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MEMORANDUM

DATE: April 29, 2020

TO: Joy Leggett-Murphy, Property Acquisition Division Manager, Property Management Department

THROUGH: Mitchell O. Palmer, County Attorney Approved by *MOP 5-5-2020*

FROM: Pamela J. D'Agostino, Assistant County Attorney Approved by *PSD 4-29-2020*

RE: **Vacation Application V-19-507 / Roger and Kimberly Anne Dunn, Scott and Carolyn McAdoo and Stephen and Christine Aron - Application to Vacate a Portion of Platted Right-of-Way in Pomello Park, specifically a portion of 77th Avenue East; CAO Matter No. 2020-0138**

Issue Presented:

In this Request for Legal Services (RLS), you have asked the County Attorney's Office (CAO) to review a vacation application (Application) from Roger and Kimberly Anne Dunn, Scott and Carolyn McAdoo, and Stephen and Christine Aron (Applicants) to vacate a portion of platted right-of-way in Pomello Park, specifically a portion of 77th Avenue East.

Brief Answer:

I have reviewed the Application. Below are my comments and advice to staff. At this

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preliminary stage in the process, portions of Sections 336.09 and 336.10, Florida Statutes, and Section 331 of the Manatee County Land Development Code (LDC) have been met. The Applicants and staff will need to ensure full compliance with state and local laws as the Application proceeds through the public hearing process to the Board of County Commissioners of Manatee County, Florida (Board). Provided the legal concerns and issues identified herein are addressed consistent with my advice, I have no objection from a legal standpoint to the Application being presented to the Board for review and consideration.

Recommendation:

As explained further below, a report and recommendation to the Board as required by Section 312.5.A.5.b. of the LDC must be prepared. Among other things, that report and recommendation should indicate whether closing this road is in the best interest of the public and whether or not granting the Application will result in a condition that violates the LDC or Public Works Department standards for roadways. Staff should also confirm that no property will be landlocked if this road is vacated. If the vacation of a road serves to significantly impair access to one or more private properties, the government may be liable in inverse condemnation. *Pinellas County v. Austin*, 323 So. 2d 6 (Fla. 2d DCA 1975).

Facts:

According to this RLS and the related documents attached, the right-of-way sought to be vacated is a portion of what is commonly referred to as 77th Avenue East. It was dedicated to the public in 1926 by the Pomello Park subdivision plat recorded at Plat Book 6, Page 61, of the Public Records of Manatee County, Florida. The Applicants are requesting that a roughly 1,276 foot stretch of this 50 foot wide unimproved right-of-way between 261st Street East and Verna Bethany Road be vacated. The Applicants own the land to the north and south of this unimproved right-of-way. In the Application, the Applicants allege that this right-of-way is unpaved grassland with no drainage ditch. The Applicants also claim that all-terrain and side-by-side vehicles occasionally pass through this right-of-way, scaring and stampeding rescue horses and dogs fostered by the Applicants and then drive illegally up 261st Street East endangering neighborhood children playing within the street. Finally, the Applicants assert that the right-of-way is maintained by the Applicants and is mostly filled with invasive vegetation.

Review of various email correspondence revealed a variety of information about the

history of this right-of-way, the surrounding area and the Applicants' motives and objectives. Apparently, the Applicants intentionally did not share their future plans in the Application because they did not want to complicate the application process. In the course of the jurisdictional review process, the Applicants advised that their future plans include entering into a private agreement among themselves to split up the vacation area and their respective land so that a horse rescue, a dog rescue and other development can occur. According to the Applicants, the land was originally pine forests used to produce turpentine during World War II and later used for cattle farming. There is little maintenance, if any, performed by the County, according to the Applicants.

Discussion:

Authority to Vacate Right-of-Way

Public places and rights-of-way are held in trust by the authorities for the benefit of the public to be used for public purposes; however, this public trust concept does not prevent the abandonment, vacation, or discontinuance of streets when done in the interest of general welfare. In *Sun Oil Co. v. Gerstein*, 206 So. 2d 439 (Fla. 3d DCA 1968), the Court explained: "The fact that [the] title to the public place . . . vacated or discontinued [in the interest of the general welfare] may revert to the adjacent landowner is of no consequence if the power to vacate is present and such power is lawfully exercised."

Section 336.09, Florida Statutes, provides the Board with the specific authority to vacate road right-of-way. According to Section 336.09(1):

[County] commissioners, with respect to property under their control may in their own discretion, and of their own motion, or upon the request of any agency of the state, or of the federal government, or upon petition of any person or persons, are hereby authorized and empowered to:

. . . .

(c) Renounce and disclaim any right of the county and the public in and to land, other than land constituting, or acquired for, a state or federal highway, delineated on any recorded map or plat as a street, alleyway, road or highway.

Procedure for Vacation of Road Right-of-Way Pursuant to Sections 336.09 and 336.10, Florida Statutes

An applicant who requests that the Board vacate any right or interest in land must make such a request in writing. Section 336.10, Florida Statutes. The Board “may adopt a resolution declaring that at a definite time and place a public hearing will be held to consider [a vacation application].” Section 336.09, Florida Statutes. While adopting a resolution to declare a public hearing on the matter is optional, the Board must comply with the following requirements pursuant to Section 336.10, Florida Statutes:

1. “publish notice . . . one time, in a newspaper of general circulation in [the] county at least 2 weeks prior to the date [of the public hearing],”
2. “hold a public hearing,”
3. adopt a resolution evidencing any action of the commissioners after the public hearing and enter such action in the minutes of the commissioners,
4. include the applicant’s written request for vacation within the minutes of the commissioners,
5. publish notice of the adoption of said resolution “one time, within 30 days following its adoption, in one issue of a newspaper of general circulation published in the county,” and
6. record the following items in the deed records of the county:
 - a. “proof of publication of notice of [the] public hearing,”
 - b. “the resolution as adopted,” and
 - c. “proof of publication of the notice of the adoption of [said] resolution.”

The alternative to having the Board adopt a resolution declaring a public hearing is presenting a motion to the Board to schedule the public hearing.

Procedure for Vacation of Platted Right-of-Way Pursuant to Sections 331 and 312, Manatee County Land Development Code

Section 331 of the LDC codifies the requirements of Sections 336.09 and 336.10, Florida Statutes, within the laws of Manatee County and also provides specific legal guidelines as to the vacation application process in Manatee County. Section 331.2 of the LDC outlines the review process for vacation applications. An applicant must:

1. “complete and submit an application to the Department Director”; and
2. “furnish any additional maps, charts, surveys, legal descriptions, title opinions, and title policies as required by the Department Director for clarification to the reviewing

agencies and the Board.”

Section 331.2, Manatee County Land Dev. Code. “Department Director” is defined within the LDC as “the staff person designated by the County Administrator to administer this code.” Section 200, Manatee County Land Dev. Code.

Appropriate published and posted notice of the vacation application must be provided in accordance with Section 336.10, Florida Statutes, and Section 312.7 of the LDC. If staff confirms that an applicant has complied with the vacation procedures of Sections 336.09 and 336.10, Florida Statutes, and Section 331 of the LDC, then the application will be legally acceptable and sufficiently complete for presentation to the Board. If, after review of an application and upon the close of the public hearing, the Board decides to approve the application, the Board shall adopt a resolution to that effect. Notice of adoption of such a resolution must then be published “one (1) time in a newspaper of general circulation in Manatee County, Florida, within thirty (30) days following [its adoption].” Section 331.3, Manatee County Land Dev. Code. In accordance with 336.10, Florida Statutes, and Section 331.4 of the LDC, the following must be recorded in the deed records of the county:

1. A certified copy of the adopted vacation resolution,
2. Original proof of the one publication of the notice of public hearing,
3. Location maps, survey, legal description or other appropriate data as determined by the Department Director,
4. Original proof of publication of the notice of adoption of the vacation resolution, and
5. Any applicable easements, if required.

Finally, within 45 days after the adoption of the resolution, the applicant must provide staff with a copy of all of the recorded documents. Section 331.4, Manatee County Land Dev. Code. Pursuant to Section 331.5 of the LDC, the vacation becomes effective after the required documents have been filed with the Clerk of the Circuit Court and duly recorded in the Public Records of Manatee County.

Legal Review of Background of Right-of-Way

In general, road right-of-way dedications within Manatee County are maintained and held in trust by the County for the benefit of the public. The plat for the Pomello Park subdivision was recorded in 1926. The face of the plat purports to “dedicate to the use of [the] public forever all of the parks, parkways, streets, alleys, avenues, boulevard[s]

and highways shown. Therefore, the rights-of-way depicted were validly offered as dedicated platted roads. Although no written acceptance by Manatee County of the dedication of these rights-of-way is evident on the face of the plat, I also see no evidence that Manatee County ever objected to the dedication. Aside from the information alleged by the Applicants in email correspondence, no other background on this right-of-way was provided by staff with this RLS.

Compliance with Sections 336.09 and 336.10, Florida Statutes

A written application for vacation has been provided as required by Section 336.10, Florida Statutes. Prior to closing and vacating any road, the Board must hold a public hearing and publish notice of same "one time, in a newspaper of general circulation in [the] county at least 2 weeks prior to" the date of the public hearing. Section 336.10, Florida Statutes. Staff must ensure compliance with this requirement that legal notice of the vacation application is provided to the public.

Compliance with Sections 312 and 331, Manatee County Land Development Code

Based on the documents provided with this RLS, it appears that some, but not all of the relevant and applicable portions of the LDC have been met. While this RLS includes a memorandum from the Director of the Building and Development Services (BADS) Department to the Board recommending that the vacation move forward to a public hearing, it does not contain a "report and recommendation" to the Board as required by Section 312.5.A.5.b. of the LDC. A report and recommendation must be prepared for presentation to the Board.

Section 312 of the LDC requires that the applicants post notice of the public hearing and that the staff person designated by the County Administrator publish notice of the public hearing. In addition, affidavits affirming that the required notices have been made must be filed with staff at least five (5) days prior to the date of the hearing. This matter should not be presented to the Board unless staff is certain that all of the requirements of the LDC relative to posted and published notices have been met.

Although the Board may legally approve a vacation application despite an applicant having unpaid property taxes, the CAO would recommend against approving such an application. This matter should not be presented to the Board if the Applicants' property taxes are delinquent. Although the Applicants provided receipts relative to 2018 taxes, staff should require the Applicants to submit payment receipts from the Manatee County Tax Collector evidencing that the Applicants are not overdue in paying their 2019 property

taxes before this matter is scheduled for consideration by the Board.

Jurisdictional Reviews

This Application was reviewed by numerous entities, both within and outside of County government. The RLS alleges that the only objection to the proposed vacation was from Stormwater Management Division staff. Although that division's objection to the vacation may be valid, despite closely reviewing the emails exchanged between the Applicants and staff, I do not fully comprehend the reasoning behind the objection. It appears that Stormwater Management Division staff oppose the vacation unless the Applicants are willing to grant the County an easement for a ditch. It is unclear where the ditch is in relation to the area to be vacated as that is not fully explained. Staff appears to be concerned about maintaining the free flow of drainage, which is of course a valid concern, but does not explain in sufficient detail how vacating this right-of-way will impede drainage. Ultimately, the reason cited by Stormwater Management Division staff for objecting to the vacation is concerns for future drainage improvements in Cow Pen Slough.

Although Code Enforcement staff voiced no formal objection to the vacation, the Chief Code Enforcement Officer expressed concerns about the impact to future road connectivity and visual access to abutting property for both code enforcement and other agencies. The Applicants responded to the Code Enforcement Department's concerns admitting that there is no visibility, but that once the property is cleared, visibility will not be a problem.

Review of the email correspondence provided with this RLS appears to reveal that BADS Department staff may have initially objected to the vacation application, but that department's formal jurisdictional response was not among the documents provided. Ultimately that department reversed its objection provided the Applicants acquire the minimum five acres in accordance with the LDC such that nonconforming lot size issues will not result. I must caution against staff altering its jurisdictional response based on promises made by applicants. The County cannot and should not condition granting a vacation application upon post-vacation action by an applicant. Similarly, promises made by applicants to take certain action post-approval of a vacation application should not be considered by staff as a part of the jurisdictional review process.

This RLS does not reveal whether County staff intends to recommend approval or denial of the Application. Staff should seek clarification from the County's Chief Code

Enforcement Officer on that department's position relative to the vacation and ask BADS Department staff to provide a jurisdictional response consistent with the above advice. Staff's preparation of a report and recommendation to the Board as required by the LDC should fully flesh out all of the above concerns and issues as well as any responses provided by the Applicants. Ultimately, the Board will have to decide whether closing this road is in the best interest of the public.

Other Observations

It appears that staff has developed a new vacation application form. While I applaud staff's effort to update this form, the instructions on the form relative to taxes should be revised. Staff alleges in the form that a vacation application must include proof that real property taxes have been paid for all abutting parcels to the proposed area to be vacated. This is not consistent with Florida law. Section 177.101, Florida Statutes, requires that for applications which seek to vacate plats in whole or in part, certificates showing that all state and county taxes have been paid is attached to the application. When an application seeks to vacate any portion of a plat, including right-of-way pursuant to a plat, staff should require from the applicant certificates showing that all state and county taxes for both the land in question and any land owned by the applicant has been paid. Staff should revise the vacation application form accordingly.

Conclusion:

At this preliminary stage in the application process, portions of Sections 336.09 and 336.10, Florida Statutes, and Section 331 of the LDC have been met. The Applicants and staff will need to address all of the matters identified above and ensure that the procedures required by the applicable statutes and the LDC are met before this Application proceeds to the Board for consideration. This completes my response to your RLS. Please contact me if you have any questions or if I can be of further assistance.

Copies to:

Cheri Coryea, County Administrator

John Osborne, AICP, Infrastructure and Strategic Planning Official – Deputy
County Administrator

Karen M. Stewart, CECD, Economic Development Official – Deputy County
Administrator

Charlie Bishop, Director, Property Management Department

Charles Meador, Senior Real Property Specialist, Property Management

Joy Leggett-Murphy, Property Acquisition Division Manager

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Department

John Barnott, Director, Building and Development Services Department

Jeffrey Bowman, Chief Code Enforcement Officer, Building and Development Services Department

Suzanne Cook, Planning & Zoning Technician III, Building and Development Services Department

Chad Butzow, P.E., Director, Public Works Department

Tom Gerstenberger, P.E., Engineering Division Manager, Public Works Department

Kenneth Kohn, P.E., Project Engineer II, Public Works Department

Clint Rimer, Field Operations Chief, Public Works Department