

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 08-28977 CA 30

PALMER TRINITY PRIVATE SCHOOL,
INC., a Florida not for profit corporation,

Plaintiff,

vs.

VILLAGE OF PALMETTO BAY, FLORIDA,
a Florida municipal corporation, CONCERNED
CITIZENS OF OLD CUTLER, INC.,
JOAN LINDSAY, individually, and BETTY
PEGRAM, individually,

Defendants.

THE ORIGINAL FILED
ON OCT 15 2012
IN THE OFFICE OF
CIRCUIT COURT MIAMI-DADE CO.
CIVIL DIVISION

FIFTH AMENDED COMPLAINT

Plaintiff, PALMER TRINITY PRIVATE SCHOOL, INC. ("Plaintiff" or "Palmer Trinity"), sues the Defendants, VILLAGE OF PALMETTO BAY, FLORIDA ("Palmetto Bay," or "Village"), CONCERNED CITIZENS OF OLD CUTLER, INC. ("CCOCI"), JOAN LINDSAY ("Lindsay"); and BETTY PEGRAM ("Pegram") and states as follows:

INTRODUCTION

1. This case started in 2006, when Palmer Trinity, a private school, filed a zoning application to rezone its property. In 2008, the Village wrongfully and illegally denied the application. Palmer filed suit resulting in several years of litigation, which continue today more than six (6) years later. On March 24, 2010, the Third District Court of Appeal held that the Village's denial of Palmer Trinity's application amounted to "illegal reverse spot zoning" and

that the Village's actions were "arbitrary, discriminatory [and] unreasonable" rising to "a departure from the essential requirements of law resulting in a miscarriage of justice." *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. 3d DCA 2010) ("*Palmer Trinity I*"). A copy of *Palmer Trinity I* is **Exhibit "A"**. Please note that all exhibits identified herein were previously filed and attached as exhibits to the Fourth Amended Complaint. Plaintiff is not re-filing those exhibits unless the Defendants or Court request that Plaintiff do so.

While the substantive zoning decisions were clearly egregious and were not consistent with well-established Florida zoning law, this Complaint addresses the systematic denial of procedural due process by The Village and the other Defendants in violation of the procedural due process rights guaranteed to the Plaintiff under the United States and Florida Constitutions. The Plaintiff in this action does not seek to revisit the substantive decisions reached by the Village, which have been successfully addressed by the various appellate courts, but instead seeks to establish that the procedures utilized by the Village (pursuant to established and codified procedures) and the other Defendants run afoul of basic procedural due process rights.

2. The Defendants' continuous, repetitive, wrongful, illegal actions, as more fully set forth below, prevented and significantly delayed Palmer Trinity from exercising its rights as a property owner to expand its existing private school onto an **adjacent** 32 acre (plus or minus) property that Palmer Trinity purchased for that very purpose. Defendants' illegal actions continue even today.

THE PARTIES

3. Palmer Trinity School is a not-for-profit corporation existing under the laws of the State of Florida. It is also an independent Episcopal school that balances a rigorous college prep

program with the development of the spiritual and moral life of students. The core values of the school include academic excellence, spiritual growth, and service to others.

4. Plaintiff owns the property located at 7900 S.W. 176th Street, which is the current school location on 22 acres, and the adjacent 32 acres (plus or minus) at 8001 SW 184th Street, Palmetto Bay, Florida (the "Property").

5. Defendant Village of Palmetto Bay is a municipal corporation located in Miami-Dade County existing under the Constitution and Laws of the State of Florida.

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

7. The Village exercises legislative authority to adopt ordinances and regulations pertaining to zoning and quasi-judicial hearing procedures for properties located within its municipal boundaries.

8. Defendant CCOCI is a Florida non-profit corporation with its principal address located at 19 West Flagler Street, Suite 305, Miami, FL 33130.

9. Defendant Joan Lindsay is a resident of the Village with the following address: 8120 SW 182 Street, Palmetto Bay, FL 33157. Ms. Lindsay was the previous President, Board of Directors, of CCOCI.

10. Defendant Betty Pegram is a resident of the Village with the following address: 18121 SW 82nd Ave., Palmetto Bay, FL 33157. Ms. Pegram is the current President, Board of Directors, of CCOCI.¹

11. Defendants CCOCI, Lindsay, and Pegram voluntarily intervened and thereby subjected themselves to the jurisdiction of this Court. *See* Unopposed Motion to Intervene as

¹ Ms. Lindsay testified in her deposition that Betty Pegram is a "very good friend." *See* Excerpted Deposition of Joan Lindsay, dated Sept. 8, 2011, at 47:13, which is **Exhibit "KK."**

Party Defendants and Unopposed Motion to Intervene to Add Parties, which is Composite Exhibit "BB." Lindsay's motion for intervention stated that Lindsay lives near the School and that Lindsay and CCOCI "were parties to the Palmer Trinity rezoning proceedings before the Village Council" and that "[t]hey retained legal counsel to represent them in that matter." *Id.*

JURISDICTION AND VENUE

12. This Court has jurisdiction pursuant to Chapters 86 and 119 of the Florida Statutes; Article I, §§ 2², 9³, and 24 of the Florida Constitution; Miami-Dade County Citizens Bill of Rights; Palmetto Bay Citizens Bill of Rights; and 42 U.S.C. § 1983, et seq.

13. Venue is proper in this court because all of the actions giving rise to the claims asserted herein occurred in Miami-Dade County.

14. This lawsuit includes Plaintiff's claims for money damages, which total significantly in excess of \$15,000.00, exclusive of interest, costs, and attorneys' fees. As described in more detail below, Plaintiff's damages exceed several million dollars.

FACTUAL ALLEGATIONS

15. Plaintiff operates the Palmer Trinity School on the Property.

16. Palmer Trinity School (previously the Palmer School) has been on the Property since 1972.

17. Palmetto Bay incorporated on September 10, 2002.

18. On September 6, 2006, in an effort to expand the existing school onto a portion of the Property from AU (agriculture) and EU1 to EUM, Plaintiff filed a zoning application seeking to rezone a portion of the Property, a special exception to expand the existing private school, site

² Pursuant to Art. I § 2, "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which . . . to acquire, possess and protect property ..."

³ Pursuant to Art. I § 9, "No person shall be deprived of life, liberty or property without due process of law..."

plan modification, and non-use variances associated with the school expansion.⁴ The requested expansion sought an increase in the number of students to 1,400 and included new buildings and athletic fields on the Property.

19. Plaintiff filed the application before the Village adopted its own land development code and the Village applied the Miami-Dade County land development code to the application.

20. After Palmer Trinity's application was filed, the Village adopted its own code of ordinances and land development code over a period of time.

21. On February 25, 2008 and April 14, 2008, the Palmetto Bay Village Council held public hearings to consider, and ultimately deny, Palmer Trinity's request to rezone a portion of its Property. The chief opponent of Palmer Trinity's rezoning application was CCOCI, which participated in the Village's hearings on the application. CCOCI's spokesperson at the hearing was Lindsay, who lives less than 150 feet from the Property. The Village entered a development order denying the re-zoning on April 22, 2008 through Ordinance No. 08-06 ("Rezoning Denial"). A copy of the development order is **Exhibit "B."**

22. The Village refused to consider the remainder of the application.

23. As a result, at the final public hearing on April 14, 2008, the Village did not render a decision as to the remainder of the application including the special exception to expand the school.

24. At the April 14, 2008 public hearing, certain Village Council Members admitted that they had had *ex-parte* communications related to the application. *See Exhibit "C"*. Those illegal *ex-parte* communications continue even today. *See infra*.

⁴ As part of its request, Palmer Trinity sought some height variances (*e.g.* for the performing arts building and an administration building), which it later withdrew.

25. Following the Village's wrongful denial of the rezoning, Palmer Trinity timely appealed by filing a Petition for Writ of Certiorari to the Circuit Court, Appellate Division.

26. The Circuit Court, Appellate Division, denied the Petition and a subsequent Petition for Rehearing was also denied.

27. Plaintiff timely filed a Petition for Writ of Certiorari with the Third District Court of Appeal challenging the Circuit Court's denial of the Petition for Writ of Certiorari.

28. On March 24, 2010, following oral argument, the Third District Court of Appeal determined that the Village's actions were "arbitrary, discriminatory [and] unreasonable" citing *Bd. of County Comm'rs v. Snyder*, 627 So.2d 469, 476 (Fla. 1993) and held that the Village's denial of the rezoning was "**a departure from the essential requirements of law resulting in a miscarriage of justice**" and remanded the case back to the Village to grant the rezoning. *See Palmer Trinity I - Exhibit "A"* (emphasis added).

29. As the Third District Court of Appeal recognized, Palmer Trinity was not afforded the same beneficial use and restrictions for its land that are enjoyed by the owners of the surrounding properties in the Village. *Id.* at 262.

30. Further, the Court found that the Village's refusal to grant the zoning change resulted in impermissible spot zoning, a departure from the essential requirements of the law, and a miscarriage of justice. *Id.*

31. The Court also found that the Village's refusal to rezone Plaintiff's property to a classification consistent with the surrounding properties was not justified and was, "**arbitrary, discriminatory [and] unreasonable.**" *Id.* at 263. (Emphasis supplied).

32. In making its unsupported decision, the Village apparently relied on "findings" that "the rezoning, if approved" would permit the physical expansion of the school, that the

change based on the “site specific development” is not consistent with the comprehensive plan or future land use map, and that Plaintiff’s traffic studies allegedly failed to establish that the “site specific” application is compatible and within proper level of service and would not negatively impact the community. *Id.*

33. In contrast, the Village’s own staff zoning recommendation determined that Palmer Trinity's application **is consistent** with the Village of Palmetto Bay's Comprehensive Plan. Specifically, the Village's staff zoning recommendation states:

The requested district boundary change to EU-M would be in keeping with the basic intent and purpose of the zoning and land use regulations. Approval of this application is in character with the existing use of the property, and is consistent with the Village’s Comprehensive Plan. The properties surrounding the site are currently zoned EU-M, as a result the rezoning of AU and EU-2 site to EU-M would make the parcels **compatible** with the neighboring properties.

Id. at 263, n. 3. (Emphasis added). *See also* Village of Palmetto Bay Official Zoning Agenda for Meeting of Monday, April 14, 2008, at **Exhibit “D”** (in particular at Bates # pages 1354, 1369, 1379 (noting that Palmer Trinity's request was, among other things, **“a public benefit”**, “would **not** negatively impact the community”, “would be **in keeping** with the basic intent and purpose of the zoning and land use regulations”, and “the re-zoning ... would make the parcels **compatible with the neighboring properties.**”). (Emphasis supplied).

34. **Exhibit “D”** also provides additional support for Palmer Trinity's claims in this lawsuit. It notes that Palmer Trinity's

55-acre site is proposed to accommodate 1,400 students at a ratio of 1,711 sq. ft. per student. As a comparison, Southwood Middle School houses 1,655 students on just over 9 acres (235 sq. ft. per student); Coral Reef Elementary School houses 881 students on 9.1 acres of land (450 sq. ft. per student); Palmetto Senior High School houses 3,260 on 20 acres of land (267 sq. ft. per student); Westminster Christian houses up to 1,280 students on 24.2 acres of land (824 sq. ft. per student); and Coral Reef Senior High houses up to 2,976 students on 65 acres of land (951 sq. ft. per student).

Exhibit D at page 001354. Thus, although Palmer Trinity is similarly situated in terms of its proposed student population and, indeed, has a **significantly** greater property area than any of the similarly situated comparator schools (for purposes of the proposed student population issue), which have been allowed to increase their student populations to numbers that in most situations far exceed Palmer Trinity's proposed expansion and, without doubt, exceed Palmer Trinity's square footage per proposed student, the Village has nonetheless wrongfully denied Palmer Trinity's requests in violation of the school's equal protection rights.

35. Notwithstanding the Village's improper decision as well as the Village's recommendations in its **own** staff zoning agenda (which approved of Palmer Trinity's requests), the Village expressly stated that the school's expansion request was **not** at issue at the hearing, and that the Village did not consider the school's special exception variance requests. *See Exhibit "A"* at 263. (Emphasis added).

36. To the contrary, Section 4 of the Ordinance states that "[t]he village council never considered the variance and special exception requests of the applicant as these requests required a separate public hearing and separate ruling, dependent on the village council approving the district boundary change." *Id.* at 263, n. 4.

37. The Third District Court of Appeal disregarded the Village's unsupported claims and specifically found that the Village denied Palmer Trinity's zoning request and implicitly denied the special exception because "**it did not wish Palmer Trinity to use the property to expand its school within the parameters of the less restricted EU-M zoning classification.**" *Id.* at 263. (Emphasis supplied).

38. The Court also held that the Village's actions were "legally impermissible."

39. The Village, by applying Miami-Dade County Code Sections 33-18 and 33-151.11 *et. seq.*, requires approval by a "special exception" after a quasi-judicial public hearing in order to operate a private school within its jurisdiction.

40. However, the Miami-Dade County land development regulations do **not** require a quasi-judicial public hearing approval for a "special exception" for a public school.

41. The Village adopted its own land development code section, Sec. 30-110.1 *et seq.*, which contains the same requirement as the Miami-Dade County land development regulations requiring all private schools to seek a zoning approval of a "special exception" through a quasi-judicial hearing.

42. The Village land development code does **not** require a quasi-judicial public hearing for a "special exception" for a public school.

43. The Village also adopted Section 2-106 in its code of ordinances ("Section 2-106") which states, in pertinent part:

c) *Ex parte communications between village officials, applicants and public participants* If any person not otherwise prohibited by statute, charter, or ordinance communicates with any village official in any manner other than publicly at a quasi-judicial hearing regarding the merits of any matter on which action may be taken by the council or a board on which the village official is a member, the communication shall not create a presumption of prejudice provided that the following disclosure is made:

(1) A village official shall disclose the name of the communicator, and the time, place and substance of the communication. The disclosure shall be made a part of the record before final action is taken on the matter.

(2) A village official may read a written communication from any person; provided, however, a written communication that relates to a quasi-judicial action pending before the official shall be made a part of the record before final action is taken on the matter.

(3) A village official may communicate with an expert witness, village staff member, or consultant, conduct an investigation, make site visits and receive expert opinions regarding quasi-judicial action pending before him

or her, provided that the activities and the existence of the investigations, site visits, or expert opinions are disclosed and made a part of the record before final action is taken on the matter.

(4) Disclosure, either written or oral, made pursuant to subsections (c)(1), (2), and (3) of this section must be made before or during the public meeting at which a vote is taken and must be made a part of the record. Persons who have opinions contrary to those expressed in the *ex parte* communication shall be given a reasonable opportunity to refute or respond to the communication.

44. Despite Section 2-106, at the April 14, 2008 public hearing, while certain of the Village Council Members admitted that they had had *ex-parte* communications related to the application, their admissions failed to even comply with the ordinance. Additionally, upon information and belief, certain of the Village Council Members, including Mayor Flinn, failed to make proper disclosure of their prior *ex-parte* communications related to the application. *See e.g.* Deposition of Rafael De Arazoza (**Exhibit "E"**) at pages 63-70, 73, 78-84 and its attached Deposition Exhibits numbered 4, 5, and 6; *see also* **Exhibit "F"** (emails with Bates # 002181 – 002182, 002147, 00214). As the evidence clearly shows, Mayor Flinn was directly involved with Joseph Corradino, the Village's traffic engineer regarding Palmer Trinity's application and traffic study. For comparison, refer to Mayor Flinn's on-record "disclosure" of communications (*see* **Exhibit "C"** at page 13).

45. Palmer Trinity revised its plans, including reducing the requested student enrollment from 1,400 to 1,150 and offering to implement the expansion in student population gradually over fifteen years.

46. On May 4, 2010, pursuant to the Third District Court of Appeal's mandate, Plaintiff's rezoning request was granted. *See* **Exhibit "G."**

47. On May 4, 2010, the Village held another public hearing to make a final decision on the rezoning and to finally consider the remainder of the application, as amended, which it

had refused to consider in 2008 and which included a special exception to expand Palmer Trinity to 1,150 students and for a site plan modification ("Public Hearing"). Once again, Lindsay testified on behalf of CCOCI, arguing against Palmer Trinity's request for approval of the application.

48. Prior to the Public Hearing, Palmer Trinity filed a Motion to Recuse Shelley Stanczyk, one of Defendant's Council Members. *See Exhibit "R"*.

49. Palmer Trinity had reason to believe that Council Member Stanczyk was not capable of rendering a fair and impartial decision at the Public Hearing, a quasi-judicial proceeding.

50. By way of example, beginning in at least 1999, Council Member Stanczyk⁵ began vocally opposing Palmer Trinity's prior zoning application and referred to Palmer Trinity as a "mega church school" that does nothing more than "consume[] what is offered, such as roads, lands, tax, space and services, but gives nothing back." *See Exhibit "S"*. Ms. Stanczyk thus clearly indicated her inability to be fair and impartial to Palmer Trinity. And, Ms. Stanczyk's obvious bias against Palmer Trinity has been even more blatant since she became a Council Member and was directly involved in improper decisions against the school as noted herein.

51. Notwithstanding her record, Council Member Stanczyk campaigned for election to the office of Village Mayor, both prior to and subsequent to the Public Hearing.

52. Ms. Stanczyk and Ms. Lindsay have been friends since 2006 and Lindsay even wrote a letter of recommendation for Stanczyk while they were campaigning for positions in the Village of Palmetto Bay. *See Exhibit "KK"* at 146:10-25.

⁵ Ms. Stanczyk has also been a friend of Joan Lindsay for many years. Their illegal actions herein are personal, and motivated by their dislike of Palmer Trinity, among other things.

53. Also, before the Public Hearing, the campaign treasurer of Ms. Stanczyk's political campaign was Stanley Kaplan, who is a founding member and longtime officer and director of CCOCI.

54. From the outset, CCOCI has pursued an extremely active and very vocal campaign against Palmer Trinity's expansion request.

55. Before the May 4, 2010 Public Hearing, the Village's professional staff reviewed Plaintiff's application "and **recommended** approval with certain conditions" (hereinafter known as the "Recommendation"). "The Recommendation contained a total of approximately 80 conditions ..." Among other things, the "Village Staff **specifically recommended** that Palmer Trinity's request for a special exception to expand the school onto Parcel B and to increase the student enrollment **from 600 to 1,150 be approved.**" See Order, dated February 11, 2011, attached as **Exhibit "H"** at page 4. (Emphasis supplied).

56. "The 900 [student figure], which the Village later adopted, was **not** mentioned in the Recommendation." *Id.* at 4. (Emphasis added).

57. "As part of its Recommendation, the Village Staff included Condition 4.2, which required Palmer Trinity to 'record an acceptable and approved restrictive covenant running with the land for specific conditions which covenant shall exist for 30 years, and automatically renew for 10 year periods, thereafter.'" *Id.* at 5.

58. "Condition 4.4 of the Village's own Recommendation further provides:

Cap on Intensity of Uses and Student Population.

Applicant shall limit future development and agrees that it shall not seek any further development approvals to increase the intensity of uses, to increase lot coverage, square footage, heights of structures, or exceed 1150 students for 30 years following the recording of this covenant. Specifically, no buildings shall exceed two (2) stories or a roof elevation of 35 feet in height measured from finished floor."

Id. at 5.

59. “At the May 4, 2010 hearing, the Village’s Planning Director (the “Director”) presented the Recommendation. The Director stated that Condition 4.4 was ‘a condition running with the land as to conditions in perpetuity, no modifications as to uses, increases, increases as to square footage or students for 30 years’ (hereinafter referred to as the “30 Year Prohibition”). Although various other individuals addressed the Village Council, **there was no other testimony or evidence presented** with respect to the 30 Year Prohibition.” *Id.* (Emphasis added).

60. “With respect to the 1,150 student cap on enrollment, the **Village’s own** traffic expert, Joseph Corradino, reviewed the traffic study included in Palmer Trinity’s Application and recommended approval, **finding that, based on 1,150 students, the Application satisfied the relevant traffic level of service standards.**” *Id.* (Emphasis supplied).

61. “Palmer Trinity’s counsel objected to several of the conditions contained in the Recommendation, including Condition 4.4, which contained the 30 Year Prohibition, as being ‘overreaching.’ Palmer Trinity’s counsel then presented its requests for the special exceptions and presented documentary evidence along with lay and expert witnesses.” *Id.*

62. The attorney for CCOCI presented argument and testimony. **Exhibit "H"** at 6.

63. In addition, Mr. George Knox, a well-respected attorney who was engaged by the Village and its attorney, addressed the Village Council and reminded them of their legal duties and obligations as well as the legal rights of private property owners like Palmer Trinity. *See Exhibit "T"*.

64. Mr. Knox stated eloquently:

First and foremost, I would like to respectfully invite you to focus your attention on your role and your responsibility in this case. You serve in a quasi-judicial

capacity. This really means that you sit in judgment, as a judge would. **Your role tonight is neither political, nor legislative.** I would suggest to you that **your obligation, as a quasi-judicial body, is a sacred obligation.**

You are charged to use an objective standard ... And this is somewhat scientific ...

If the record reflects that you have made determinations about contested facts, then your determination will not be second-guessed by a court of law, but **what a court will look for is competent substantial evidence,** which is made part of the record in support of whatever decision you make.

Competent substantial evidence has been shown to include such things as calculations, formulas, expert testimony on analysis, your staff recommendations.

And these are troublesome words, because, again, ... **you must interpret these words broadly, and they must be interpreted in favor of a property owner.**

Factors such as fear, mistrust, even past violations and unenforceable broken promises are not factors that you are allowed to consider when you consider this land use application ... the law says that in your quasi-judicial capacity, you can't react to these factors in your decision making. Your personal preferences or desires cannot be factors in your decision making. You must be guided by the facts that appear on the record.

And, finally, I think it's important to refer to the fact that **the foundation of our republic is based upon the right to own and use property, and to use property in any lawful way. And so any limitation, which is imposed by this or any other government, must be clearly justified ...**

And as you begin your deliberations, please keep foremost in your mind your sacred duty, to follow the essential requirements of law, which for better or worse, appear to favor a property owner.

Exhibit "T" at 260-265. (Emphasis added).

65. At the very conclusion of the evidentiary portion of the hearing, the Village Council began its deliberations.

66. However, as is patently obvious from the record and factual history of this dispute, the Village completely and intentionally ignored its legal duty (as well as its "sacred duty") and abused the legal process at the same time. Instead of upholding the law, the Village illegally followed political and personal agendas, including in particular those of its own biased

Council members. It decided against Palmer Trinity arbitrarily and without any consideration of the actual evidence, which proved the legitimacy of Palmer Trinity's requests. In so doing, the Village also ignored, among other things, its own Comprehensive Plan, its own hired expert, and even its own specially retained legal counsel, George Knox, to render an arbitrary and capricious decision based on politics - - **not facts or evidence.**

67. Specifically, “[s]everal amendments to the conditions recommended by the Village Staff were made. Council Person Stanczyk made a motion to reduce the number of students permitted to 900. [However,] **[t]his was the first time the number 900 was ever mentioned at the public hearing or in the entire record preceding the public hearing.**” **Exhibit "H"** at 6. (Emphasis added).

68. Council Member Stanczyk specifically waited until the Public Hearing had closed and Palmer Trinity was precluded from making further comment and then stated she "would like to reduce the number of students to 900" and made a motion to reduce the requested 1,150 students to 900. *See* **Exhibit "U"**.

69. The Mayor responded to the motion stating, "[t]hat's a tough one. I mean, I don't know how we can just **arbitrarily** do that, but ..." *See* **Exhibit "U"** at 297. The motion passed with little discussion and the number of students was reduced to 900.

70. Even after Council Member Stanczyk successfully had the application amended to reduce the number of students to 900, she still voted against the application for a special exception to expand the school to 900 students, as amended by her very own motion, and also voted against site plan modification.

71. Ultimately the Village of Palmetto Bay approved, by a 3 to 2 vote, the special exception for the private school expansion and site plan modification through the Resolution. At

the conclusion of the May 4, 2010 hearing, Plaintiff's application for a special exception to expand the school was granted; however, the Village again broke the law by placing a myriad of onerous and absolutely unreasonable conditions on Palmer Trinity through Resolution 2010-48. *See generally Exhibits "G" and "H."* Palmer Trinity objected to these onerous conditions but was not allowed to address them at the hearing.

72. Among other things, the Village reduced the number of students from 1,150 to 900, which was the only modification to the language of Condition 4.4. "The language providing for the 30 Year Prohibition on Palmer Trinity's ability to seek further development approvals remained the same." *See Exhibit "H"* at 6-7.

73. As a result of yet another illegal decision by an obviously biased Council, Plaintiff timely filed a Petition for Writ of Certiorari and challenged two of the conditions imposed by the Village, including a 30-year prohibition on Palmer Trinity requesting further zoning approvals and a 900-cap student enrollment.

74. On February 11, 2011, the Eleventh Judicial Circuit agreed that the Village's conduct was again illegal and quashed both of the challenged conditions. *See Exhibit "H."*

75. Specifically, the Eleventh Judicial Circuit stated that the "30 Year Prohibition leaves no room for trust because it operates as an outright ban on Palmer Trinity's ability to even ask for additional development approvals. Accordingly, the Court holds that the provision in Condition 4.4 of the Resolution, which not only prohibits development, but *even* applications for development, for the next 30 years constitutes a departure from the essential requirements of law and should be quashed." *Id.* at 9.

76. The Court also held that "the 900 student cap is not supported by competent substantial evidence." *Id.* at 10.

77. In so doing, the Court stated, “Palmer Trinity argues that the 900 student cap contained in Condition 4.4 of the Resolution **is not supported by competent substantial evidence and constitutes a departure from the essential requirements of law. We agree.**” *Id.* at 10. (Emphasis supplied).

78. The Court also noted that “[o]ther than the brief discussion between the Mayor and Council Person Stanczyk, wherein the 900 number was admittedly arbitrary, **there [wa]s no mention of that number, nor any mathematical calculation from which it could have been derived, contained in either the record or transcript** preceding the adoption of the Resolution.” *Id.* (Emphasis added).

79. With respect to the 30 Year Prohibition, the Court found that there was “simply no legal authority cited to support such an extreme and unreasonable restriction on a private property owner ... [t]hus, [it] constitutes a departure from the essential requirements of law.” *Id.*

80. The Court then quashed both provisions and remanded the case back to the Village to correct the previous decisions in accord with the Order. *Id.* The Circuit Court's mandate indicated that the Village must conduct "proceedings in accordance with this decision."

81. Defendant Joan Lindsay has at all times vehemently opposed Plaintiff's rezoning requests and, in fact, she and others created CCOCI for the **sole purpose** of opposing Plaintiff's reasonable requests.

82. While Palmer Trinity's appeal of the Village's May 4, 2010 decision was pending, Lindsay was elected to Village Council Seat 3.

83. The Village scheduled a public hearing on remand on July 19, 2011 pursuant to the Circuit Court's mandate. Prior to the Hearing on Remand, Palmer Trinity moved to recuse Lindsay from the hearing. During the hearing, Palmer Trinity renewed its request for Lindsay to

recuse herself. Despite having acted as the president of and spokesperson for the chief opponent of Palmer Trinity's application in 2008 and 2010, Lindsay denied both the motion and the renewed request for recusal. Lindsay then participated in and voted at the Hearing on Remand in her capacity as a Village Councilwoman. Lindsay took these actions despite the fact that she is a co-defendant in pending litigation filed by Palmer Trinity against the Village relating to the Village's actions on Palmer Trinity's rezoning and special exception application, and Lindsay was represented in that matter by the same attorney who represented CCOCI in its opposition to Palmer Trinity's application.

84. CCOCI was formed on August 1, 2005. Lindsay was an officer of CCOCI from its inception and served as its President from 2007 until November 3, 2010, the day after she was elected to Village Council Seat 3. (*See* CCOCI's Annual Reports, **Exhibit "X"**). Lindsay also owns real property located less than 150 feet from the Property. (*See* Results of Property Searches, Miami-Dade County Property Appraiser's website⁶, **Exhibit "Y"**).

85. At the February 25, 2008 hearing on Palmer Trinity's rezoning application, Lindsay testified at length on behalf of CCOCI, arguing that the planned expansion "is incompatible with a quiet, single-family neighborhood anywhere." *See* Excerpted Transcript of February 25, 2008 Hearing at p. 154, which is **Exhibit "Z"**. Lindsay asked the Village to deny Palmer Trinity's request. (*Id.* at 166-176). Lindsay concluded by asking the Village to "do everything in your power to keep us from having to appear before you again with yet another Palmer Trinity expansion plan." (*Id.* at 166).

86. Lindsay also testified on behalf of CCOCI at the Village's May 4, 2010 hearing on Palmer Trinity's rezoning and special exception application. *See* Excerpted Transcript of

⁶ Available at http://www.miamidade.gov/pa/property_search.asp.

May 4, 2010 Hearing, pp. 138-162, which is **Exhibit “AA”**. Lindsay argued that, in opposing the application, CCOCI sought “to maintain our quality of life, the quiet enjoyment of our homes and our property values.” (*Id.* at 142-143). Lindsay discussed the potential impact on her own property, stating, “I’ve lived there, owned my property there, since 1978, and it’s quiet, unless Palmer Trinity is hosting an event. . . What you will be doing, if you approve this, is to rob us of the quiet enjoyment of our homes.” (*Id.* at 152). Lindsay further testified that the special exception, if granted, would negatively impact property values of nearby properties, stating, “As to real property values, the importance of location is an undisputed fact. People [sic] preferences for location is influenced by quiet, peaceful surroundings, among other things. Would you choose to live 75 feet from these athletic fields?” (*Id.* at 155-156).

87. As noted previously, prior to the Village's July 19, 2011 Hearing on Remand, Palmer Trinity moved to recuse Lindsay due to her numerous conflicts of interest, including her prior pronouncements as the chief opponent of Palmer Trinity's application at previous public hearings, her intervention in prior litigation amongst the parties, and that she is a nearby property owner and presently a defendant in litigation with Palmer Trinity. Lindsay denied the motion to recuse herself.

88. As described above, Lindsay had acted as the chief opponent to Palmer Trinity’s application at the February 2008 and May 2010 public hearings. Despite her prior involvement in opposing the application, Lindsay insisted that she could be unbiased and make a fair and impartial decision on Palmer Trinity’s application. (*See Id.*). Her refusal to recuse herself is contrary to a large body of case law which requires that a judge disqualify herself where the judge has previously participated in proceedings against the party appearing before the judge. (*See, e.g., Duest v. Goldstein*, 654 So. 2d 1004 (Fla. 4th DCA 1995) (granting writ of prohibition

to disqualify trial judge who had assisted in prosecuting defendant at his first trial, while the judge was an assistant and supervising state attorney of the division in which defendant was tried); and *Roberts v. State*, 161 So.2d 877 (Fla. 2d DCA 1964) (disqualification required as matter of law where trial judge had been County Solicitor who filed information in same case)). Furthermore, a judge is required to recuse herself where counsel for one of the parties is representing or has recently represented the judge (*City of Fort Lauderdale v. Palazzo*, 882 So. 2d 1102, 1103 (Fla. 4th DCA 2004)), as is the case with attorney W. Tucker Gibbs, who represented both CCOCI in its opposition to Palmer Trinity's application (and who argued against the application at all of the Village's hearings on the application) and Lindsay and CCOCI in the Civil Rights Suit.

89. At the July 19, 2011 Hearing on Remand, counsel for Palmer Trinity requested again that Lindsay recuse herself, based on her position as a defendant in Palmer Trinity's pending Civil Rights Suit against the Village, CCOCI, Lindsay, and Pegram. Lindsay repeated her refusal to recuse herself, stating, "This application has nothing to do with the case that you're speaking of." See Transcript of July 19, 2011 Hearing, p. 56, Appendix 6 to the Motion to Enforce Mandate or, in the Alternative, for Extraordinary Relief, which is **Exhibit "CC"**. Lindsay's assertion that the Civil Rights Suit has nothing to do with the Hearing on Remand is plainly incorrect. In fact, the May 4, 2010 hearing and the Village resolution that were the subject of Palmer Trinity's appeal and that resulted in the July 19, 2011 Hearing on Remand are expressly referenced in paragraphs 44, 51-67, and 202-204 of Palmer Trinity's Third Amended Complaint.

90. Even the Village has recognized that Lindsay may have a conflict of interest in the July 19, 2011 Hearing on Remand, prompting the Village Attorney to send a letter requesting

direction on this matter to the State Attorney General and the Florida Commission on Ethics. *See* Eve Boutsis' letter to the State of Florida Commission on Ethics dated January 31, 2011, which is **Exhibit "DD."** The response from the Florida Commission on Ethics (the "Commission") dated February 21, 2011, states that:

"[I]f a vote/measure of the Council would affect a lawsuit or matter in which [Lindsay] is a party . . . she should orally announce, abstain from voting, and file Form 8B. That is because such votes have the likely potential to cause her to have to keep litigating, to do away with her need to litigate further or to cause her to have to pay costs or fees in maintenance of her end of the litigation . . ."

See State of Florida Commission on Ethics letter to Eve Boutsis, dated February 21, 2011, which is **Exhibit "EE"**. Despite these precedents and the opinion of the Florida Commission on Ethics, Lindsay pressed forward in participating in and voting at the Hearing on Remand.

91. Clearly, the outcome of the Hearing on Remand could affect the Civil Rights Suit pending against Lindsay. Palmer Trinity's Third Amended Complaint expressly states claims against Lindsay relating to the May 4, 2010 hearing and the Village resolution that resulted in the July 19, 2011 Hearing on Remand. As a result of her conflicts of interest, Lindsay was required to abstain from participating in the Hearing on Remand.

92. On July 19, 2011, the Village held its Hearing on Remand. During the Hearing on Remand, Lindsay revealed that she had participated in previously-undisclosed *ex parte* communications with the director and staff of the Miami-Dade County Public Works Department up to and including on the day of the hearing. *See* Transcript of July 19, 2011 Hearing (**Exhibit "CC"**) at pp. 17-19. Lindsay stated that she engaged in these discussions by phone and email with Public Works employees in a "**little treasure hunt**" to examine traffic studies Palmer Trinity had submitted in earlier proceedings. *Id.* at p. 85. (Emphasis added). Lindsay pontificated at length as to her opinion of these outdated and irrelevant studies, over the objections of counsel for Palmer Trinity. *Id.* at pp. 83-97. Some of Lindsay's emails (and certain

responses thereto), which were provided by the Village's Attorney during and subsequent to the Hearing on Remand, are **Exhibit "FF."**

93. Lindsay's conduct at the July 19, 2011 Hearing on Remand was contrary to the standards of basic fairness that must be adhered to in a quasi-judicial zoning hearing in order to afford due process. *See Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991), *rev. den.*, 598 So. 2d 75 (Fla. 1992). "When a judge becomes a participant in judicial proceedings, 'a shadow is cast upon judicial neutrality. . .'" *Florida Dep't of Highway Safety and Motor Vehicles v. Griffin*, 909 So. 2d 538, 542 (Fla. 4th DCA 2005) (quoting *J.F. v. State*, 718 So. 2d 251, 252 (Fla. 4th DCA 1998)). Lindsay's actions at the hearing belie her protestations of impartiality. Lindsay's conduct in becoming an advocate for one side and testifying as a witness as to her opinion of irrelevant and outdated traffic studies was the antithesis of that required of a neutral decision-maker, and her behavior amply demonstrates the influence of her conflicts of interest with respect to the Hearing on Remand.

94. Toward the close of the hearing, Lindsay indicated that, in her view, removing the 900-student enrollment limit previously disapproved by the court would result in Palmer Trinity being permitted to have only 600 students, in accordance with its prior zoning approval, rather than the 1,150 students Palmer Trinity had requested. *See* Transcript of July 19, 2011 Hearing (**Exhibit "CC"**) at pp. 152-53. Such an outcome is clearly contrary to the intent of the Circuit Court decision remanding the zoning application to the Village to remove the condition limiting Palmer Trinity's enrollment to 900-students as unsupported by the evidence presented in favor of Palmer Trinity's request to increase enrollment to 1,150 students.

95. Nevertheless, at the close of the Hearing on Remand, Lindsay voted to quash the illegal conditions on the prior approval of Palmer Trinity's zoning application without approving

the expansion of student enrollment to the requested 1,150 students. *Id.* at pp. 175-177. On August 17, 2011, Palmer Trinity received Resolution No. 2011-53, approving Palmer Trinity's application subject to 80-plus conditions but limiting enrollment to 600 students instead of the requested 1,150.

96. The relevant section of the Code of Ethics for Public Officers and Employees (the "Code"), "Voting Conflicts," applies to persons elected to hold municipal office, including Lindsay, and provides that:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure **which would inure to his or her special private gain or loss**; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Such public officer shall, prior to the vote being taken, publicly state to the assembly the nature of the officer's interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who shall incorporate the memorandum in the minutes.

See Section 112.3143(3)(a), Florida Statutes (emphasis added).

97. As the opinion letter obtained by the Village's attorney on February 21, 2011 from the Commission states, if Lindsay's vote on Palmer Trinity's application "would affect a lawsuit or matter in which she is a party (*e.g.*, a vote to request rehearing by the Circuit Court, a vote to appeal the Court's decision, or a vote to send the underlying matter for a public hearing), that she should orally announce, abstain from voting and file Form 8B." *See Exhibit "EE"*. The Commission's letter explains that "[t]his is because such votes have the likely potential to cause her to have to keep litigating, to do away with her need to litigate further, or to cause her to have to pay costs or fees in maintenance of her end of the litigation, even if costs/fees are not payable by her as court sanctions." *Id.*

98. As discussed above, the pending Civil Rights Suit in which Lindsay is a co-defendant directly relates to Palmer Trinity's zoning application and the actions the Village has taken to date on that application, as well as Lindsay's prior actions as the president of CCOCI and as an individual. Clearly, Lindsay's vote and actions undertaken prior to the Hearing and also at the Hearing on Remand (in her capacity as Councilwoman for the Village) had the potential to affect the pending Civil Rights Suit.

99. In addition, Lindsay's vote at the Hearing on Remand had the potential to have a direct, personal financial effect on Lindsay. Lindsay's home is located less than 150 feet from the Property. She alleged her proximity to the Property as the basis for her standing to intervene as a defendant in the Civil Rights Suit. *See* CCOCI and Joan Lindsay's Unopposed Motion to Intervene as Party Defendants (**Exhibit "BB"**). Lindsay testified at the May 4, 2010 hearings that her own home would be affected by increased noise and a reduction in property value if the Village approved Palmer Trinity's application. *See* Excerpted Transcript of May 4, 2010 Hearing, pp. 152, 155-156 (**Exhibit "AA"**). Clearly, Lindsay believes she will be directly financially affected by the action of the Village Council in voting on a special exception allowing expansion of the School on the Property.

100. Based on these facts, Lindsay was required to have orally announced her conflict of interest and abstained from voting at the Hearing on Remand. Instead, Lindsay took extensive steps to attempt to influence fellow councilpersons by offering her own testimony during and improperly voting at the Hearing on Remand. Her actions violated Palmer Trinity's rights to a fair and neutral arbiter and violated the Code.

101. As a result of the Village's decision to cap Palmer Trinity's student population even further - - this time to 600 students - - Palmer Trinity has been further damaged.

102. As a result, on August 26, 2011, Palmer Trinity filed a Motion to Enforce Mandate with the Appellate Division of the Miami-Dade County Circuit Court, asking the Appellate Court to issue an Order directing the Village to approve Palmer Trinity's request to expand its enrollment to no fewer than 1,150 students. *See Exhibit "II"* - Palmer Trinity's Motion to Enforce Mandate. The above-described dispute, and others, present valid zoning issues that remain disputed as of the date of this filing. Thus, this case presents **numerous** current and existing controversies.

103. One of Plaintiff's causes of action explains that improper and illegal *ex-parte* communications occurred between Village Council members and its Mayor, and members of the public, including but not limited to Ms. Lindsay, her husband Jerry Templer, other board members, and members of CCOCI.

104. From the onset of this case, and perhaps even before, all of the Defendants have been keenly aware of their clear duty to maintain these evidentiary communications.

105. Notwithstanding Defendants' knowledge of the importance of these illegal *ex-parte* communications to this case, and even after Defendants received numerous discovery requests seeking this information, Ms. Lindsay, CCOCI, and the Village engaged in a coordinated, continuing, calculated, intentional abuse of process and deliberate and intentional destruction of key evidence, including specifically the subject *ex-parte* communications.

106. Defendants, in particular Ms. Lindsay and CCOCI, committed significant and flagrant discovery abuses, including fraud on the court in connection with Defendants' violations of at least one of this Court's Orders regarding this same discovery, which have materially altered the landscape of this case and have hindered Plaintiff's ability to prove its case against Defendants, Village of Palmetto Bay, Lindsay, and CCOCI.

107. On October 9, 2008, Palmer Trinity propounded a Request for Production on Lindsay (the "Request for Production"). Among other items, the request sought correspondence, letters, emails, etc. between Lindsay and any third parties, including but not limited to the Palmetto Bay Village Council, relating to Palmer Trinity's application for a rezoning, special exception to expand the existing school and related variances (hereinafter referred to as the "Application"). *See Exhibit "I."*

108. Also on October 9, 2008, Palmer Trinity sent its First Request for Production to CCOCI seeking correspondence, letters, emails, etc. between CCOCI and any third parties, including but not limited to the Palmetto Bay Village Council relating to Palmer Trinity's Application. *See Exhibit "J."*

109. On November 13, 2008, Lindsay responded to the Request for Production (hereinafter referred to as the "Response").

110. After reviewing Lindsay's Response, Palmer Trinity became aware that Lindsay had not produced all the documents Palmer Trinity had requested, including documents created by Lindsay, both individually and on behalf of CCOCI. Palmer Trinity had proof that such documents were in existence yet Lindsay failed to produce them. Subsequently, Palmer Trinity filed a Motion to Compel Production of Documents on December 8, 2010 (the "Motion to Compel").

111. After receiving the Motion to Compel, Lindsay then filed an amended response to the Request for Production (referred to as the "Amended Response").

112. After reviewing Lindsay's Amended Response and the discovery it had received to date, Palmer Trinity continued to be aware that Ms. Lindsay had not been forthcoming in her Amended Response. Again, she failed to produce all of the documents requested by Palmer

Trinity. And, once again Palmer Trinity had evidence such documents existed yet Lindsay did not produce them.

113. On June 24, 2010, Palmer Trinity served Lindsay with a subpoena *duces tecum* to take her deposition ("Subpoena") requesting the very same documents as it had in its Request for Production, which still had not yet been produced by Lindsay. See **Exhibit "K"**.

114. On July 8, 2010, Plaintiff took the deposition of Lindsay.

115. During her deposition, Lindsay admitted that she regularly, intentionally deleted e-mail communications that had been requested by Palmer Trinity, which she also had a legal duty and obligation to preserve. She stated that she only provided Palmer Trinity with e-mail communications she "saved" by printing from her computer before permanently deleting them and otherwise deleted all e-mail communications. See below and **Exhibit "L"** - excerpts of Ms. Lindsay's deposition testimony.

Q. When you sent e-mails relating to the Palmer Trinity matter, did you print copies and put them into the file that you produced to us in the box yesterday?

A. I don't have copies of everything that I have ever written. **You have what I have, and that's it.**

Q. So the answer to my question is -- when you send e-mails, your normal course was not to print out a copy and put it in your file, correct?

A. No. My normal course is not to save those either. I keep my computer very clean.

Q. So when we asked you for copies of e-mails that you sent back in -- and you said the date -- 2008, did you send us e-mails that you then printed from your computer?

A. I gave you the copies of the e-mails that I printed from my computer, yes.

Q. And the ones that you printed from your computer, were those already printed or did you print them pursuant to the subpoena?

A. No, I printed them and then I deleted them from my computer when I printed them.

Q. So the ones that you sent us were ones that were still on your computer, not ones that had possibly been deleted, correct?

A. I don't understand the question.

Q. You understood pursuant to this subpoena that one of the things we wanted was any e-mails that you may have sent in 2008 to any third parties related to Palmer Trinity, correct?

A. **Exactly.**

Q. And you went on to your computer, turned it on, went into your, what did you look at, in your inbox?

A. No. What you're not understanding is that I don't keep e-mails. If I have an e-mail and I want to keep it, I print it. **You have the printed copies of the e-mails I wanted to keep, and that's all I have, and that's what I gave you.**

Q. **Okay. And that's exactly what I wanted to understand. In other words, for instance, e-mails that you may have written in 2008 to third parties regarding Palmer Trinity that you deleted, those were not produced to us because they had been deleted, correct?**

A. **Exactly.**

116. What's more, Lindsay admitted to deleting e-mails related to the very communications that Palmer Trinity is seeking evidence of to prove its case. She further admitted that she has spoliated evidence as recently as May, 2010, which is more than twenty (20) months after she received Plaintiff's First Request for Production, seeking this very information. See below and **Exhibit "L"** for excerpts from the Deposition.

Q. Have you permanently deleted e-mails related to the Palmer Trinity matter?

A. I've deleted e-mails related to every matter.

Q. So the answer is yes to my question?

A. **Certainly.**

* * *

Q. When was the last time that you went into your computer and **permanently deleted any e-mails relating to the Palmer Trinity matter?**

A. Well, I don't think I received any for a while, and I delete regularly. It's July now, so probably in May sometime.

Q. **In May of this year?**

A. Uh-huh.

Q. You have to say yes or no.

A. I'm sorry. **Yes.**

117. Palmer Trinity has evidence that Lindsay directly communicated with Village Council members and such evidence has never been produced by either Lindsay or CCOCI. See **Exhibits "L", "M", and "N."** Lindsay has intentionally deleted or withheld those communications from Palmer Trinity in an obvious attempt to hide the truth and prejudice

Palmer Trinity's ability to prove that illegal *ex-parte* communications occurred. As a result, Palmer Trinity has been severely damaged and prejudiced by Lindsay and CCOCI's bad acts.

118. Notwithstanding their admissions that Lindsay destroyed key evidence, Lindsay and CCOCI had a duty to preserve such evidence that was essential to Palmer Trinity proving its case that was clearly in existence before she deleted it.

119. Based on Lindsay's own sworn testimony, she destroyed this evidence intentionally.

120. From Ms. Lindsay's own testimony, we know for certain that her conduct in destroying this evidence was deliberate. She admitted to "regularly" deleting e-mails and has, as recently as May, 2010, deleted e-mails related to Palmer Trinity despite the fact that she has known since 2008, and arguably earlier, that such *ex-parte* communications were illegal and relevant to this case and that she had a legal duty to preserve them.

121. After Lindsay's deposition and her admission that she intentionally destroyed communications (presumably to prevent Palmer Trinity and the public from learning the truth of what has transpired since at least 2008 and to prejudice Palmer Trinity), Palmer Trinity requested Lindsey's computer hard drive.

122. Not surprisingly, Lindsay and CCOCI adamantly objected to producing it. Several hearings were required to compel Lindsay to produce her hard drive for inspection by a forensic computer expert so that the expert could retrieve Lindsay's emails and other communications.

123. On or about October 18, 2010, this Court rejected Lindsay's objections and attempts to keep her hard drive from having to be produced and examined. *See* Order (**Exhibit "O"**), which compelled Lindsay to produce her computer's hard drive.

124. Consistent with Lindsay's actions to date, and in yet **another** deliberate act of defiance of this Court and the applicable case law regarding destroying evidence, several weeks after entry of the Court's Order, Lindsay's attorney informed counsel for Plaintiff, for the first time - - notwithstanding all of the discovery conducted thus far on this issue and the hearings on Plaintiff's Motion to Compel, and obviously only after Defendants Lindsay and CCOCI were faced with the hard realization that the communications on Lindsay's hard drive were finally going to be discovered by Plaintiff - - that Defendant's computer had been "trashed" and was therefore not available for inspection despite Ms. Lindsay's sworn testimony to the contrary.

125. In addition, the Defendant Village of Palmetto Bay had specific communications, which were never produced in this case, including but not limited to *ex-parte* communications between the Mayor and the Village's own traffic expert, Joseph Corradino. See **Exhibits "E"** and **"F."** See also **Exhibit "GG"** - email from Joan Lindsay to Eugene Flinn dated Jan. 30, 2010. See also **Exhibit "GG"** - email from Jerry Templer to Julian Perez, dated April 16, 2010, which references Mr. Templer's "phone conversation" with Mayor Flinn wherein they discussed "that the [V]illage was having the Corradino Group do a traffic study like the one completed in 2008."

126. CCOCI's current president, Betty Pegram has furthered CCOCI's assault on Palmer Trinity, continuing its improper *ex-parte* communications with the Village. As an example, in one email on behalf of CCOCI, Ms. Pegram suggested that CCOCI should "email [the] Village Council and Village Manager to request they hire a traffic engineer, a planner, and a sound engineer to produce the competent substantial evidence to limit Palmer Trinity's expansion." See attached group of emails from Ms. Pegram, identified as **Exhibit "W"** and

specifically an email from CCOCI dated March 13, 2011. CCOCI also states that "the Village needs to protect all of the residents from excessive traffic and noise."

127. In another email, CCOCI stated that the Vice-Mayor will "most likely be the swing vote." *See Exhibit "W."* This confirms, yet again, that CCOCI and Ms. Stanczyk continue to conspire with the Village to make decisions against Palmer Trinity.

128. CCOCI's suggestion that Defendants should have **another** chance to illegally steal Plaintiff's property rights, despite losing twice on appeal already, is **preposterous**. Rather, this is yet another bold attempt to contravene this Court's authority. **Such behavior should be sanctioned, not condoned.**

129. Further, CCOCI's string of emails proves the very conspiracy at issue in the Counts below. The emails also show just how far the Defendants are willing to go, in violation of the law and the Village's legal duty (**sacred** as it is). In light of the two (2) harshly worded opinions from the Third District and Eleventh Judicial Circuit appellate courts, it is appalling that Defendants continue in this vein.

130. The Village has also engaged in a pattern of selective enforcement in applying its building regulations to the Property.

131. The Village, for example, issued a Stop Work order to halt a security wall that Palmer Trinity was constructing on its Property after obtaining the requisite building permit. Palmer Trinity, like any other property owner in the Village, has a right to construct a wall on its Property. Although the wall was situated in such a way that it was located three feet inward from its boundary line, the Village stopped the work and ordered Palmer Trinity to relocate the wall even further away from the boundary line. The Village's order to relocate the wall was arbitrary and capricious and not required under the Village's regulations.

132. The Village issued another Stop Work order to halt the construction of the boundary wall because an entry gate on the Property was allegedly encroaching into the public right-of-way. The entry gate had been in existence in excess of thirty years and had never been targeted for enforcement action until after the Village and Palmer Trinity became engaged in litigation.

133. The Village refused to renew a Village permit for the installation of landscaping required under a collateral permit issued and renewed by Miami-Dade County's Department of Environmental Resources Management. The ground stated by the Village for refusing to renew the permit was the pending litigation between the Village and Palmer Trinity.

134. The Village's pattern of selective enforcement against Palmer Trinity, as noted herein as well as in regards to additional actions undertaken by the Village, violates Palmer Trinity's equal protection right to be treated the same as other similarly situated property owners, not singled out for punitive enforcement actions. The Village's pattern of selective enforcement also violates Palmer Trinity's due process right to conduct lawful activities without being subjected to arbitrary and capricious enforcement actions.

135. As a result of the Defendants' wrongful, illegal, and intentional actions, Plaintiff has sustained significant damages, including but not limited to attorneys' fees, other professional fees, and out of pocket expenses in excess of One Million, Eight Hundred Four Thousand, Nine Hundred Seventy-Three Dollars (\$1,804,973). *See* Exhibit "P" as a reference for some of these expenses and fees. Obviously, in light of the Defendants' continued bad acts, Plaintiff's fees and costs continue to increase.

136. As a further result of the Defendants' wrongful, illegal, and intentional actions, Plaintiff has sustained significant additional damages, including: approximately \$37,500 or more

per year for extra delivery expenses due to restrictions placed by the Village on delivery hours for Plaintiff, which do not apply to other schools in the same area; additional expenses for stoppage of work on, among other things, the surrounding wall, landscaping, and other construction; loss to the Plaintiff's capital campaign in the amount of approximately \$4 million or more; additional damages related to Plaintiff's Annual Fund; and additional damages caused by the delays in construction due to inability to take advantage of favorable interest rates; as well as other damages, which accrue and increase on a daily basis.

137. As a further result of the Defendants' wrongful, illegal, and intentional actions, Plaintiff has sustained significant damages, including the loss of fields, buildings, etc., as well as other items that have not yet been calculated.

138. Notwithstanding the discriminatory, illegal, wrongful, and arbitrary conduct of the Defendants, Palmer Trinity was in fact able to settle a similar dispute.

139. A neighborhood association south of Palmer Trinity known as Old Cutler Glen Homeowner's Association, which also intervened as a party in this case, filed a Stipulation of Dismissal With Prejudice on October 22, 2009, after Palmer Trinity and Old Cutler Glen were able to resolve their differences. *See* Stipulation of Dismissal, which is **Exhibit "V"**.

140. Unfortunately and obviously, these Defendants have not even attempted to negotiate in good faith with Palmer Trinity.

141. As a result, Palmer Trinity has been forced to spend millions of dollars, which should, **of course**, have been spent instead on the noble pursuit for which Palmer Trinity exists -
- educating children.

142. **Simply put, Enough is enough.**

143. All conditions precedent (assuming any are applicable, which Plaintiff does not admit) to the filing of this action have been or will be performed,⁷ completed, were waived by the Village⁸, or otherwise excused.

**COUNT I – AGAINST THE VILLAGE
PLAINTIFF'S DUE PROCESS RIGHTS WERE VIOLATED BY THE VILLAGE
COUNCIL MEMBERS' *EX-PARTE* COMMUNICATIONS AND VILLAGE CODE
SECTION 2-106 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED**

144. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

145. Any *ex-parte* communications, prior to a quasi-judicial proceeding, are inherently improper and are anathema to quasi-judicial proceedings. *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991).

146. *Ex-parte* communications prior to quasi-judicial proceedings are denials of due process pursuant to the Florida Constitution.

⁷ Pursuant to Fla. Stat. § 768.28(6)(a), Plaintiff presented the claim in writing to the Village of Palmetto Bay and the Florida Dept. of Financial Services. Said notices were mailed on May 12, 2011 and received by the Village on May 15, 2011. Plaintiff does not agree that the Village is entitled to sovereign immunity for these claims; however, Plaintiff nonetheless initiated notice under § 768.28(6)(a). As of November 9, 2011, 180 days will have elapsed since service, notwithstanding Plaintiff's position that the notice requirement does not apply in this case. See attached **Exhibit "JJ"** - Certified Letter of May 12, 2011 with Certified Return Receipts attached. Note that the Certified Letter documents a claim for damages, although, again, such claim had been properly documented previously.

⁸ In this case, Village officials including the Mayor and Council Members acquired actual knowledge of the events underlying these claims and, indeed, participated directly in the illegal conduct at issue, as is alleged throughout this Complaint. Furthermore, the Village pursued investigation of the matters involved herein, which revealed substantially the same information which may have required notice under Fla. Stat. § 768.28. Thereafter, the Village followed a continuing course of action which reasonably led Palmer Trinity to conclude that formal notice was unnecessary (*e.g.* its actions following the April 14, 2008 hearing and prior to, at, and after the May 4, 2010 hearing, as well as its continued actions throughout these proceedings, which in every instance, denied Palmer Trinity's claims and requests in writing). Thus, the filing of formal notice was waived by the Village, or, alternatively, was unnecessary in this case. Further, due to the Village's conduct, Palmer Trinity in good faith failed to serve the notice, or acted thereon to its disadvantage; accordingly, the Village is estopped from arguing that notice is required in this case. See *e.g. Brown v. State*, 701 So.2d 1211, 1213 (Fla. 1st DCA 1997); *Rabinowitz v. Town of Bay Harbor Islands*, 178 So.2d 9, 12-13 (Fla. 1965).

147. Members of the Village Council and Mayor engaged in substantive *ex-parte* communications with residents of the Village regarding Plaintiff's zoning application prior to Plaintiff's Rezoning Denial.

148. At the April 14, 2008 public hearing, Village Council Members admitted that *ex-parte* communications occurred. Further, the evidence clearly shows that many communications were not properly disclosed and that these violations continue, even today.

149. The *ex-parte* communications severely prejudiced and continue to prejudice the Plaintiff.

150. Section 2-106 contains disclosure requirements related to *ex-parte* communications and provides that compliance shall not create a presumption of prejudice.

151. Section 2-106, which tries to create exceptions to allow *ex-parte* communications constitutes a violation of due process, is contrary to *Jennings*, and is an unlawful attempt by a legislative body to alter the requirements of due process. This is just one example of an "actual controversy" between Plaintiff and the Village, in which Plaintiff has a sufficient stake or cognizable interest which would be affected by the outcome of the litigation, in order to satisfy the requirements of standing. *See, e.g., Warren Technology, Inc. v. Carrier Corp.*, 937 So.2d 1141 (Fla. 3d DCA 2006). Another such example is the prejudice caused to Plaintiff by Defendant's *ex-parte* communications, which obviously impacted Defendant's wrongful decisions against Plaintiff, and which, in turn, proximately caused Plaintiff to have to spend significant money on attorney's fees and costs, as well as incur additional damages as alleged hereinabove.

152. Section 2-106 is an unlawful encroachment by the Village upon the powers of the judicial branch of government.

153. The Southern District of Florida entered an Order of Remand, remanding this case from Federal Court back to the Circuit Court on July 29, 2011. As part of his Order (**Exhibit "HH"**), the Honorable Judge Lawrence King noted:

The constitutionality of the Code section is **indeed cast into doubt** by an opinion by a Florida District Court of Appeal, *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991). The Third District found that ex parte communications by a quasi-judicial officer about the merits of a decision may violate due process. *Id.* at 1341. To determine whether a particular ex parte communication violates due process, the Third District created an evidentiary framework:

We hold that upon proof that a quasi-judicial officer received an ex parte contact, a presumption arises ... that the contact was prejudicial. The aggrieved party will be entitled to a new and complete hearing before the commission unless the defendant proves that the commission was not, in fact, prejudicial.

Id. at 1339. Section 2-106, however, creates a scheme that is **directly contrary** to the framework laid out in *Jennings*. By its terms, the purpose of Section 2-106 is to "eliminate the presumption of prejudice that may result from ex parte communications with village council and members." Village Mun. Code § 2-106(a). The Code provision goes on to provide that an ex parte communication "shall not create a presumption of prejudice," so long as it is disclosed.

See **Exhibit "HH"** at 5-6. (Emphasis added).

154. Section 2-106 is unconstitutional on its face and violates Plaintiff's procedural due process rights as guaranteed by the United States Constitution and the Florida Constitution because Section 2-106 is arbitrary and capricious and does not bear a substantial relation to the public health, safety or welfare.

WHEREFORE, the Plaintiff requests that this Court:

(a) Issue an order declaring Section 2-106 unconstitutional facially and as applied, as violative of the due process rights of Plaintiff, and as an unlawful encroachment on the judiciary and

(b) Award Plaintiff costs of suit, attorneys' fees if applicable, interest⁹, compensatory damages if applicable, and provide for such other relief as is just and proper.

**COUNT II – AGAINST THE VILLAGE
CLAIM FOR DAMAGES AGAINST THE VILLAGE
BASED UPON VIOLATION OF SECTION 2-106**

155. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

156. Pursuant to Section 2-106, all Members of the Village Council, including the Mayor, were required to place in the public record of the quasi-judicial proceeding all *ex-parte* communications relating to the application.

157. Village Council Members violated the requirements of Section 2-106.

158. Specifically, although certain Village Council Members admitted they had *ex-parte* communications, these *ex-parte* communications were not fully disclosed on the public record, nor were they made public by the Council as required by Section 2-106. Further, certain Village Council Members failed to make any disclosures whatsoever.

159. For example, the major objectors to Palmer Trinity's application were CCOCI and its president, Joan Lindsay. Upon information and belief, numerous *ex-parte* communications with the Village Council Members were with Ms. Lindsay. However, the Village Council Members either failed to disclose at all, or failed to properly disclose these *ex-parte* communications.

160. Upon information and belief, Ms. Lindsay and therefore CCOCI knew at the time of the *ex-parte* communications that it was wrongful to participate in such communications, but purposefully proceeded despite such knowledge.

⁹ Plaintiff requests an award of pre and post-judgment interest, where the applicable law supports such an award, throughout this Complaint.

161. Although Ms. Lindsay was requested to produce copies of all communications with Village Council Members prior to the 2008 hearings, Ms. Lindsay deleted such *ex-parte* communications from her computer and perhaps elsewhere. Indeed, Ms. Lindsay deleted *ex-parte* communications from her computer even after the initial Complaint in this action was filed. Ms. Lindsay's attempt to dispose of these communications despite knowing that a claim has been made by Palmer Trinity regarding the impropriety of these communications constitutes spoliation of key evidence, which now - - based on her own testimony - - can never be recovered.

162. Under Florida law, prejudice is presumed to have resulted from the *ex-parte* communications.

163. The prejudice caused by the *ex-parte* communications deprived Palmer Trinity of its due process right to a fair and impartial hearing, which is mandated by both the United States Constitution and the Florida Constitution.

164. The Village's continuous, wrongful denials forced Palmer Trinity to file numerous legal challenges which have now spanned over several years, delayed Palmer Trinity's expansion plans over that period of time, and ultimately caused Palmer Trinity to suffer severe monetary and non-monetary damages as alleged specifically hereinabove.

165. As a direct and proximate result of the Council Members' and Mayor's violation of Section 2-106, Palmer Trinity suffered substantial actual and consequential damages, and continues to suffer such damages in excess of \$15,000.

WHEREFORE, the Plaintiff demands judgment against the Village for compensatory damages, attorneys' fees if applicable, interest, taxable costs and such other relief as is just and proper.

COUNT III – SPOILIATION OF EVIDENCE AGAINST THE VILLAGE

166. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

167. The subject action has been ongoing since 2008.

168. There exists a legal or contractual duty, or duty imposed by properly served discovery requests in this lawsuit, for the Defendant to preserve evidence including any and all *ex-parte* communications that are relevant to this action.

169. Notwithstanding this duty, Defendant either destroyed or withheld such evidence from these proceedings.

170. The Defendant's destruction of this key evidence caused significant impairment to the Plaintiff's ability to prove certain aspects of this lawsuit, including the claims Plaintiff asserts against Defendants CCOCI and Joan Lindsay¹⁰, which obviously Defendant has known about for a significant period of time.

171. There is a causal relationship between Defendant's evidence destruction and Plaintiff's inability to prove certain aspects of this lawsuit.

172. As a direct and proximate result of the Defendant's spoliation of evidence (not including "first-party" spoliation)¹¹, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages in excess of \$15,000.

WHEREFORE, the Plaintiff demands judgment against Defendant, the Village of Palmetto Bay, for compensatory damages, attorneys' fees if applicable, interest, taxable costs and

¹⁰ Plaintiff seeks damages against Defendant for its involvement in "third-party" spoliation pursuant to, *e.g.*, *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1997).

¹¹ Plaintiff seeks relief against Defendant for its involvement in "first-party" spoliation pursuant to *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

such other relief as is just and proper. Furthermore, Plaintiff respectfully requests that the Court enter an Order:

- (a) Striking the pleadings of the Defendant;
- (b) Entering Default Judgment in favor of Plaintiff and against the Defendant;
- (c) Awarding Palmer Trinity all of its attorneys' fees and costs expended in Plaintiff's lawsuits against the Village of Palmetto Bay, Lindsay and CCOCI, to include both the 2008 and 2010 lawsuits, as well as the appeals filed by Palmer Trinity, and any and all other litigation involving Plaintiff and Defendants CCOCI and Joan Lindsay;
- (d) Entering an order preventing the Defendant from deleting any further information related to Palmer Trinity's Requests for Production and other discovery requests;
- (e) Granting Palmer Trinity such other different and/or additional relief as is deemed just and proper.

As an alternative to paragraphs 172 (a), (b), (c), and (d) above, Palmer Trinity asks the Court to find the following rebuttable presumptions:

- (i) That Defendant had illegal communications with third parties that prejudiced Palmer Trinity's rezoning application as well as Palmer Trinity's application for approval of its expansion or variance application and
- (ii) That if Defendant had complied with Plaintiff's discovery requests that they would have evidenced *Jennings'* violations (*see Jennings v. Dade County*) and Sunshine violations by Defendant.

COUNT IV – SPOILIATION OF EVIDENCE AGAINST CCOCI AND LINDSAY

173. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

174. The subject action has been ongoing since 2008.

175. There exists a legal or contractual duty, or duty imposed by properly served discovery requests and at least one (1) Court Order, for the Defendants to preserve evidence including any and all *ex-parte* communications that are relevant to this action.

176. Notwithstanding this duty, Defendants either destroyed or withheld such evidence from these proceedings.

177. The Defendants' destruction of this key evidence caused significant impairment to the Plaintiff's ability to prove certain aspects of this lawsuit, including the claims Plaintiff asserts against the Village¹², which obviously Defendants have known about for a significant period of time.

178. There is a causal relationship between the Defendants' evidence destruction and Plaintiff's inability to prove certain aspects of this lawsuit.

179. As a direct and proximate result of the Defendants' spoliation of evidence (not including "first-party" spoliation)¹³, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages in excess of \$15,000.

WHEREFORE, the Plaintiff demands judgment against Defendants, CCOCI and Joan Lindsay, for compensatory damages, attorneys' fees if applicable, interest, taxable costs and such other relief as is just and proper. Furthermore, Plaintiff respectfully requests that the Court enter an Order:

- (a) Striking the pleadings of Defendants;
- (b) Entering Default Judgment in favor of Plaintiff and against Defendants;

¹² Plaintiff seeks damages against Defendants for their involvement in "third-party" spoliation pursuant to, *e.g.*, *St. Mary's Hospital, Inc. v. Brinson*, 685 So.2d 33 (Fla. 4th DCA 1997).

¹³ Plaintiff seeks relief against Defendants for their involvement in "first-party" spoliation pursuant to *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

(c) Awarding Palmer Trinity all of its attorneys' fees and costs expended in Plaintiff's lawsuits against the Village of Palmetto Bay, Lindsay and CCOCI, to include both the 2008 and 2010 lawsuits, as well as the appeals filed by Palmer Trinity, and any and all other litigation involving Plaintiff and Defendants;

(d) Entering an order preventing Defendants from deleting any further information related to Palmer Trinity's Requests for Production and other discovery requests;

(e) Granting Palmer Trinity such other different and/or additional relief as is deemed just and proper.

As an alternative to paragraphs 179 (a), (b), (c), and (d) above, Palmer Trinity asks the Court to find the following rebuttable presumptions:

(i) That the Defendants had illegal communications with third parties that prejudiced Palmer Trinity's rezoning application as well as Palmer Trinity's application for approval of its expansion or variance application and

(ii) That if the Defendants complied with Plaintiff's discovery requests that they would have evidenced *Jennings's* violations (*see Jennings v. Dade County*) and Sunshine violations by Defendants.

**COUNT V – AGAINST THE VILLAGE
DECLARATORY ACTION - THE DISCRIMINATORY PROVISIONS
ARE UNCONSTITUTIONAL AND HAVE DAMAGED PALMER TRINITY SCHOOL**

180. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

181. Plaintiff desires to operate a private school on the Property.

182. The Village discriminates against private schools in relation to public schools by limiting the areas on which private schools may be located and by requiring approval by special exception after public hearing to operate a private school.

183. The Village also discriminates by placing onerous conditions on Palmer Trinity, which it does not impose on other Village schools.

184. The Village does not limit the areas in which a public school is authorized and does not require approval by special exception after public hearing to operate a public school.

185. The Village does not impose any public hearing requirement for public schools to expand or be constructed within the Village.

186. The provisions of the Village's land development regulations which treat public schools differently than private schools are hereinafter sometimes referred to as "Discriminatory Provisions."

187. Public schools in the Village have continued to add students and build additional structures without any zoning authorization from the Village or being required to undergo the same procedures as Palmer Trinity.

188. In this case, the Village would not issue a building permit and other permits, approvals, and certificates necessary for a private school on the Property or any other property in the Village unless an application was made for a special exception, one or more public hearings were held, and final approval of a special exception authorizing the operation of a private school was obtained.

189. A public school is not required to obtain approval after public hearing in order to operate on the Property. A public school is not required to obtain special exception approval to

operate on the Property. A public school is not subjected to the onerous conditions contained in Resolution 2010-48.

190. Plaintiff contends that the Village's interpretation and application of the Discriminatory Provisions wrongfully discriminated against Plaintiff.

191. Plaintiff further contends that the Village's decisions in denying Plaintiff's proper expansion requests are arbitrary, unreasonable, and discriminatory inasmuch as the Village has allowed other schools to expand with smaller property sizes and larger amounts of students than are requested by Palmer Trinity in this case.

192. The Village disagrees.

193. There is an actual, present, bona fide controversy between Plaintiff and Defendant as to the interpretation and application of the Discriminatory Provisions creating doubt in the Plaintiff as to its rights.

194. The Discriminatory Provisions violate Plaintiff's equal protection rights under the Florida Constitution and U.S. Constitution by requiring private schools to obtain a special exception through a public hearing where public schools do not have the same requirement.

195. The Discriminatory Provisions are arbitrary and unreasonable and bear no relation to the public safety, health, morals, comfort, or general welfare.

196. On March 24, 2010, the Third District Court held that the Village's actions were "arbitrary, **discriminatory** [and] unreasonable." *See Exhibit "A"* (emphasis added).

197. As a direct result of the Village's wrongful application of the Discriminatory Provisions to the Plaintiff and its repeated denials of Plaintiff's expansion requests, the Plaintiff has incurred severe monetary and non-monetary damages.

WHEREFORE, the Plaintiff requests:

- (a) A declaratory judgment against Defendant stating that the Discriminatory Provisions are unlawful and unconstitutional;
- (b) Compensatory damages against the Village for its wrongful application of the Discriminatory Provisions to the Plaintiff and/or for the Village's repeated denials of Plaintiff's expansion requests; and
- (c) Taxable costs, attorneys' fees, interest, and such other relief as are just and proper.

COUNT VI – AGAINST THE VILLAGE
DECLARATORY RELIEF – VIOLATIONS OF CITIZENS' BILLS OF RIGHTS

198. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

199. The Miami-Dade County Home Rule Charter Citizens' Bill of Rights is intended to "insure to all persons fair and equitable treatment," and guarantees that "[e]very person has the right to transact business with the County and the Municipalities with a minimum of personal inconvenience."

200. The Village of Palmetto Bay Municipal Charter Citizens' Bill of Rights is intended to "insure to all persons fair and equitable treatment," and guarantees that "[e]very person has the right to transact Village business with a minimum of personal inconvenience."

201. Plaintiff contends that the actions of the Village in adopting, applying, and enforcing the Discriminatory Provisions and by requiring expensive, inconvenient, and time-consuming approval procedures for private schools but not for public schools are in violation of the foregoing provisions of the Miami-Dade County Citizens' Bill of Rights and the Village of Palmetto Bay Citizens' Bill of Rights (together the "Citizens' Bills of Rights").

202. The Village disagrees.

203. There is an actual, present, bona fide controversy between Plaintiff and Defendant with respect to the Citizens' Bills of Rights creating doubt in the Plaintiff as to its rights with respect thereto.

204. The Village's breaches of the Citizens' Bills of Rights violate Plaintiff's rights by requiring expensive, inconvenient, and time-consuming approval procedures for private schools whereas public schools do not have the same requirements.

205. The Third District Court has already held, on March 24, 2010, that the Village's actions were "arbitrary, **discriminatory** [and] unreasonable." See **Exhibit "A"** (emphasis added).

206. The Village's violations of the Citizens' Bills of Rights have caused Plaintiff to be damaged and have caused Plaintiff to incur severe monetary and non-monetary damages.

WHEREFORE, the Plaintiff requests entry of an Order:

(a) Declaring that the Village has willfully violated both the Village's Citizens Bill of Rights and the County's Citizens Bill of Rights; and awarding

(b) Compensatory damages against the Village for its violation of the Village's Citizens Bill of Rights and the County's Citizens Bill of Rights; and

(c) Taxable costs, attorneys' fees, interest, and such other relief as are just and proper.

**COUNT VII – AGAINST THE VILLAGE
VIOLATION OF THE PUBLIC RECORDS LAW
(FLA. STAT. 119)**

207. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

208. Article I, S. 24 of the Florida Constitution establishes a constitutional right of access to any public record made or received in connection with the official business of any

public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted or made confidential by the Constitution.

209. Chapter 119 of the Florida Statutes mandates that all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge must be open for public inspection unless the Legislature has exempted them from the disclosure.

210. Section 119.011 (12) of the Florida Statutes requires providing access to public records is a duty of each agency.

211. Any written communications, including but not limited to e-mails or text messages, made or received by agency employees in connection with official business are public records and subject to disclosure in absence of an exemption.

212. Any written communications, including but not limited to e-mails or text messages, made or received from city commissioners regarding a transaction of official business are public records subject to disclosure.

213. On May 13, 2008, May 15, 2008, July 9, 2008, October 28, 2009, November 24, 2009, and December 15, 2009, as well as afterwards, Palmer Trinity made public records requests to the Village (the "Public Records Requests"). In its Public Records Requests, Palmer Trinity asked for copies of communications between Members of the Village Council and third parties. *See Exhibit "Q"*.

214. Upon information and belief, Defendant and its elected officials have withheld written communications, including but not limited to e-mails and text messages, from the Plaintiff.

215. Plaintiff has received discovery from third parties which clearly demonstrates that Defendant and its elected officials have either willfully or knowingly or negligently failed to produce all of the requested documentation.

216. Such failure to produce documents circumvents the Florida Constitution and Chapter 119 of the Florida Statutes mandating access to public records.

217. Defendant had a clear duty under the Florida Constitution and Chapter 119 of the Florida Statutes to provide Palmer Trinity with the public records it requested.

218. Monetary damages are insufficient to afford Plaintiff a complete remedy and Plaintiff does not have an adequate remedy at law.

219. Plaintiff has a substantial likelihood of being successful on the merits of this cause of action.

WHEREFORE, the Plaintiff prays that this court enter a judgment:

- (a) Ordering the Village to produce all of the documents requested by Palmer Trinity in its Public Records Requests;
- (b) Enjoining the Defendant from further violating Plaintiff's rights to inspect and examine the documents requested in the Public Records Requests;
- (c) Awarding Attorneys' Fees pursuant to Section 119.12 of the Florida Statutes, as well as taxable costs and interest; and
- (d) Granting Palmer Trinity such other and further relief as is deemed just and proper.

COUNT VIII – 42 U.S.C. § 1983
AGAINST THE VILLAGE

220. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

221. The Defendant, Village of Palmetto Bay, acting under color of state and local law, has caused the Plaintiff herein to be deprived of the rights and privileges secured by the Constitutions of the United States and the State of Florida.

222. The Defendant has engaged in a series of actions which caused the Plaintiff to be deprived of the essential rights of procedural due process as set forth herein.

223. The Defendant has intentionally deprived Plaintiff of its rights to due process of law and equal protection of the law as guaranteed by the Constitutions of the United States and the State of Florida and has intentionally deprived Plaintiff of its right of access to the courts as guaranteed by the Constitution of the State of Florida. Defendant has also deprived Plaintiff of its civil rights in violation of 42 U.S.C. § 1983 and while it acted under color of law. Defendant has also deprived Plaintiff of its constitutionally protected property interest while it acted under color of law.

224. The Defendant has also violated Plaintiff's constitutional rights as guaranteed by the Constitutions of the United States and the State of Florida because Defendant's policy and/or custom, including the Defendant's official ordinances and application of code sections, played a part in the violations of federal law.

225. There is an actual, present controversy between Plaintiff and Defendant and Plaintiff is in doubt as to its rights. Further, there is no constitutionally adequate process to resolve this matter.

226. Plaintiff has retained undersigned counsel to represent it throughout the events alleged in this Complaint, which have necessitated the bringing of this Complaint as well as incurring reasonable attorneys' fees and costs.

227. Plaintiff has suffered monetary damages as a result of the Defendant's actions as alleged herein.

WHEREFORE, the Plaintiff prays that this court enter a judgment against the Village and:

(a) determine that Defendant has violated and deprived Plaintiff of its civil rights in violation of 42 U.S.C. § 1983;

(b) award compensatory damages to Plaintiff caused by Defendant's deprivation of Plaintiff's civil rights;

(c) award attorneys' fees to Plaintiff pursuant to 42 U.S.C. § 1988 and/or other applicable authority;

(d) award taxable costs and interest; and

(e) grant Plaintiff such other and further relief as is deemed just and proper.

**COUNT IX – ABUSE OF PROCESS
AGAINST THE VILLAGE**

228. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

229. Defendant engaged in an illegal, improper, willful and/or intentional abuse of process by, for example, failing to disclose the *ex-parte* communications involving Village Council Members and using and misusing this litigation for the purpose of denying and/or delaying Plaintiff's reasonable re-zoning requests.

230. The Third District Court of Appeal held that the Village's denial of the rezoning was "**a departure from the essential requirements of law resulting in a miscarriage of justice**" and remanded the case back to the Village to grant the rezoning. *See Exhibit "A"* (emphasis added).

231. The Village's refusal to rezone Plaintiff's property to a classification consistent with the surrounding properties was not justified and was, "**arbitrary, discriminatory [and] unreasonable.**" *Id.* at 263. (Emphasis supplied).

232. Among other things, the Village's decision was also inconsistent with its own staff zoning recommendation, which determined that Palmer Trinity's application **is consistent** with Palmetto Bay's Comprehensive Plan.

233. After the Third District Court of Appeal threw out the Village's illegal 2008 zoning decision, on May 4, 2010, the Village held another public hearing.

234. Instead of upholding the law, the Village illegally followed political and personal agendas, including in particular those of its own biased and personally motivated Council members and reliance on illegal *ex-parte* communications. The Village decided against Palmer Trinity arbitrarily and without any consideration of the actual evidence, which proved the legitimacy of Palmer Trinity's requests. In so doing, the Village also ignored, among other things, its own Comprehensive Plan, its own hired expert, and even its own specially retained legal counsel, George Knox, to render an arbitrary and capricious decision based on politics - - **not facts or evidence.**

235. Most recently, in July 2011, the Village continued in its abuse of process by failing to follow the Court's mandate and, by its most recent decision, has placed Palmer Trinity in a much worse position than when it started the zoning application process in 2006.

236. The Circuit Court had ordered the Village to quash the 900-student cap which the Village imposed as a condition of its approval of Palmer Trinity's application for a special exception to expand its school and increase its enrollment from 600 to 1,150 students. The Court held that the 900-student cap was not supported by substantial competent evidence. *See Palmer*

Trinity Private School, Inc. v. Village of Palmetto Bay, 18 Fla. L. Weekly Supp. 342a (Fla. 11th Cir. Ct. Feb. 11, 2011).

237. However, notwithstanding the Court's mandate, the Village then responded by reducing the student cap even further - - this time to 600 students.

238. Thus, although this Court ordered the Village to quash or otherwise render ineffectual the conditions that the Court determined were unlawful and directed the Village to "take no further action that would be inconsistent with this Court's prior Order of May 4, 2011 and this Order" the Village then responded and abused the process further **by taking further inconsistent action in reducing the number of students to 600**. In doing so, the Village converted its previous approval, with conditions, of Palmer Trinity's request to increase its student enrollment to a complete denial of that request. *See Exhibit "II."*

239. It should also be pointed out, again, that the Village made its latest improper decision while Joan Lindsay, Plaintiff's primary opponent, was the most outspoken advocate for continued opposition to Palmer Trinity's expansion request.

240. The Village also improperly allowed Ms. Lindsay to conduct independent "research", offer testimony, and participate in the decision to limit Palmer Trinity to 600 students, while at the same time Ms. Lindsay (and also Ms. Stanczyk) had obvious conflicts of interest.

241. Defendant's actions, which continue even today, constitute an illegal, improper, willful and/or intentional misuse of process for some wrongful and unlawful object, or ulterior purpose not intended by the law to effect.

242. Defendant had ulterior motives or purposes for exercising such illegal, improper, willful, and/or intentional misuse of process.

243. Further, Defendant's actions were frivolous or so devoid of merit both on the facts and the law as to be completely untenable.

244. As a direct and proximate result of the Defendant, Village of Palmetto Bay's actions, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer significant damages.

WHEREFORE, the Plaintiff demands judgment against the Village of Palmetto Bay for compensatory damages, interest, attorneys' fees if applicable, taxable costs and such other relief as is just and proper.

**COUNT X – AGAINST THE VILLAGE
CIVIL CONSPIRACY**

245. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

246. At a time unknown to the Plaintiff, Defendants, the Village of Palmetto Bay, CCOCI, and Joan Lindsay agreed, conspired, and confederated with each other to do an unlawful act(s), specifically to engage in illegal *ex parte* communications, which were carried out in regards to the wrongful denial and/or delay of Plaintiff's reasonable re-zoning requests. Pursuant to *Jennings*, cited above, the *ex parte* communications are illegal and serve as the basis for the independent wrong committed in furtherance of this conspiracy.¹⁴

247. Defendant, the Village of Palmetto Bay's actions in this regard was the result of the Defendant knowingly, willfully, wantonly, wickedly, maliciously, and malevolently, agreeing, conspiring, combining, confederating and agreeing together with CCOCI and Joan Lindsay to deny and/or delay Plaintiff's reasonable re-zoning requests through, among other

¹⁴ Pursuant to, *e.g.*, *Blatt v. Green, Rose, Kahn & Piotrkowski*, 456 So.2d 949, 951 (Fla. 3d DCA 1984), a cause of action for conspiracy if the "basis for the conspiracy is an independent wrong or tort which would constitute a cause of action if the wrong were done by one person." Pursuant to the *Jennings* case, which specifically prohibits these illegal *ex parte* communications, Plaintiff satisfies this standard.

things, illegal *ex-parte* communications, which is an actionable underlying and independent wrong.

248. Defendant, the Village of Palmetto Bay, along with CCOCI and Joan Lindsay, at a time unknown to the Plaintiff, maliciously, wantonly, and willfully conspired and agreed together to punish the Plaintiff.

249. The said punishment was and is the malicious, wanton, willful, malevolent denial and/or delay of Plaintiff's legitimate zoning requests by Defendant, the Village of Palmetto Bay, in conspiracy with CCOCI and Joan Lindsay.

250. The said conspiracy commenced at a time unknown to the Plaintiff and has persisted continuously since.

251. Until said conspiracy is terminated, the Plaintiff will continue to sustain damages, including but not limited to attorneys' fees, costs, lost tuition, lost philanthropy, as well as the loss of use of its fields, buildings, etc., and other damages.

252. Each act done in furtherance of this conspiracy by one of the conspirators is an act for which Defendant, the Village of Palmetto Bay, is jointly and severally liable.

253. As a direct and proximate result of the Defendant, Village of Palmetto Bay's actions, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages.

WHEREFORE, the Plaintiff demands judgment against the Village for compensatory damages, attorneys' fees if applicable, interest, taxable costs, and such other relief as is just and proper.

COUNT XI – AGAINST CCOCI AND JOAN LINDSAY
CIVIL CONSPIRACY

254. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

255. At a time unknown to the Plaintiff¹⁵, Defendants, the Village of Palmetto Bay, CCOCI, and Joan Lindsay agreed, conspired, and confederated with each other to do an unlawful act(s), specifically to engage in illegal *ex parte* communications, which were carried out in regards to the wrongful denial of Plaintiff's reasonable re-zoning requests. As was noted previously, the *ex parte* communications are illegal and serve as the basis for the independent wrong committed in furtherance of this conspiracy.

256. Defendants, Joan Lindsay and CCOCI, further conspired to make false statements about Plaintiff to third parties and the Village officials for the purpose of harming Plaintiff's economic interests.

257. Defendant's actions in this regard was the result of the Defendants, CCOCI and Joan Lindsay, knowingly, willfully, wantonly, wickedly, maliciously, and malevolently, agreeing, conspiring, combining, confederating and agreeing together with the Defendant, Village of Palmetto Bay, to deny and/or delay Plaintiff's reasonable re-zoning requests through, among other things, illegal *ex-parte* communications, which is an actionable underlying and independent wrong.

258. Defendants, along with the Village of Palmetto Bay, at a time unknown to the Plaintiff, maliciously, wantonly, and willfully conspired and agreed together to punish the Plaintiff.

1. ¹⁵ Plaintiff alleges, in an abundance of caution, that Joan Lindsay was involved in such conspiracy prior to and while she was an elected official in the event the Village disclaims any responsibility for her actions undertaken since she became a Village Council member.

259. The said punishment was and is the malicious, wanton, willful, malevolent denial and/or delay of Plaintiff's legitimate zoning requests by Defendant, in conspiracy with CCOCI and Joan Lindsay.

260. The said conspiracy commenced at a time unknown to the Plaintiff and has persisted continuously since.

261. Until said conspiracy is terminated, the Plaintiff will continue to sustain damages, including but not limited to attorneys' fees, costs, lost tuition, lost philanthropy, as well as the loss of use of its fields, buildings, etc., and other damages.

262. Each act done in furtherance of this conspiracy by one of the conspirators is an act for which Defendants, CCOCI and Joan Lindsay, are each jointly and severally liable.

263. As a direct and proximate result of the Defendants, CCOCI and Joan Lindsay's actions, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages.

WHEREFORE, the Plaintiff demands judgment against Defendants, CCOCI and Joan Lindsay, for compensatory damages, attorneys' fees if applicable, interest, taxable costs, and such other relief as is just and proper.

**COUNT XII – AGAINST CCOCI AND JOAN LINDSAY
PUNITIVE DAMAGES PURSUANT TO FLA. STAT. § 768.72**

264. The allegations of Paragraphs No. 1 through 263 set forth above are incorporated into this count by reference and are re-alleged herein.

265. The Defendants, CCOCI and Joan Lindsay, are guilty of intentional misconduct and/or gross negligence, which was a substantial cause of loss, injury, or damages to the Plaintiff, Palmer Trinity.

266. Defendants, CCOCI and Joan Lindsay, had actual knowledge of the wrongfulness of their conduct and that there was a high probability that injury or damage to the Plaintiff would occur, and, despite that knowledge, they intentionally pursued their course of conduct, resulting in injury or damage to the Plaintiff.

267. Alternatively, Defendants, CCOCI and Joan Lindsay, acted with gross negligence, which means that their conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of the Plaintiff, which was exposed to and affected by such conduct.

268. Punitive damages should also be awarded against CCOCI for the acts of Joan Lindsay, as the managing agent, primary owner, or other person whose conduct on behalf of CCOCI warrants punitive damages in this case.

269. Punitive damages should also be awarded against CCOCI, which is vicariously liable for Joan Lindsay, as its employee and/or agent for Joan Lindsay's conduct as alleged herein.

270. As a direct and proximate result of the Defendants' actions, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages.

WHEREFORE, the Plaintiff demands judgment against Defendants, CCOCI and Joan Lindsay, for compensatory damages, attorneys' fees if applicable, punitive damages, interest, taxable costs, and such other relief as is just and proper.

COUNT XIII – DEFAMATION AGAINST CCOCI AND BETTY PEGRAM

271. The allegations of Paragraphs No. 1 through 143 set forth above are incorporated into this count by reference and are re-alleged herein.

272. Defendants, Pegram and CCOCI, published false statements about Plaintiff to a third party or parties.

273. Among other things, in March 2011, Pegram and CCOCI sent emails to numerous people indicating that Palmer Trinity had not honored past agreements by cutting down trees on its own property.

274. Ms. Pegram/CCOCI's March 22, 2011 email notes, among other things, that:

The Village of Palmetto Bay has a standing signed resolution that Palmer Trinity is not to remove any trees until they have a building permit. ...

For years the residents of Palmetto Bay have been telling the Village Council, the Village Manager, and the Village Attorney that PT has **not** been a good neighbor and they have not honored past agreements. **Palmer Trinity has proven it yet another time that they have no regard for the neighbors, the environment or any agreement they have made with the residents and the village.**

See March 22, 2011 attached as part of **Exhibit "W."** (Emphasis added).

275. Ms. Pegram/CCOCI's statements in this email, and perhaps others, were published when it/they were sent to numerous recipients on the CCOCI email list and were also published beyond CCOCI's members, including to third parties.

276. As Ms. Pegram confirmed in her deposition, she learned, after sending these emails, that Palmer Trinity had **not** violated any rule or law when it cut down the trees. See Excerpted Portion of Betty Pegram Deposition at 93:13-18 (**Exhibit "LL"**).

277. Ms. Pegram confirmed that when she sent her emails she thought Palmer Trinity had indeed violated a Village resolution by cutting down the trees. *Id.* at 94:3; 97:23.

278. Ms. Pegram subsequently learned from Ron Williams, at the Village of Palmetto Bay, that indeed Palmer Trinity had not violated any law or resolution and that it had the proper permit when it cut down its own trees. *Id.* at 103:24 – 104:5; 105:24 - 106:9.

279. Ms. Pegram also confirmed that her statement that Palmer Trinity had violated an agreement with residents was also untrue. *Id.* at 106:11-20.

280. Ms. Pegram also confirmed that although she had no idea how many emails she sent claiming (inaccurately) that Palmer Trinity had violated an agreement or a resolution or law, she may have done so more than once. *Id.* at 106:24 – 107:8.

281. Further, although Ms. Pegram’s email suggests that Palmer Trinity violated a resolution or other law in cutting down its own trees “all at once” she also confirmed that that statement was not true. *Id.* at 108:8-23.

282. Further, although Ms. Pegram’s email suggests that Palmer Trinity’s tree removal would likely kill certain animals, she also admitted she had not seen any animals killed. *Id.* at 110:15-21.

283. Ms. Pegram also admitted she had had communications with Joan Lindsay about the hay associated with Palmer Trinity’s efforts to remove trees. *Id.* at 49-50.

284. As a direct and proximate result of Pegram and CCOCI's actions in sending the email(s) with multiple untrue statements, Palmer Trinity suffered substantial actual and consequential damages and continues to suffer damages.

WHEREFORE, the Plaintiff demands judgment against Defendants, Betty Pegram and CCOCI, for compensatory damages, attorneys' fees if applicable, interest, taxable costs, and such other relief as is just and proper.

COUNT XIV – INJUNCTION AGAINST THE VILLAGE

285. The allegations of Paragraphs No. 1 through 284 set forth above are incorporated into this count by reference and are re-alleged herein.

286. Plaintiff has demonstrated that the Village's actions have caused the likelihood of irreparable harm to the Plaintiff by, among other things, engaging in selective enforcement in applying building regulations, continuing to delay construction, applying restrictions on delivery hours, issuing Stop Work Orders or otherwise ordering construction to stop on the Property, delaying permits or refusing to issue or renew permits, imposing unfair, illegal, and constitutionally violative conditions on Plaintiff (e.g. the more than 80 conditions that have been imposed on Property) and many, many other improper acts.

287. Plaintiff has no adequate remedy at law for some or all of these continuing violations and bad acts and indeed, the Village has continued these actions in the face of this lawsuit and other litigation involving these same parties.

288. There is a substantial likelihood of success on the merits in favor of the Plaintiff.

289. The threatened injury to Plaintiff by Defendant's actions outweighs any possible harm to the Village.

290. The granting of a temporary injunction will not disserve the public interest.

WHEREFORE, the Plaintiff demands judgment against Defendant, Village of Palmetto Bay, for an injunction and also for future injunctions as necessary to resolve any additional continuing violations by Defendant. Plaintiff further seeks any and all other relief to which it is entitled under this count including interest, taxable costs, and such other relief as is just and proper.

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury of all issues and claims which can be tried by a jury in this complaint.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Fifth Amended Complaint was served Via Email this 15th day of October, 2012, to: **Eve Boutsis, Esq.**, Figueredo & Boutsis, P.A., 18001 Old Cutler Road, Suite 533, Miami, Florida 33157; **Jeffrey L. Hochman, Esq.**, Johnson Anselmo Murdoch, et al., P.O. Box 030220, Ft. Lauderdale, FL 33303; **Benedict P. Kuehne, Esq.**, Law Office of Benedict P. Kuehne, P.A., 100 S.E. 2d Street, Suite 3550, Miami, FL 33131-2154; and **Stanley B. Price, Esq.**, and **Mitchell E. Widom, Esq.**, Bilzin Sumberg Baena Price, et al., 1450 Brickell Avenue, Suite 2300, Miami, Florida 33131.

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