



OFFICE OF THE COUNTY ATTORNEY

MITCHELL O. PALMER, COUNTY ATTORNEY*
William E. Clague, Chief Assistant County Attorney
Sarah A. Schenk, Assistant County Attorney**
Christopher M. De Carlo, Assistant County Attorney
Pamela J. D'Agostino, Assistant County Attorney
Anne M. Morris, Assistant County Attorney
Katharine M. Zamboni, Assistant County Attorney
Alexandria C. Nicodemi, Assistant County Attorney

MEMORANDUM

DATE: May 13, 2019

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

THROUGH: Mitchell O. Palmer, County Attorney *MOP 5-13-19*

FROM: Pamela J. D'Agostino, Assistant County Attorney *PJD 5-13-2019*

RE: **Vacation Application V-18-508; Marco of Manatee, Inc., St. Nick's, LLC, and Terra Siesta Co-op, Inc.; Application to Vacate a Portion of Roseland Drive and Pine Street as Shown on the Plat of Rose Park; CAO Matter No. 2019-0169**

Issue Presented:

In this Request for Legal Services (RLS), you have asked the County Attorney's Office (CAO) to review a vacation application.

Brief Answer:

I have reviewed the vacation application. At this 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 this application proceeds through the public hearing process to the Board of County Commissioners of Manatee County, Florida (Board). The decision to vacate these unimproved platted roads is a business decision (legislative in nature) which the Board has the authority to make.

Recommendation:

Staff should confirm that no property will be landlocked if these rights-of-way are vacated. If the

* Board Certified in Construction Law

** Board Certified in City, County, & Local Government Law

vacation of a street 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:

Marco of Manatee, Inc. (Marco), St. Nick’s LLC (St. Nick’s), and Terra Siesta Co-Op, Inc. (Terra) (collectively, the Applicants) are requesting the Board vacate portions of two platted unimproved rights-of-way, specifically Roseland Drive and Pine Street. Both rights-of-way were dedicated to the public in 1925. Roseland Drive is sixty feet wide and Pine Street is fifty feet wide. The Applicants allege that people with no legitimate purpose are using these rights-of-way to access the adjacent property without permission from the adjacent property owners and to commit vandalism. The Applicants seek vacation of these rights-of-way to stop these individuals from trespassing on their adjacent property and to expand their respective properties. The total area proposed to be vacated for these two rights-of-way is 23,760 square feet (.5 acres) in size.

Discussion:

1. Authority to Vacate Platted 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*.

(Emphasis added.)

2. *Procedure for Vacation of Platted Road Right-of-Way*

a. *Sections 336.09 and 336.10, Florida Statutes*

In addition to providing the authority to vacate maintained road right-of-way, Sections 336.09 and 336.10, Florida Statutes, also provide the procedure for vacating platted road right-of-way. According to Section 336.10, an applicant who requests that the Board vacate any right or interest in land must make such a request in writing. Section 336.09 states that 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].” 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:

- 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:
 - i. “proof of publication of notice of [the] public hearing,”
 - ii. “the resolution as adopted,” and
 - iii. “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.

b. 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 (1) 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 forty-five (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.

3. *Legal Review of Current Vacation Application*

a. *Background of Right-of-Way*

On December 15, 1925, the Rose Park subdivision plat was filed in Plat Book 4, Page 96, of the Public Records of Manatee County, Florida. The face of the plat states that the “parkways, streets, alleys, avenues, boulevards and highways shown” are “dedicate[d] to the use of the public.” Furthermore, the plat appears to have been properly received and accepted by the Board through its accredited representatives in accordance with Chapter 10275, Laws of Fla. (1925) and a resolution adopted by the Board on September 9, 1925.

Staff has not provided much information within this RLS as to the background of the right-of-way sought to be vacated. This memorandum and the opinions expressed herein are premised upon the assumption that the information provided by the Applicants providing their reasons and justification supporting the vacation request is accurate.

b. *Compliance with Sections 336.09 and 336.10, Florida Statutes*

In review of the subject application, the Applicants provided a written application for vacation in compliance with Section 336.10, Florida Statutes. Staff should closely scrutinize the vacation application to ensure it complies with the Information and Requirements for Vacating Plats, Rights-of-Way and Public Easements and to ensure that all of the Application Filing Requirements have been met. In particular, staff should review whether (1) the Applicants have provided sufficient evidence certifying their fee interest ownership, (2) whether the Applicants should provide a list and mailing labels for adjacent properties lying within 250 feet, (3) whether the Applicants must demonstrate that property taxes and assessments are current and provide receipts of tax payments, and (4) whether to require St. Nick’s and Terra to amend their respective portions of the application so that the signatures of their respective authorized representatives are properly witnessed by two individuals.

If an applicant provides an ownership and encumbrance report, that report must be dated no more than six months prior to the filing date of an application which has met all filing requirements. The Applicants’ application appears to have been hand-delivered on July 2, 2018, and contains ownership and encumbrance reports dated June of 2018. If staff determines that not all filing requirements have been met, the Applicants will need to submit new ownership and encumbrance

reports dated no more than six months prior to the filing date of an application which has met all filing requirements.

It appears that Terra may not have legal authority to sign the application as an owner pursuant to Section 719.1055, Florida Statutes. Specifically, for a cooperative to acquire real property two-thirds of the total voting interests of the cooperative must approve of such action, unless the cooperative's documents provide for a lower number and provided the cooperative's articles of incorporation or bylaws do not prohibit such action. It is clear that the Applicants anticipate that Terra will acquire at least some portion of the area proposed to be vacated. Accordingly, Terra should be required to comply with the requirements of Section 719.1055, Florida Statutes.

Prior to vacation, 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.

c. 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 Building and Development Services 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. Staff must prepare a report and recommendation for presentation to the Board. The applicants have paid the \$200 application fee, but it does not appear that all the minimum vacation application requirements have been met. Property Acquisition Division staff noticed that St. Nick's has unpaid property taxes.

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.

d. Other Considerations

This application was reviewed by twenty-three (23) reviewing entities, both within and outside of County government. All but two (2) responded indicating their lack of objection to the vacation application. The Transportation Planning Division originally responded recommending that these areas not be vacated and Public Works staff advised that a drainage easement was needed. Transportation Planning Division and Public Works staff subsequently met with a representative

for the Applicants and their counsel to address these outstanding concerns. Public Works staff has concluded that its concerns will be satisfied if Marco and St. Nick's execute a document entitled Declaration of Limited Joint Access and Cross Easements (Declaration) prior to or concurrent with the Board adopting a resolution approving the vacation. According to staff, a twenty (20) foot wide drainage easement is still needed, but the Applicants have not provided any legal description and sketch nor has any easement deed been presented to staff for consideration or review. Public Works staff purports that Pine Street conveys public runoff and runoff from an adjacent property, but it is unclear whether the easement is needed within Pine Street, Roseland Drive or both. I also question whether the response from the Manatee County Sheriff's Office (MCSO) should be relied upon by staff. The MCSO representative advised that there was "no objection to the easement vacation request." Staff should clarify with MCSO personnel that the application proposed to vacate right-of-way, not an easement.

I must caution against staff considering anything contained within the Declaration in its consideration as to whether to object to or recommend approval of the proposed vacation application. Based on my limited review of the Declaration, I gleaned the following:

- It is an agreement between two (2) of the Applicants, specifically Marco and St. Nick's;
- It contains information which is factually incorrect;
- It contains conclusions of law and opinions of title which the CAO either disagrees with or cannot endorse;
- It purports that Manatee County requires that certain permanent restrictions and easements be imposed on private property as a condition of approval of the vacation application, including:
 - o Restricted access to U.S. 301 (a state road);
 - o Reciprocal access easements between Marco and St. Nick's; and
 - o Private drainage easements to accommodate historical drainage patterns and future drainage.

As the Declaration is a private agreement between two of the Applicants, it can be modified or terminated by agreement of those parties. For the reasons explained above, I cannot support presenting this vacation application to the Board for consideration if staff's approval of the vacation application is conditioned upon the Declaration being executed.

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. The decision to vacate these rights-of-way is a business decision (legislative in

Joy Leggett Murphy, Property Acquisition Division Manager, Property Management Department
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nature) which the Board has the authority to make. 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, Acting County Administrator
John Osborne, AICP, Infrastructure and Strategic Planning Official – Deputy
County Administrator
Karen M. Stewart, CECD, Economic Development Official – Acting Deputy County
Administrator
Charles Bishop, Director, Property Management Department
Charles Meador, Real Property Specialist, Property Management Department
Chad Butzow, Interim Director, Public Works Department
Clarke Davis, Transportation Planning Division Manager, Public Works Department
Kenneth Kohn, Project Engineer II, Public Works Department
John Barnott, Director, Building and Development Services Department