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OF COUNSEL:
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July 17, 2019

Flow Way CDD
c/o JPWard & Associates, LLC
Attn: James P. Ward
2900 Northeast 12th Terrace, Suite 1
Oakland Park, FL 33334

Re: **Ownership and Maintenance of Esplanade's "Main Preserve"**

Dear Mr. Ward:

The Board of Supervisors of the Flow Way CDD has requested my investigation and thoughts regarding the long-term ownership and maintenance of certain preserves associated with the residential planned unit development known as Esplanade Golf and Country Club of Naples ("Esplanade"). More specifically, the CDD is the current owner of what is described in certain permitting documents as the "Main Preserve." This preserve is comprised of approximately 1,087 acres generally located to the north of, as well as along the western boundary of, the residential development formerly known as Mirasol and now known as Esplanade. While the CDD is presently maintaining the Main Preserve, it has questioned whether the ownership and maintenance responsibility (along with the associated costs thereof) should lie with the CDD in perpetuity.

To familiarize myself with these issues, I reviewed a handful of documents provided by you and Greg Urbancic, Esquire. My investigation then led to the review of a few additional documents, as well as telephone conversations with Stephen Walker, Esquire, an attorney with the law firm of Lewis, Longman and Walker, and Tim Hall, an environmental consultant with the firm of Turrell, Hall & Associates. Mr. Walker and Mr. Hall have had significant involvement in the history of the development and environmental permitting of Esplanade. That history is long and complicated, including more than one judicial challenge by various conservation/environmental advocacy groups. Therefore, I must emphasize that the conclusions and opinions set forth in this letter are based only upon a review of the documents listed below.

The primary documents relevant to the long-term ownership and maintenance of the Main Preserve are the two permits issued by the Army Corps of Engineers (“ACOE”) and the South Florida Water Management District (“SFWMD”), respectively. However, my review included other documents as well, all of which are listed in rough chronological order below:

1. Various Collier County ordinances approving and modifying the Mirasol/Esplanade RPUD, beginning with Ordinance No. 01-20.
2. Collier County Ordinance No. 02-09, which established the Flow Way CDD.
3. Recommended Order, dated July 24, 2007, by Administrative Law Judge Donald R. Alexander in *National Audubon Society, Inc., et al. v. South Florida Water Management District and I.M. Collier, J.V.*, Case No. 06-4157 in the State of Florida, Division of Administrative Hearings.
4. Order on Motions for Summary Judgment, dated October 23, 2009, by United States District Judge Jose E. Martinez in *National Wildlife Federation, et al. v. Paul Souza, et al.*, Case No. 08-14115-CIV-MARTINEZ-LYNCH in the United States District Court for the Southern District of Florida.
5. Settlement Agreement and Covenants Running With The Land, dated August 13, 2012, between IM Collier Joint Venture and various conservation groups.
6. Memorandum of Settlement Agreement etc., recorded on August 15, 2012 at Official Record 4826, Page 2030 in the Public Records of Collier County.
7. The “Biological Opinion” letter, dated September 18, 2012, from the United States Department of the Interior, Fish and Wildlife Service, to the ACOE regarding ACOE permit SAJ-2000-01926 (IP-HWB)—Mod 1.
8. SFWMD ERP Modification No. 11-02031-P, dated November 5, 2012.
9. ACOE permit SAJ-2000-01926 (IP-HWB)—Mod 1, dated December 7, 2012.
10. Sheets 1 and 2 of the Esplanade Golf and Country Club of Naples subdivision plat, recorded on June 12, 2013 at Plat Book 53, Pages 1 and 2 in the Public Records of Collier County.
11. Declaration of Covenants, Conditions, Restrictions and Easements for Esplanade, recorded on June 12, 2013 at Official Record 4932, Page 1245 in the Public Records of Collier County, along with amendments thereto.
12. Passive Deed of Conservation Easement etc. (pertaining to the “western preserve”), recorded on October 30, 2014 at Official Record 5090, Page 1004 in the Public Records of Collier County.
13. Passive Deed of Conservation Easement etc. (pertaining to the “internal preserve”), recorded on October 30, 2014 at Official Record 5090, Page 1035 in the Public Records of Collier County.
14. Passive Deed of Conservation Easement etc. (pertaining to the “northern preserve”), recorded on October 30, 2014 at Official Record 5090, Page 1063 in the Public Records of Collier County.
15. Certificate of Compliance and Release of Covenants Running With The Land, recorded on December 9, 2014 at Official Record 5102, Page 22 in the Public Records of Collier County.

16. Special Warranty Deed (pertaining to Tract P5) from Taylor Morrison Esplanade Naples, LLC, as grantor, to the CDD, as grantee, recorded on May 20, 2015 at Official Record 5153, Page 3968 in the Public Records of Collier County.
17. Quitclaim Deed (pertaining to Tract P5) from Esplanade Golf & Country Club of Naples, Inc., as grantor, to the CDD, as grantee, recorded on May 20, 2015 at Official Record 5153, Page 3970 in the Public Records of Collier County.
18. Special Warranty Deed (pertaining to Tracts P-1, P-2, P-3, P-4, P-6 and P-7) from Taylor Morrison Esplanade Naples, LLC, as grantor, to the CDD, as grantee, recorded on March 12, 2019 at Official Record 5606, Page 3232 in the Public Records of Collier County.
19. Quitclaim Deed (pertaining to Tracts P-1, P-2, P-3, P-4, P-6 and P-7) from Esplanade Golf & Country Club of Naples, Inc., as grantor, to the CDD, as grantee, recorded on March 12, 2019 at Official Record 5606, Page 3230 in the Public Records of Collier County.

General Factual Background

In 2001, Collier County adopted Ordinance No. 01-20 which created what was then known as the Mirasol PUD. The PUD ordinance has been amended at least three times since then, the latest coming in 2014 (Ordinance No. 14-36) which, among other things, changed the name of the development to the Esplanade. From the beginning, the Master Plan of the RPUD has illustrated the preserve lands and has classified them variously as "Preserve District," "Native Preserves," and "Preserve."

The 2001 ordinance (01-20) expressly referenced the restoration and enhancement of impacted or degraded wetland systems and stated that "[t]he Developer, its successor(s) or assigns, including the master property owners' association shall be responsible for the control and maintenance of lands within the Preserve District." See Section 5.5 of Ordinance No. 01-20. However, that ordinance was repealed when the PUD was amended in 2009 (Ordinance 09-21) and, from that time forward, the language quoted above was omitted from the PUD ordinances.

In 2002, Collier County established the Flow Way CDD through the adoption of Ordinance No. 02-09. The petition to establish the CDD, a copy of which is attached to Ordinance No. 02-09, expressly states that the CDD "shall comply with all the conditions in the... [SFWMD ERP]...regarding the perpetual maintenance and monitoring of the preserve areas. See paragraph 10 of the petition.

In 2002 (about the same time the CDD was established), the SFWMD issued ERP No. 11-02031-P for the Mirasol development. The ERP has been modified over the years, the latest substantive version of which (November 5, 2012) will be discussed below.

In 2006, several conservation groups formally challenged a proposed modification to the ERP in the State of Florida Division of Administrative Hearings (Case No. 06-4157). In a "Recommended Order," dated July 24, 2007, Administrative Law Judge Donald R. Alexander

stated, in his Findings of Fact, that the ERP “anticipated that [the] northern preserve area would ultimately be donated to an existing mitigation area known as the Corkscrew Regional Ecosystem Watershed, along with an interest-bearing fund to ensure perpetual management.” See paragraph 16 of the Recommended Order. However, the Recommended Order contains no express holdings or conclusions related to the ownership and maintenance of the preserve area.

In 2007, the ACOE issued permit SAJ-2000-01926 (IP-HWB), the latest substantive modification of which (December 7, 2012) will be discussed below.

In 2008, several conservation groups challenged the ACOE permit by filing a declaratory judgment action in the United States District Court for the Southern District of Florida (Case Number 08-14115-CIV-MARTINEZ-LYNCH). In his “Order on Motions for Summary Judgment,” dated October 23, 2009, United States District Judge Jose E. Martinez addressed the permit’s compliance with the Clean Water Act and stated that the ACOE allowed for preservation credits based on the “eventual transfer of ownership of the...main preserve to the Corkscrew Regional Ecosystem Watershed Land Trust (“CREW”)...[and] the establishment of an escrow fund for perpetual maintenance....” See page 45 of the order. Judge Martinez continued:

Prior to transfer of the main preserve to CREW, the Corps has also required the establishment of an endowment fund “to ensure the perpetual maintenance and management of the main preserve” after it is transferred to CREW and documentation establishing that CREW now assumes full responsibility for the perpetual maintenance of the main preserve.

See page 46 of the order. Ultimately, Judge Martinez concluded that the ACOE permit complied with the Clean Water Act, but he invalidated the permit on other grounds.

In August 2012, the developer of Mirasol/Esplanade and the various conservation groups which had challenged the SFWMD and ACOE permits for the project entered into a settlement agreement which, in general, reduced the physical land area of actual development and increased the preserve areas in exchange for a commitment from the conservation groups to cease further permit challenges or opposition. Among other things, the settlement agreement required certain conservation easements and transfer of the Main Preserve to “an appropriate governmental regulatory and conservation land management body” for preserve maintenance purposes. Examples of appropriate maintenance entities included the SFWMD and the CDD. See paragraphs 10 and 20, as well as Exhibit E. Upon satisfaction of these and other requirements/obligations, the settlement agreement required the conservation groups to execute a “Certificate of Compliance” at which time the developer would be “finally and forever relieved of any and all liability under” the settlement agreement. See paragraphs 10 and 12.

In November and December 2012, the SFWMD and the ACOE issued the latest substantive versions of their respective permits, each of which will be discussed below.

In June 2013, the developer¹ filed the subdivision plat for Esplanade. The first page of the plat (Plat Book 53, Page 1) contains the dedications/reservations, paragraph 18 of which indicates that the Main Preserve (Tracts P5, P6 and P7) is a common area with maintenance responsibilities imposed upon the Esplanade Golf and Country Club of Naples, Inc. (which is described as the “Club” and essentially serves as a master homeowners association) “until such time they are deeded to an appropriate land management entity such as the Corkscrew Regional Ecosystem Watershed Trust (CREW).” At that time, maintenance responsibility will also transfer to the “land manager.”

At around the same time the plat was filed (June 2013), the developer recorded the Declaration of Covenants, Conditions, Restrictions and Easements for Esplanade. In Article II, Section 2.D (page 14), the Declaration states that the platted “Preserve Tracts” (which include the Main Preserve) “shall be ultimately owned by the Club and/or the CDD, and shall be maintained, administered and operated by the Club and/or the CDD in accordance with the provisions of this Declaration and the requirements of the appropriate governmental agencies.” Although the Declaration has been amended several times since 2013, the above-quoted language remains unchanged.

In October 2014, the developer recorded conservation easements over the preserve areas in the Esplanade, including the Main Preserve. The conservation easements expressly reference the SFWMD and ACOE permits, and they grant “third party beneficiary rights” to those agencies.

In November/December 2014, the Conservancy of Southwest Florida, Inc. executed and recorded a “Certificate of Compliance and Release of Covenants Running with the Land.” The Certificate states that the developer had fully complied with the settlement agreement discussed above.

In 2015, the developer conveyed Tract P5 (that portion of the preserve lands generally running along the western boundary of the project) to the CDD.

In 2018, the developer conveyed the remaining preserve lands (including Tracts P6 and P7, which generally comprise the northern portion of the Main Preserve) to the CDD.

The SFWMD ERP

In November 2012, the SFWMD issued the latest substantive version of the ERP for the development. Attached as Exhibit 3.6 to the ERP is the “Mitigation/Monitoring/Maintenance Plan for Main Preserve,” prepared by Turrell Hall & Associates, Inc. This Plan states that the Main Preserve is comprised of approximately 1,087 acres and “encompasses the northern portion of the project site as well as approximately 200 acres along the western boundary of the site.” See page 1.

¹ By this time, Taylor Morrison Esplanade Naples LLC had succeeded IMCollier Joint Venture as developer.

Several sections/paragraphs of the Plan address the long-term ownership and maintenance responsibility of the Main Preserve, as quoted below:

Page 8 “Once the exotic vegetation has been removed and the native vegetation restored, the intent of the applicant is to donate the preserve to CREW or another appropriate public entity for perpetual preservation. Until such time as that may happen however, it will be the responsibility of the CDD or homeowner’s association to maintain the preserve. In addition to the donation of the property to an appropriate public entity, the applicant will also establish an escrow fund for the long-term maintenance of the preserve.”

* * *

“It is felt that the donation of the preserve to a public entity specifically charged with property maintenance and preservation, in lieu of perpetual management by a homeowners association that may not be fully equipped or experienced in preservation management techniques, will be more appropriate for a preserve of this size.”

Page 10 “Once creation and enhancement activities are deemed successful, the preserve will be offered to CREW and an escrow fund will be established for the long-term maintenance of the preserve.”

Page 12 “The maintenance and management of the preserve areas will be the responsibility of the owner/developer in perpetuity. The responsibility for the preserve maintenance can be transferred to the property owners association or CDD once the project is ‘turned-over’ to the appropriate association.”

* * *

“This may entail the property owner’s association or CDD acquiring ownership of the preserve prior to the CREW transfer. The maintenance and management responsibilities for the preserves will transfer to that entity. At this time the said associations shall assume responsibility for the perpetual maintenance and management of the preserve and retained areas....Once the restoration activities have met the success criteria, the Preserve will be offered to CREW (or another suitable public entity) along with the escrow funds to perpetually maintain the preserve.”

Page 13 This page contains a “Monitoring/Maintenance Schedule,” the final two activities of which are “Establish CREW Escrow Account” and “Turnover to CREW.”

The ACOE Permit

In December 2012, the ACOE issued the latest substantive version of its permit for the development. Attachment A to the ACOE Permit are the "Permit Drawings," one of which illustrates that what are described as "Preserve Area A" and "Preserve Area B" generally comprise the Main Preserve. Paragraph 12 of the permit (page 8) states that "Preserve Areas A & B are proposed to be donated to the adjacent CREW preserve or another conservation land management agency upon meeting performance criteria and receiving release from monitoring requirements from the Corps and the SFWMD." Paragraph 17 (page 11) again references the proposal "to transfer Preserve Areas A & B to CREW or another acceptable land conservation entity...."

Attachment D to the ACOE Permit is the "Mitigation, Maintenance & Monitoring Plan – Main Preserve." This Plan is substantially similar to Exhibit 3.6 of the SFWMD ERP, but it carries a later date (December 2012 as compared to August 14, 2012) and subtle differences which are highlighted below by ~~strike thru~~ and underlining:

Page 8 "Once the exotic vegetation has been removed and the native vegetation restored, the intent of the applicant is to donate the preserve to CREW or another appropriate ~~public~~ land management entity for perpetual preservation. Until such time as that may happen however, it will be the responsibility of the CDD or homeowner's association to maintain the preserve. In addition to meeting the success criteria of the preserve with respect to the exotic removal and native vegetation re-establishment and the future donation of the property to an appropriate ~~public~~ land management entity, the applicant will also establish an non-wasting escrow fund for the long-term maintenance of the preserve."

* * *

"It is felt that the donation of the preserve to an ~~public~~ entity specifically charged with property maintenance and preservation, in lieu of perpetual management by a homeowners association that may not be fully equipped or experienced in preservation management techniques, will be more appropriate for a preserve of this size. It is important to note that the applicant will be responsible for reaching the success criteria outlined below before the donation of the preserve occurs."

Page 10 "Once creation and enhancement activities are deemed successful, the preserve will be offered to CREW and an escrow fund will be established for the long-term maintenance of the preserve."

Page 12 "The maintenance and management of the preserve areas will be the responsibility of the owner/developer in perpetuity. The responsibility for the

preserve maintenance can be transferred to the property owners association or CDD once the project is 'turned-over' to the appropriate association."

* * *

"This may entail the property owner's association or CDD acquiring ownership of the preserve prior to the CREW transfer. The maintenance and management responsibilities for the preserves will transfer to that entity. At this time the said associations shall assume responsibility for the perpetual maintenance and management of the preserve and retained areas....Once the restoration activities have met the success criteria, the Preserve will be offered to CREW (or another suitable ~~public~~ land management entity) along with the escrow funds to perpetually maintain the preserve."

Finally, Attachment G to the ACOE Permit is the U.S. Fish & Wildlife Service's Biological Opinion Amendment, dated September 18, 2012. Pages 4 to 5 of the Biological Opinion state as follows:

"Once the exotic vegetation has been removed and the native vegetation restored, the preserve lands outside of the development footprint (about 1,089 ac) are to be maintained by the applicant or the homeowner's association until they can be donated to the CREW Trust, or another appropriate public entity capable of providing such services, and approved by the Service."

* * *

"In addition to the donation of the property to an appropriate entity, a non-wasting escrow fund for the perpetual maintenance and monitoring of the preserve shall be established."

Analysis and Opinions

Based upon the documents referenced herein, and attempting to interpret and reconcile the subtle differences between them, it is my opinion that ownership and maintenance responsibility of the Main Preserve can be summarized as follows:

1. Upon completion of mitigation and restoration requirements set forth in the SFWMD ERP and the ACOE Permit, a transfer of ownership of the Main Preserve must be offered to CREW or another appropriate public or land management entity capable of maintaining the preserve lands in perpetuity.
2. Before mitigation and restoration requirements are complete, ownership and maintenance responsibility of the Main Preserve may be transferred to the property owners association or the CDD. However, the transfer to the property owners association or the CDD is to occur after "turn-over" of the project. It is

my understanding that the developer has not yet “turned-over” the project, if the term “turned-over,” as utilized in the SFWMD ERP and the ACOE Permit, refers to the transition of association control from the developer to the members/residents as addressed by Section 720.307, Florida Statutes. If that interpretation of the term “turned-over” is correct, the transfer of ownership and maintenance responsibility of the Main Preserve in 2015 and 2018 to the CDD may have been premature.

3. If ownership of the Main Preserve is offered to CREW or another “appropriate” entity that does not possess the inherent power or capability to finance the maintenance costs, and if CREW or that other entity accepts the offer, then the transfer must include a non-wasting escrow fund in an amount sufficient to finance the costs to maintain the Main Preserve in perpetuity.
4. In my opinion, the documents are ambiguous as to whether the non-wasting escrow fund is required if the “appropriate” entity ultimately owning the Main Preserve does possess the inherent power and capability to finance the maintenance costs. According to Mr. Hall, it was not the developer’s intent to require the escrow fund under these circumstances, and permit modifications will be sought to clarify this ambiguity.
5. The U.S. Fish & Wildlife Service must approve the entity that ultimately will own and assume maintenance responsibility for the Main Preserve in perpetuity.

Please contact me with any questions or if you would like to discuss further. Thank you.

Sincerely,



Clay C. Brooker
Cheffy Passidomo, P.A.