to the view adopted in Thornburg v. Port of Portland, [3] Martin v. Port of Seattle, [4] and the two United States Supreme Court cases of United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, and Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962). In these cases, it is in substance held that noise can be a nuisance and that such nuisance can give rise to an easement, and that such noise may come straight down from above, or from some other direction. That the land owner has a right to be free from unreasonable interference caused by the noise, and if such noise and/ or intense vibration produced by low flying aircraft deprived such owner of an essential element in his relationship to his land, compensation therefor should be made by the public authority responsible therefor, and it makes no difference whether the public or condemning authority is the movant or the land owner, through a process similar to that employed in this case by the plaintiffs.

Most of the arguments raised by appellant are similar to those raised in and settled by this court in the first appearance of this case before this court. A repetition thereof in this opinion to any further extent than already made, would serve no good purpose.

[3] We think the evidence supported the finding of the trial court in view of the guidelines laid down by this court in its first decision in this case when here on interlocutory appeal.

***730** Appellant's points one, three and five, as raised in its brief, have been answered above and adversely to the appellant.

As to appellant's point two, we think this point has also been laid to rest by the decision in Griggs v. Allegheny County, supra, and is therefore without merit.

We think we have partly dealt with appellant's point five, but here reiterate that the trial court made a broad finding as to those plaintiffs who had given 'avigation easements.' In substance, the court's order was to the effect that each plaintiff's problem had to be treated in the light of the easement given, as to its substance and time of giving thereof. He did not rule that all such would receive damages, but left the element of damages, if any, to the jury to be later empanelled to try such issue. We can find no error committed by the learned trial judge, but on the contrary think his decree was well thought out, well worded and very comprehensive in its coverage of the facts and we agree with his decree and therefore affirm the same.

The City of Jacksonville v. Edwin H. Brain, et al., being our case numbered I-142, was consolidated for trial and for purpose of appeal herein, with the Schumann case, supra. In appellant's brief four points are raised in which error is contended. These points are identical to four points raised in the Schumann case and which points we have treated supra. The same reasoning applies equally to both cases with the same ultimate decision from both the trial court and this court. We see no reason for disturbing the trial court's finding of fact nor his application of the appropriate law thereto.

In both cases, the trial court ordered the defendant (appellant) to institute eminent domain proceedings within 60 days to condemn the necessary easements.

We affirm this decree in both cases.

WIGGINTON, Acting C.J., and SPECTOR, J., concur.

All Citations

199 So.2d 727

Footnotes

1 City of Jacksonville v. Schumann, et al., 167 So.2d 95, (Fla.App.1st, 1964).
2 Section 4, Declaration of Rights, Florida Constitution, F.S.A., and Section 12, Declaration of Rights, Florida Constitution.
3 Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962).
4 Martin v. Port of Seattle, 64 Wash.2d 309, 391 P.2d 540 (1964).

Exhibit D

NOTIFICATION, ACKNOWLEDGMENT, WAIVER AND RELEASE OF PROXIMITY TO INDUSTRIAL AND INSTITUTIONAL USES

FORM OF WAIVER

This Instrument was Prepared by:

Name: Tracy R. Slavens, Esq.
Address: Holland & Knight LLP
701 Brickell Avenue
Suite 3300
Miami, Florida 33131

(Space Reserved for Clerk of the Court)

NOTIFICATION, ACKNOWLEDGMENT, WAIVER AND RELEASE OF PROXIMITY TO INDUSTRIAL AND INSTITUTIONAL USES

The purchasers (their heirs, successors, assigns), lessees, occupants and residents (hereinafter jointly and severally, the "Covenanters") of that certain real property located in the county of Miami-Dade, State of Florida, more particularly described on Exhibit A attached hereto (the "Property") are hereby advised and hereby acknowledge, agree and covenant as follows:

The Property is located in proximity to the City of Miami Beach (the "City") maintenance facility (the "Maintenance Facility") and United States Coast Guard Base Miami Beach (the "USCG Base"), both of which engage in 24-hour intensive industrial and/or institutional uses as further described below.

City Maintenance Facility. The Maintenance Facility is used in connection with the City's sanitation and recycling operations, fleet management and other City vehicle servicing activities. The Maintenance Facility operates 24 hours per day, 365 days per year. Said operations include, but are not limited to, (i) parking areas for various City vehicles, including, but not limited to oversized vehicles pending repairs, dump trucks, fuel tanker trucks, heavy duty equipment, police vehicles and other light duty vehicles; (ii) fueling island(s); (iii) air, water, vacuum self-service island(s); (iv) air compression room(s); (v) warehouse(s); (vi) car wash rack(s); (vii) repair and service area(s); and (viii) storage facilities for containers, large equipment and other maintenance related purposes, including, but not limited to, waste tires, used oil filters, waste batteries, lubricant and diesel exhaust.

United States Coast Guard Station. The USCG Base is a 24 hours per day, 365 days per year industrial support facility and operational base serving Coast Guard operations in Florida and the Caribbean. The USCG Base is an industrial facility providing ship maintenance and repair as well as support for shore infrastructure. This work requires the use of industrial equipment such as grinders, needle guns, sand blasting and welding equipment which generates significant noise and emissions into the air. Operationally, the USCG Base provides emergency response and law enforcement services that require rapid departures with large wakes, sirens and flashing lights. Large and small patrol cutters along with Aids to Navigation vessels are homeported or call at the USCG Base. These vessels conduct operations at the dock both day and night. Helicopters are

also able to land at the USCG Base. The USCG Base uses amplified sound equipment to broadcast information around the facility.

The Covenanters agree that they do not object to the presence of the Maintenance Facility or the USCG Base, or their respective operations. The Covenanters agree that they waive and shall not raise any objection to the continued operation of the Maintenance Facility or the USCG Base. Further, the Covenanters waive and release the City and the United States Coast Guard from any and all liability for any past, present or future claims, and the Covenanters hereby agree not to file any claim or action against Miami-Dade County or the operator(s) of the Maintenance Facility and the USCG Base, pertaining to or arising out of the current operations or ancillary uses of the Maintenance Facility or the USCG Base. This waiver and release includes, but is not limited to, both non-constitutional and constitutional claims and actions (including, but not limited to, inverse condemnation, takings and nuisance), of any kind or other constitutional or non-constitutional claims of any kind or nature whatsoever. In the event that any paragraph of portion of this notice is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable, it shall affect no other provision of this Notification, Acknowledgment, Waiver and Release ("Notice"), and the remainder of this Notice shall be valid and enforceable in accordance with its terms.

[SIGNATURE ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this instrument has been executed on the _____ day of _____, _____.

Witnesses:

_____
Signature

_____
Print Name

_____
Signature

_____
Print Name

OWNER

By: _____

Name: _____

STATE OF _____]
] SS
COUNTY OF _____]

The foregoing instrument was acknowledged before me this _____ day of _____, _____ by _____;
who is personally known to me or has produced _____
as identification.

(Notary Seal)

_____
Notary Public
STATE OF _____
My Commission Expires _____

EXHIBIT "A"

LEGAL DESCRIPTION FOR THE PROPERTY:

COMMENCING AT A POINT 1580 FEET NORTH AND 2015 FEET WEST FROM THE SOUTHEAST CORNER OF SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, SAID POINT BEING AT THE INTERSECTION OF THE CENTERLINE OF THE ROADWAY OF THE ORIGINAL MIAMI COUNTY CAUSEWAY VIADUCT AND THE FACE OF THE WEST BRIDGE ABUTMENT, RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE CENTERLINE OF SAID ROADWAY PRODUCED, A DISTANCE OF 58.70 FEET TO A POINT; THENCE RUN SOUTH 31 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 64.75 FEET TO A POINT, SAID BEING THE POINT OF BEGINNING (1); THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 117.78 FEET TO THE POINT OF BEGINNING OF CUT-OUT PARCEL OF LAND HEREIN DESCRIBED,

FROM SAID POINT OF BEGINNING; THENCE RUN SOUTH 67 DEGREES 05 MINUTES 00 SECONDS WEST, ALONG THE SAID SOUTHERLY LINE OF THE MIAMI COUNTY CAUSEWAY, A DISTANCE OF 40.43 FEET; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 06 DEGREES 15 MINUTES 30 SECONDS AND A RADIUS OF 243.86 FEET, A DISTANCE OF 26.64 FEET TO A POINT; SAID POINT BEING THE POINT OF COMPOUND CURVATURE OF A CIRCULAR CURVE; THENCE RUN ALONG THE ARC OF A CIRCULAR CURVE DEFLECTING TO THE RIGHT, AND HAVING FOR ITS ELEMENTS A CENTRAL ANGLE OF 01 DEGREES 25 MINUTES 44 SECONDS AND A RADIUS OF 1,566.95 FEET, A DISTANCE OF 39.08 FEET TO A POINT; THENCE RUN SOUTH 31 DEGREES 43 MINUTES 00 SECONDS EAST A DISTANCE OF 403.80 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 97.46 FEET TO A POINT; THENCE RUN NORTH 64 DEGREES 31 MINUTES 00 SECONDS WEST A DISTANCE OF 120.00 FEET TO A POINT; THENCE RUN SOUTH 25 DEGREES 29 MINUTES 00 SECONDS WEST A DISTANCE OF 100.00 FEET TO A POINT; THENCE RUN SOUTH 64 DEGREES 31 MINUTES 00 SECONDS EAST, ALONG A LINE PARALLEL TO THE MUNICIPAL CHANNEL A DISTANCE OF 832.55 FEET (RECORD AND LEGAL DESCRIPTION) 832.55 FEET (CALCULATE) TO A POINT; THENCE RUN NORTH 31 DEGREES 43 MINUTES 00 SECONDS WEST A DISTANCE OF 583.57 FEET; THENCE SOUTH 58 DEGREES 17 MINUTES 00 SECONDS WEST FOR A DISTANCE OF 175.85 FEET; THENCE NORTH 32 DEGREES 27 MINUTES 12 SECONDS WEST FOR A DISTANCE OF 59.61 FEET; THENCE NORTH 32 DEGREES 00 MINUTES 10 SECONDS WEST FOR A DISTANCE OF 61.22 FEET; THENCE NORTH 31 DEGREES 57 MINUTES 07 SECONDS WEST FOR A DISTANCE OF 59.87 FEET; THENCE NORTH 31 DEGREES 45 MINUTES 47 SECONDS WEST FOR A DISTANCE OF 99.47 FEET; THENCE NORTH 32 DEGREES 00 MINUTES 04 SECONDS WEST FOR A DISTANCE OF 109.79 FEET; THENCE NORTH 58 DEGREES 01 MINUTES 56 SECONDS EAST FOR A DISTANCE OF 19.00 FEET TO THE POINT OF CURVE OF A NON TANGENT CURVE TO THE RIGHT, OF WHICH THE RADIUS POINT LIES NORTH 87 DEGREES 07 MINUTES 46 SECONDS EAST, A RADIAL DISTANCE OF 71.65 FEET; THENCE NORTHERLY ALONG THE ARC, THROUGH A CENTRAL ANGLE OF 43 DEGREES 56 MINUTES 24 SECONDS, A DISTANCE OF 54.95 FEET; THENCE NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST FOR A DISTANCE OF 10.00 FEET, TO THE SOUTHEASTERLY CORNER OF AN EXISTING ONE-STORY C.B.S. BUILDING; THENCE CONTINUE NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST, NORTHWESTERLY ALONG THE FACE OF THE SAID EXISTING C.B.S. BUILDING LINE, A DISTANCE OF 39.60 FEET, TO THE NORTHEASTERLY CORNER OF SAID EXISTING ONE-STORY C.B.S. BUILDING; THENCE CONTINUE NORTHWESTERLY, NORTH 31 DEGREES 06 MINUTES 33 SECONDS WEST, FOR A DISTANCE OF 30.28 FEET, TO THE POINT OF BEGINNING OF THE CUT OUT PARCEL OF LAND.

CONTAINING 161,716 SQUARE FEET OR 3.71 ACRES, MORE OR LESS.

LYING AND BEING IN SECTION 4, TOWNSHIP 54 SOUTH, RANGE 42 EAST, CITY OF MIAMI BEACH, MIAMI-DADE COUNTY, FLORIDA.

Exhibit E

NON-EXCLUSIVE EASEMENT AGREEMENT

Instrument prepared by:

Tracy R. Slavens, Esq.
Holland & Knight, LLP
701 Brickell Avenue, Suite 3000
Miami, Florida 33131

User department: _____

EASEMENT

This **GRANT OF PERPETUAL NON-EXCLUSIVE EASEMENT** ("**Easement**") dated _____ by and between Miami Beach Port, LLC, a Florida limited liability company (the "**Developer**") and the United States Coast Guard (the "**USCG**"). "Developer" means Miami Beach Port, LLC and its parent, affiliates, contractors, subcontractors, working interest owners, joint venturers, officers, directors, employees, agents, attorneys, representatives, insurers, reinsureres, assigns, and successors-in-interest.

Recitals

A. The Developer is the owner of that certain ±3.71 acre parcel of land located on the southeastern tip of Terminal Island at 120 MacArthur Causeway, as legally described in that certain deed recorded in Official Records Book 28620 at Page 3512 of the Public Records of Miami-Dade County (the "**Developer Property**").

B. The USCG is the owner of the ±17.52 acre parcel to the east of the channel abutting the Developer Property (the "**USCG Property**").

C. The USCG utilizes the USCG Property for a variety of activities including, without limitation, the operation of (i) an industrial facility providing ship maintenance and repair as well as support for shore infrastructure; (ii) industrial equipment such as grinders, needle guns, sand blasting and welding equipment; (iii) helicopter take-off, landing, and maintenance, (iv) sound amplification systems to communicate information across the USCG Property at amplified volume, (v) a high traffic marine facility providing dockage and maintenance for USCG vessels providing emergency response, protection of the borders of the United States of America and surrounding areas (which activities involve the loading, unloading and maintenance of live armaments), (vi) explosives storage and transfer, and (vii) various future activities as the USCG may see fit (items (i) through (vi) are collectively hereinafter referred to as the "**USCG Operations**").

D. The Developer desires to construct on the Developer Property a development which may consist of one or more of the following: (i) a residential tower with approximately 90 multi-family dwelling units and associated amenities, (ii) offices, (iii) a yacht moorage, and (iv) a fleet management and sanitation city facility (the "**Development**").

E. Developer acknowledges that the USCG Operations may from time to time interfere and infringe on the unfettered use and enjoyment of the Developer Property and, as a result of such infringement and interference, on the terms and conditions set forth herein, Developer desires to grant an easement to USCG to permit any such infringement and interference that occurs as a result of any USCG Operations occurring now or in the future, all as more particularly set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions contained herein, together with other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the Developer hereby voluntarily grants and conveys a perpetual Easement for and in favor of the USCG upon the Developer Property which shall run with the land and be binding upon the Developer and the USCG, their successors and assigns.

Agreement

1. Easement. The Developer hereby grants a perpetual non-exclusive easement over the Developer Property running in favor of the USCG as follows:

(a) Avigation and Navigation. The Developer reserves unto itself, its successors and assigns, for the use and the benefit of the public, and hereby grants and conveys to the USCG a non-exclusive easement and right-of way for the free and unobstructed performance of the USCG Operations, including flight, navigation, sail, passage and effects thereof of all types of aircraft and vessels. For the purpose of this Easement, (i) "aircraft" shall mean any contrivance now known or hereafter invented, used or designated for the navigation of, or flight in or through the air (i.e., airplane, helicopter, drone, etc.), and (ii) "vessel" shall mean any contrivance now known or hereafter invented, used or designated for the navigation of, or sail on or over the water (i.e., boat, ship, raft, etc.).

(b) Operational. The Developer reserves unto itself, its successors and assigns, for the use and the benefit of the public, and hereby grants and conveys to the USCG a non-exclusive easement and right of way over and above the Developer Property for the noise, vibrations, dust, light, smoke, odors, fumes, vapors, fuel particles, soot or other air pollution, vibrations, fear, interference with sleep, use and enjoyment, and communications and any and all other effects as may be alleged to be incident to or caused by the USCG Operations.

2. Construction. Notwithstanding the foregoing, the Developer reserves unto itself, its successors and assigns, the right to perform such activities on the Developer Property as the Developer may deem reasonably necessary or desirable in connection with the design, engineering, and construction, maintenance, repair and redevelopment of the Developer Property and the Development.

3. Covenants Running with Land. This Easement shall run with the lands described herein, and shall be binding upon the Developer and the USCG and shall inure to and be for the benefit of the Developer and the USCG and their respective successors and assigns. The provisions of this instrument shall become effective upon their recordation in the public records of Miami-

Dade County, Florida. This Easement shall run with the land of the Developer Property and shall be binding upon the Developer, its heirs and assigns and shall inure to the USCG, its successors and assigns forever.

4. Attorney's Fees. In the event that any party brings an action to enforce its rights hereunder, the prevailing party in such action shall be entitled to receive all costs and reasonable attorney's fees in addition to any damages to which it is due by reason of such action.

5. Notices. Any demands or notice allowed or required hereunder shall be deemed to have been properly given or served when delivered personally or deposited with the United States Postal Service, as registered or certified mail, postage prepaid and addressed as follows:

If to USCG: United States Coast Guard
[_____]
[_____]
[_____]

and a copy to: [_____]
[_____]
[_____]

If to Developer: Miami Beach Port, LLC
315 S. Biscayne Blvd.
Miami, FL 33131

and a copy to: Tracy R. Slavens. Esq.
Holland & Knight, LLP
701 Brickell Avenue, Suite 3300
Miami, FL 33131

Any party may change his, her or its address for notice by giving the other parties hereto at least fifteen (15) days' prior written notice of any such change of address.

6. Amendments. This Easement may not be changed, modified, released or amended in whole or in part except by a written and recorded instrument, executed by the then record fee owners of the Developer Property and USCG Property.

7. No USCG Obligation to Exercise. Nothing herein shall be construed as obligating the USCG to exercise any of its easement rights herein, and the USCG may determine whether to exercise all or any portion of its easements rights herein, in its sole discretion.

8. Severability. If any portion contained herein shall be held to be invalid or to be unenforceable or not to run with the land, such holding shall not affect the validity or enforceability of the remainder of this instrument.

IN WITNESS WHEREOF, the Developer has caused this instrument to be executed and delivered as of the date and year first written above.

_____
Developer

STATE OF FLORIDA)
) SS:
COUNTY OF MIAMI-DADE)

The foregoing instrument was acknowledged before me this ___ day of _____, 2017, by _____, as _____ of Miami Beach Port, LLC, a Florida limited liability company, on behalf of said company, who is personally known to me or has produced _____ as identification.

My Commission Expires:

_____
Notary Public – State of Florida

_____
Printed Name

Exhibit F

COMPATIBILITY, SEA LEVEL RISE AND RESILIENCY ANALYSIS PREPARED BY THE CURTIS GROUP

THE CURTIS GROUP

MEMORANDUM

To: Thomas Mooney, AICP
Director, Planning Department
City of Miami Beach

From: Rob Curtis, AICP

Date: December 6, 2018

Re: Terminal Island – Industrial and Residential Uses Compatibility and Sea Level Rise and Resiliency Analysis

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I. INTRODUCTION

The Curtis Group, Inc., has been asked to analyze existing examples of compatible industrial and residential uses immediately adjacent to each other. This analysis is undertaken in relation to the new 90 unit, 25 story multi-family residential building proposed by Miami Beach Port LLC on Terminal Island in the City of Miami Beach (the "Project"). Particular to this analysis is the compatibility of the proposed multi-family residential use with the United States Coast Guard Base (USCG) located 300-feet to the east across a channel.

Chapter 163, Florida Statutes, defines compatibility to mean 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 of condition is unduly negatively impacted directly or indirectly by another use or condition. The analysis provides evidence of compatibility between the existing and proposed uses on Terminal Island, as well as, numerous examples of industrial and residential mixed-use environments where these uses successfully coexist. In addition to the compatibility analysis, The Curtis Group has also been asked to provide an analysis of the Project in relation to sea level rise and storm surge. This analysis is presented in Section IV of this memorandum. In addition, sea level protections and resiliency measures are also presented.

II. BACKGROUND

Location of Terminal Island

Located on the MacArthur Causeway, Terminal Island is a gateway to Miami Beach. The waterfront land on Terminal Island is unique and special. It is highly visible and is surrounded by both luxury residential uses and marine operations. Its location on the north side of Government Cut and is centrally located between Dodge Island (PortMiami) to the southwest, Star Island to the north, Fisher Island to the southeast, and the South of Fifth Neighborhood to the east. With the expansion of PortMiami, cargo operations have left Terminal Island and relocated to where waters are deeper and new cranes provided superior service.

Existing Uses

In addition to the now vacant 3.71 acre cargo operation property, other uses on Terminal Island include, the 2.18 acre Fisher Island Ferry loading and parking area; 3.13 acre FPL substation; and, 2.16 acre City of Miami Beach fleet facility. The ±17.52 acre USCG Base is not part of Terminal Island and is separated and buffered from Terminal Island by a 300-foot channel.

Proposed Development

The proposed redevelopment on Terminal Island consists of (i) a new 25 story residential building (±300 feet) with 90 multi-family dwelling units and associated amenities, including a mega-yacht moorage, (ii) a city facility consisting of ± 40,600 square feet of administrative offices, service bays, vehicle maintenance and warehousing facilities and other related facilities, and (iii) 395± parking spaces for the city's sole, permanent and exclusive use.

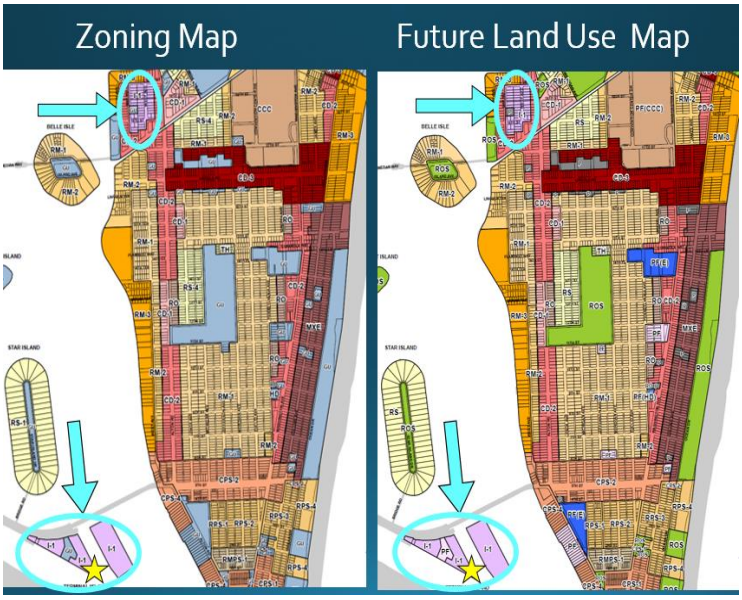
In addition, as a separate adjacent project, the Fisher Island surface parking lot is approved to be redeveloped as a parking garage for construction workers, island employees, and residents' staff.

Existing and Proposed Use Compatibility

The existing and proposed development projects will define Terminal Island for the foreseeable future. It is likely the FPL substation and Fisher Island Ferry loading area will remain long term. Therefore the uses and there potential impacts are known. These uses can coexist in relative proximity to each other in a stable fashion over time such that no use of condition is unduly negatively impacted directly or indirectly by another use or condition.

Comprehensive Plan

Terminal Island and the USCG are designated as Urban Light Industrial (I-1) in the adopted City of Miami Beach 2025 Comprehensive Plan Future Land Use Map (FLUM). The Sunset Harbour area is the only other area in the City designated on the FLUM as Urban Light Industrial (I-1).



Zoning

The majority of Terminal Island is designated as Urban Light Industrial (I-1) and the portion owned by the city is designated as Government Use (GU) on the City's zoning map. The uses permitted in the City Zoning Code Urban Light Industrial (I-1) designation, which includes offices, main use parking garages, tailoring and dry cleaning, automobile service stations, and print shops, are generally compatible with residential uses. Specifically, the permitted I-1 uses can coexist in relative proximity to residential uses in a stable fashion over time such that no use is unduly negatively impacted directly or indirectly other uses. This compatibility has been demonstrated in the Sunset Harbour area where two 26 story residential towers coexist with the surrounding light industrial uses which includes an immediately adjacent 439 space, 6 level parking garage similar to the approved Fisher Island parking garage adjacent to the proposed Project.

Context and Height

Terminal Island is located: west of the tallest building on Miami Beach; adjacent to Government Cut frequented by enormous cruise and cargo ships; within view of PortMiami with its cargo cranes; and, west of the City of Miami Central Business District and Watson Island with proposed high rise hotel towers.

Miami Beach

The height of the proposed building is consistently below the height of the buildings to the east on Miami Beach. The proposed 25 story, 90 unit residential building will be no more than 300 feet tall and will be below the building heights found south of Fifth Street and east of West Avenue including:

- Icon – 40 stories, 289 units;
- Murano Grande – 37 stories, 270 units;
- Yacht Club – 34 stories, 360 units;
- Murano Portofino – 37 stories, 189 units; and,
- Floridian – 32 stories, 334 units.

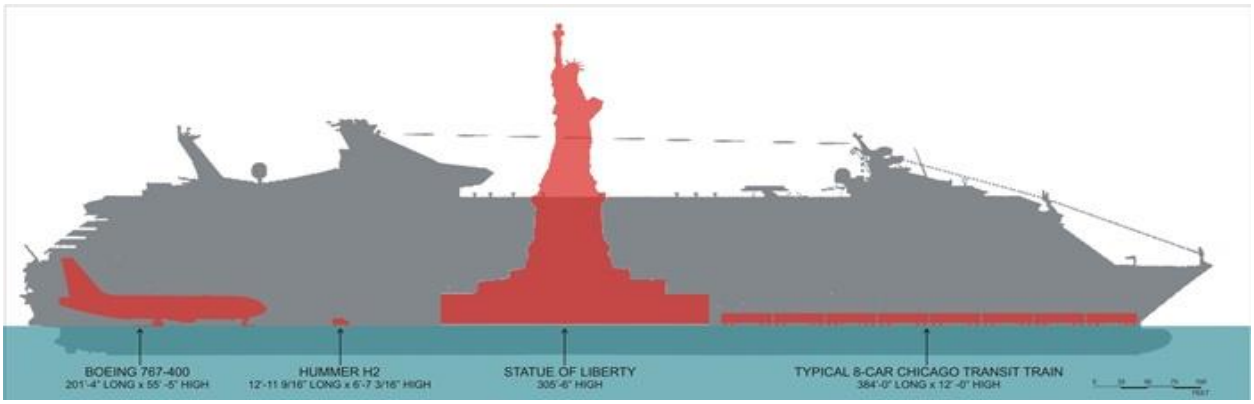
The proposed structure is approximately the same height as Bentley Bay at 25 stories but with almost half the number of dwelling units. Bentley Bay has 160 units compared to the proposed 90 residential dwelling units.

The image below shows the density of development looking east to west from Miami Beach to downtown Miami.

Government Cut and PortMiami

Terminal Island is directly adjacent to Government Cut and the shipping activity. The image below shows cruise ships at PortMiami with downtown Miami in the background.

In 2018, Royal Caribbean International, will bring the Allure of the Seas to PortMiami. Allure of the Seas is approximately 1,200-feet in length and 240-feet tall. The image below compares this ship to other familiar objects and landmarks. This illustrates the scale and magnitude of the vessels that will be passing Terminal Island and supports the appropriateness of the height and scale of the proposed Project.



The image below shows the 300-foot cargo cranes and downtown Miami in the background.

Watson Island

The City of Miami previously approved development of two hotel towers with a total of 605 rooms, 221,000 square feet of retail, 1,700 parking spaces, and a 50 slip mega yacht marina on Watson Island. The image below shows the approved plan for Watson Island with Miami Beach in the background. The hotel tower on the left of the image is 375-feet tall and the tower on the right is 535-feet tall.

III. COMPATIBILITY OF USES

Local Examples of Mixed-Use Residential and Industrial

There are many local examples of multi-family residential projects coexisting with light industrial uses. Below are a few examples including Sunset Harbour in Miami Beach, Fisher Island, and Village of Merrick Park in Coral Gables.

Sunset Harbour

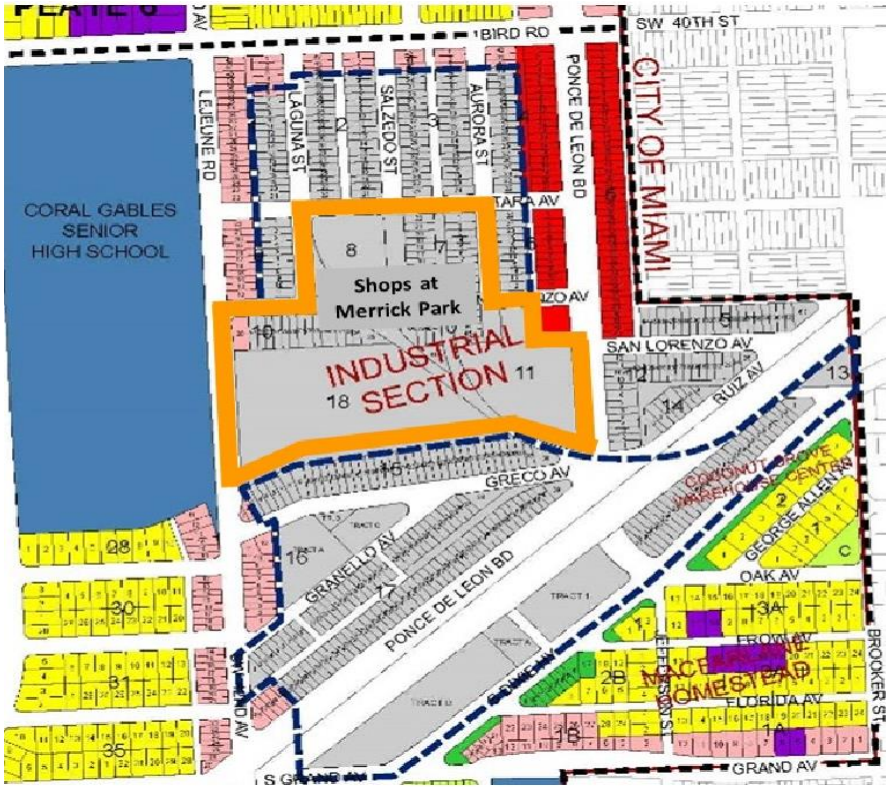
These two residential condominium towers are part of a neighborhood with gyms, restaurants, nearby grocery store, marina and a waterfront park. The area also has light industrial uses including offices, a storage facility, warehouse and towing company. As shown in the image below, the two residential towers are directly adjacent to a 439 space, 6 level parking, similar to the approved Fisher Island parking garage abutting the subject Project.

Fisher Island

This high-end condominium community shares the island with substantial oil storage tanks and pumping facility.

Village of Merrick Park

The boundary of the Village of Merrick is shown in the orange outline in the map below. This project opened in 2002 on the former site of the City of Coral Gables fleet maintenance facility located in the Industrial Section of the city. Multi-family residential is located within the Village Merrick Park and throughout the City of Coral Gables Industrial Section.

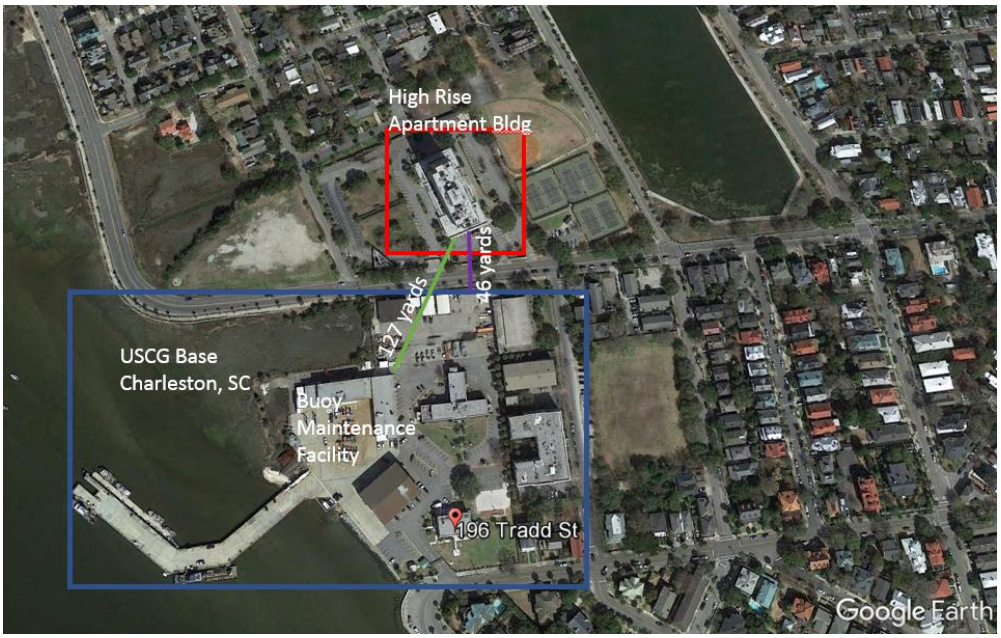


Examples of USCG Facilities and Residential

There are numerous examples throughout the United States of multi-family residential coexisting adjacent to USCG Bases and facilities. Below are some examples including Charleston, South Carolina, Battery Wharf in Boston, Marina del Sol in California and nearby facilities in Islamorada and Key West.

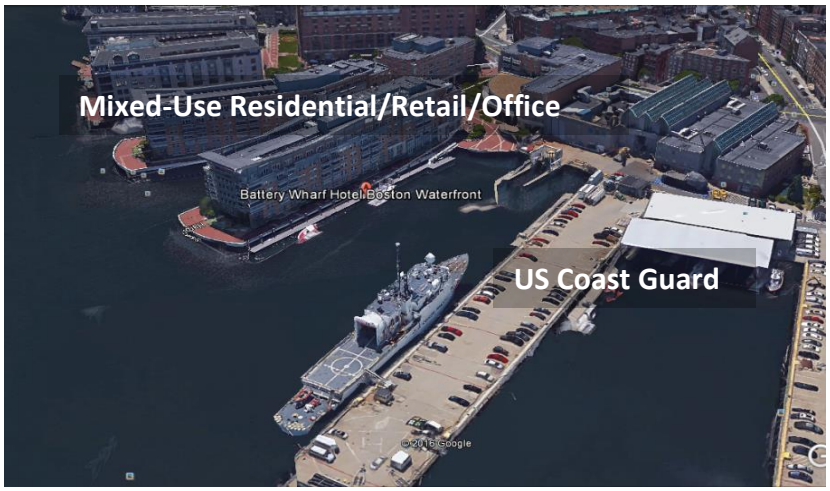
<u>USCG Base Charleston, South Carolina</u>

The image below shows high-rise residential approximately 380-feet from the USCG Base in Charleston, South Carolina.



Battery Wharf, Boston

The USCG Base at Battery Wharf in Boston, shown below, is adjacent to mixed-use development including office, retail and multi-family residential development.



Marina Del Sol USCG, California

This USCG Base is directly abuts the Breakwater Apartment Community which includes 225 dwelling units with 1, 2, and 3 bedroom units ranging in rent from $3,200 to over $5,000 per month.

US Coast Guard Islamorada, Florida

US Coast Guard Sector Key West, Florida

Compatibility Conclusion

The proposed application does not create a use or condition that causes undue negative impact directly or indirectly to other uses or conditions in the area. The 300-foot channel between the proposed project and USCG Base provides a significant buffer between the uses. Furthermore, to ameliorate any concerns that future condo owners will complain about the operations at the USCG base, all proposed Project condo owners will be required to execute a waiver in favor of the USCG to allow the USCG to continue to conduct its operations on the USCG Base without encroaching or depriving any adjacent project property owners of the use of their property due to noise, vibrations, fear, anxiety, fumes, residue and other related impacts that the USCG operations may cause. The applicant is also proffering a Nuisance Easement in favor of the USCG, which will allow the Base's use to continue in an uninterrupted manner in the vicinity of, over, and around the Terminal Island parcel. Therefore, even though the uses are compatible, the waiver and

Nuisance Easement will ensure future residents acknowledge the USGC Base proximity and use; and, guarantee the Project's residents shall not interfere with the Base's use or operation and further ensure that the uses can coexist in a compatible manner.

Furthermore, it is important to understand that Miami Beach Port, LLC will not automatically be allowed to develop the Project with residential uses following approval of the proposed text amendments. After the approval of the proposed text amendments to create the opportunity to seek the conditional use approval, Miami Beach Port, LLC will be required to file an application to seek approval of conditional use permit at a public hearing before the City's Planning Board as well as design approval by the City's Design Review Board. A conditional use permit requires a public hearing approval and may be approved only if certain criteria are satisfied. Section 118-191 of the City's Land Development Regulations is of a public or semi-public character and are essential and desirable for the general convenience and welfare of the community, but also because the nature of the uses and their potential impact on neighboring properties, requires the exercise of planning judgement as to location and site plan." The conditional use review process requires that Miami Beach Port, LLC would need to address any identified impacts of its project with appropriate design and mitigation, which will, in turn, protect the interests of both the Project and the area property owners.

IV. ANALYSIS OF SEA LEVEL RISE AND RESILIENCY

This section analyzes the Project in relation to sea level rise and storm surge. Sea level protections and resiliency measures are also presented.

Background

The City of Miami Beach has prioritized resiliency and sea level rise protections for all development projects. The City has adopted legislation to implement these priorities in accordance with the Community Planning Act, passed by the Florida Legislature in 2011, which allows local governments the option of planning for coastal hazards and the potential of sea level rise within their Comprehensive Plan through the Adaptation Action Areas. In 2016, the City of Miami Beach amended its 2025 Comprehensive Plan and designated the entire City as an Adaptation Action Area (AAA). The City has subsequently implemented resiliency strategies that include:

1. Protection: hard and soft defensive measures to mitigate the impacts of sea level rise in order to decrease vulnerability.

2. Accommodation: a strategy that allows the altering of a design through elevation, and/or stormwater improvements, allowing the structure of infrastructure to remain intact.

3. Management Strategies: removing or relocating development from high risk areas.

4. Avoidance: ensuring development does not take place in areas subject to coastal hazard associated with sea level rise or where the risk would increase over time.

The City has adopted policies through its 2025 Comprehensive Plan Future Land Use Element that will:

1. Maximize pervious landscape to allow for more stormwater infiltration and encourage the planting of vegetation that is highly absorbent and can withstand the marine environment and the potential storm winds.

2. Encourage development measures that include innovative climate adaptation and mitigation designs.

3. The requirement for new construction, that the first floor elevation habitable space in residential and commercial buildings be a minimum above the FEMA requirement, of the City of Miami Beach Freeboard, as stipulated in the Code of Miami Beach to protect during flood conditions and from Sea Level Rise.

In 2017, the City of Miami Beach, through Ordinance 2017-4123, established "Sea Level Rise and Resiliency Review Criteria" in order to review projects that would potentially propose and amend the uses in zoning categories, or the actual zoning map of a particular parcel, or other Land Development Regulations or the City's Comprehensive Plan. The review criteria include:

1. Recycling or salvage plan for partial or total demolition shall be provided.

2. Windows that are proposed to be replaced shall be hurricane proof impact windows.

3. Where feasible and appropriate, passive cooling systems, such as operable windows shall be provided.

4. Whether resilient landscaping (salt tolerant, highly water-absorbent, native or Florida Friendly plants) will be provided.

5. Whether adopted sea level rise projections in the South East Florida Regional Climate Action Plan, as may be revised from time-to-time by the Southeast Florida Regional Climate Change Compact, including a study of land elevation and elevation of surrounding properties were considered.

6. The ground floor, driveways and garage ramping for new construction shall be adaptable to the raising of public rights-of -way and adjacent land.

7. Where feasible and appropriate, all critical mechanical and electrical systems shall be located above base flood elevation.

8. Existing buildings shall be where reasonably feasible and appropriate, elevated to the base flood elevation.

9. When habitable space is located below the base flood elevation plus the City of Miami Beach Freeboard, wet or dry flood proofing systems will be provided in accordance with Chapter 54 of City Code.

10. Where feasible and appropriate, water retention system shall be provided.

Sea Level Rise

This section presents an analysis of the Project relative to the adopted sea level rise projections in the South East Florida Regional Climate Action Plan and includes a study of land elevation and elevation of surrounding properties.

In accordance with the 2015 Unified Sea Level Rise Projection Chart, from the Southeast Florida Regional Compact, infrastructure intended to last 50 years or more, should use the National Oceanic and Atmospheric Agency's (NOAA) projections. Figure 2 shows the NOAA high projection highlighted in orange, below.

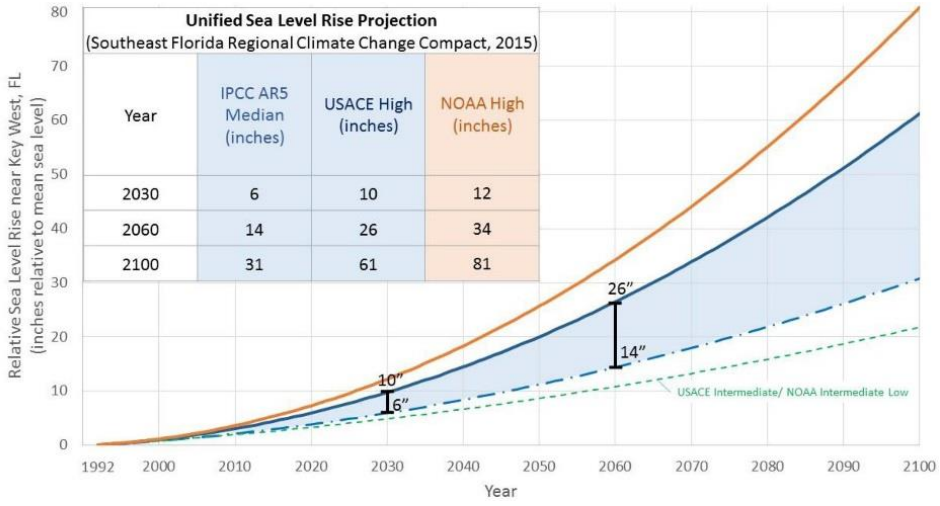


Figure 2 – Unified Sea Level Rise Projection

Using these NOAA projections we have analyzed the Project Site for the 2060 and 2100 Sea Level Rise projections, as well as, for storm surge. The site is currently at elevation 7.76-feet. See Figure 3. NOAA projects the sea level will rise 34-inches by 2060. Figure 3 shows the Project Site and all of Terminal Island above the elevation of the flood and tide water. As illustrated in Figure 3, much of Miami Beach proximate to 5th Street is impacted by flood and tide water.

Figure 3 – Site Elevation 7.76-Feet with Sea Level Rise of 34-Inches at Year 2060

By 2060, NOAA projects the sea level will rise 81-inches in the Miami Beach area. Figure 4 shows the Project Site above the elevation of the flood and tide water. The remainder of Terminal Island and Miami Beach are below the elevation of the flood and tide water.

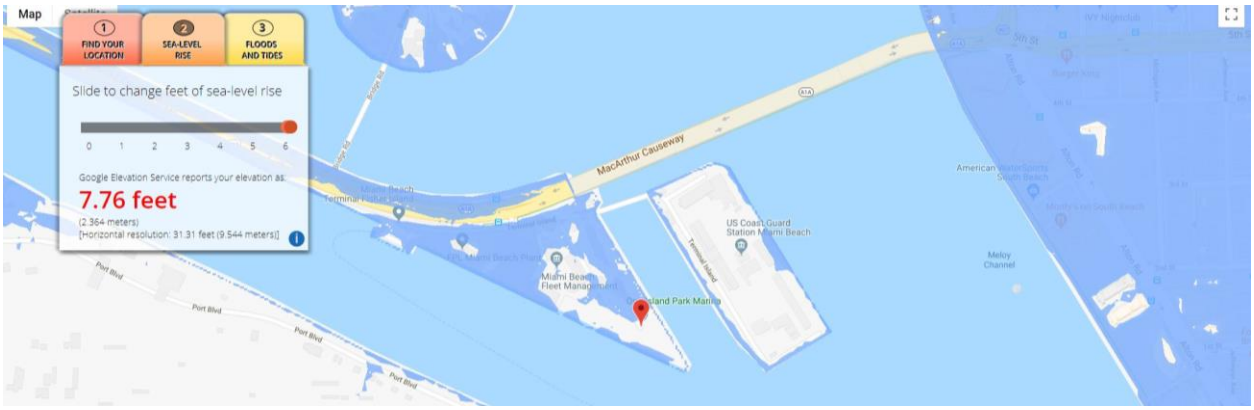


Figure 4 – Site Elevation 7.76-Feet with Sea Level Rise of 81-Inches at Year 2060

Storm Surge

In regard to storm surge, Figures 5 – 7 show the impact of category 3 – 5 storms, respectively. Based on these charts, category 3 storms will not result in storm surge impact to the Project site and Category 4 and 5 storms are projected to cause a on-site storm surge a 1 – 3-feet, respecitvely.

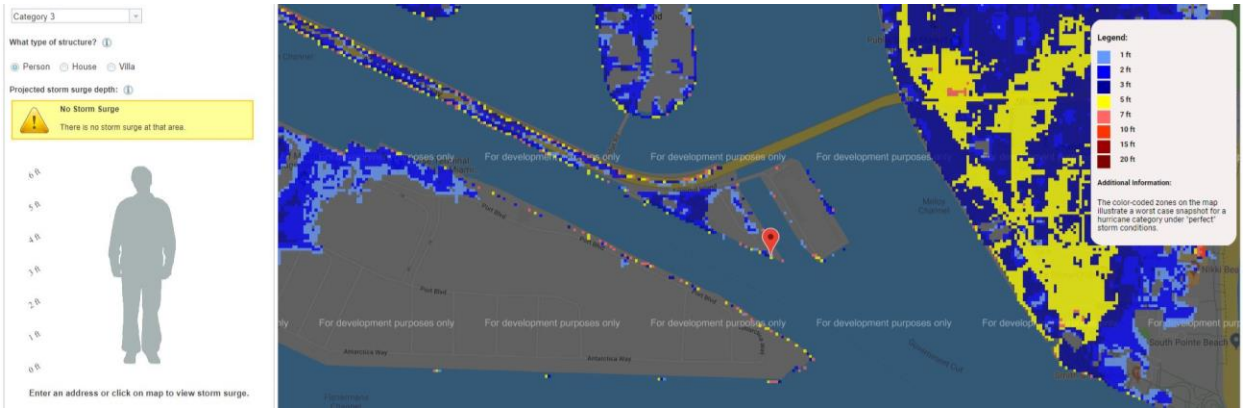


Figure 5 - Storm Surge Projected for a Category 3 Storm

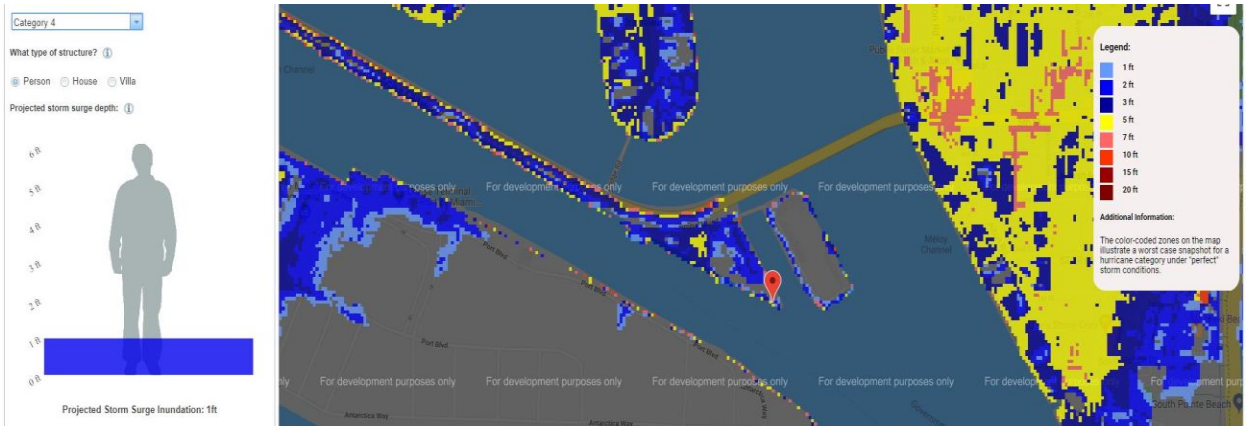


Figure 6 – Storm Surge Projected for a Category 4 Storm

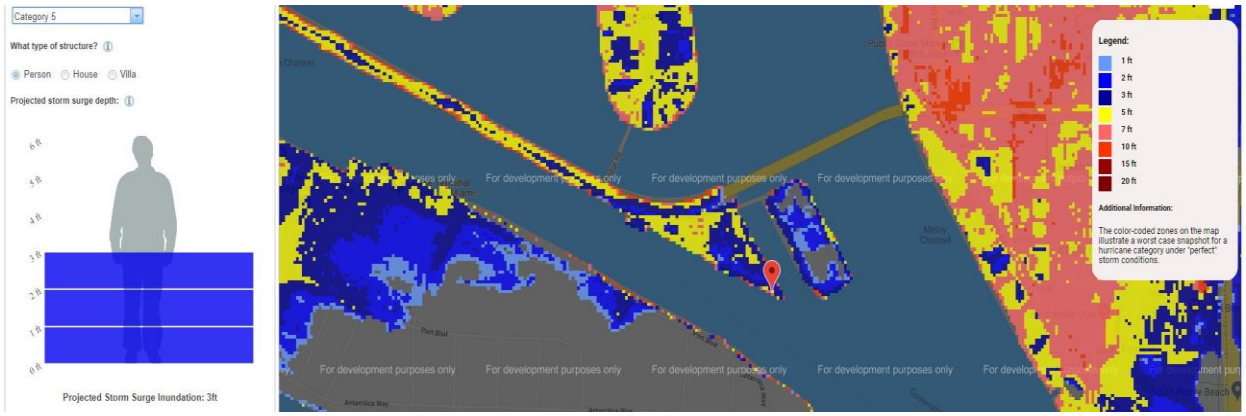


Figure 7 - Storm Surge Projected for a Category 5 Storm

The Project will take into account the projections of the Southeast Florida Regional Climate Compact, and projected storm surge maps, when designing the project.

Sea Level Rise Protections and Resiliency Measures

The Project will be developed in compliance with all City of Miami Beach's recent Code amendments and will be designed to ensure resiliency and protection from sea level rise and storm surges. The Project, which also includes reconstruction of the City's Sanitation Department and Fleet Management Facility, inclusive of its service bays, vehicle maintenance, storage and related facilities, will be developing a fully resilient component of the City's infrastructure thereby protecting public assets and resources against the impacts of climate change and sea level rise.

Specifically, as it relates to the City's established Sea Level Rise and Resiliency Criteria the Project will:

1. Provide a recycling/salvage plan when demolition plans are submitted to the City's Building Department.

2. Install new and hurricane proof impact windows, as required by applicable codes.

3. Allow for passive cooling systems, by providing balconies in residential areas and operable windows when appropriate.

4. The landscape will be salt tolerant, drought tolerant, and will use Florida Friendly plants. Where appropriate (at ground level) the priority will be to incorporate highly water-absorbent plants.

5. Prepare an analysis of adopted sea level rise projections in the South East Florida Regional Climate Action Plan, as may be revised from time-to-time by the Southeast Florida Regional Climate Change Compact, including a study of land elevation and elevation of surrounding properties. This analysis is presented in the following section of this memorandum.

6. The ground floor, driveways and garage ramping will be designed to allow for adaptation to the future raising of public right-of-ways and adjacent land.

7. All mechanical and electrical systems will be located above the base flood elevation.

8. The FEMA base floor elevation maps locate the Project Site in an AE Zone, thereby establishing a minimum base floor elevation of 10 feet. See Figure 1. The elevation of the Project's first floor habitable space will be set at the minimum FEMA elevation of 10 feet, plus the City of Miami Beach's Freeboard (an additional 1 to 5 feet).

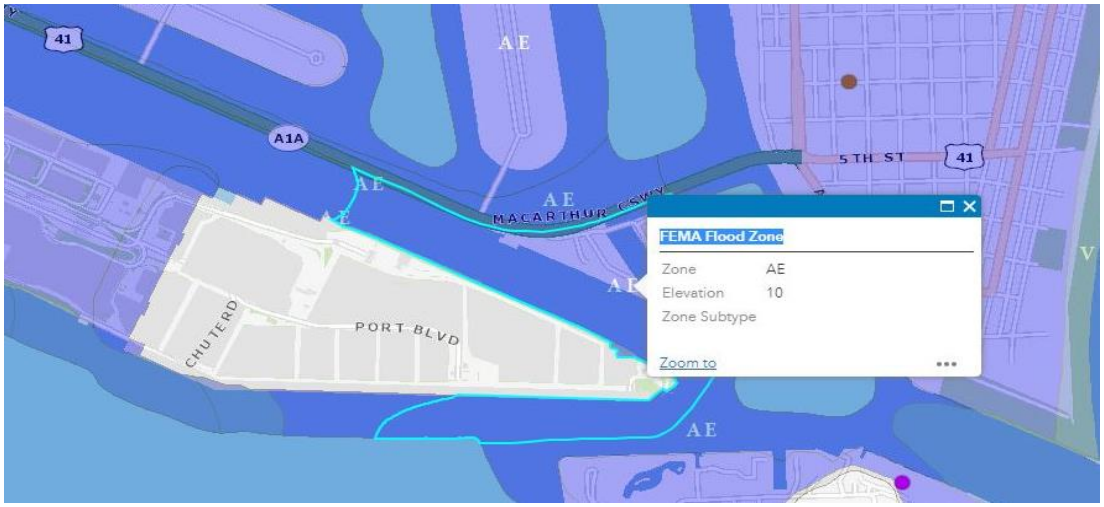


Figure 1 - FEMA Flood Zone Map - AE Elevation 10'

9. The Project will not contain any habitable space located below the base flood elevation.

10. The Project will consider the inclusion of a water retention system, if feasible and appropriate.

In addition to these codified criteria, the Project will :

- Incorporate significant terraced areas as green roofs, landscaped with Florida Friendly plantings.

- Install and provide access to electrical power supply rated at 240 volts or greater, in parking garages for the use of residents, guests, and employees.

- Provide a new, resilient Fleet Facility for the City of Miami Beach, allowing the Sanitation Department to provide services to protect human life and City resources.

Sea Level Rise and Resiliency Conclusion

Federal, State, Regional, and City regulations are being implemented to ensure that new development projects are sustainable and resilient to our changing climate. The Project encompasses residential and government uses, which are uses that demand resiliency and adequate protections against sea level rise in their designs and construction. The Developer will work with the City to achieve these protections on a long term basis in accordance with, and likely over and above, the applicable regulations.