



OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

DATE: June 6, 2019

TO: Clarke Davis, Interim Deputy Director, Traffic Management, Public Works Department

THROUGH: Mitchell O. Palmer, County Attorney *MOP 6-7-19*

FROM: Pamela J. D'Agostino, Assistant County Attorney *PJD 6-6-2019*

RE: **Right-of-Way Maintenance Agreement Termination – Conservatory Estates HOA; CAO Matter No. 2019-0053**

Issue Presented:

In this Request for Legal Services (RLS), you have asked the County Attorney's Office (CAO) to review a Maintenance Agreement for Right-of-Way Improvements (Maintenance Agreement) and advise as to the appropriate process to terminate the agreement.

Brief Answer:

I have reviewed the Maintenance Agreement. Although the validity of the Maintenance Agreement is legally questionable, the Board may enter into a separate agreement to formally terminate the Maintenance Agreement. Attached is a form Termination Agreement for staff's use which is legally sufficient to present to the Board. I express no opinion as to the business judgment of entering into this agreement to terminate the Maintenance Agreement. The decision to execute this agreement is a business decision that the Board has the authority to make.

Discussion:

According to this RLS, in 2013, during a routine maintenance inspection, staff noticed that all

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County-installed traffic signs and supports within the community known as Conservatory Estates had been removed and replaced with non-standard decorative traffic signs and supports. After researching the matter, it was discovered that no agreement between the County and the Conservatory Estates Homeowners Association (HOA) had been executed authorizing the removal of the County's signs and supports or the replacement of same with the decorative signs and supports. The then-Director of the Public Works Department (Ron Schulhofer) sent a letter to the HOA advising that if the HOA desired to keep its non-standard decorative traffic signs and supports, the HOA would need to, among other things, enter into a maintenance agreement with the County. On May 1, 2013, the President of the HOA transmitted a signed maintenance agreement to the County along with a site plan and photographs purportedly of the improvements the HOA made to the traffic signs and supports within the HOA boundaries. On May 20, 2013, Mr. Schulhofer executed the agreement.

According to staff, the Board of County Commissioners of Manatee County, Florida (Board) delegated to the Public Works Director the authority to execute maintenance agreements in Resolution R-01-96. Close review of that resolution, however, reveals that the County Administrator or his designee was delegated the authority to execute maintenance agreements. Furthermore, those maintenance agreements were limited to the following improvements: landscaping and associated lighting and irrigation features. Attached to the resolution was a form Maintenance Agreement for Right-of-Way Landscaping. The delegation of authority specifically stated that it was to enter into agreements in substantial conformity with the form agreement. I asked staff to provide any records evidencing that before May 20, 2013, the County Administrator had designated Mr. Schulhofer or the Public Works Director for the purposes of this resolution. Staff was unable to provide any such documentation and instead asserted that staff was operating under the assumption that such a designation was made at some time before 2008.

Staff is cautioned to never assume that authority exists to execute documents on behalf of the Board. Resolution R-01-96 is almost 18 years old and was adopted when the County Administrator was Ernie Padgett. It is unknown whether Mr. Padgett designated anyone to enter into these agreements pursuant to this resolution. Once Mr. Padgett retired and Ed Hunzeker became County Administrator in January of 2007, it is unknown whether Mr. Hunzeker executed any document evidencing that his predecessor's designations were to be considered still effective.

Generally, "a principal is not bound by the acts of his agent when the agent exceeds his authority." *Fla. Dairies Co. v. Rogers*, 161 So. 85 (Fla. 1935). This is true provided that the principal's actions do not lead third parties to reasonably conclude that the agent is acting within his authority. *Id.* and *S. Fla. Elec., Inc. v. Treasures on Bay II Condo Ass'n, Inc.*, 89 So. 3d 264 (Fla. 3d DCA 2012). If the agent is acting within the scope of his apparent authority, even though the acts are not authorized, the principal may be liable. *Bradley v. Waldrop*, 611 So. 2d 31 (Fla. 1st DCA 1992). The United States Supreme Court explained, however, in *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), that:

“ . . . anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.”

If a county employee enters into an agreement on behalf of a county without possessing the requisite authority to do so, the employee’s action is considered ultra vires and is void ab initio. *See Corona Properties of Florida, Inc. v. Monroe County*, 485 So. 2d 1314 (Fla. 3d DCA 1986). Furthermore, governmental entities are generally not liable for ultra vires acts of its officers and agents. *See Town of Palm Beach v. Vlahos*, 15 So. 2d 839 (Fla. 1943).

Staff has not provided sufficient documentation to support that Mr. Schulhofer was authorized to execute this agreement on behalf of the County. Accordingly, it is likely that this agreement is not enforceable. Moving forward, staff should not rely upon Resolution R-01-96 or any other resolution adopted before February 2007 in which the Board delegated specified authority to the County Administrator or his designee. Such resolutions may no longer be valid and action taken in reliance upon those resolutions may be unenforceable and subject the signer to personal liability for ultra vires acts.

Conclusion:

While the validity of the Maintenance Agreement is legally questionable, the Board may enter into a separate agreement to formally terminate it. The attached Termination Agreement can be presented to the Board for consideration. The decision to terminate this Maintenance Agreement is a business decision that the Board has the authority to make. This completes my response to your Request for Legal Services. Please contact me if you have any questions or if I can be of further assistance.

Copies with attachment to:

Cheri Coryea, County Administrator
John Osborne, AICP, Infrastructure and Strategic Planning Official – Deputy
County Administrator
Karen M. Stewart, CECD, Economic Development Official – Acting Deputy County
Administrator
Chad Butzow, P.E., Interim Director, Public Works Department
Aaron Burkett, Traffic Operations Division Manager, Public Works Department
Francisca Backenstross, Senior Administrative Specialist, Public Works Department
William E. Clague, Chief Assistant County Attorney

THIS AGREEMENT PREPARED BY:

Pamela J. D'Agostino, Assistant County Attorney
Manatee County Government
Office of the County Attorney
Post Office Box 1000
Bradenton, Florida 34206

AGREEMENT TO TERMINATE
MAINTENANCE AGREEMENT FOR RIGHT-OF-WAY IMPROVEMENTS

THIS AGREEMENT TO TERMINATE MAINTENANCE AGREEMENT FOR RIGHT-OF-WAY IMPROVEMENTS (hereinafter the **Agreement**) is made and entered into this _____ day of _____, 2019, between **CONSERVATORY ESTATES HOMEOWNERS ASSOCIATION, INC.**, a Florida not for profit corporation, (hereinafter the **Licensee**), and **MANATEE COUNTY**, a political subdivision of the State of Florida, (hereinafter the **County**). Licensee and County are sometimes collectively referred to herein as **Parties** and individually as **Party**.

WHEREAS, the Parties entered into a Maintenance Agreement for Right-of-Way Improvements dated May 20, 2013, as related to the construction and maintenance of improvements installed within certain public right(s)-of-way (hereinafter the **Original Agreement**), a copy of which is attached hereto and incorporated herein as Exhibit 1; and

WHEREAS, the Parties desire to cancel and terminate the Original Agreement.

NOW, THEREFORE, in consideration of the mutual promises made herein, and other good and valuable consideration, the adequacy, sufficiency and receipt of which are hereby acknowledged, the Parties agree as follows:

1. **RECITALS**: The foregoing recitals are true and correct and are incorporated herein by this reference.
2. **CANCELLATION AND TERMINATION**: The Original Agreement is hereby canceled and terminated in its entirety and is null and void and shall be of no further force and effect.
3. **DISCHARGE AND RELEASE**: Both Parties hereby discharge and release the other from any and all obligations and liabilities under the Original Agreement.
4. **EFFECTIVE DATE**: This Agreement shall be effective upon approval by both Parties.
5. **ENTIRE AGREEMENT**: The Agreement constitutes the entire understanding between the Parties with respect to termination of the Original Agreement and is intended to be an integration of all prior negotiations and understandings. This Agreement supersedes all prior negotiations, understandings, representations, or agreements, both written and oral. The Parties shall not be bound by any terms, conditions, statements, warranties, or representations, written or oral, not contained herein.
6. **FLORIDA LAW AND MANATEE COUNTY VENUE**: This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Florida. Venue

for resolution of all disputes, whether by mediation, arbitration, or litigation, shall lie in Manatee County, Florida.

7. **INTERPRETATION:** Neither this Agreement nor any uncertainty or ambiguity in the Agreement shall be construed against Licensee or County, whether under any rule of construction or otherwise. On the contrary, this Agreement shall be construed and interpreted according to the ordinary meaning of the words used so as to accomplish fairly the purposes and intentions of the Parties. The Parties have each carefully read the terms and conditions of this Agreement and know and understand the contents and effect of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the day, month, and year written above.

Signed, sealed, and delivered in the presence of **TWO (2)** witnesses:

LICENSEE:
CONSERVATORY ESTATES
HOMEOWNERS ASSOCIATION, INC.,
a Florida non-profit corporation

First Witness Signature

By: _____
Signature of John Bartley

First Witness Printed Name

As: President

ATTEST: _____
Signature of Secretary
George Schwartz

Second Witness Signature

Second Witness Printed Name

COUNTY:
MANATEE COUNTY, a political
subdivision of the State of Florida

By: its Board of County Commissioners

By: _____
Chairperson

Date: _____

ATTEST: ANGELINA COLONNESO
CLERK OF THE CIRCUIT COURT AND COMPTROLLER

By: _____
Deputy Clerk