

at issue may be reasonably inferred. *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003). Fact based-statements, whether made by an expert or layperson are considered competent and substantial evidence. *Id.*; *Metro-Dade County v. Section II Property, Corp.*, 719 So. 2d 1204, 1205 (Fla. 3d DCA 1998) (holding that fact based testimony from citizens regarding the aesthetic incompatibility of the proposed project with the surrounding neighborhood constituted competent substantial evidence). However, generalized statements regarding a land use proposal, even those from an expert should be disregarded. *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So. 2d at 204. The law will not and cannot approve a zoning regulation or any governmental action adversely affecting the rights of others which is based on no more than the fact that those who support it have the power to work their will. *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311 (Fla. 5th DCA 1987).

- i. The Village Council Majority relied upon an assumed fact that the Sender Site had vested residential development rights that is not supported by competent substantial evidence.

The Village Council's majority relied upon an assumed fact that the Sender Site had vested residential development rights. (App. at 4, Eugene Flinn, 02:56:04, 03:00:02; App. at 4, Tim Schaeffer, 3:21:00; App. at 4, Marissa Siegel-Lara, 3:48:20) However, such a factual finding is not supported by competent and

substantial evidence. Throughout discussion and deliberation among the majority Councilmembers approving the Resolution and Ordinances a constant refrain of the fact that the Sender Site had vested residential development rights was echoed. (App. at 4, Village Councilmembers, 2:40:00 – 3:55:00) However, there is no competent and substantial evidence to support this fact upon which the Village Council rendered their approval.

Vested rights may be established in Florida either through Statute or under the common law. Florida common law provides that vested rights may be established if a property owner has, “(1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses (4) that it would make it highly inequitable to interfere with the acquired right. *Monroe County v. Ambrose*, 866 So. 2d 707, 710 (Fla. 3d DCA 2003). The mere purchase of land without doing more does not create a right to rely on existing zoning. *Id.* In fact, “it would be unconscionable to allow the Landowners to ignore evolving and existing land use regulations under circumstances when they have not taken any steps in furtherance of developing their land.” *Id.* The Village Code defines vested rights as, “A right that cannot be changed or altered by changes in the regulation. Existing land uses that were lawfully conforming uses **prior to the adoption of the comprehensive development master plan or the Land Development Code** shall continue as lawful uses and shall be

subject to and regulated by vested rights policies contained in the Land Development Code.” Palmetto Bay, FL, Municipal Code §. 30-10.3(b) (emphasis added).

There was not any competent substantial evidence presented before the Village Council on May 2, 2016 to support a factual finding that the Sender Site had vested common law or statutory residential development rights. Nowhere in the record is there evidence that the Applicant incurred any significant expenses or in any way substantially changed their position in reliance on some act or omission of the Village which would establish any common law vested residential development rights on the Sender Site. To the contrary, all presented record evidence established affirmatively that any vested rights on the Sender Site would have been exclusively commercial uses which must be consistent with a Village Comprehensive Plan designation of “Parks and Recreation.” In 2005 the Village of Palmetto Bay adopted a comprehensive Use Plan. (App. at 48) Under the newly adopted and enacted Comprehensive Plan, the Sender Site was designated “Parks and Recreation” and zoned “Interim.” *Id.* Immediately prior to the enactment of the Village’s Comprehensive plan, the Sender Site was zoned exclusively General Use (GU). (App. at 48) Under a GU designation, a property was subject to a trend of development analysis identical to that utilized under the Village’s “Interim” designation. *See* Palmetto Bay, FL, Municipal Code §30-50.22; Miami-Dade County, Florida, Municipal Code Art. XIII §33-195. Further, immediately prior to

the adoption of the Comprehensive Plan in 2005, none of the properties adjacent to the Sender Site were zoned for residential development. Only the neighboring property, 17777 Old Cutler Rd had existing private development rights; 17777 Old Cutler was zoned “Office Park Development” (OPD). (App. at 37) An OPD zoned property could only be developed for commercial office space and related ancillary uses. Miami-Dade County, Florida, Municipal Code Art. XIII §33-284.30. Thus, the only statutorily vested rights on the Sender Site pursuant to the Village Land Development Code §. 30-10.3 must have been limited to commercial development rights. Further, record evidence establishes that subsequent to the Village’s adoption of the Comprehensive Plan in 2005, the Applicant/property owner has done nothing other than allow the sender site to sit as an undeveloped parcel of land. Therefore, because the Applicant/property owner did not take any steps in furtherance of developing the Sender Site subsequent to the adoption of the Comprehensive Plan and a Parks and Recreation future land use designation being applied to the Sender Site, the only vested rights on the Sender Site must have been limited specifically to restricted commercial development rights consistent with a “Parks and Recreation” designation, if any existed at all. There is no competent substantial evidence to support the Village Council’s assumed fact that the Sender Site had vested residential development rights.

- ii. The findings of fact relied upon by the Village Council to approve Resolution 2016-28 were not supported by competent substantial evidence.

The findings of fact supportive of Resolution 2016-28 relied upon by the Village Council are not supported by competent substantial evidence in the record. All findings of fact made in Resolution 2016-28 are based on a Planning & Zoning Department staff report and testimony from the applicant and the applicant's experts. (App. at 5-13). The Resolution does not state that any findings of fact were based on testimony provided by any participants who spoke publicly during the May 2, 2016 quasi-judicial hearing or any other documents presented at the quasi-judicial hearing. *Id.* It must be noted, however, that the Applicant did not have any experts present opinions or materials at the May 2, 2016 quasi-judicial hearing. In fact, the only alleged expert testimony presented at the May 2, 2016 quasi-judicial hearing was from an expert retained by the Village; a further illustration as to just how nebulous the distinction between the Village and the Applicant is in this case. (App. at 4, Joseph Corradino, 00:53:00). Thus, the findings of fact upon which the Village Council Majority approved Resolution 2016-28 was limited to consideration of the application itself and analysis of staff. As was previously discussed at length, the Village staff report is a clear departure from the essential requirements of law. Resultantly, only the application itself could be relied upon to approve Resolution 2016-28 by majority vote. Also, as previously discussed, the application itself was

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the font and margin requirements under Florida Rule of Appellate Procedure 9.100.

_____/s/_____
Jeffrey P. Leary, Esq. (FBN 98653)

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016 a copy of this appendix was served to all counsel on the attached service list.

_____/s/_____
Jeffrey P. Leary, Esq.

Service List

Dexter W. Lehtinen Palmetto Bay Village Attorney Lehtinen, Schultz, Riedi, Catalano, de la Fuente PLLC 1111 Brickell Ave, Ste 2200 Miami, FL 33131 dlehtinen@palmettobay-fl.gov	Jerry B. Proctor, Esq. Bilzin Sumberg Attorneys at Law 1450 Brickell Ave, 23 rd floor Miami, FL 33131 jproctor@bilzin.com Scott A. Silver 18001 Old Cutler Rd Palmetto Bay, FL 33157 Registered Agent for Respondent, 17777 Old Cutler Rd LLC
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IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

Case No.:

Bette April Burch,

Plaintiff,

vs.

Village of Palmetto Bay, Florida,
A Florida municipal corporation, and
17777 Old Cutler Rd LLC

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, Bette “April” Burch, by and through undersigned counsel, files this Complaint for Declaratory and Injunctive Relief against the Defendant(s) pursuant to Fla. Stat. §163.3215 seeking statutory review of a development order that is inconsistent with the duly-adopted Comprehensive Plan and Fla. Stat. 86.021 for Declaratory relief as to the present enforceability of Restrictive Covenants recorded against real property owned by 17777 Old Cutler Rd LLC and in support thereof states as follows:

1. Plaintiff challenges the Village of Palmetto Bay’s approval of a development order for the properties located at 17901 Old Cutler Rd and 17777 Old Cutler Rd (hereinafter collectively “Subject properties”) presently known as the “Palmetto Bay Village Center” as inconsistent with the Village of Palmetto Bay Comprehensive Use Plan and Future Land Use Map (FLUM). This

action is brought pursuant to Fla. Stat. §163.3216 to enjoin violations of the adopted and effective Village of Palmetto Bay Comprehensive Use Plan, as well as state law.

2. Plaintiff further seeks a determination of the present enforceability and appurtenant rights of a Declaration of Restrictive Covenants fully executed on January 31, 1985 to run with the properties located at 17901 and 17777 Old Cutler Rd and an order to enforce the same upon the Village of Palmetto Bay and 17777 Old Cutler Road LLC pursuant to Fla. Stat. §86.021.

PARTIES

3. Plaintiff is a resident and citizen of the Village of Palmetto Bay, Miami Dade County, FL.

4. Plaintiff has statutory standing as an adversely affected party under Fla. Stat 163.3215 as follows:

- a. Plaintiff, Bette April Burch, owns real property located at 17601 Old Cutler Rd, Palmetto Bay, FL 33157 immediately adjacent to the subject properties (hereinafter “homestead property”).
- b. Plaintiff’s property is presently zoned EU-2 single Family 5-acre estates and has an Agricultural (AU) exemption.
- c. Plaintiff or Plaintiff’s family have continuously owned, resided upon and utilized the homestead property for agricultural purposes and as a center for equestrian training, breeding, boarding and educational activities since initial purchase in 1945. The homestead property itself has been utilized for agricultural purposes since the late nineteenth century. Presently, Plaintiff is in the process of becoming certified to provide Equine Assisted Psychotherapy and Equine Assisted Learning services.

- d. Plaintiff is employed with Miami Dade County and works in downtown Miami, necessitating daily commutes along Old Cutler Rd. Additionally, the only means of ingress and egress from the homestead property for Plaintiff, guests, clients, professionals, emergency services, etc. is via Old Cutler Rd. The Miami Dade County Hurricane Evacuation Route from Plaintiff's property also necessitates travel along Old Cutler Rd¹.
- e. Plaintiff, Plaintiff's livestock, and Plaintiff's agricultural operations will suffer disproportionately as a result of the development order. Plaintiff's livestock will regularly be subjected to the noise, air, light and particulate pollution resultant from both the increased traffic along Old Cutler Rd and increased residential development which will occur by the Council's passage of Resolution 2016-28.
- f. Plaintiff is additionally affected by the challenged action, because the challenged action jeopardizes her continued private use and enjoyment of her property, reasonable ingress and egress from Old Cutler Rd, and agricultural activities presently in operation on the property.

5. The continued urbanization of the area will increase traffic, noise, light pollution, and intense infrastructure required for the approved development will negatively impact Plaintiff's property value and right to quiet enjoyment of the same. Plaintiff will be further adversely affected by this action due to increased traffic, increased costs due to the provision of urban services, impacts to water quality and impacts to the aquifer upon which Plaintiff relies to provide potable water for her household and livestock, the loss of rural character of her community, continued loss

¹ Both the homestead property and the Subject Properties experienced the zenith of destructive forces experienced during Hurricane Andrew in 1992; a storm surge of 17.9 feet was recorded at the Subject properties.

of rural aesthetic, and impacts to her ability to use and enjoy equestrian and other agricultural activities on the property.

6. Thus, Plaintiff is aggrieved or adversely affected party under Fla. Stat. §163.3215, in that she will suffer an adverse effect to an interest protected or furthered by the County's Comprehensive Plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, equipment or services and environmental or natural resources, which exceed in degree the general interest in community good shared by all persons in the Village of Palmetto Bay.

7. This Court has jurisdiction to enter declaratory and injunctive relief pursuant to Fla. R. Civ. P. 1.610 and Fla. Stat. Chap. 86.

8. Defendant, Village of Palmetto Bay (hereinafter "Village") is a municipal corporation located in Miami Dade County existing under the Constitution and Laws of the State of Florida.

9. The Village exercises the authority to issue zoning and other land use approvals on the lands located within the boundaries of the Village.

10. Defendant 17777 Old Cutler Rd LLC is a foreign limited liability company that maintains a principal place of business at 18001 Old Cutler Rd Ste 600, Palmetto Bay, FL 33157. 17777 Old Cutler Rd LLC is also the record owner of the Subject Properties.

JURISDICTION AND VENUE

11. This is a statutory action brought pursuant to Florida Stat. §163.3215 seeking review of a development order that is not consistent with the Village of Palmetto Bay's duly-adopted Comprehensive Plan.

12. A Complaint pursuant to Fla. Stat. §163.3215 is the sole method available for challenging a development order for inconsistency with a local comprehensive plan.

13. The subject properties consist of approximately 80 acres located within the municipal boundaries of the Village of Palmetto Bay, Florida.

14. This Circuit court has jurisdiction of the subject matter of this action pursuant to Florida Constitution Article V, Section 20 and Fla. Stat. §§163.3215(5), and 26.012(2)(a), 26.012(3). Pursuant to Fla. Stat. §163.3215(5) venue in this action lies in Miami Dade County because the challenged action was taken by Village of Palmetto Bay Council and occurred within Miami Dade County.

15. Village of Palmetto Bay Resolution 2016-28 (hereinafter “TDR Resolution”) is a “development order²” as defined by Fla. Stat. §163.3164 that must be “consistent” with the duly adopted local Comprehensive Plan under Fla. Stat. §163.3215. (See Exhibit 1)

16. Fla. Stat. Chap. 163 Part II, the Local Comprehensive Planning and Land Development Regulation Act (hereinafter “The Act”), requires each local government in Florida to prepare and adopt a local comprehensive plan containing mandatory elements that address issues such as land use.

17. After a local government has adopted its comprehensive plan, the Act requires that all actions taken by the local government in regard to development orders be consistent with the adopted local comprehensive plan. Fla. Stat. §163.3215

18. The Act further places the burden for enforcement of consistency of the development orders with duly-adopted Comprehensive Plans on citizens. Additionally, Fla. Stat.

² The act defines “development order” as any order granting, denying, or granting with conditions an application for a development permit. Fla. Stat. §163.3164(7). The Act defines “development permit” as any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land.” Fla. Stat. §163.3164(8).

§163.3215 provides that, “*any aggrieved or adversely affected party*” may bring a civil action for injunctive or other relief against any local government to prevent the local government “*from taking any action on a development order which materially alters the use or density or intensity of use*” of a parcel of property in a manner that is not consistent with the adopted local comprehensive plan.

19. The TDR Resolution would allow additional uses and increased intensity on the subject parcels, causing or increasing adverse impacts on plaintiff’s surrounding lawful existing uses. The proposed uses are not compatible with the surrounding existing uses in a manner that is consistent with the goals, objectives, and policies contained in the duly adopted Comprehensive Plan and the proposed development order does not meet all other criteria enumerated by the local government.

PROCEDURAL HISTORY

20. 17901 Old Cutler Rd consists of approximately 54.6 acres and is zoned as both “Interim” and “Village Mixed Use” under the Village of Palmetto Bay’s Land Development Code.

21. 17777 Old Cutler Rd consists of approximately 25.01 acres of land zoned exclusively as “Village Mixed Use (VMU)” under the Village of Palmetto Bay’s Land Development Code. 17777 Old Cutler Rd is bordered by 17901 Old Cutler Rd to the North, West and South and Biscayne National Park to the East.

22. On May 2, 2016 the Village of Palmetto Bay Council approved Resolution 2016-28 which granted a Transfer of Development Rights (TDR) from an approximately 22 acre portion of the real property located at 17901 Old Cutler Rd immediately adjacent to Old Cutler Rd (hereinafter “Sender Site”) to adjoining portions of land consisting of approximately 25 acres of land located at 17777 Old Cutler Rd and 15 acres of land located at 17901 Old Cutler Rd, Palmetto

Bay, FL (hereinafter “Receiver Site”). 17777 Old Cutler Rd LLC was the applicant for the TDR Resolution and owns both of the Subject Properties. The TDR Resolution further provided that a total of approximately 40 acres, inclusive of the Sender Site, of environmentally sensitive lands located on 17901 Old Cutler Rd would be donated to the Village once the development rights to 85 residential units are officially transferred.

23. The TDR transferred the development rights determined to exist by Village Staff on the Sender site to the entirety of the area designated Village Mixed Use according to the Comprehensive Plan encompassing the Receiver Site. As the Sender Site was zoned exclusively “Interim” under the Village of Palmetto Bay Land Development Code, it was subject to a “Trend of Development Analysis” to determine what, if any, development rights existed. Analysis from Village staff determined that are existing development rights of 85 residential units within Sender Site.

24. At the time the TDR Resolution was passed, however, the entirety of the Sender Site was designated “Parks and Recreation” under the Village of Palmetto Bay’s Comprehensive Plan and corresponding Future Land Use Map (FLUM).

25. According to Policy 1.1.1 of the Comprehensive Plan, a property designated “Parks and Recreation” may only be developed to be larger park and recreation areas, as well as golf courses; certain commercial uses related to the resources of a park or that would enhance the quality, utility, or enjoyment of the site and its natural, historical, or archaeological resources are also allowed. However, residential development is not permitted in a property designated “Parks and Recreation” pursuant to the Comprehensive Plan and FLUM³.

³ Village Staff admitted this to be true within their own Trend of Development Analysis.

26. The Sender Site also presently contains numerous threatened environmental habitats and unique transitional ecotonal areas. The Sender Site is further a known active habitat of the endangered American Crocodile.

THE COMPREHENSIVE PLAN

27. The subject TDR Resolution grants additional uses and increased intensity on the subject parcels, causing or increasing adverse impacts to Plaintiff and surrounding existing uses. The proposed uses are not compatible with the surrounding existing uses in a manner that is consistent with the goals, objectives and policies contained in the duly-adopted Comprehensive Plan and the development order does not meet all other criteria enumerated by the local government.

28. The future land use classification of the Sender Site under the Comprehensive Plan is Parks and Recreation (PR) which does not permit any residential development under the Comprehensive Plan. Policy 1.1.1 provides that properties with a PR designation,

The Future Land Use Map (FLUM) specifically illustrates larger park and recreation areas, as well as, golf courses. Compatible parks are encouraged in all residential land use categories. The siting and use of future parks and recreation areas shall be guided by the Recreation and Open Space Element and the Capital Improvements Element of this plan, and by other applicable goals, objectives, and policies of the Comprehensive Plan. Certain commercial activities ancillary to recreational uses and related to resources of the park, such as boat supply stores, fuel docks, or tennis and golf clubhouses are also permitted and may be considered for approval in the PR category. Other commercial recreation, entertainment or cultural uses may also be considered for approval in the PR category if they would enhance the quality, utility, or enjoyment of the site and its natural historical or archaeological resources and facilities.

29. The TDR Resolution transferring the development rights of 85 residential units from the Sender Site is inconsistent with the duly adopted Comprehensive plan, because the Sender Site lies entirely within an area designated PR and an area designated PR under the Comprehensive plan cannot have residential development rights.

30. The future land use designation of the Receiver Site is Village Mixed Use (VMU) which grants a maximum residential density of 10 units/gross acre. Specifically, Policy 1.1.1 of the Comprehensive plan provides that properties with a VMU designation, "Each parcel must also adhere to a unified "Development Plan" established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types, and design features and controls. Residential density shall range from a minimum of 5.0 to a maximum of 10.0 dwelling units per gross acre, subject to the approved Development Plan."

31. The TDR Resolution transferring the development rights of 85 residential units to the Receiver Site is inconsistent with the duly adopted Comprehensive plan, because the Receiver site now has total residential development rights of 485 units on approximately 40 acres of land. The resultant residential development density on the Receiver site is 12.125 units per gross acre, in clear excess of the maximum 10.0 units per gross acre allowable in a VMU designated property.

32. Policy 1.1.1 of the Comprehensive Plan requires that Each parcel within a Village Mixed Use district, "adhere to a unified 'Development Plan' established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types and design features and controls." In 2004, a unified development plan was established through a public charrette process in which the entirety of the Sender Site was specifically proposed to be dedicated to recreational/park use with park facilities open to the public; no proposed residential development on the Sender Site was proposed or considered.

33. The TDR Ordinance transferring the development rights of 85 residential units to the Receiver Site is inconsistent with the duly adopted Comprehensive plan, because there was no "development plan" established through a public charrette process to specify the permitted uses, densities/intensities, building scale and types, and design features and controls for a parcel partially

zoned VMU and containing the Sender Site specifying any residential uses or development within the Sender Site.

34. The subject properties are located within the coastal high hazard area (CHHA) as defined in the Coastal Management Element of the Comprehensive Plan and Fla. Stat. §163.3178(2)(h). The subject properties are also located within the Hurricane Vulnerability Area (HVA) as measured using the methodology assumed in the South Florida Regional Council “Hurricane Evacuation Study.”

35. Comprehensive Plan Policy 5.4.3 provides,

The Village will reduce or maintain a maximum hurricane evacuation clearance time of 10.0 hours for the Hurricane Vulnerability Area (HVA) measured using the methodology assumed in the South Florida Regional Planning Council “Hurricane Evacuation Study.” To this end, no comprehensive plan amendments or development applications should be approved that increase densities or intensities beyond those depicted on the Future Land Use Map for lands within the HVA without property analysis to determine compliance with this policy for hurricane evacuation clearance time. A 12-hour evacuation time to shelter is maintained for a category 5 storm event as measured on the Saffir-Simpson scale and shelter space reasonably expected to accommodate is available.

36. The TDR Ordinance granting the transfer of development rights between the subject properties is inconsistent with the duly adopted Comprehensive plan, because there was no property analysis performed in compliance with policy 5.4.3 of the Comprehensive Plan to determine whether maximum hurricane evacuation clearance times would be maintained.

37. Comprehensive Plan Policy 5.4.4 provides,

All proposed large-scale amendments to this Comprehensive Plan and/or applications for development review shall be evaluated for significant impacts to evacuation routes and times for significant impacts to current available off-site sheltering capacities. Roadway improvements and shelter improvements shall be required, if deemed necessary, to mitigate negative impacts and phased with new residential development. Appropriate mitigation shall include, without limitations, payment of money, contribution of land, and construction of hurricane shelters and transportation facilities. Required mitigation may not exceed the amount required for a developer to accommodate impacts reasonably attributable to development.

A local government and a developer shall enter into a binding agreement to memorialize the mitigation plan.

38. The TDR Ordinance granting the transfer of development rights between the subject properties is inconsistent with the duly adopted Comprehensive plan, because there was no evaluation for significant impacts to evacuation routes and times or for significant impacts to current available off-site sheltering capacities.

Count I – Declaratory and Injunctive Relief

39. Plaintiff incorporates by reference all allegations contained in paragraphs 1 – 38 as if fully set forth herein.

40. The parties to this Count are the Plaintiff and the Village of Palmetto Bay

41. This is an action for declaratory judgment and for permanent injunctive relief under Fla. Stat. §163.3215.

42. Village of Palmetto Bay Resolution 2016-28 is a development order pursuant to Fla. Stat. §163.3215 et. al.

43. Plaintiff is entitled to declaratory and injunctive relief to invalidate the development order as a matter of law because the development order is inconsistent with the Village of Palmetto Bay Comprehensive Plan and thus violates state law.

WHEREFORE, for all of the reasons stated herein, Plaintiff respectfully requests this Court:

- A. Declare Resolution 2016-28 is invalid and inconsistent with Fla. Stat. §§ 163.3194 and 163.3215 et. al.
- B. Declare Resolution 2016-28 is invalid and inconsistent with the Village of Palmetto Bay Comprehensive Plan.

- C. Permanently enjoin Defendant, Village of Palmetto Bay from implementing Resolution 2016-28 by any means, including the issuance of any further, additional or subsequent development orders related to or based upon Resolution 2016-28.
- D. Award costs of this action to Plaintiff; and,
- E. Grant Plaintiff any such other and further relief as this Court may deem just, proper and necessary.

COUNT II – Declaratory Relief Pursuant to Fla. Stat. §86.021

44. Plaintiff incorporates by reference all allegations contained in paragraphs 1 – 10 as if fully set forth herein.

45. The Parties to this count are Plaintiff, Village of Palmetto Bay, and 17777 Old Cutler Rd LLC.

46. This Court has personal jurisdiction over the Defendant, 17777 Old Cutler Rd LLC in that they have made applications for the development of real property that is involved in this litigation that are inconsistent with restrictive covenants currently run with real property owned by 17777 Old Cutler Rd LLC.

47. On January 31, 1985 South Cutler Bay, Inc. (hereinafter “SCB”) and Sun-Belt Corporation of America (hereinafter “Sun-Belt”) fully executed a Declaration of Restrictive Covenants (hereinafter “Restrictive Covenants”) in favor of Dade County, Florida to run with the subject properties.

48. Among other requirements, the Restrictive Covenants provide:

- 1. That the development will be built in substantial compliance with the plans entitled “Burger King World Headquarters” prepared by Hellmuth, Obata and Kassabaum, P.A., Planners and Architects, dated January 7, 1985 on Sheets 1, 3, 4, 5, 7, 7A, 7B, 8, 9, 10, 11 and 13-17, dated revised January

10, 1985 on cover sheet and sheet, dated and revised January 15, 1985 on sheet 6 and dated last revised January 30, 1985 on sheets 7A revised and 7B revised, a complete set which is on file with the Dade County Building and Zoning Department.

3. That the portion of real property described as Tracts II and B (which will be designated GU and RU-4) shall only be developed in substantial compliance with the plans described in paragraph 1.

7. The OWNERS will continue to maintain native vegetation on the portion of their property located adjacent to Old Cutler Road and the north and south boundaries with the intent to obscure any visibility of the office building from Old Cutler Rd. All landscaping plans will be submitted to Dade County for approval prior to implementation.

49. On March 15, 1985 Sun-Belt transferred ownership of its real property subject to the aforementioned Restrictive Covenants to Burger King Corporation.

50. On March 19, 1985 SCB transferred ownership of its real property subject to the aforementioned Restrictive covenants to Burger King Corporation (hereinafter "Burger King").

51. On June 20, 1985 Burger King executed a "Unity of Title" of the real properties acquired from SCB and Sun-Belt to Dade County.

52. On September 12, 1985 a Plat of the properties acquired by Burger King and subject to the aforementioned Restrictive Covenants was accepted and filed in the Public Records of Miami Dade Count in **Plat Book 127 at page 86**. The Plat was approved by the Dade County Zoning Department confirming that the size of the tracts and other features shown thereon conformed all requirements of zoning requirements, including the Restrictive Covenants executed thereon on January 31, 1985.

53. On April 5, 1989 an amendment to the Restrictive Covenants was executed between Burger King and Dade County modifying the plans with which development must conform on the subject properties.

54. On September 27, 1989 Burger King executed a quit-claim deed transferring ownership of the subject properties to Sun Bank/Miami N.A. as Trustee of the Headquarters Building Trust (hereinafter "Headquarters") and Re-imposing the Restrictive Covenants. The real property being transferred was described as:

Tracts A & B of the Plat of Burger King World Headquarters, as recorded in **Plat Book 127, Page 86** of the Public Records of Dade County, Florida.

55. On January 7, 2003 a summary final judgment of foreclosure was issued in favor of New Cutler Bay Corp. transferring ownership of the subject properties from Headquarters to New Cutler Bay Corp. (hereinafter "New Cutler") and re-imposing the Restrictive Covenants. The real property being transferred was described as:

Tracts A & B of the Plat of Burger King World Headquarters, as recorded in **Plat Book 127, Page 86** of the Public Records of Dade County, Florida

56. On October 8, 2003 a special warranty deed was executed transferring ownership of the subject properties from New Cutler to 17777 Old Cutler Rd LLC and re-imposing the Restrictive Covenants. The real property being transferred was described as:

Tracts A & B of the Plat of Burger King World Headquarters, as recorded in **Plat Book 127, Page 86** of the Public Records of Dade County, Florida

57. On May 2, 2016 a Village of Palmetto Bay Council meeting was held regarding an application for a transfer of development rights between the subject properties owned by 17777 Old Cutler Rd LLC. During discussion regarding the proposed transfer, much discussion surrounded the present enforceability of the Restrictive Covenants imposed upon the subject properties. Specifically, opinions were provided that the CC&Rs would no longer run with the property subsequent to 2019 and that a number of the Restrictive Covenants may be unenforceable as violating the rule against perpetuities.

58. Plaintiff disputes the validity of such opinions and asserts that the Restrictive Covenants continue to run with the subject properties and are presently fully enforceable.

59. Plaintiff is directly affected by present enforceability of the Restrictive Covenants imposed upon the subject properties because she owns real property directly adjacent to the subject properties.

60. This court has the jurisdiction and authority to declare the right and applicability of the Restrictive Covenants running with the subject properties presently that:

- a. The restrictive covenants were most recently re-imposed upon 17777 Old Cutler Road LLC upon transfer of the subject properties in October 2003 to 17777 Old Cutler Rd LLC;
- b. The Restrictive Covenants do not violate the rule against perpetuities;
- c. The Restrictive Covenants remain fully enforceable against 17777 Old Cutler Road LLC.

WHEREFORE, pursuant to Fla. Stat. §86.021, Plaintiff Bette April Burch seeks that this Court enter a judgment declaring the present enforceability of the Restrictive Covenants running with the properties located at 17777 and 17901 Old Cutler Rd, and for such other relief as this Court finds just, fair, and equitable.

Respectfully submitted this June 1, 2016.

Jeffrey P. Leary
18495 S. Dixie Hwy PMB 439
Palmetto Bay, FL 33157
mdepr.jl@gmail.com

_____/s/_____
Jeffrey P. Leary, Esq. (FBN 98653)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was served on counsel listed on the below Service List
by email on June 1, 2016:

Service List

Dexter W. Lehtinen Palmetto Bay Village Attorney Lehtinen, Schultz, Riedi, Catalano, de la Fuente PLLC 1111 Brickell Ave, Ste 2200 Miami, FL 33131 dlehtinen@palmettobay-fl.gov	Jerry B. Proctor, Esq. Bilzin Sumberg Attorneys at Law 1450 Brickell Ave, 23 rd floor Miami, FL 33131 jproctor@bilzin.com
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