

GRAYROBINSON

Getting Past “No” With Local Governments

October 24, 2022

Presented by

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Run of Show

- **What To Do When You Need to Challenge a Government Decision**
- **Types of Government Proceedings for Land Use Approval**
- **Appellate Review Rule**
- **Types of writs and when to use them**
- **Ch. 70 Bert Harris**
- **Ch. 70 Environmental Dispute Resolution**
- **Case Study**

FIRST THING IS FIRST: WHY DO I CARE?

- We all represent landowners who see frequent changes to what they can and can't do with their land.
- Some changes are driven by the landowner (Site Plan, PSP approvals, variances, etc.) and some are driven by the government.
- Land use changes, all require hearings before City Hall/County Commission
- If Commission vote impacts owner's uses/rights in the land and landowner does not timely file something, final decision FOREVER.
- Even when landowners are successful at the Commission hearing, they and the County/City may still face NIMBY or competitor challenges within these arenas challenging the approval.

What To Do When You Need to Challenge a Government Decision

Identify the Type of Proceeding or Decision and Desired Outcome

Identify Options for Challenge

What To Do When You Need to Challenge a Government Decision

Identify the Type of Proceeding or Decision and Desired Outcome

- Quasi-Judicial
- Quasi-Legislative

Identify Options for Challenge

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Identify Options for Challenge

- Cert Petitions
- Declaratory Actions
- Comp. Plan Challenges
- Bert Harris Claims
- Environmental Dispute Resolution
- Inverse Condemnation Claims
- Due Process Claims
- Creative options (breach of contract/injunctive relief)

Types of Government Proceedings for Land Use Approval

Quasi-Legislative vs. Quasi Judicial

Types of Government Proceedings for Land Use Approval

- Quasi-Legislative
 - Quasi-legislative decisions are generally described as those in which the local government is tasked with formulating policy rather than applying specific rules to a particular situation

Types of Government Proceedings for Land Use Approval

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 - Quasi-legislative decisions are generally described as those in which the local government is tasked with formulating policy rather than applying specific rules to a particular situation
 - Examples:
 - Approved uses under a Zoning Ordinance
 - Broad Amendments to Comp. Plans
 - Less frequently challenged because more broad application – not site specific

Types of Government Proceedings for Land Use Approval

- Quasi-Legislative

- Standard of Review:

- [I]n deference to the policy-making function of a board when acting in a legislative capacity, its actions will be sustained as long as they are fairly debatable. *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993), quoting *Nance v. Town of Indialantic*, 419 So.2d 1041 (Fla.1982).
 - "A board's legislative action is subject to attack in circuit court." *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) quoting *Hirt v. Polk County Bd. of County Comm'rs*, 578 So.2d 415 (Fla. 2d DCA 1991).

Types of Government Proceedings for Land Use Approval

- Quasi-Judicial
 - Quasi-judicial decisions involve the application of policy to a specific development application.

Types of Government Proceedings for Land Use Approval

- Quasi-Judicial
 - Quasi-judicial decisions involve the application of policy to a specific development application.
 - Examples:
 - Site-Specific Re-Zoning Hearings
 - Site Plan Approvals
 - Variances
 - Special Exceptions
 - Voluntary Annexations

Types of Government Proceedings for Land Use Approval

- Quasi-Judicial

- Standard of Review:

- “Substantial Competent Evidence” Subject to Certiorari Standard of Review on Appeal

“[R]ulings of a board acting in its quasi-judicial capacity are subject to review by certiorari and will be upheld only if they are supported by substantial competent evidence.” *Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) quoting *De Groot v. Sheffield*, 95 So.2d 912 (Fla.1957).

Types of Government Proceedings for Land Use Approval

Remember:

For both types of hearing, ensure that the record is preserved and establishes a clear entitlement to the outcome sought. (May sometimes require a court reporter if proceedings do not have one, or are not otherwise recorded in a way that can be transcribed).

THESE HEARINGS ARE A TRAP FOR THE UNWARY – THE NATURE OF COMMISSION HEARINGS CAN GIVE A FALSE SENSE OF INFORMALITY, BUT

FAILURE TO MAKE A RECORD (INCLUDING INTRODUCING THE EVIDENCE AND EXPERT TESTIMONY YOUR CLIENT NEEDS TO SUPPORT THEIR CONTENTIONS) AND PRESERVE THE RECORD WILL KILL ANY CHANCE OF RELIEF IN THE COURTS

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The Other Writs:

Prohibition

When to Use:

Motion to disqualify/recuse judge

Improper jurisdiction of lower tribunal.

Prevent appellate court from exercising jurisdiction over untimely appeal.

Prevent trial court from proceeding contrary to appellate court mandate.

Challenge authority of administrative agency.

Where to File:

Circuit Court**

Can issue to County Courts, local officials, and non-APA administrative agency actions.

DCA**

Can issue to Circuit Courts, County Courts or agencies.

Timing:

No Formal Limit (Equitable Principles Apply).

Only used to prevent further action, not used to correct previous actions.

The Other Writs:

Quo Warranto

When to Use:

Challenge authority of a public officer to take certain actions in his or her official capacity.
Challenge Agency Authority.

Where to File:

DCA

Where DCA Original Jurisdiction Applies.

Circuit Court

Where DCA does not have Original Jurisdiction.

Timing:

No Formal Limit (Equitable Principles Apply).

Types of writs and when to use them

“All Writs”

When to Use:

- Used to stay certain or all proceedings in a lower court.
- Used to preserve jurisdiction that has already been invoked.
- Used to protect jurisdiction that will be invoked in the future.

Where to File:

- Filed in next highest court from lower court against which writ is sought.

Timing:

- No Formal Limit (Equitable Principles Apply).

The 'other' writs:

Mandamus

When to Use:

- Act to be performed must be ministerial, not discretionary.
- Used to compel lower court or government individual.

Compel trial court to provide remedies set forth in statute where party fails to comply with statutory requirements.

Where to File:

Circuit Court**

Can issue to County Courts, local officials, and non-APA administrative agency actions.

DCA**

Can issue to Circuit Courts, County Courts or agencies.

Timing:

No Formal Limit (Equitable Principles Apply).

Must have exhausted all other legal or administrative remedies.

The 'other' writes:

Mandamus: When do they Come Up In Land Use?

- Staff for intercoastal City had issued comments for permit
- City had also put a timeline on the site plan approval (“if permit not obtained by October 31, approval will be null and void”)
- City was ALSO preparing to condemn the same property for a park
- Upon completion of the punch list, City Manager did not issue permit
- Writ of Mandamus filed to compel Manager to issue permit

Types of writs and when to use them

Certiorari

- When to Use:
 - Challenging local government quasi judicial decisions
 - Challenging lower court decisions on things like motion to dismiss, motions to discharge lis pendens, discovery.
- Where to File:
 - Circuit Court**
 - Challenges to local government quasi-judicial
 - Final Orders of other non APA-tribunals (matter of right).
 - Nonfinal County Court Orders <\$15,000.
 - Nonfinal Orders of non-APA Tribunals (not matter of right).
 - DCA**
 - Review of nonfinal Cir. Ct. Orders & County Court Orders.
 - Review of Circuit Court denial of Petition for Writ
- Timing
 - 30-Days from Rendition of Order to be reviewed.

Certiorari in Land Use:

- Only three available grounds to challenge:
 - **Lack of Procedural Due Process**
 - Didn't let you speak, didn't properly notice hearing, other 'went off the rails' procedural issues
 - **No competent substantial evidence to support decision**
 - This is not reweighing the evidence, just deciding if there was
 - Competent (the type typically relied on in making these decisions)
 - Substantial (enough to put reasonable mind at ease)
 - Evidence (type of things admissible in Court, though not as formal).
 - If Commission went on 'gut feeling' or 'I live near there and this will be too much traffic' – good cases for lack of competent substantial evidence.
 - Deferential to Local government, but not carte blanche.
 - **Departure from the Essential Requirements of Law**
 - Where to File:
 - Circuit Court**

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Certiorari in Land Use (cont'd):

- Only three available grounds to challenge:
 - **Lack of Procedural Due Process**
 - **No competent substantial evidence to support decision**
 - **Departure from the Essential Requirements of Law**
 - If an Ordinance directly contradicts and existing ordinance
 - Denials of site plans or similar 'late phase' development approvals based on use or zoning
 - Other things that shock the conscience
 - NOT inconsistency with the comprehensive plan (those are a direct action under Chapter 163, Fla. Stat.)

Certiorari in Land Use:

- **If you win:**

- Whichever Ground the Court agrees with you on, that gets sent back to Commission
- Commission could still rule against appellant, just fix the issues (though the optics on this aren't great for the government)

- **If you lose:**

- Circuit Court decisions can be appealed via "Second Tier Certiorari" to the DCA
 - DCA actually analyzing Circuit Court decision, not commission decision
 - Did Circuit Court provide due process?
 - Did Circuit Court depart from the essential requirements of law?
 - BUT NOT competent substantial evidence (non 2nd Tier appealable)

Warning – Cert fights are Long and Expensive

- Circuit Courts not used to being a point of appeal – get in line with all the trials
- Each Circuit handles these differently
- Some clerks have no idea how to treat them so they hang in limbo
- Multiple appeal venues + motion practice + multiple appeals briefs = time and \$\$\$
- Example →
- This 'denial of Motion for Rehearing' issued by the 5th DCA was the final final final order after a nearly two years battle from when the County Commission approved our client's site plan

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

PRESERVE FLAGLER BEACH AND BULOW
CREEK, INC., A FLORIDA NOT FOR PROFIT
CORPORATION, AND STEPHEN NOBLE,

Petitioner,

v.

CASE NO. 5D21-2548
LT CASE NO. 20-CA-565

FLAGLER COUNTY, FLORIDA, A POLITICAL
SUBDIVISION OF THE STATE OF FLORIDA,
AND PALM COAST INTRACOASTAL, LLC, A
FLORIDA LIMITED LIABILITY COMPANY,

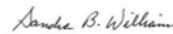
Respondent,

DATE: June 06, 2022

BY ORDER OF THE COURT:

ORDERED that Petitioner's "Motion for Rehearing/Clarification . . .
," filed May 20, 2022, is denied.

*I hereby certify that the foregoing is
(a true copy of) the original Court order.*


SANDRA B. WILLIAMS, CLERK



Panel: Judges Evander, Cohen and Wozniak

cc:

Albert J. Hadeed
John W. Tanner
V. Nicholas Dancaescu

Dale A. Scott
Michael D. Chiumento,

David A. Theriaque
S. Brent Spain

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Appellate Rule Change: (The Asterix on the Previous Pages)

- Effective January 1, 2021, the jurisdiction of the Courts changed.
- Appeal of Final county court orders must now be filed in their respective district court of appeal, no longer circuit courts
- We know Circuit Courts continue to have appellate jurisdiction from final administrative orders rendered by local code enforcement boards (statutory).
- Prior to change Circuit courts had certiorari jurisdiction to review any quasi-judicial action of a local government agency when appellate jurisdiction is not otherwise conferred by law. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982).
- Now, very well may be at DCA, not Circuit Courts.
- Anyone had this issue yet?

Types of writs and when to use them

Type	When to Use	Where to File	Timing
Certiorari	<p>Uses of writ before district and circuit courts for non-final orders not reviewable by rule 9.130:</p> <ul style="list-style-type: none"> • Issues related to Discovery. • Orders denying a motion to dismiss • Orders granting or denying motions to discharge lis pendens 	<p>DCA</p> <ul style="list-style-type: none"> • Review of nonfinal Cir. Ct. Orders & County Court Orders. <p>Circuit Court</p> <ul style="list-style-type: none"> • Nonfinal County Court Orders <\$15,000. • Final Orders of non APA-tribunals (matter of right). • Nonfinal Orders of non-APA Tribunals (not matter of right). 	30-Days from Rendition of Order to be reviewed.
Mandamus	<ul style="list-style-type: none"> • Act to be performed must be ministerial, not discretionary. • Used to compel lower court to rule on matter or set trial for hearing. • Compel trial court to provide remedies set forth in statute where party fails to comply with statutory requirements. 	<p>DCA</p> <ul style="list-style-type: none"> • Can issue to Circuit Courts, County Courts or agencies. <p>Circuit Court</p> <ul style="list-style-type: none"> • Can issue to County Courts, local officials, and non-APA administrative agency actions. 	<p>No Formal Limit (Equitable Principles Apply).</p> <p>Must have exhausted all other legal or administrative remedies.</p>
Prohibition	<ul style="list-style-type: none"> • Motion to Disqualify/Recuse Judge • Improper jurisdiction of lower tribunal. • Prevent appellate court from exercising jurisdiction over untimely appeal. • Prevent trial court from proceeding contrary to appellate court mandate. • Challenge authority of administrative agency. 	<p>DCA</p> <ul style="list-style-type: none"> • Can issue to Circuit Courts, County Courts or agencies. <p>Circuit Court</p> <ul style="list-style-type: none"> • Can issue to County Courts, local officials, and non-APA administrative agency actions. 	<p>No Formal Limit (Equitable Principles Apply).</p> <p>Only used to prevent further action, not used to correct previous actions.</p>
Quo Warranto	<ul style="list-style-type: none"> • Challenge authority of a public officer to take certain actions in his or her official capacity. • Challenge Agency Authority. 	<p>DCA</p> <ul style="list-style-type: none"> • Where DCA Original Jurisdiction Applies. <p>Circuit Court</p> <ul style="list-style-type: none"> • Where DCA does not have Original Jurisdiction. 	No Formal Limit (Equitable Principles Apply).
“All Writs”	<ul style="list-style-type: none"> • Used to stay certain or all proceedings in a lower court. • Used to preserve jurisdiction that has already been invoked. • Used to protect jurisdiction that will be invoked in the future. 	Filed in next highest court from lower court against which writ is sought.	No Formal Limit (Equitable Principles Apply).

When a Petition for Writ Won't Do:

- Sometimes, there may be a glimmer of hope with the local government instead of a hard 'NO'
- In these situations, consider Chapter 70 Environmental and Land Use Dispute Resolution Act
- Many practitioners don't know this is also tucked in Chapter 70 (along with Bert Harris)
- Many practitioners don't know this applies to both environmental disputes **AND LAND USE**
- "Initiation of a proceeding tolls the time for seeking judicial review of a local government development order or enforcement action until the special magistrate's recommendation is acted upon by the local government."

Ch. 70 Environmental and Land Use Dispute Resolution

Process

1. Within 30 days of receipt of Order or Action, Owner must first file a request with the elected or appointed head of governmental entity that issued the development order or enforcement action.
2. Within 10 days of receipt of request, government entity must forward the request to a mutually agreed special magistrate
3. Government entity must file response to the request within 15 days of the filing of the request for relief
4. Special magistrate attempts to mediate a mutually acceptable solution between parties
5. If parties cannot agree, special magistrate conducts hearing that must be informal and open to the public

Ch. 70 Environmental Dispute Resolution

Notice Requirements

- Owners of contiguous real property
- Any substantially affected party who submitted substantive oral or written testimony and who testified concerning the order or action.

Request Contents

- Brief Statement of the owner's proposed use of the property
- Summary of the development order or enforcement action & copy of order or action
- Brief statement of the impact of the order or action on the owner's ability to achieve the proposed use.
- Certificate indicating service of the parties, including the governmental entity

Ch. 70 Environmental Dispute Resolution

Remedy Recommendations Available to Special Magistrate (w/o Limitation)

- An adjustment of land development or permit standards or other provisions controlling the development or use of land.
- Increases or modifications in the density, intensity, or use of areas of development.
- The transfer of development rights.
- Land swaps or exchanges.
- Mitigation, including payments in lieu of onsite mitigation.
- Location on the least sensitive portion of the property.
- Conditioning the amount of development or use permitted.
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.
- Issuance of the development order, a variance, special exception, or other extraordinary relief, including withdrawal of the enforcement action.
- Purchase of the real property, or an interest therein, by an appropriate governmental entity.

Ch. 70 Environmental Dispute Resolution

Standard of Review

Review of order or action that is “unreasonable” or “unfairly burdens” owner.

Different Standard than Burt Harris Claims – “inordinate burden”

Ch. 70 Bert Harris

- **Tips & Tricks**

- Must get “no” before appeal
- Exhaust all remedies before appeal (many municipalities vary)
- What outcome is sought – affects/determines options (Ch 70/certiorari/declaratory actions)
- Can immediately appeal Bert Harris actions regardless of case status

Ch. 70 Bert Harris

- **Property Owner Submits Bert Harris Claim to Governmental Entity**

- Must be submitted 90 days prior to filing suit.

- **Government Responds to Owner Claim**

- Must report the claim to FL Department of Legal affairs within 15 days of receipt of claim.
- Within 90 days of receiving claim must send the claimant a “settlement offer” and “statement of allowable uses”
- If no offer made or offer rejected – suit may be immediately filed

Ch. 70 Bert Harris

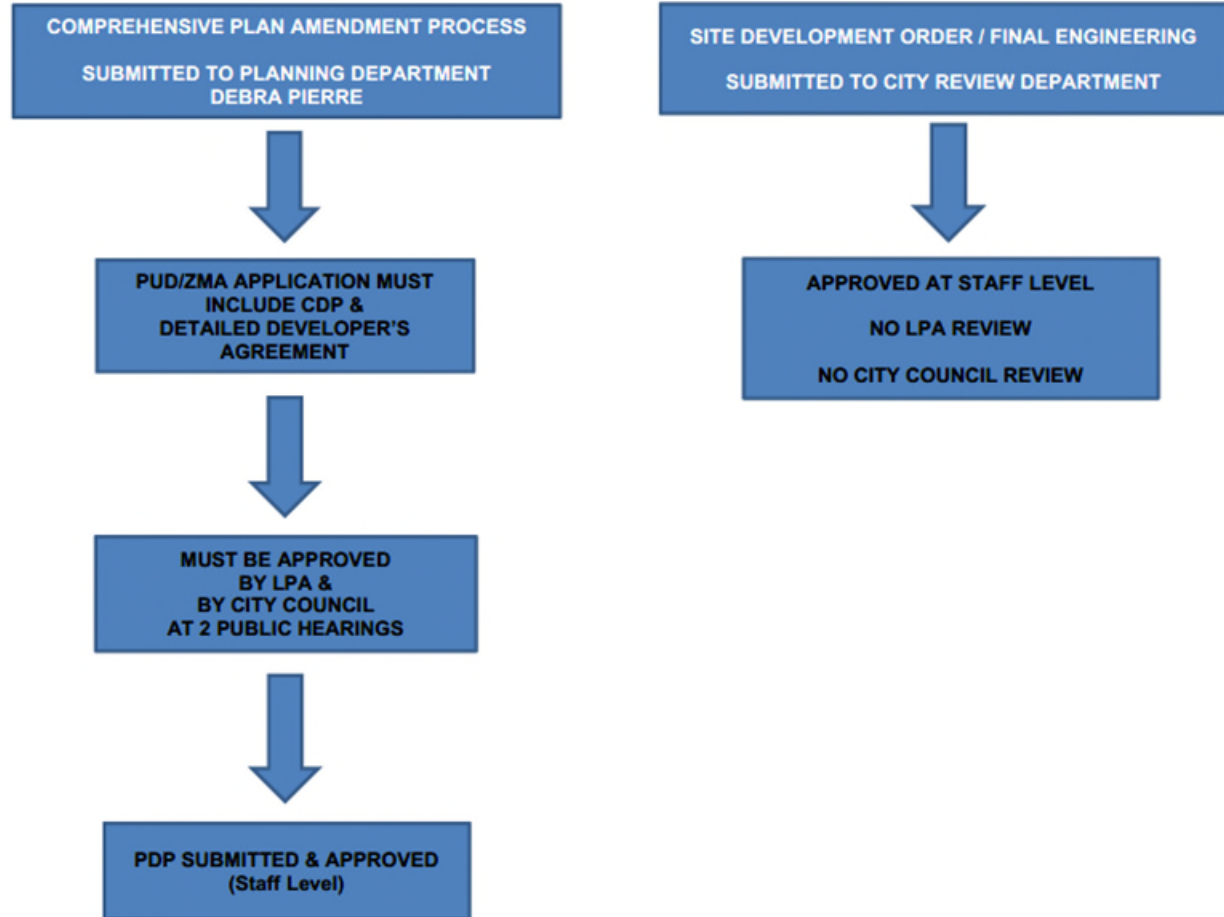
- **Claim Letter Contents**
 - Property Owner's Interest in the property at issue
 - Legal description of property
 - Nature of laws applied by government entity and how those laws directly restrict or unfairly burden the owner's vested property rights
 - How the government's action applied the restrictive law and the date the law was first applied to the property.

RECENT Changes to Bert Harris

- Now, an owner can sell his property and keep his Bert Harris claim.
 - This is a change made by the FL Legislature to in response to Second DCA holding in *Dean Wish, LLC v. Lee Cnty.*, finding that a developer who sold a property during the suit was no longer entitled to relief under Bert Harris. See 326 So. 3d 840 (Fla. Dist. Ct. App. 2021), review denied, No. SC21-1529, 2022 WL 852956 (Fla. Mar. 23, 2022)

Case Discussion

CASE STUDY



CASE STUDY

18 MR. PERSAMPIERE: Council Britton, anything?

19 MR. BRITTON: That is a long dissertation. I
20 didn't follow everything, so I'm not sure how we
21 can go forward tonight anyway without understanding
22 what the Counsel of the applicant actually said.

23 MR. PERSAMPIERE: I'll caution everybody that
24 they do have a court reporter here.

25 MR. BRITTON: So I'm hesitant to go forward

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with anything until we can get some interpretation
from our attorney.

MR. GROOT: Can I interrupt at that point?
And I don't want to say anything else because here
is where you are right now. This is a
quasi-judicial proceeding. You've seen the
evidence in terms of the staff report. You've

3 MR. POLLACK: You know, hearing all of the
4 information, I am inclined right now to send it
5 back to the staff and deny this resolution. I
6 think that we need to have more discussion and --
7 rather than just affirm a hearing and kill it.

8 MR. PERSAMPIERE: Council members?

9 MS. SLADEK: I think this boils down to
10 reading the vested rights determination letter.
11 I've looked at it. I scanned backwards, so it took
12 me a while to figure out which order to read it in.
13 But the only way it makes sense to have such a
14 letter, and it goes through all the reasons why
15 these letters exist, the rights they concern. It
16 only makes sense in the context of incorporating
17 the -- by the time this was issued, the vested
18 rights letter, the developer's agreement I think
19 had already expired. So that seems to me to be
20 incorporated by reference.

21 And talk about playing chicken -- choosing
22 when to play chicken with somebody who has the
23 potential to win a lawsuit, I don't feel that this
24 is a wise time to -- I don't feel like we have a
25 leg to stand on.

1 I know our legal counsel disagrees, but I just
2 look at the plain language of that, and reading
3 some of the memos that went back and forth, it
4 looks like that has to be incorporated by
5 reference.

6 So my question, and I guess we should not have
7 questions because then we get more --

8 MR. PERSAMPIERE: Don't ask --

9 MS. SLADEK: No questions. A hypothetical
10 question is we --

11 MR. PERSAMPIERE: Council Member, I would
12 really just --

13 MS. SLADEK: Say nothing more?

14 MR. PERSAMPIERE: Say nothing more.

15 MS. SLADEK: Okay.

CASE STUDY



CITY OF OVIEDO FLORIDA

400 ALEXANDRIA BLVD • OVIEDO, FLORIDA 32765

407-971-5555 • WWW.CITYOF OVIEDO.NET

MEMORANDUM

DATE: August 30, 2012
TO: Kathryn Breazeale, City Manager
FROM: Debra M. Pierre, Planning and Development Manager *DMP*
SUBJECT: Approval of River Oaks Reserve Certificate of Vesting

HRS OVIEDO II, LLC, the Developer within the River Oaks Planned Unit Development, through its legal counsel, Mr. David M. Mechanik, Esquire, of the law firm of Mechanik, Nuccio, Hearne and Wester P.A., submitted an application for a certificate of vesting to the City.

River Oaks Reserve is located on the north side of CR 419 and on the east side of Lockwood Boulevard. The Development Agreement was approved by the City Council on April 16, 2001. The Development Agreement was later amended on June 17, 2002. The Preliminary Development Plan for Phase I (Commercial Tract- maximum of 154,000 sq.ft. of commercial) was approved on June 17, 2002. The Preliminary Development Plan for Phase II (50 single family attached townhomes) was approved on February 7, 2007. To date, all 50 townhomes have been constructed and approximately 24,923 sq ft. of commercial have been constructed.

The Development Agreement expired on June 11, 2011. Approval of the Certificate of Vesting will allow for the development of the Property (see Exhibit B of the Certificate of Vesting) consistent with the Development Agreement, as if the Development Agreement was still active. The proposed Certificate of Vesting requires the Developer to obtain approval of a building permit for the Property on or before December 31, 2022. The Developer intends to develop the Property as a commercial/office development consisting of a maximum of 98,300 square feet. If a building permit is not obtained for the Project prior to December 31, 2022, the Certificate of Vesting will expire.

City Staff and the City Attorney have reviewed the enclosed request for a Certificate of Vesting and concur with and recommend approval of the Certificate of Vesting. If you concur with the City Attorney and City Staff, please sign on approve below. Upon your approval, I will forward the Certificate of Vesting to the owners for their signature first and then to you for your signature. Let me know if you have any questions. Thank you.

Approve _____

Kathryn Breazeale
Kathryn Breazeale
City Manager

Deny _____

Kathryn Breazeale
City Manager

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Questions



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