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IN THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT IN
AND FOR COLLIER COUNTY, FLORIDA
CIVIL ACTION

3472475 OR: 3640 PG: 3292
RECORDED in OFFICIAL RECORDS of COLLIER COUNTY, FL
09/13/2004 at 09:17AM DWIGHT E. BROCK, CLERK
REC FEE 18.50

Retn:
CIVIL

LELY BAREFOOT BEACH PROPERTY
OWNERS ASSOCIATION, INC., a Florida
corporation, and LELY BAREFOOT
BEACH MASTER ASSOCIATION, INC.,
a Florida corporation,

Plaintiffs,

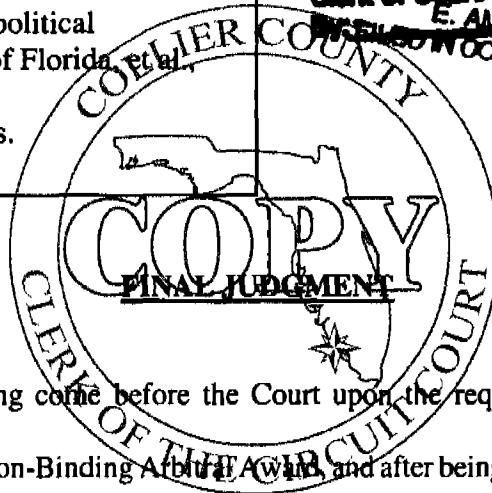
v.

COLLIER COUNTY, a political
subdivision of the State of Florida,

Defendants.

CASE NO. 95-0073-CA-01

Filed in Open Court
Date: 9/11/04
Clerk of Court
E. AMERSON, J.C.
RECEIVED IN COMPUTER



THIS CAUSE having come before the Court upon the request for the entry of a Final Judgment confirming the Non-Binding Arbitral Award, and after being fully advised in the premises, the Court finds as follows:

1. A Non-Binding Arbitration was held in this cause.
2. The Arbitrator served a Non-Binding Arbitral Award to the parties on June 7, 2004.
3. The Non-Binding Arbitral Award was filed under seal with the Clerk of this Court on June 11, 2004.
4. Pursuant to Fla. R. Civ. P. 1.820(h) a Motion for Trial De Novo was to be filed in this cause on or before June 28, 2004.

5. No party to this action filed a Motion for Trial De Novo, and therefore, this court is required to enter any and all such orders and judgments as may be required to carry out the terms of the decision.

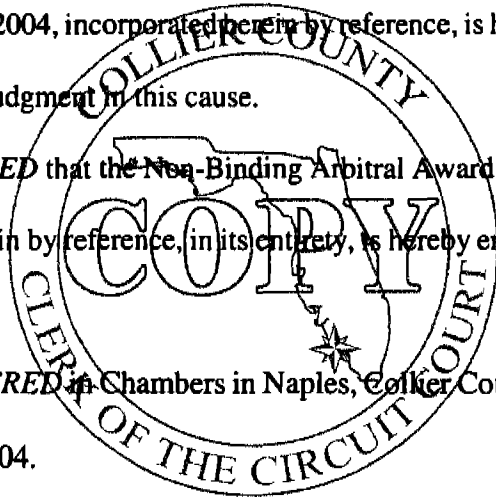
THEREFORE, IT IS:

ORDERED AND ADJUDGED that the Decision of the Arbitrator filed in this cause on June 11, 2004 shall be unsealed by the Clerk of Court, and be maintained by the Clerk of this Court as part of the public record.

FURTHER ORDERED that the Non-Binding Arbitral Award dated June 7, 2004, as filed with this Court on June 11, 2004, incorporated herein by reference, is hereby confirmed and adopted by this Court as the Final Judgment in this cause.

FURTHER ORDERED that the Non-Binding Arbitral Award filed with this Court on June 11, 2004, incorporated herein by reference, in its entirety, is hereby entered as the judgment of this Court.

DONE AND ORDERED in Chambers in Naples, Collier County, Florida on this 01 day of September, 2004.



Hugh D. Hayes
Honorable Hugh D. Hayes
Circuit Court Judge

EA 9/1/04
Conformed copies to:
✓ William J. Hazzard, Esq.
✓ Jason Korn, Esq.
✓ Monica Reimer, Esq.
✓ William Mountford, Esq.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

July 22, 2004

CASE NO.: 2D04-2291
L.T. No. : 95-0073 CA 01

The Attorney General,

v. Lely Barefoot Beach
Property Owners Assoc.

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Pursuant to the notice of voluntary dismissal filed herein, this appeal is dismissed.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Served:

William E. Mountford, Esq.

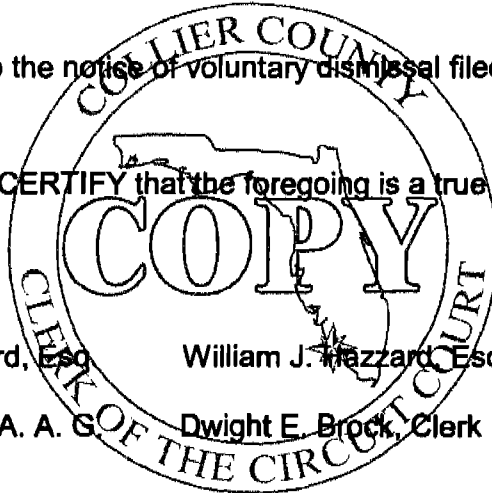
William J. Hazzard, Esq.

Jason Hunter Korn, Esq.

Monica K. Reimer, A. A. G.

Dwight E. Brock, Clerk

me



James Birkhold
James Birkhold
Clerk

270Pg1567

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BY _____ D.C.
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*** 3447180 OR: 3613 PG: 2371 ***
RECORDED In the OFFICIAL RECORDS of COLLIER COUNTY, FL
07/27/2004 at 11:16AM DWIGHT E. BROCK, CLERK

Re: CIVIL

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA, CIVIL ACTION

LELY BAREFOOT BEACH PROPERTY
OWNERS ASSOCIATION, INC., a Florida
Corporation, and LELY BAREFOOT BEACH
MASTER ASSOCIATION, INC., a Florida
Corporation,

Plaintiffs,

vs.

CASE NO.: 95-0073-CA-HDH

COLLIER COUNTY, a political
Subdivision of the state of Florida

Defendant,

ROBERT A BUTTERWORTH, in his
Official capacity as Attorney General
For the State of Florida, and on
Behalf of the BOARD OF TRUSTEES
OF THE INTERNAL IMPROVEMENT
TRUST FUND

Defendants/Intervenors.

**NON-BINDING ARBITRAL
AWARD**

This is an action brought by Lely Barefoot Beach Property Owners Association, Inc. and Lely Barefoot Beach Master Association, Inc. ("Homeowners"), in a three count verified complaint against Collier County ("the County"), seeking a declaratory judgment. The Circuit Court has granted summary final judgment in favor of Homeowners on Count I, leaving only Counts II and III for consideration in this proceeding.

The County answered the Complaint, raised affirmative defenses and counterclaimed against Homeowners. Although Homeowners have filed a motion for summary judgment as to the Counterclaim, the undersigned has been advised that the Circuit Court has not yet ruled on that motion and thus the Counterclaim is also a part of this proceeding.

Shortly after the filing of the verified complaint, the State of Florida moved to intervene. The motion was granted and the State filed an Answer, "Counterclaim" (actually a Complaint in Intervention) and Cross-Claim against the County. Since then, the Circuit Court has granted summary final judgment in favor of homeowners and against the State as concerns the Complaint in Intervention.¹

Homeowners answered the Complaint in Intervention, raised affirmative defenses and counterclaimed against the State. That Counterclaim is also a part of this proceeding.

BACKGROUND

The temporal scope of this case is numbing in its enormity, encompassing a time frame of over 20 years. At a hearing conducted on November 6, 2003, the parties agreed to make an effort to reach a stipulated statement of facts. After many efforts to do so, they were unable to stipulate and ultimately submitted an encyclopedic factual statement which is attached hereto as Tab A of the Appendix .

The factual basis for the conclusions expressed below is to be found in the

¹ The State has further indicated that it is withdrawing its cross-claim against the County from consideration in this proceeding.

factual statement found in Tab A, as well as the numerous exhibits introduced into evidence during these proceedings.

At the heart of this dispute is the Homeowners' maintenance and operation of a guardhouse at the entrance to the property in question which both the County and the State claim impedes and interferes with their respective, valid easements over the Road.

THE VERIFIED COMPLAINT

Counts II and III

Count II of Homeowners' Verified Complaint asks the Court to force the County to fulfill its obligations (as perceived by Homeowners) under the Option Agreement and Use/Access Agreement to close general public vehicular access to the private road when the County's parking lot at the park reaches capacity and generally to operate as it agreed to do under those contracts.

In Count III, the Homeowners seek to force the County to limit the amount of parking at its park, as Homeowners suggest the County agreed to do under the Option Agreement and Use/Access Agreement when it bought its land. A review of the pertinent parts of the two agreements at issue follows.

The Option Agreement²

The Option Agreement, dated June 23, 1987, was entered into between the Lely Development Corporation ("seller") and the Board of County Commissioners of Collier County, Florida ("board"), and set forth the terms and conditions for the

² A copy of the Option Agreement is attached at Tab B of the Appendix.

purchase of a portion of Lely Barefoot Beach. In addition to the purchase price, the Option Agreement contained the following language, pertinent to this lawsuit:

5. Access to and Use of Property. SELLER will grant a permanent, access easement over said land described in Exhibit "C," attached hereto and made a part hereof. Further, SELLER will cause a permanent, access easement to be given to BOARD over and on the existing roadway known as Lely Beach Boulevard as shown on the plat of Lely Barefoot Beach Unit 1, Plat Book 12, Pages 34 through 37; provided, however, said easement shall not extend to other streets shown on said plat. At closing, SELLER and BOARD will enter into a Use/Access Agreement . . . (Emphasis added).

The remainder of the agreement, as pertinent here, speaks to the execution of a Use/Access Agreement at the time of closing and lists the provisions to be contained within the Use/Access Agreement.

The Use/Access Agreement³

As per the Option Agreement, Lely Development Corporation and the Board entered into the Use/Access Agreement on November 10, 1987. In pertinent part, this Agreement reads as follows:

Whereas, the Board has exercised its option pursuant to the terms of the Option Agreement.

In consideration of the payment of TEN (\$10.00) Dollars by Board to Seller, receipt of which is hereby acknowledged, and in further consideration of the mutual covenants set forth below and other good and valuable consideration, the parties agree as follows:

2. Seller guarantees the Board permanent, unrestricted legal access to Property, including the right to use any road now or hereafter constructed within said easement.
5. All access rights granted to the Board shall benefit the general public and shall not be restricted in any way.

³ A copy of the Use/Access Agreement is attached at Tab C of the Appendix.

6. Board Agrees to limit use of Property and road by the general public in accordance with regular County operating procedures for parks and recreational facilities.

7. ***Board agrees to limit the total number of parking spaces to be constructed for the general public on Property consistent with current County construction and design codes and standards.***

8. ***Board agrees that standard operating procedures of recreational activities occurring on Property will include limiting the number of vehicles accessing the Property to the number of actual parking spaces located on the property. If parking becomes full at any time, access to the Property will temporarily be closed at the intersection of Bonita Beach Road at the entrance to Lely Barefoot Beach subdivision until such time as parking spaces become available. Upon request of the Park Superintendent or representative, Seller, or its assigns, shall have the right to stop access to Property when parking lot is full.*** (Emphasis added).

As concerns Counts II and III, the County correctly argues that the Homeowners are judicially estopped from asserting that they have the right to avail themselves of these conditions which will restrict access to the park because they took the diametrically opposite position before the Code Enforcement Board ("CEB") in successfully defending against the County's Notice of Violation. The Notice of Violation was issued by County code enforcement officials and charged that the guardhouse violated several sections of the County's Land Development Code by violating the Lely Barefoot Beach Planned Unit Development ordinance and by improperly restricting public access to a County and State Park.

The doctrine of judicial estoppel is used "to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial,

proceedings.” Blumberg v. USAA Casualty Insurance Company, 790 So. 2d 1061, 1066 (Fla. 2001), quoting Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998). “The doctrine prevents parties from ‘making a mockery of justice by inconsistent pleadings,” Blumberg, 790 So. 2d at 1066, quoting American Nat’l Bank v. Federal Deposit Ins. Corp., 710 F. 2d 1528, 1536 (11th Cir. 1983), “and ‘playing fast and loose with the courts.” Blumberg, 790 So. 2d at 1066, quoting Russell v. Rolfs, 893 F. 2d 1033, 1037 (9th Cir. 1990). As indicated by the Florida Supreme Court, the doctrine contemplates positions taken in judicial and quasi-judicial proceedings. Thus, even if the proceeding before the CEB was quasi-judicial in nature, the legal position taken by the Homeowners in that proceeding, that the operation of the guardhouse in no way impedes or interferes with the County’s easement because the public’s ingress and egress from the property is completely unimpeded during the County Park’s operating hours, estops them from taking a diametrically contrary one in this proceeding. Moreover, the Homeowners’ motion for summary judgment on Count I of their Complaint relied heavily on the CEB’s findings in their favor and concluded by arguing to the trial judge that the CEB’s quasi-judicial determination and the Circuit Court’s affirmance of the same (while sitting in its appellate capacity), bound the court to grant summary judgment on Count I. Had Homeowners asserted the position they take in this proceeding as concerns Counts II and III before the CEB, it is entirely possible, indeed - probable, that they would not have prevailed in that forum. The undersigned finds that the Homeowners are judicially estopped from raising the arguments they now raise as

to Counts II and III, and that the County is entitled to judgment in their favor as to these two counts of the Verified Complaint.

**THE COUNTY'S COUNTERCLAIM
AS CONCERNS THE GUARDHOUSE**

The bulk of the parties' efforts in this proceeding have been directed at the allegations contained within Count I of the Verified Complaint. Although the Circuit Court has granted summary final judgment on that Count, the County's Counterclaim addresses the issue of the guardhouse being an impediment and obstruction on its easement and must therefore be addressed here.

Paragraph 5 of the County's Counterclaim asserts "that the location of the guardhouse in the middle of the road over which Defendant County has the easement impedes and interferes with the "full and free right and liberty" of Defendant County and the general public to pass and repass along the Road to County and State Preserve lands."

Paragraph 7 also addresses this subject and says that, "[t]he existence of the guardhouse constructed by Plaintiffs as well as Plaintiffs' demands to restrict access along the road at certain times during open park hours unduly burden the County's easement and interfere with the County's rights for public access to the Preserve lands along the Road pursuant to the easement. Defendant County, as a political subdivision of the State of Florida, has a responsibility to the public to ensure unrestricted access to public lands during open park hours. Any interference by Plaintiffs with said access rights of the public causes substantial ongoing and irreparable harm to the public and the County."

Any effort to seek to reconcile every aspect of the tortured history of this case; every significant event; every piece of correspondence exchanged by the parties; every legal memorandum; and every legal and/or public document with every argument made by counsel in support of his or her client's interest would result in a non-binding arbitral award of enormous dimensions. It is necessary, therefore, to narrow this analysis to those facts that can properly be viewed as dispositive of the issues in this proceeding.

In order to accomplish this it is essential to begin with the undeniable reality that the County has a valid easement over the property in question.⁴ The County's argument that it's easement is valid either under the doctrine of after acquired title, see Murray v. Newsome, 149 So. 2d 387 (Fla. 1933); Daniel v. Sherrell, 48 So. 2d 736 (Fla. 1950); or, as an easement by way of necessity, see Hynes v. City of Lakeland, 451 So. 2d 505 (Fla. 2d DCA 1984), is persuasive.⁵

The County is also persuasive when it argues that the trial court's entry of summary final judgment on Count I of the Verified Complaint did not address the County's easement and consequently the County is not collaterally estopped from claiming it has a valid easement.

In Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906 (Fla. 1995), the Florida Supreme Court explained that

⁴ A copy of the County's right of way easement is contained in Tab D of the Appendix.

⁵ The undersigned reaches no conclusion on the County's argument that it also has an easement by virtue of the application of equitable estoppel.

Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from re-litigating the same issues that have already been decided. The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a context which results in a final decision of a court of competent jurisdiction. The courts have emphasized that collateral estoppel precludes re-litigation of issues *actually litigated* in a prior proceeding. (Emphasis in original).

See also Mobil Oil Corp. v. Shevin, 354 So. 2d 372, 374 (Fla. 1977); Hochstadt v. Orange Broadcast, 588 So. 2d 51 (Fla. 3d DCA 1991).

In checklist fashion, the Second District Court of Appeal in Hold v. Brown's Repair Service, Inc., 780 So. 2d 180 (Fla. 2d DCA 2001), said that for collateral estoppel to apply, [1] "an identical issue must be presented in a prior proceeding, [2] "the issue must have been a critical and necessary part of the prior determination; [3] there must have been a full and fair opportunity to litigate that issue;" [4] "the parties in the two proceedings must be identical;" and [5] the issues must have been actually litigated." One need look no further than the fifth requirement to decide this issue. Neither the Code Enforcement Board nor the Circuit Court adjudicated the validity of the County's easement.

Having established that the County has a valid easement, the next question is whether the existence of the guardhouse constructed by the Homeowners unduly burdens that easement. The evidence in this case is overwhelming that the guardhouse does not impede or interfere with the public's rights of ingress and egress over the public easement.

On November 6, 2003, the undersigned was escorted by counsel for the respective parties to a site visit of the entire area in question. As pertinent to the

issue being discussed, the inspection revealed that the guardhouse has an ample roadway on either side. The roadway that allows entry has two lanes and allows two cars to comfortably travel next to each other. During daytime, there is no obstruction of any kind for either lane, although it is clear that the lane closest to the guardhouse (the left lane) has a device intended for the use of a gate which can be lowered and raised but which does not obstruct free passage through the gate. The lane more distant from the guardhouse (the right lane) has no such device and provides free access to those visiting the public property.⁶ Having thoroughly and carefully observed the physical layout and further observed traffic at that spot - albeit for a short time - it is clear to the undersigned that the existing guardhouse in no way interferes with the County's easement. These observations are entirely consistent with the overwhelming amount of evidence presented in this proceeding and before the CEB.

As concerns the allegations contained in paragraphs 6 and 7 of the County's counterclaim, that Homeowners seek to restrict public access by determining the number of parking spaces that can exist on the County's property or by restricting access along the road at certain times during park hours, the undersigned finds, consistent with the ruling on Counts II and III of the Verified Complaint, that the County prevails on this aspect of its counterclaim.

⁶ Just to the right of the right lane there is a sign which reads: "ALL PARK VISITORS SHALL PROCEED DIRECTLY TO PRESERVE WITHOUT STOPPING."

**THE HOMEOWNERS' COUNTERCLAIM
AGAINST THE STATE OF FLORIDA**

The State's Complaint in Intervention is no longer at issue since the trial court entered summary final judgment in favor of Homeowners.

In response to the State's Complaint in Intervention, Homeowners answered, asserted affirmative defenses and, as relevant here, counterclaimed. The Counterclaim contains three counts. Count I seeks a declaratory judgment and further relief concerning the terms and conditions of the State's purported easement across Lely Barefoot Beach Property Owners Association, Inc.'s ("POA") land. Count I asserts that the Homeowners' operation of the guardhouse is consistent with any rights of ingress or egress the state might have over the road.

Count II seeks a declaratory judgment concerning a document known as the Land Management Plan for Barefoot Beach County Park ("LMP"). This document was created and entered into by and between the County and the State, and, the argument goes, these government entities seek to impose its provisions upon Homeowners. The Homeowners seek a judgment declaring that the provisions of the LMP have no effect on them.

Count III is an action to vacate an easement over Homeowners' land. Homeowners allege that the original purpose for the easement was to allow the state access to its land which was designated as a preserve at the time the easement was granted. Homeowners further allege that since the easement was granted, the state has substantially altered its use of the land in such a way that it now attracts significantly greater numbers of visitors. The greater traffic over the

easement, Homeowners claim, constitutes a surcharge upon the easement and an abuse of the easement.

As concerns Count I of the Homeowner's Counterclaim, the undersigned finds that like the County, the State of Florida has a valid easement through the area in question.⁷ As with the County, for the reasons set forth in detail above describing the guardhouse's method of operation, the undersigned finds that the State's right of ingress and egress over its easement are in no way impeded or interfered with by the guardhouse. The analysis of Count I cannot end here, however, because Count I seeks more than this simple declaration.

Paragraph 7 of Count I reads as follows: "Homeowners assert the right to operate a guardhouse and ***to stop all persons entering the Road to ascertain their purpose for entering upon private property*** and to provide all necessary assistance to those who do not enter with the purpose of utilizing the State's purported easement rights." (Emphasis added). Homeowners' prayer for relief in Count I seeks the following: "Homeowners demand judgment declaring that they are entitled to maintain and operate a guardhouse on their property, ***and to stop all persons entering the road at the guardhouse to ascertain the purpose for which they enter onto the Homeowners' private property or, alternatively, that the State must provide a method by which Homeowners can identify those persons entering the Road as assignees of the State without stopping such persons.***" (Emphasis added). The initial relief sought is appropriate and

⁷ A copy of the State's easement agreement with the Lely Development Corporation is contained within Tab E of the Appendix.

Homeowners are entitled to maintain and operate the existing guardhouse in the manner that it is presently being operated. However, the very same principles of judicial estoppel that doom Homeowners' position in Counts II and III of their verified complaint as against the County, preclude Homeowners from asserting the position that they are entitled to stop **all** persons entering the property as against the State, a position that is diametrically contrary to that taken before the CEB.

The State's reliance on the doctrine of judicial estoppel in response to Homeowners' suggestion that they are free to stop all persons at the guardhouse is meritorious, even though the State was not a party to the CEB proceeding. In Blumberg, the Supreme Court stated that although judicial estoppel ordinarily requires mutuality of parties, there are exceptions to that requirement. The Court approvingly quoted from West v. Kawasaki Motors Mfg. Corp., 595 So. 2d 92, 94 (Fla. 3d DCA 1992), where the District Court said: "Florida courts have on occasion recognized exceptions to the identity of parties requirement under the res judicata or collateral estoppel doctrines where special fairness or policy considerations appear to compel it." See also Zeidwig v. Ward, 548 So. 2d 209 (Fla. 1989)(allowing defendant lawyer in malpractice suit to assert defense of collateral estoppel based on prior criminal judgment even though he was not a party to the post-judgment criminal proceeding). The Supreme Court went on to say: "[w]e see no reason why this exception should not be extended to the doctrine of judicial estoppel. Further, we find that special fairness and policy considerations compel the exception in this case." The undersigned similarly finds that fairness and sound policy considerations compel the application of this equitable doctrine in the present case. The interests of the State and the County in this case are essentially identical. Both government entities are affected in exactly the same way by

the existence of the guardhouse. When the County filed the notice of violation, Homeowners sought to derail the effort before the Circuit Court and their efforts were equally opposed by the County and the State, both of whom argued that the administrative proceeding should go forward. The arguments upon which the Homeowners prevailed before the CEB and in Count I of their Verified Complaint on the issue of the guardhouse, are identical to the arguments upon which they prevail against the State in the part of Count I of their Counterclaim against the State that addresses the same issue. It would be fundamentally unfair to allow Homeowners to prevail on the argument that the operation of the guardhouse does not interfere with the State's rights of ingress and egress over the easement, and simultaneously allow them to argue that they should be allowed to stop all persons who seek access to the State's lands.

Accordingly, as concerns Count I of the Homeowners' counterclaim, they are entitled to maintain and operate the presently existing guardhouse on their property. They are not entitled to the additional relief they seek therein.

In Count II of their Counterclaim Homeowners seek a declaration that the provisions of the Land Management Plan (LMP), entered into between the County and the State, is of no effect on Homeowners in as much as it presumes to dictate how the guardhouse facility must operate. This count is disposed of by the decision reached in count I and requires no further attention.

In Count III of their Counterclaim, Homeowners accuse the State of abusing its easement rights by placing a surcharge on the land and consequently seek to vacate the easement. Specifically, Homeowners allege in paragraph 18 that "[s]ince the easement was granted, the State has, without permission of the POA, substantially and unilaterally altered its use of the land from that which was

expected at the time the easement was granted. Specifically, the State has developed or has allowed the development of substantial facilities upon its land designed to attract vast numbers of visitors to the land.”

In paragraph 19, Homeowners add that “[t]he change in use of the land has resulted in a dramatic increase in the use of the easement by the State and its assignees such that use of the easement far exceeds that which was reasonably anticipated by the parties to the agreement at the time the easement was granted.”

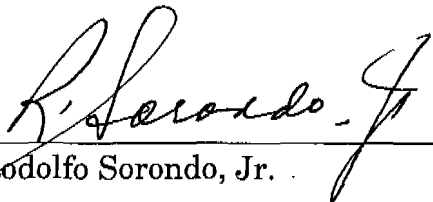
In response to this assertion, the State argues that the developer has acknowledged that it was aware from the beginning that although the State’s initial purpose for its land was passive and would draw few people, ultimately there would be pressure to develop beach recreational usage on the land and there would be an increase in the use of the access road. The developer was therefore aware that an increase in usage was inevitable. This argument is persuasive. More significantly, however, the undersigned does not believe that there is enough evidence in this record to justify vacating the State’s easement on these particular grounds.

CONCLUSION

To summarize, as concerns Counts II and III of the Verified Complaint, judgment should be entered in favor of the County. As concerns the County’s Counterclaim, judgment should be entered in favor of the Homeowners as concerns the allegations that the guardhouse impedes or interferes with the County’s easement, and for the County as concerns any efforts by Homeowners to restrict access to the Park or to restrict the number of parking spaces. As concerns the

Homeowners' Counterclaim against the State, judgment should be entered in favor of the Homeowners only as concerns that section of Count I of the Counterclaim that seeks a declaratory judgment finding that the States' right of ingress and egress over its easement are in no way impeded by the guardhouse. As concerns all other claims in the Counterclaim, judgment should be entered in favor of the State.

DONE AND ORDERED in Collier County, Florida this 7th day of June, 2004.


Rodolfo Sorondo, Jr.

Copies Furnished to:

Jason Hunter Korn, Esquire
William J. Hazzard, Esquire
Monica K. Reimer, Assistant Attorney General
William Mountford, Assistant County Attorney