

Memo

To: Mayor Moore and Town Council Members
Cc: Kirk Blouin, Town Manager
From: Joanne M. O'Connor
Date: August 30, 2024
Re: Litigation Status Report – September 2024

This report provides a brief summary of litigation against the Town that is pending as of June 1, 2024 and that concluded in the preceding quarter.

PENDING LITIGATION

1. Paramount Litigation

WEG Paramount LLC has challenged the Town Council's July 15, 2024 Development Order denying its application for Special Exceptions with Site Plan Review by invoking an alternative dispute resolution process available under the Florida Land Use and Environmental Resolution Act, Fla. Stat. 70.51 ("FLUEDRA"), a part of the Bert Harris Act. FLUEDRA has been in effect for 15 years. It operates under the guidance of a special magistrate in a two-stage process by which the special magistrate (1) acts as a mediator charged with facilitating a resolution between the property owner and the government entity and (2) acts more like an administrative law judge who holds a public hearing(s) and then issues recommended findings of fact and conclusions of law that the developer and the Town can ultimately accept, modify or reject. The process may not continue longer than 165 days, unless the parties agree otherwise.

The Town's response to the developer's Request for Relief will be forthcoming, as is the identity of the Special Magistrate. The Town has liberally construed the notice requirements under



FLUEDRA. It has already given notice to adjacent property owners and notice will issue to others who objected at hearings or in writing early next week.

FLUEDRA tolls the time for the developer to pursue litigation against the Town. WEG Paramount LLC filed a “Protective Petition for Certiorari” against the Town appealing the Town Council’s decision. That Petition has been stayed by order of the Court and agreement of the parties.

2. Simon Taylor Public Records Act Litigation

- a. ***Simon Taylor v Town of Palm Beach, et al.***, Case No: 502024CA004376XXXXAMB AH (15th Jud. Cir. in and for Palm Beach Cnty, Fla.).
- b. ***Simon Taylor v Town of Palm Beach, et al.***, Case No: 502024CA004394XXXXAMB AF (15th Jud. Cir. in and for Palm Beach Cnty, Fla.).

At the beginning of August, the Town was served with two Public Records Act lawsuits brought by Simon Taylor. These cases arise out of public records requests made by Mr. Taylor for records concerning the Royal Poinciana Playhouse and Mar-a-Lago. The Town charged Mr. Taylor fees to produce the voluminous records sought, as the Public Records Act permits. He declined to pay any of those fees yet has sued the Town for unlawful refusal to produce records. The Town’s initial responses to these lawsuits are due on September 5 and 9.

3. Form 6 Litigation

By Resolution 005-2024, the Town Council authorized participation by the Town and any elected officials that wished to participate in lawsuits seeking a declaration that the provisions of Section § 112.144(1)(d), Florida Statutes that require municipal elected officials to file Form 6 financial disclosure forms is unconstitutional and invalid. The Town, Mayor Moore and all the Town Council members have elected to participate. The law firm of Weiss Serota Helfman Cole & Bierman has filed two separate lawsuits against the members of the Florida Commission on Ethics, which is the agency charged with implementing and enforcing the State’s financial disclosure laws:

- a. **The Federal Form 6 Suit: *Loper v. Lukis***, Case No. 1:24-cv-20604 (S.D. Fla.). This suit is brought only on behalf of the elected officials, asserting that the Form 6 requirement compels content-based, non-commercial speech in violation of the First Amendment to the United States Constitution.

On June 10, 2024, after an evidentiary hearing in April, U.S. District Judge Melissa Damian preliminarily enjoined the operation of the Form 6 requirement set forth in SB 774 until otherwise ordered.

- b. **The State Form 6 Suit: *Loper v. Lukis***, filed in the Circuit Court of the Second Judicial Circuit in and for Leon County, Fla. This suit is brought on behalf of the municipalities and elected officials, asserting that the Form 6 requirement violates the right to privacy under the Florida Constitution. A motion to dismiss the lawsuit and that motion is pending.

4. Midtown Beach: Private Property Rights Challenges.

a. ***George A. Cloutier, Tiffany Dawn Cloutier v Town of Palm Beach***, Case No: 502022CA003744XXXXMB AN (15th Jud. Cir. in and for Palm Beach Cnty, Fla.).

b. ***The Condominium Association of Ocean Towers, Inc. and Warden House Association, Inc. v Town of Palm Beach***, Case No: 502022CA005042XXXXMB AO (15th Jud. Cir. in and for Palm Beach Cnty, Fla.)

Residents who own oceanfront property between Sunrise Avenue and Wells Road sued the Town in 2022. These residents own parcels that encompass a portion of the dry sand beach upland of the Erosion Control Line ("ECL") that was recorded on January 7, 2003 (the State holds title to land seaward of the ECL).

Plaintiffs ask the Circuit Court to declare their respective property rights in the beach areas and their ability to post the boundaries of their private beach areas with post and rope and "no trespassing" signs. They have also alleged that the Town's failure to enforce trespass ordinances—including as to persons using their beach areas for traditional beach uses, such as sunbathing and dog walking—constitutes a temporary "taking" of their property without compensation.

The Town has asserted numerous defenses, including that the additional sand added to Plaintiffs' private beach areas upland of the ECL following publicly funded beach renourishments are "subject to a public easement for traditional uses of the sandy beach" pursuant to Florida law. Fla. Stat. § 161.141.

Following a three-hour hearing before Judge Scott Kerner on July 9, Judge Kerner denied Plaintiffs' motions for summary judgment against the Town. The Town's responses to those motions were supported by extensive testimony from current and former residents and from Town staff. The Town sought judgment in its favor on the takings claim, which the Court also denied. The case will therefore proceed to a non-jury trial. The parties have jointly moved to extend pretrial and trial deadlines and to consolidated the cases for trial. Trial is anticipated on the court docket that runs from March 10, 2025 through May 2, 2025.

5. ***State of Florida ex rel. Virginia E. Dadey, Gregory J. Englesbe and Peter Kaupe v Town of Palm Beach***, Case No: 502022CA008479XXXXMB AI (15th Jud. Cir. in and for Palm Beach Cnty, Fla.). Town residents in the 200 Block of Atlantic Avenue challenge the status of the beach access at the east end of Atlantic Avenue. Certain owners in the 100 Block of Atlantic Avenue asserted a private ownership right to the access point based on a recorded plat. In December 2020, the Town publicly announced that it agreed with this determination. The 100 Block owners have locked the access at Atlantic Avenue.

Plaintiffs bring two-counts: (1) a claim to abate a purported public nuisance (the gate and any other obstructions of the access); and (2) a claim that the Town has violated the Public Records Act. As to the first claim, Plaintiffs rely on a statute that provides for dedication of public roadways to

assert that title to the beach access became vested in the Town. The Town has asserted numerous defenses, including that Plaintiffs failed to join the 100 Block owners, who are indispensable parties.

The Town recently filed its motion for summary judgment on Count I and will be setting that motion for hearing. Plaintiffs did not cross-move for summary judgment. The case will be determined by the Court, either at summary judgment or a non-jury trial. No trial date has been set.

6. *Robert F. Greenhill v. Town of Palm Beach*, Case No. 502023CA002478 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division): This appeal filed by Mr. Greenhill challenges the designation of his property at 686 Island Drive as a historic landmark.

As of September 14, 2023, this matter has been fully briefed and awaiting a decision from the circuit court appellate division.

7. *Thomas O. McCarthy v. Town of Palm Beach*, Case No. 502023CA012789 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division): This is an appeal by neighbors challenging the Town's grant of variances to permit the rehabilitation of a two-story accessory structure designated as a historically significant building to be raised 16 inches and to increase the first-floor ceiling height from 7 to 8 feet.

As of October 20, 2023, this matter has been fully briefed and awaits a decision from the circuit court appellate division.

CONCLUDED LITIGATION

1. Alef Preschool Challenges

a. *Palm Beach Biltmore Condo. Ass'n v. Town of Palm Beach, Biltmore Galleria, LLC and Alef Preschool of Palm Beach, Inc.*, Case No. 22-012348 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division)

b. *Parc Regent Condom. Ass'n, Inc., Linda Landis, Jamie Stern, Steven Brown and Judith Berkowitz v. Town of Palm Beach, Biltmore Galleria, LLC and Alef Preschool of Palm Beach, Inc.*, Case No. 22-012330 (15th Jud. Cir. in and for Palm Beach Cnty., Fla.) (Appellate Division)

On June 12, 2024, the Circuit Court Appellate division denied the Petitions for Certiorari that challenged the Town Council's grant of a parking variance and approval of a site plan and special exception to permit the preschool project. Petitioners did not seek further review from the Fourth District Court of Appeal. This matter is now concluded in the Town's favor.