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November 14, 2019

Mayor William G. Thiess
2512 Lightlewood Lane
Fort Pierce, Florida 34946

Mr. James Grimes
3203 North Indian River Drive
Fort Pierce, FL 34946

Ms. Ingrid M. Van Hekken
304 Anchor Way
Fort Pierce, FL 34946

Mr. Dale Reed
2811 North Indian River Drive
Fort Pierce, FL 34946

Mr. John Langel
2511 North Indian River Drive
Fort Pierce, FL 34946

Mr. Timothy Ritter
2513 Lightlewood Lane
Fort Pierce, Florida 34946

RE: Town of St. Lucie Village

Gentlemen and Ms. Van Hekken:

Please accept the following as our attorney's report for the November 19th meeting.

1. All Aboard Florida: We are working on follow up letters as directed. In the interim, Susan Mehiel has sent an additional email and attachment and asked if I would review and comment. Bill and I discussed and do not think that there is any practical benefit of doing so—so, I have not. A copy of our email exchange with the attachment is enclosed.

2. Zoning Queries: Concerning 2304 N. U.S 1 (Carmakal Property), I have not heard from Mr. Pryor since our last meeting. Carl has provided additional input and I have emailed Mr. Pryor with further information. My email to him is attached.

   I have also emailed you the product of Ian's review on bars and entertainment. Copies of the memos (without attachments) are enclosed.

   I have heard nothing further concerning Mr. and Mrs. Delo and the Bowling Alley property, but I have reminded the Delos that I am waiting to hear from them. A copy of that email is enclosed.

Concerning property identified as being located at 4100 N U.S, we had a query from Mr. Mia asking whether the property could be used for auto (particularly used auto) sales. I told him that, generally, if the property is on U.S 1 and extends eastward no further than half way to Old Dixie Highway, the zoning would allow for auto sales. My assistant and I have asked him to confirm the Property Appraiser's parcel ID number in order for me to check and confirm as to the propriety of the zoning on the particular property; and, I made it clear that I needed that information to definitely confirm zoning.

3. Demming Road. I had a contact from Susan Copeland Hodges and, after speaking with Bill, wrote the enclosed letter.

   This matter will be on the agenda for possible reconsideration if Ms. Copeland-Hodges presents additional information; and, Bill has advised that doing the culverts is essentially the same cost as doing the removal of material which you approved, and he is likely to suggest you follow that approach.

   It is also our understanding that there are some concerns about the impact of the railroad on drainage in the same general area—we gather that AAF will replace old culverts (which may be in disrepair) with two 24 inch culverts north of Chamberlin that will discharge into the low area and that it may be appropriate for the Village to install another culvert or culverts related to the Fort Capron Ditch. Enclosed is a copy of an email from Steve Cooper in relation to communications or concerns expressed by David King to Chris Dzadovsky.

4. Caribee Colony/IRLWC: I have asked my associate, Brandon Hale, for an update on permit status and some research, and will give you any update at the meeting, during my report.

5. Vacation Rentals: We had the workshop on October 2nd and Ian has started drafting provisions to address the issues of interest to the Board. I haven't had a chance to review his work so far.

6. Codification of Zoning Amendment: As you are aware, we have revised the Zoning Ordinance codification and sent you an email attaching the redline codification and all the Ordinances which would be incorporated. We are asking you to adopt Resolution 2019-13, to approve this revision. A copy (without the attachment) is enclosed.

7. 3532 N. U.S 1 (Northside Nursery). I was asked to check the status of the Northside Nursery variance in relation to apparent change in ownership. We have started that review but have not completed it.

8. Marshall's Vehicle. We also discussed whether there was any issue allowing a volunteer to use the Marshall's vehicle. I have contacted FMIC and was told that that did not create a problem. A copy of the email exchange is enclosed. I'll plan to drop this matter.

9. Impact Fees. St. Lucie County has adopted a new Impact Fee schedule. Bill, Carl and I have been copied on the documentation. If anyone is interested in reviewing that, please let me know and I can forward what we received. I'll drop this matter from my report.

10. Sarasola Generator. Although the issue of living on the property appears to have been resolved, Scott has expressed some concern and Ian had done some review concerning the current condition/use of the property.

11. Tree Abuse Statute: I am enclosing, for your information, a copy of an email from Pamela Chicon regarding Tree Abuse, Fla. Stat. 163.045, and the response of another attorney, illustrating the problem created by the legislation. I'll plan to drop this matter.

12. 465 Rouse Road (Cartwright). Mr. Cartwright contacted us with a query concerning his property being considered two parcels and whether the construction of the additional structure (approximately 10 years ago) would have changed that. I have reviewed that and was able to provide some correspondence concerning the construction being permitted but not anything more specific. My email and a copy of that letter are enclosed. I am not aware of anything happening since my email.

13. Occupational Licenses: I am carrying forward this note that it is probably time to update and revise the governing Village ordinance.

14. St. Lucie School. I have followed up with Marty Sanders who suggested I needed to follow up with someone on the School Board. I had planned to do that at an EDC meeting, but none were there. I will follow up.

15. Audit. I want to encourage us to get copies of the audit, review them and sit down and discuss any findings.

16. National Flood Insurance Program: Bill has responded to the query Donna received from FDEM, and a copy of that response is enclosed. At this point, I don't recall if we have concluded the issue on compliance measures, or not.

17. TNT Construction (Information Request): Ms. Kairalla is a realtor with TNT Construction, the company is requesting information regarding developmental approvals for 2018-2019, and they seem mostly concerned with residential development. I'll follow up on this item.

18. Comprehensive Plan Amendment: We have started looking at the EAR process and amending our Comprehensive Plan to incorporate all of the annexed properties into our Future Land Use Map.

19. Sales Tax: The Board decided to keep money separately and have a separate account. I will drop this item.

20. 3103 N Indian River Drive (King) Outdoor Storage Question. I have addressed this and will drop this item.

21. Resilience Grant. This was addressed, so I will drop this item.

22. Appointment of Deputy Clerk. I haven't heard further and will drop this item.

23. Proposed Millage Rate and Tentative Budget Hearing Date: We have submitted a final package for the Department of Revenue and I will drop this item.

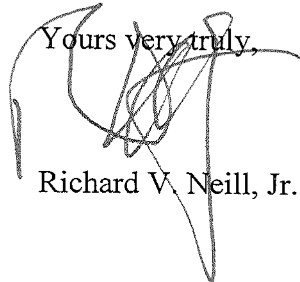
24. Referrals to Special Magistrate:

    a. 4050/4058 N US 1 (Zito)
    b. 2450 N US 1 (Top Notch Marine)
    c. 3429-3463 Old Dixie (Danks) - we are working on related paperwork.
    d. 3100 N. US 1 (Sarasola)

Do feel free to call if there's anything you want to discuss with me before the meeting.

With best regards.

Yours very truly,



Richard V. Neill, Jr.

RVNjr/mk
Enclosures

cc: Donna Dennis, Clerk (w/encls.)
Scott Dennis (w/encls.)
Cathy Townsend (w/encls.)
Wesley Taylor (w/encls.)

Laura Marotta

From:	William Thiess <william.thiess@stlucievillagefl.gov>
Sent:	Tuesday, November 05, 2019 6:07 PM
To:	Richard V. Neill, Jr.
Cc:	Donna Dennis; Laura Marotta; Scott Dennis
Subject:	RE: per my earlier question

I do not see this approach getting any traction at all.

From: Richard V. Neill, Jr. <RNeillJr@neillgriffin.com>
Sent: Tuesday, November 5, 2019 2:30 PM
To: William Thiess <william.thiess@stlucievillagefl.gov>
Cc: Donna Dennis <donna.dennis@stlucievillagefl.gov>; Laura Marotta <LMarotta@neillgriffin.com>; Scott Dennis <scott.dennis@stlucievillagefl.gov>
Subject: FW: per my earlier question

Bill,

I will mention Susan's email and attachment in my report but I'm not inclined to think that we need to dig into this.

Richard

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From: Richard V. Neill, Jr.
Sent: Tuesday, November 05, 2019 2:28 PM
To: 'Susan Mehiel'
Subject: RE: per my earlier question

Susan,

I think that we have discussed or reviewed similar analysis without my feeling it would be helpful in our situation; but, let me ask my Board whether they are interested in having us dig into it further.

FYI--in forming the Village, I don't think that we included the FEC right of way.

Regards,

Richard

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From: Susan Mehiel [mailto:susanm@ersmd.com]
Sent: Sunday, November 03, 2019 8:30 AM
To: Richard V. Neill, Jr.
Subject: per my earlier question

About Police Powers, the attached I may have sent you earlier in the year. It is the opinion of the retired lawyer who believes the municipalities have more ability to slow or stop the trains than they are exercising. Please let me know if we've already discussed this and you find no merit.

Thanks!

Susan
Alliance for Safe Trains
FLSafeTrains.com
828-606-5369

MEMORANDUM

FROM: George Bryant

TO: Virgin Trains USA Interested Persons

DATE: May 29, 2019

SUBJECT: Is Virgin Trains USA (formerly All Aboard Florida (AAF), Brightline and Florida East Coast Industries and Florida East Coast Railway (collectively, FEC)) Subject to the Exercise of a Municipality's Zoning and Police Powers?

Virgin Trains USA (VTUSA) proposes to (a) operate **32 passenger trains daily, at speeds of up to 110 miles per hour,** over the presently existing tracks owned by VTUSA through our municipalities, and (b) construct an additional track in VTUSA's right-of-way through our municipalities. For many years, VTUSA has operated freight trains over its existing, single track on an intermittent schedule and at much slower speeds. VTUSA's operation of those passenger trains will delay and interrupt the operation of fire, emergency response and police vehicles at each of the many grade crossings of its tracks throughout our municipalities. Our citizens' access to our hospitals and other municipal services will also be interrupted and interfered with. Therefore, the passenger train operations proposed by VTUSA and its construction of an additional track will constitute a **significant** alteration, enlargement, extension and modification of the use for which VTUSA's existing, single track is presently used.

The federal Surface Transportation Board (STB), the regulatory authority that regulates interstate railroad commerce under 49 U.S.C. §§ 701, et seq., the Interstate Commerce Commission Termination Act of 1995 (ICCTA), has determined that VTUSA's proposed **passenger trains are an intrastate affair, not subject to the STB's jurisdiction**. The STB's DECISION on Docket Number: FD 35680 states: "we conclude that AAF's construction and operation of the propose Line [the '230-mile rail line between Miami, Fla., and Orlando, Fla.'] would not be part of the interstate rail network and therefore would not come within the Board's jurisdiction." Accordingly, as discussed below, county and municipal officials may act under their zoning laws and other police powers without interference from the STB.

CONCLUSION: County and municipal officials may successfully protect our citizens against the risks presented by VTUSA's **proposed high speed passenger trains and its proposed track construction** both by their exercise of their zoning and land use laws (Zoning Laws) and by their exercise of their other county and municipal police powers (Police Powers). This Memorandum will first discuss the application of the Zoning Laws to VTUSA's **proposed passenger trains and track construction.** It will then discuss the

application of the Police Powers to VTUSA's **proposed passenger trains and track construction.**

ZONING LAWS

The STB's decision declaring that VTUSA's proposed **passenger service** between Miami and Orlando is "not part of the interstate rail network and therefore would not come under the Board's jurisdiction" places that **passenger service** and VTUSA and FEC's use the existing FEC tracks for that **passenger service,** as well as any construction of an additional track for that **passenger service,** in the same position as that of any other landowner wishing to expand the use of its land for a nonconforming use. Therefore, all of Florida's and, by analogy, other states' law concerning the expansion of nonconforming uses, including but not limited to the Sebastian Land Development Code and the Official Zoning Ordinance of the Village of Tequesta, apply to that **passenger service and related track construction.** Accordingly, as discussed below, each municipality whose Zoning Laws do not permit the **proposed passenger service and related track construction** may deny VTUSA the power to operate that **passenger service and undertake new, related track construction** within its borders.

VTUSA's and FEC's use of the FEC tracks for **freight service** is a nonconforming use that is in no way covered by this Memorandum.

The Zoning Laws of the City of Sebastian, Florida presently cover VTUSA's existing or proposed tracks within their Commercial General, Commercial Riverfront, Commercial Waterfront Residential, Industrial and Residential Single-Family zoning districts. Railroad operations are not permitted in any of those zoning districts.

The Zoning Laws of the Village of Tequesta, Florida, presently cover VTUSA's existing or proposed railroad tracks within their Single Family, Community Commercial and General Commercial zoning districts. Railroad operations are not permitted in any of those zoning districts.

The Zoning Laws of other municipalities similarly cover the railroad tracks passing through those municipalities. See City of Hamilton v. Hausenbein, 102 Ohio App. 556, 561, 139 N.E. 2d 459 (OH Ct. Apps. OH 1956).

The Zoning Laws of Indian River County, Martin County, St Lucie County and the City of Vero Beach do not presently include VTUSA's tracks in any of their zones. Therefore, those Zoning Laws do not regulate the VTUSA's present **freight train** operations. See Appendix for relevant excerpts from the Zoning Ordinances of the City of Sebastian. The Village of Tequesta, Indian River County, Martin County and St. Lucie County.

The Zoning Laws of Indian River County, Martin County, St. Lucie County and the City of Vero Beach could be amended to include the VTUSA's tracks in one or more of their

zoning districts. Such amendments could be readily and inexpensively accomplished by appropriate county or municipal action. If the appropriate officials make such amendments before VTUSA commences its **proposed passenger operations and track construction**, VTUSA's **proposed passenger train operations and track construction** would then constitute an expansion of a nonconforming use that would not be permitted under the Zoning Laws of Indian River County, Martin County and St. Lucie County quoted in the Appendix.

COURT INTERPRETATIONS OF ZONING LAWS

Florida Courts. For many years, Florida courts have stated that Florida law views the extension or enlargement of nonconforming uses with disfavor, and expects that such uses will gradually be eliminated over the course of time through abandonment, attrition, acts of God or other destruction or obsolescence. Bixler v. Pierson, 188 So. 2d 681 (FL Dist. Ct. App. 4th Dist. 1966), involving the replacement of an old house trailer with a new and larger trailer, and 3M Nat. Advertising Co. v. City of Tampa. Code Enforcement Bd., 587 So. 2d 640 (FL Dist. App. 2d Dist. 1991), involving the expansion of the use of a nonconforming billboard.

Discussing nonconforming uses, other Florida courts have not permitted (a) the expansion of a restaurant's sale of beer and wine to permit the sale of all alcoholic beverages (JPM Inv. Group, Inc. v. Brevard County Bd. of County Comm'rs, 818 So. 2d 595 (FL Dist. Ct. App. 5th Dist. 2002)), (b) the expansion of a single story house to permit the construction of a second story on the same building (Redington Shores v. Innocenti, 455 So. 2d 642 (Fla. Dist. App. 2d Dist. 1981)), (c) the expansion of a five-unit motel to 30 units (Dowd v. Monroe County, 557 So. 2d 63 (FL Dist. Ct. App. 3d Dist. 1990, dismissed as Popplewell v. Dowd, 564 So. 2d 488 (FL Sup. Ct. 1990)), (d) the expansion of the operation of an aquarium into a full amusement park (Marine Attractions, Inc. v. City of St. Petersburg Beach, 224 So. 2d 337 (FL Dist. Ct. App. 2d Dist. 1969)), and (e) the replacement of an old house trailer with a new and larger trailer (Bixler v. Pierson, supra).

In Johnston v. Orange County, 342 So. 2d 1031 (FL Dist. Ct App. 4th Dist.), the court found that the replacement of single mobile homes with double-wide mobile homes was not an enlargement or extension of a nonconforming use based on the record before the trial court. However, the court indicated the result might have been otherwise if the number of double-wide trailers exceeded the number of single trailers or "actually had an effect of increasing the density of population or if such replacement would have been detrimental to the public health, welfare and safety." See the discussion of the courts' consideration of a nonconforming use's impact on the surrounding neighborhood and the public under (a) Other States' Courts below and (b) Treatises and Other Sources, 61 ALR 4th 806 below. There is ample evidence that VTUSA's proposed **passenger trains and construction of a new track** would have an

adverse effect on the public health, welfare and safety of the populace on either side of the FEC tracks.

The Zoning Laws of Martin County and Sebastian **both specifically prohibit an increase in the intensity of a nonconforming use. The VTUSA passenger trains clearly appear to increase the intensity of the use of the current FEC tracks. The Zoning Laws of St. Lucie County would also clearly not permit VTUSA's proposed passenger trains and track construction because of the adverse impact on neighboring properties and residents and the County in general.**

As shown by both the Florida Courts above and Other States' Courts below, the determination of whether the intensity of a nonconforming use has been impermissibly increased is fact driven. "[E]ach case must be decided under its own facts." City of Lake Charles v. Frank, 350 So.2d 233 (LA Ct. App., 3d Cir. 1977). The courts give considerable deference to the determinations of those facts by municipal bodies and lower courts. See Miller v. Board of Adjustment under Other States' Courts below. Therefore, a determination by a county or municipal zoning official or by a county court that VTUSA is an expansion of a nonconforming use should likely be affirmed, if challenged.

However, the use of FEC's existing track by high speed passenger trains that will require the construction of (a) welded rails and improved concrete ties and other track bed improvements and (b) a second track similarly constructed thereby doubling the area that must be crossed by vehicles and pedestrians and presenting the potential danger of such high speed passenger trains simultaneously and confusingly passing each other from opposite directions clearly increase the intensity of FEC's use of its existing track and right of way. Such construction and danger will obviously also have a material, adverse impact on the neighborhoods and public surrounding FEC's existing track and right of way.

Other States' Courts. Courts of many other jurisdictions have also refused to permit the expansion of nonconforming uses, including the following: (a) Miller v. Board of Adjustment, 67 NJ Super. 460, 171 A.2d 8 (NJ Super. Ct., App. Div. 1961), where the court held there was a substantial change of a nonconforming use when an owner wanted a pond used for fishing and picnicking to also be used for swimming, (b) City of Lake Charles v. Frank, supra, where the court held there was an impermissible change in the quality or character of a property's use when the owners wanted to change from a parking lot in connection with an auto repair shop and a construction business to a parking lot for the customers of the owner's bar and lounge, (c) Brown v. Cleveland, 66 Ohio St. 2d 93, 420 NE 2d 103 (OH Sup. Ct. 1981), where the court held that an owner could not add a permitted use to a nonconforming use unless the zoning board found that the change was no more harmful or objectionable than the prior nonconforming use, and (d) Tier Oil Corp. v. Egan, 99 App. Div. 2d 903, 472 NYS 2d 504 (NY App. Div. 3d Dept. 1984), where the court held that the owner of a gasoline service station could not modify its interior to create a combination gasoline service station and convenience

store (even though there was to be no increase in the size of the structure) when the ordinance stated that it did not permit a change to a more intensive nonconforming use.

In Bonaventure Intern., Inc. v. Borough of Spring Lake, 350 N.J. Super. 420, 795 A.2d 895 (NJ Super. Ct., App. Div. 2002), the court stated that the expansion of a restaurant from serving occupants of a 10-room hotel in the summer to seating 96 patrons, open to the public year round with extended hours and catering business, was impermissible. The court also stated: "The use may not be enlarged as of right except when the change is negligible or insubstantial. ... Where there is doubt whether the enlargement or change is substantial rather than insubstantial, the courts have consistently declared that the dispute is to be resolved against the enlargement or change." Similarly, "When there is doubt as to whether an extension of a use is substantial, the extension should be disapproved." Miller v. Board of Adjustment, supra.

The courts frequently look at the impact, on the neighborhood and the public, of the expansion of a nonconforming use. In De Felice v. Zoning Bd. of Appeals, 130 Conn. 156, 32 A.2d 635 (CT Sup. Ct. Errors 1943), the court found a change from extracting loam and sand from a sandpit using picks, shovels and a steam shovel to using a wet sand classifier was impermissible. The court stated: "in view of the **residue of resulting disadvantage to the neighborhood and the public**, plus the difference in structures, process and resulting product" (emphasis supplied), that use was an impermissible extension of a nonconforming use. In Santoro v. Zoning Bd. of Review, 93 R.I. 68, 171 A.2d 75 (RI Sup. Ct. 1961), the court held that replacement of a nonconforming wooden gasoline filing station and grocery store structure with a building of cinder blocks and an increase in the number of pumps from 2 to 3 or 4 was impermissible, and noted that "a 'genteel' use, thereby meaning **small and relatively quiet and suitable for the neighborhood**" (emphasis supplied) was to be substituted for "one larger and less pleasing." Similarly, in Ray's Stateline Mkt. v. Town of Pelham, 140 N.H. 139, 665 A.2d 1068 (NH Sup. Ct. 1995), while not finding an impermissible expansion, the court noted that whether a nonconforming "use will have a substantially different impact upon the neighborhood" was one of the factors it could consider "in evaluating the extent of the nonconforming use." The court in Pope v. Little Boar's Head Dist., 145 N.H. 531, 764 A.2d 932 (NH Sup. Ct. 2000) cited Ray's Stateline Mkt. approvingly for the same point. **As discussed above, FEC's proposed high speed passenger trains and related track construction will clearly have a material, adverse impact on the neighborhoods and public surrounding FEC's existing track and right of way.**

Railroads and Nonconforming Uses. I have searched literally hundreds of cases, in LexisNexis and West Law, involving railroads and nonconforming uses. Because of the preemption of local laws by the ICCTA, there are relatively few cases that discuss the ability of a municipality to enforce its Zoning Laws as to nonconforming uses against a railroad.

However, in City of Belton v. Smoky Hill Ry. & Historical Society, Inc. 170 S.W.3d 429 (MO Ct. Apps. 2005), the court, while discussing the federal preemption issues, found that the Society (though regulated by the Federal Railroad Administration as to compliance with federal railroad safety and other laws and regulations) was operating a tourist excursion railroad that ran exclusively on five miles of track, and concluded that the Society was not part of the interstate rail network governed by ICCTA. Therefore, the court concluded that the Society was in violation of the City of Belton's Zoning Laws. In reaching that conclusion, the Belton court relied, in part, on the West Palm Beach case next discussed.

Federal Courts. Most importantly, in Fla. East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), where Rinker leased a portion of the railroad's yard to conduct Rinker's aggregate (the feedstock for concrete) distribution business, the court discussed at length the preemption of Zoning Laws by the Federal Legislation. In that case, FEC basically tried to cloak its lessee, Rinker, in FEC's preemption of Zoning Laws protections by arguing that West Palm Beach's zoning and occupational ordinances interfered "with the railroad's efficient allocation of its resources (by leasing its property to Rinker instead of performing such services itself)." Id. at 1338. The court concluded that ICCTA did not preempt West Palm Beach's zoning and occupational license ordinances. The court stated: "The ordinances at issue in this case are entitled to this presumption of validity under the [federal] Supremacy Clause." Id. at 1328. The court also said: "Against this presumption of validity, we conclude that the application of the ordinances against Rinker, based on the facts found by the district court [the nature of Rinker's aggregate distribution business], does not qualify as 'regulation of rail transportation' and does not frustrate the objectives of federal railroad policy." Id. at 1339. It added: "Allowing localities to enforce their ordinances with the possible incidental effects such laws may have on railroads would not result in the feared 'balkanization' of the railroad industry as companies sought to comply with those laws." Ibid.

In the process of reaching its decision, the West Palm Beach case provides an excellent analysis of the interaction of ICCTA's preemption provisions with local Zoning Laws. It also shows that a federal court sitting on a Florida case will apply applicable Florida Zoning Law when reaching its decision despite a claim of federal preemption of that Zoning Law.

It is significant that both a Missouri court applying a Missouri city's Zoning Law to a railroad in the Belton case and a federal court applying a Florida city's Zoning Law to a railroad (FEC) in the West Palm Beach case concluded that interstate commerce was not involved. Insofar as VTUSA's proposed **passenger service and any track construction related to that passenger service** is concerned, as discussed above, the STB has already similarly concluded that that **passenger service and presumably any track construction related to that passenger service** is not involved in interstate commerce. **Therefore, it seems likely that a Florida court, federal or state, would reach a conclusion, similar the**

conclusions of the Belton and West Palm Beach courts, that interstate commerce is not involved, and, therefore, hold that VTUSA's passenger service and any related track construction is an expansion of a non-conforming use that is not permitted under Sebastian's and Tequesta's Zoning Laws.

Treatises and Other Sources. See Florida Jur 2d (2012), Building, Zoning, and Land Controls, §226 (Generally) and §230 (Expansion or extension of nonconforming use). See also 83 Am Jur 2d (2003 and 2011 pocket part), Zoning and Planning, §590 (at 506): "The right to continue a nonconforming use does not include a right to extend it." See also Corpus Juris Secundum (2005 and 2014 pocket part), §§181, 182 and 186 (at 263 – 265). See 61 ALR 4th (1988) 724, et seq., "Addition of another activity to existing nonconforming use as a violation of zoning ordinance"; 61 ALR 4th (1988) 806, et seq., "Change in volume, intensity, or means of performing nonconforming use as violation of zoning ordinance", "§ 7. View that consideration should be given to whether there is a difference in the quality or character, as well as the degree, of [nonconforming] use" (at 826 – 828) and "§ 8. View that consideration should be given to whether the current use is different in kind in its effect on the neighborhood" (at 828 – 830); 147 ALR 167 (1943), et seq., "Zoning changes, after adoption of zoning regulations, in respect of nonconforming use."; and 8A McQuillin, Municipal Corporations (3d Ed Rev. 2012 (2014 Cum. Supp.)), § 25.189, Nonconforming Uses], "Definition and Nature".

POLICE POWERS

In addition to a municipality's power to block VTUSA's **passenger service and any related track construction** because it is an impermissible expansion of a nonconforming use, a municipality may also exercise its other Police Powers to adopt ordinances intended to protect the health, safety and welfare of its citizens. Such ordinances (Safety Ordinances) could reasonably require that VTUSA's **passenger service and newly constructed track** may only pass through grade crossings in a municipality if VTUSA's tracks run under or over bridges that permit vehicular and pedestrian traffic to cross without interference from VTUSA's high-speed **passenger service and newly constructed track** in order to prevent pedestrian injuries and deaths from their crossing the tracks and the disruption of essential municipal services such as police, fire and emergency vehicles. **Nearly all railroad crossings of roads are under bridges below, or elevated on bridges above above, the railroad tracks in the municipalities along the northeast railroad corridor through which the existing, high-speed Acela Express trains presently run.**

As previously discussed, a municipality should be able to require additional Safety Ordinance protections for its citizens because of FEC's proposed use of its existing tracks by high speed passenger trains that will require the construction of (a) welded rails and improved concrete ties and other track bed improvements and (b) a second track similarly constructed thereby doubling the area that must be crossed by vehicles and pedestrians and presenting the potential danger of such high speed passenger

trains simultaneously and confusingly passing each other from opposite directions. The confusion and new danger that will be presented by FEC's proposed high speed passenger trains and related new track construction should be particularly acute in highly populated areas, such as Vero Beach, Sebastian, Fort Pierce, Stuart and Tequesta.

The STB, as previously stated, has determined that VTUSA's **passenger service and presumably any newly constructed track related to that passenger service** will operate within Florida and that that operation is not within interstate commerce, and, therefore, that that **passenger service and related newly constructed track** are not subject to the STB's jurisdiction. Accordingly, in order to avoid preemption by the ICCTA, our county and municipal officials should draft Safety Ordinances that only affect VTUSA's **passenger trains or the new hazards created by a new track,** and otherwise will not affect VTUSA's **freight trains.** A Safety Ordinance requiring the construction of bridges for road crossings and adequate fencing along the remainder of the VTUSA's tracks only if VTUSA will operate **passenger service over the VTUSA's existing track or over a newly constructed track** should avoid preemption by ICCTA and by FRSA (as defined below).

The Federal Railway Safety Act of 2004 (FRSA), 49 U.S.C. §20101-53 preempts all nonfederal regulations related to railway safety - **with two specific exceptions**. First, a state may adopt or continue in force a law, regulation, or order related to railroad safety or security until either the Secretary of Transportation or the Secretary of Homeland Security issues an order or regulation covering the subject matter of the State requirement. Second, "A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—<u>(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unnecessarily burden interstate commerce.</u>" 49 U.S.C. §20106(a)(2). (Emphasis supplied.) See discussion under **Preemption of Safety Ordinances by FRSA** below.

Other less costly Safety Ordinances might, of course, be drafted. For instance, although such Safety Ordinances would increase the time that VTUSA's **passenger service and newly constructed track** will interfere with municipal services, <u>some municipalities may want to regulate the speed at which those trains may operate through their streets.</u> A municipality might adopt other reasonable Safety Ordinances applicable to VTUSA's **passenger service** for the protection of its citizens. **In addition**, a municipality may adopt a Safety Ordinance, applicable to **both** VTUSA's **passenger service and its proposed newly constructed track** <u>**and**</u> to VTUSA's **freight trains**, <u>requiring adequate fencing along all of VTUSA's right-of-way through the municipality.</u> See discussion under **Safety Ordinances Requiring the Fencing of Railroad Rights-of-Way** below.

As discussed above, our county and municipal officials should be able to draft one or more Safety Ordinances providing for bridges, fencing or other requirements that will

adequately protect our citizens from the safety risks presented by VTUSA's proposed high speed **passenger trains and related second track.** In order to avoid preemption by the FRSA, such Safety Ordinances must (a) be necessary to eliminate or reduce an essentially local hazard (disruption of emergency vehicle traffic would seem to qualify), (b) not be incompatible with a federal law, regulation or order (I do not know of any such), and (c) should not unnecessarily burden interstate commerce (even the construction of adequate bridges and fencing should be a reasonable exercise of a municipality's Police Power). Therefore, such Safety Ordinances should avoid the FRSA's preemption provisions. Given the risks to our citizens if VTUSA persists in pursuing its proposed, high-speed **passenger trains and related second track** through our communities, the preparation of such Safety Ordinances to protect our citizens seems mandatory!

The devil is in the details. I will be happy to assist in the drafting of any Safety Ordinances that any county or municipality considers proposing.

Court and Other Interpretations of Safety Ordinances

Florida Jur 2d (2012), Railroads, §19 (at 508) provides: "The state legislature may delegate to a municipality the power to regulate the manner of construction and operation of the portion of a railroad that is within the boundaries of that municipality. In order that a municipal regulation of a railroad may be valid, the municipality must have the power to pass the particular ordinance, and it must be reasonable." In Weeks v. Welch, 92 So. 2d 645 (FL Sup. Ct. 1957), relied upon by Florida Jur 2d, the court affirmed the validity of an ordinance that required trains to stop at certain road crossings because the ordinance was intended for the protection of "the safety of pedestrians and motorists at railroad crossings of the city". In Seaboard Air Line Railway v. Smith, 53 Fla. 375, 43 So. 235 (FL Sup. Ct.), the court said a municipality had the power to pass and enforce an ordinance limiting the speed of a train within the municipality's corporate limits. See 44 Am. Jur. Railroads, §396 (at 607 – 608).

> "It is a general rule that municipal corporations can, under their power to regulate and control the use of their streets, require railroads or street railways to make their roadbeds and tracks conform to the grade and surfacing of the street on which they are located. ... Moreover, a municipal corporation can require a railroad or street railway, **at its own expense**, to change the grade or surface of its roadbed or tracks to conform with a change of grade or surface in the street on which it is located. ... Accordingly, a municipal corporation can compel a change in the roadbed of a railroad or street railway on a street, to **facilitate a public improvement or for the public convenience.** ... Furthermore, a **municipal corporation may, after notice and on failure of a railroad or street railway company to do the necessary work to change its roadbed or rails to conform with grade or change of grade in the street on which they are located, have the same done at the railroad or street railway's expense.**" (Emphasis

supplied.) 8A McQuillin, Municipal Corporations (3d Ed. Rev. 2012 (2014 Cum. Supp.)), §24.721, Municipal Police Power and Ordinances, "Conformity to grade and surfacing of Street".

> "Municipal corporations under their police power generally can regulate railroad crossings of streets and other public ways, even where the railroad's right-of-way was acquired before the street came into existence. ... This is subject, of course, to paramount or exclusive state and federal regulation. Such municipal regulation may relate to securing public safety, convenience, and welfare. ... [Here, McQuillin cites Weeks v. Welch, supra] Regulation of this character, which constitutes a reasonable exercise of the police power, is not open to objection that it alters, amends, or repeals any franchise, contract, or vested right of the railroad or street railway company. ...
>
> "**Generally, violations by a railroad of its duty under an ordinance with respect to crossings constitutes, or at least gives evidence of, actionable negligence.**" (Emphasis supplied.) Id. §24:725, at 705 -706.

However, "Ordinances relating to the speed of trains and streetcars must be reasonable, and they are subject to judicial review with respect to whether or not they are oppressive and unreasonable. ... Furthermore, a speed limit of 15 miles per hour within city limits has been held unreasonable and arbitrary as applied to interstate trains. [citing Loftin v. City of Miami, 53 So. 2d 654 (FL Sup. Ct. 1951).]" Id. §24.708, at 678 – 680.

If VTUSA persists in its intention to run **passenger service over its existing tracks or particularly over a newly constructed track**, the issue of who will pay for the bridges over VTUSA's tracks must be determined. However, the cases discussed in McQuillin, supra, §24.721 provide support for the proposition that a municipality may require VTUSA to pay for such bridges if required by Safety Ordinances adopted under its Police Powers for the protection of the safety, health and welfare of its citizens.

Further, the Eleventh Circuit Court of Appeals in Fla. E. Coast Ry. v. City of West Palm Beach, 266 F.2d 1324, 1338 (11th Cir. Ct Apps. 2001) stated that FEC's

> "claim of pre-emption is based essentially on the supposed interference of West Palm Beach with the railroad's efficient allocation of its resources ... . This microeconomic focus is not consistent with the stated purposes of the ICCTA. In reducing the regulation to which railroads are subject at state and federal levels, the ICCTA concerns itself with the efficiency of the industry as a whole across the nation. ... No statement of purpose for the ICCTA, whether in the statute itself or in the major legislative history, suggests that any action which prevents an individual firm from maximizing its profits is to be pre-empted. Naturally, at some level, all regulation places constraints on firms' profit-maximizing behavior;

to allow FEC's argument to prevail would subsume all local regulation to the profit-maximizing priorities of individual railroad companies. The nationwide efficiency of the railroad industry, however, may still be preserved without necessarily denying the possibility of all local regulation."

Accordingly, based on the above quoted language from the West Palm Beach case, the fact that a Safety Ordinance requiring that VTUSA's proposed passenger trains may only pass through a municipality over or under a bridge over would create additional expenses for VTUSA should not justify a court in overturning the Safety Ordinance based on either ICCTA's or FRSA's preemption provisions. The West Palm Beach court, id, at 1339, also dismissed the railroad's argument that the City had a "hostile motivation in its enforcement of its zoning ordinance"; it again stated that the railroad's argument that "the City intended to impose additional costs on FEC ... is not relevant to our analysis ... ." Ibid.

In Wheeling & Lake Erie Ry. Co. v. Pennsylvania Public Utility Com'n, 778 A. 2d 785 (PA Commonwealth Ct. 2001), the court held that the Pennsylvania Public Utility Commission could require the railroad to construct and maintain a new bridge at the railroad's sole costs, and that power was not preempted by the ICCTA.

Accordingly, the fact that Safety Ordinances may require VTUSA to make expensive alterations to VTUSA's tracks should not render such Safety Ordinances unreasonable and therefore unenforceable. **Our counties and municipalities may reasonably, and as previously stated may be obligated to, protect the safety of our citizens against the safety hazards created by VTUSA's proposed high speed passenger trains and track construction by adopting reasonable Safety Ordinances.**

PREEMPTION OF SAFETY ORDINANCES BY THE ICCTA

Even if the STB had not concluded that it does not have jurisdiction of VTUSA's passenger trains because they are not involved in interstate commerce, the courts have given local municipalities the authority to reasonably exercise their Police Powers to regulate railroads. In an excellent summary of the law as to the preemption of Safety Ordinances by the ICCTA, the Third Circuit Court of Appeals, in New York Susquehanna & W. Ry. Corp. v. Jackson, 500 F. 3d 238, 252 – 253 (3d Cir. Ct. App. 2007) stated:

> "For the [Surface Transportation] Board, the touchstone is whether the state regulation imposes an unreasonable burden on railroading. ...
>
> "In subsequent cases, the Board has explained that uniform building, plumbing, and electrical codes generally are not preempted because they do not unreasonably interfere with railroad operations. ... On the other hand, some local zoning ordinances, local land-use regulations, and environmental permitting requirements are preempted because they unreasonably prevent,

delay, or interfere with activities protected by the [ICCTA] … . … The Board has emphasized, however, that even pedestrian regulations like building codes must be applied in a manner that does not discriminate against railroad operations to avoid preemption. …

"Thus, according to the Board, state regulation is permissible if it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads. … This is a fact-intensive inquiry. …

"The Court of Appeals for the Second Circuit has endorsed the Board's approach. … [I]t stated that while pre-construction permitting programs often unreasonably interfere with rail travel, less burdensome and non-discriminatory regulations would pass muster. It explained further:

> "It therefore appears that states and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption. …

"We believe that the approach of the Board and the Second Circuit Court is sound. In particular, we agree that a state law that affects rail carriage survives preemption if it does not discriminate against rail carriage and does not unreasonably burden rail carriage. The nondiscriminatory prong is particularly useful in determining whether a state is regulating principally to discriminate against a specific industry. Much of the Board's logic in finding that standard building, fire, and electrical codes are not preempted is that, while the costs of compliance may be high in some sense, they are 'incidental' when they are subordinate outlays that all firms build into the cost of doing business. … Thus, for a state regulation to pass muster, it must address state concerns generally, without targeting the railroad industry.

"As for the unreasonably burdensome prong, the most obvious component is that the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion. In addition, … regulations must be settled and definite enough to avoid open-ended delays. … The animating idea is that, while states may set health, safety, and environmental ground rules, those rules must be clear enough that the rail carrier can follow them and that the state cannot easily use them as a pretext for

> interfering with or curtailing rail service. ... In that case, the Board found it relevant that the cities' real goal in creating an environmental permitting process was to constrain (rather than render safe) a railroad's operations. ... It noted that one of the problems with the permitting process was that it gave the cities too much room to give effect to their anti-railroading policy in the guise of non-discriminatory environmental regulation. ...
>
> "We do not hold that local regulations may not give state and local officials any discretion at all, for that would be impractical. Standard building, electrical, and fire codes no doubt give local officials some discretion. ... Storage of combustible rubbish shall not produce conditions that will create a nuisance or a hazard to the public health, safety, or welfare. ... (giving local code official discretion to determine if fire safety plan is adequate). But regulations may not (1) be so open-ended as to all but ensure delay and disagreement, or (2) actually be used unreasonably to delay or interfere with rail carriage. In other words, some regulations, ... give too much discretion to survive a facial challenge because they invite delay. ... In addition, even a regulation that is definite on its face may be challenged as-applied if unreasonably enforced or used as a pretext to carry out a policy of delay or interference."

The New York Susquehanna & W. Ry. court noted that the STB itself had stated that the ICCTA's "preemption clause 'does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads,' so long as those regulations do not interfere with or unreasonably burden railroading." Id. at 252. The court quoted the STB as stating: "A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce." Id. at 253.

The New York Susquehanna & W. Ry. court, id. at 256, concluded that some of New Jersey's regulations applicable to the railroad were not preempted by the ICCTA "if ... [such regulation] is nondiscriminatory and not unreasonably burdensome." It then remanded the case to the Federal District Court for further determinations as to which New Jersey state regulations were or were not discriminatory or unreasonable, including whether they gave the state too much discretion in determining how the railroad needed to comply with them and whether the fines imposed for noncompliance were unreasonable.

In Village of Ridgefield Park v. New York Susquehanna & Western Ry. Corp., 163 N.J. 446, 461 750 A. 2d 57 (NJ Sup. Ct. 2000), the court stated: "We envision that it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction

regulations interfere with a railroad's operations." The court, id. at 457, also quoted the following passage from a decision of the STB:

> "Regarding public health and safety matters, the STB observed:
>
> > [R]ecent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce. *That means that, while state and local government entities ... retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce."*

The court added, id. at 457 - 458:

> "Regarding building codes, the STB determined that railroads are exempt from the traditional permitting process but not, as the railroad argues, from most other generally applicable laws:
>
> > "Given the broad language of 49 U.S.C. 10501(b) and the case law interpreting it, *our preliminary view is that local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause.* At the same time, we believe local authorities can take actions that are necessary and appropriate to address any genuine ... emergency on railroad property, and that interstate railroads such as NYSW are not exempt from certain local fire, health, safety and construction regulations and inspections. ...
>
> "The STB, however, stated that the ICCTA does not preempt 'non-discriminatory' public health and safety regulations that do not foreclose or restrict a railroad's ability to conduct its operations. ... The STB observed that although states cannot require permits as prerequisites to the maintenance or construction activities of railroads, states can enforce local fire, health, safety and construction regulations against railroads and can inspect railroad facilities. ... The STB also held that states are permitted 'to address any genuine emergency on railroad property.'"

In Iowa, Chicago & Eastern R.R. Corp. v. Washington County, 2003 WL 23807751 (U.S. Dist. Ct. S. D. Iowa, Davenport Div. 2003), the court agreed with the reasoning of another court that concluded that Section 10501(b) of the ICCTA

> "'does not expressly preempt a states' [sic] traditional police power over the public safety of the rail-highway system.'" ... Congress clearly only intended to preempt the 'states' previous authority to economically regulate the rail transportation within their borders with respect [sic] such matters as the operation, rates, rules, routes, services, tracks, facilities, and equipment, and reserve the states' police power to regulate the safety of the rail-highway crossing.'"

The court concluded: "The court also finds no evidence of a conflict between the exclusive jurisdiction of the STB to regulate rail carriers economically and Iowa's power to regulate the safety of bridges at rail-highway crossings."

Numerous courts have held that an ordinance such as one limiting "noises by switching, hooking, unhooking, or bumping of any railroad equipment in specified hours of the night season" in predominantly residential areas are "a valid police power regulation [and therefore] it comes within the reserved power of the State ... ." City of Hamilton v. Hausenbein, 102 Ohio App. 556, 561, 139 N.E. 2d 459 (OH Ct. Apps. 1956).

PREEMPTION OF SAFETY ORDINANCES BY FRSA

In Norfolk Southern Ry. Co. v. City of Alexandria, 2009 WL 1011653 (U.S. Dist. Ct. E.D. VA, Alexandria Div. 2009), the court concluded that an ordinance regulating the bulk transportation of ethanol, a hazardous substance, **was not preempted** by the Federal Railway Safety Act of 2004 (FRSA), 49 U.S.C. §§ 20101-53. The court stated:

> "The FRSA preempts all nonfederal regulations 'related to railway safety,' with two specific exceptions. ... The first exception provides that '[a] State may adopt or continue in force a law, regulation, or order related to railroad safety or security until' either the Secretary of Transportation ... or Secretary of Homeland Security ... issues an order or regulation 'covering the subject matter of the State requirement.' ... Second, '[a] State may adopt or continue in force an additional or more stringent law, regulation, or order' that is necessary to eliminate or reduce an essentially local safety or security hazard, if the law is not incompatible with the federal regulation and does not unnecessarily burden interstate commerce."

The court concluded that various federal regulations did not "substantially" subsume the City's bulk transportation of ethanol ordinance. The court approvingly cited In re Vermont Railway, 171 VT 496, 769 A. 2d 648, 655 (Sup. Ct. VT 2000), where

"the court held that municipal zoning regulations specifying the routing of trucks hauling salt from a rail yard, the number of trucks that may exit the rail yard, and the hours during which trucking could occur were not preempted by the FRSA. It determined that the municipal requirements did 'not interfere with railway operations; they merely address [ed] traffic issues and concerns with environmental contamination, matters properly within the province of municipalities by virtue of the state's delegation of its police powers.'"

However, the Norfolk Southern Ry. Co. court **did** also conclude that the ethanol ordinance, as applied, "is preempted by the ICCTA and is invalid", because the ordinance's permitting requirements were aimed at railroad operations, and were therefore not a proper exercise of the City's Police Powers, even though it related to local health and safety. Further, even environmental regulations that do not prevent a railroad's operations enacted under a municipality's "police powers to protect public health and safety" may be preempted where "such regulations stand as an obstacle to a carrier's ability to construct facilities or conduct operations." Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 U. S. Dist. Lexis 40131, 2005 WL 134077, at 19 (U.S. Dist. Ct. E.D. Mich. S.D. 2005). Nevertheless, as previously discussed, the ICCTA will not preempt a Safety Ordinance applicable to VTUSA's **passenger trains and track construction** adopted under a county's or municipality's Police Powers because the STB has determined that it does not have jurisdiction of those **passenger trains and track construction**.

SAFETY ORDINANCES REQUIRING THE FENCING OF RAILROAD RIGHTS-OF-WAY

Two courts have concluded that a state commission's requirement that a railroad repair or replace or construct a fence separating the railroad's right-of-way from private lands was not preempted by the ICCTA because the fences were not transportation facilities. State ex rel. Oklahoma Corp. Com'n v. Burlington Northern and Santa Fe Railway Company, 24 P. 3d 368 (Okla. Ct. Civ. Apps., Div. No. 2 2000) and Union Pacific Railroad Company v. State of Oklahoma, ex rel. Corporation Com'n, 990 P. 2d 328 (Okla. Ct. Civ. Apps., Div. 1, 1999). Those courts also stated that the FRSA's preemption provisions, at §§ 20106, did not preempt the state from enforcing its right-of-way fencing requirements, and, therefore, the state "could continue to enforce the state requirement that railroads construct and maintain fencing on their rights-of-way. Finally, the court rejected the railroad's equal protection argument, finding the state's fencing requirements are rationally related the legitimate state interest of assuring that railroads maintain their property in a manner safe to the public." Burlington Northern, supra, at 370. **These fencing cases, of course, apply to the VTUSA's rights-of-way, regardless of whether freight or passenger trains are affected.**

This Memorandum does not discuss whether or not VTUSA could construct an additional track over the FEC right of way for an expansion of its **freight service**.

I am not admitted to practice law in the State of Florida. The above are solely my opinions, intended to aid county and municipal counsel in the enforcement of their respective Zoning Laws and Police Powers.

APPENDIX

Sebastian. Sec. 54-2-8.1 of **Sebastian's** Land Development Code (SLDC) defines "Nonconforming use" as:

> "A use of a building or structure or a tract of land which does not, on the effective date of this ordinance or amendment thereto, conform to any one of the current permitted uses of the zoning district in which it is located, but which was legally established in accordance with the zoning in effect at the time of its inception, or which use pre-dates all zoning codes and which use has not changed or been abandoned during its existence. Herein such nonconforming use may be referred to as a nonconformity."

Sec. 54-2-8.2 of SLDC provides:

> "The regulations are especially important in regulating changes in the use, building or structure. Characteristics regulated include: kind of quality, volume or intensity, ... extension, enlargement, replacement, or any other change in characteristics of uses, buildings, or structures."

Sec. 54-2-8.5 of SLDC flatly states: "A nonconformity shall not be extended, expanded, enlarged, or increased in intensity ... ."

Tequesta. The Official Zoning Ordinance of the Village of Tequesta, Florida states that its purpose is "the promotion of the health, safety, morals, and general welfare of the residents of the village [of Tequesta] by ... Dividing the village into districts according to the **use of land** and buildings, **the intensity of such use** (including bulk and height), and surrounding open space. ... **Regulating and restricting the location and use of buildings, structures, and land for residential, commercial, and other uses.**" (Sec. 78-2) (Emphasis supplied.) "*Use* means the purpose or activity for which land or any building thereon is designed, arranged, or intended, or for which it is occupied or maintained." "*Structure* means a walled or roofed building ... or other manmade facility or infrastructure ... ." (Sec. 78-4) The Tracks fit within the definition of "Structure" because are an "other manmade facility or infrastructure." The Tracks are within the definition of "Use" because they are a "purpose ... for which land ... is occupied or maintained."

The Ordinance states: "*Nonconforming use* means any building, structure, or land lawfully occupied by a use at the effective date of the ordinance from which this chapter is derived or at the effective date of an amendment thereto which does not conform after the passage of such ordinance or amendment with the use requirements of the district in which it is situated." (Sec. 78-4)

The Ordinance provides the following as to "NONCONFORMING USES; NONCONFORMING STRUCTURES": "A structure that contains any nonconforming use

may be maintained … . However, **no alterations, enlargements, extensions or other modifications shall be made** except those required by law including eminent domain proceedings." (Sec. 78-94) (Emphasis supplied.) As set forth in the Memorandum, the passenger train operations proposed by Virgin Trains USA, which include the construction of an additional set of Tracks through Tequesta, will constitute a significant alteration, enlargement, extension and modification of the use for which the Tracks are presently used.

Indian River County. Section 904.05(1) of the **Indian River County**, Florida Code of Ordinances (IRC Code) presently provides:

> "*Generally.* No nonconformity shall be enlarged, increased, or changed to a different nonconformity, except upon a determination by the director of community development or his designee that the change results in lessening of the degree of the nonconformity."

Martin County. Sec. 8.1.C of **Martin County's** Land Development Regulations provides: "*Nonconforming use* means any land use which, at its commencement, was lawful but which fails to meet the requirements of the current Land Development Regulations." Sec. 8.2.C provides: "A nonconforming use shall not be materially increased in intensity." Sec. 8.2.E provides: "A nonconforming use shall not undergo a change of use unless the new use is a conforming use."

St. Lucie County. Section 3.01.01A of **St Lucie County's** Land Development Code (SLCLDC) provides: "No structure or land in the unincorporated area of St. Lucie County shall hereafter be constructed, built, moved, remodeled, reconstructed, used, or occupied except in accordance with the requirements of the zoning district in which the structure or land is located, unless it is a nonconformity under the provisions of Section 10.00.02 of this Code."

Section 10.00.01 of SLCLDC provides: "Nonconformities may continue, but the provisions of this Section are intended to curtail substantial investment in nonconformities and to bring about their eventual elimination, when appropriate, in order to preserve the integrity of the zoning district." Section 10.00.02 of SLCLDC provides: "Nonconforming uses of land and nonconforming uses of structures may continue in accordance with the provisions of this Section." Section 10.00.02C of SLCLDC provides: "Nonconforming uses shall not be expanded."

Section 10.00.02E of SLCLDC provides:

> "A nonconforming use shall not be changed to any other use unless such use conforms to the provisions of this Code, except in accordance with the procedure set forth in this paragraph. A change to another nonconforming use shall be permitted if and only if the proposed nonconforming use would not

result in a requirement for additional parking over that required for existing nonconforming use, and in addition, the Board of County Commissioners: 1. Determines that the proposed nonconforming use is equally or more appropriate to the district and the specific property involved than the existing nonconforming use; 2. Determines that any adverse effect of the proposed nonconforming use upon neighboring properties and residents will not be greater than that created by the existing nonconforming use; and 3. Requires that the applicant meet appropriate conditions, limitations, and requirements as are necessary to prevent or minimize adverse effects on neighboring properties and residents."

VTUSA's proposed **passenger service and related track construction** would clearly not be permitted under part 2 in the above quoted three-part test of SLCLDC 10.000.02E.

Vero Beach. Sec 64.21 provides: "The nonconforming use of land shall not be extended to any additional land not so used on the effective date of this chapter, May 16, 1978." Sec. 64.23 provides: "No nonconforming structure (as opposed to a structure used for a nonconforming use) shall be added to or altered in a fashion so as to increase the extent to which the structure is in violation of applicable regulations."

Laura Marotta

From: Richard V. Neill, Jr.
Sent: Monday, November 04, 2019 4:00 PM
To: elighapryor@gmail.com
Cc: Carl Peterson; William Thiess; Donna Dennis (donna.dennis@stlucievillagefl.gov); Scott Dennis; Laura Marotta
Subject: Property at US 1 and Naco

Dear Mr. Pryor,

I wanted to review, for my benefit and yours, what I recalled of the discussion with the Board of Aldermen at the last meeting.

To me, it seemed that the most efficient way to put the property into use would be to pursue the matter under the current county regulations. The Building Official was comfortable that a restaurant with bar would be okay in County Commercial General and would not require a conditional use permit. (At the time, we were clear that just a bar would require a Conditional Use permit.)

There was discussion about the type of liquor license associated with the property. You did not know. The Marshal suggested that the type of license might impact the issue of whether operations could continue after food service ceased.

Alderman Ritter, in particular, seemed concerned about post-food-service entertainment. That could impact consideration of the matter if he and others felt that the Village needed to establish regulations on that point.

One question that came up was whether there was a closing time established in the Village. (I don't see one but noise is restricted from 11 p.m. to 7.a.m. (and to 1 p.m. on Sunday.))

We also discussed that you would presumably need to meet ADA requirements, that there might be landscaping requirements, that you were going to need a sign off from the Fire Department, that the Health Department would be involved, that you would presumably need sewer and water connections, etc. There was some discussion about certain types of use, perhaps, requiring that the structure have a sprinkler system.

I understand that the Building Official, Mr. Peterson, spoke with the senior planner at St. Lucie County. What he reported was that the Senior Planner at St. Lucie County said we were correct there can be a restaurant that serves alcohol in Commercial General. Once the band starts playing and it does not serve food, it would require a conditional use. He also stated that, if it was too close to an occupancy type that was restricted because of distance, they would grant a waiver of distance if there were no objections from the property being affected.

Mr. Peterson also advised that, as far as the Building Code, a restaurant would be fine. If it is also used a night club, the Building Code has stricter requirement for that use inside the A2 occupancy type that would trigger a change of use and would require some changes as required in Chapter 10 of the Florida Building Code Existing Buildings and Chapter 9 of the Florida Building Code Building.

Is this helpful? I am trying to communicate things that may well be involved.

Since then, I've also looked at the landscaping/site plan issue. My understanding currently is that, if the matter moves forward under the County code, the County would require that the landscaping be brought up to Code and that the parking lot be re-striped; so, you should expect that the Village would require that if we apply the County code.

If the Village code were to be applied, we would first have to change the Future Land Use Map (which is involved enough that it has to go to Tallahassee), and then our current provisions would, according to my associate, require a full site plan of review, which would be at least as onerous as complying with the County regulations.

I'm sorry if this isn't encouraging. Are there other questions I could try to answer for you?

Regards,

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rneilljr@neillgriffin.com

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Memo

Dan, what guides permitting a conditional use? Are there standards within the County Code to these CU's? Or CU's in general?

To: RVNjr

From: IEO

Date: 10-29-2019

Subject: SLV- St. Lucie County and St. Lucie Village regulations of bars and entertainment

---

Attached hereto you will find the regulations that I have gathered from the St. Lucie County Land Development Code and their Code of Ordinances.

St. Lucie County permits free standing "drinking places" to as conditional uses and permits "Drinking Places" as accessary uses to restaurants. Also, Alcoholic Beverages may not be sold during the hours of 2a.m. and 7a.m. each day. Lastly, the selling of alcohol is not permitted within 1,600 feet of any existing religious facility, school, public park, or public playground (not applying to people who were selling prior to those facilities coming into existence). There is a waiver procedure found at 7.10(c), of the land development code, that says that the distance requirement may be waived if sales of alcohol are accessary to an eating establishment (a restaurant). Lastly, if the establishment is a hotel or motel with 100 or more rooms, or if it is a restaurant with seating for at least 200 and the building is over 4,000 square feet.

St. Lucie County does permit Bars/Clubs/Entertainment in Commercial Resort districts as Secondary Recreation/Leisure/Entertainment Experiences. They find that those Secondary Amenity Uses are important, but not primary, to the resort experience.

St. Lucie Village does have the Nuisance Ordnance which restricts the volume of noise that can be heard coming from a building. In a commercial district, it is unlawful to cause music to be played at a volume such that it can be heard from a distance of 50 feet from the establishment between the hours of 11 pm- 7am (each day) and 7 am – 1 pm each Sunday.

Also, the Village Ordinances do allow for Bars, Lounges, & Related Entertainment (there is no definition for Night Club, I would assume night club might be a related entertainment). But, the Village does require that those uses be non-profit.

If the Village would like to create regulations for a Bar or related entertainment in think that it would need to specifically address the sale or consumption of alcohol and where it will be permitted etc.

This does not get into establishments displaying nudity or the like, but St. Lucie County does regulate those as well.

Memo

To: RVNjr

From: IEO

Date: 11-6-2019

Subject: SLV- Review of conditional uses and County regulations

---

Attached hereto you will find the regulations that I have gathered from the St. Lucie County Land Development Code pertaining to the Conditional Use standards, etc.

You will note that their procedure for conditional uses is largely similar to ours. The applicant must demonstrate: consistency with the local code and comprehensive plan (which is where we can probably get some of our regulations and plan considered or at least be an influence); Effect on adjacent properties; adequacy of public facilities; adequacy of fire protection; and environmental impact. Also, the Board can impose conditions on the conditional use.

The procedure that utilize is: (A) pre-application conference; (B) Filing and submitting an application;(C) Hearing by the planning and zoning commission; and (D) Hearing by the Board of Commissioners.

Also, they provide for adjustments and extensions of conditional uses.

Richard V. Neill, Jr.

From: Richard V. Neill, Jr.
Sent: Monday, October 28, 2019 4:24 PM
To: smdelo@comcast.net
Cc: 'William Thiess'; Donna Dennis (donna.dennis@stlucievillagefl.gov); LMarotta@neillgriffin.com
Subject: FW: St Lucie Village -- bowling alley property

Mrs. Delo,

Following up on my email of October 4 and 6, 2019 (below), I am hoping for your input on how to describe the use you want permitted and the conditions under which the use will be allowed. My belief is that that will help reduce the time and expense as far as my work on the matter; so, I am not planning to move forward on this until I get your input.

Just wanted you to be aware that I was waiting for you input and not planning to work on the matter until I had your thoughts.

Regards,

Richard V. Neill, Jr.
Town Attorney
Town of St. Lucie Village, Florida

Neill Griffin Marquis, PLLC
Post Office Box 1270
Ft. Pierce, FL 34954
Telephone: 772-464-8200
Fax: 772-464-2566
richard.neill@stlucievillagefl.gov

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From: Richard V. Neill, Jr.
Sent: Sunday, October 06, 2019 12:56 PM
To: Sharon
Cc: William Thiess; Donna Dennis (donna.dennis@stlucievillagefl.gov); Laura Marotta
Subject: RE: St Lucie Village -- bowling alley property

Law Offices
NEILL GRIFFIN MARQUIS, PLLC
311 South Second Street
Suite 200
Fort Pierce, FL 34950

Richard V. Neill+▫
Richard V. Neill, Jr. +☆
Renée Marquis-Abrams*
Ian Eielson Osking
Brandon M. Hale

Mailing Address:
Post Office Box 1270
Fort Pierce, FL 34954-1270
Telephone: (772) 464-8200
Fax: (772)464-2566

*Board Certified Wills, Trusts, & Estates Lawyer
☆Certified Circuit Civil/County Court Mediator
+ Board Certified Civil Trial Lawyer
▫ Of Counsel

October 25, 2019

Ms. Susan Copeland-Hodges
3301 N. Indian River Dr.
Fort Pierce, FL 34946

Re: Demming Road Project

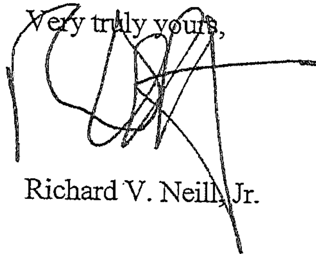
Ms. Copeland-Hodges,

Following up on our telephone conversation, I have spoken with the Mayor and asked that work on the Demming Road project, which was, approved by the Board, be deferred until after next month's meeting.

I did that so that you would have an opportunity to look for and present evidence on the elevation at the area in question prior to it being filled, which I understand took place in 2014 or thereafter.

The meeting will be on November 19 at 6:30 p.m. at the Village Hall. If I could have any information you develop by November 12, I can include it in my pre-meeting report to the Board.

Very truly yours,



Richard V. Neill, Jr.

RVNjr/lam

Richard Neill

From: Stephen Cooper <scooper@scpeinc.com>
Sent: Monday, October 21, 2019 1:05 PM
To: 'Patrick Dayan'; 'Don West'
Cc: 'Chris Dzadovsky'; William Thiess; Richard Neill
Subject: RE: Message from KING DAVID (7729796068)

Importance: High

Hello Patrick;

I received the emails and will get with the SLV Mayor/Attorney to review.
We will offer whatever assistance we can, to help understand/resolve the issue.

In reading your email, I would agree that SLV is experiencing the annual "King tides", which may have a negative tail water impact. Would need to see grades. Also, I would agree that if the existing FEC pipes have collapsed, that also would have a significant adverse upstream impact.

Please allow me a little time to get review and we will respond with whatever relevant information we can discover.

Thx

Stephen Cooper, P.E.
Stephen Cooper, P.E. & Associates, Inc.
7450 South Federal Highway
Port St. Lucie, Florida 34952
(772) 336-2933 office
(772) 263-3904 cell

-----Original Message-----
From: Patrick Dayan [mailto:DayanP@stlucieco.org]
Sent: Friday, October 18, 2019 1:04 PM
To: Don West
Cc: Stephen Cooper; Chris Dzadovsky
Subject: RE: Message from KING DAVID (7729796068)

Don,

I spoke to Mr. King and pointed him in the direction of Steve Cooper, who the village has contracted with as their drainage engineer for information on the village's drainage systems and history. That is the best source for what drains where. Mr. King was aware of the current king tides, which may add about 1-2' of tailwater influence to the low-lying village properties.

For the FEC work, I found the plans for the Brightline (all aboard FL) project, which indicated the existing twin 24" pipes in this location, north of Chamberlain Blvd were to be replaced. The note on the plans state "replace collapsed pipe" which may explain why more apparent surface flows are being seen in the area. The water management district did issue a permit for this work, which is primarily the 2nd rail and the new 3rd rail south of downtown FP. The SFWMD permit did not approve any re-routing of drainage or additional areas to be drained, to my knowledge. Staff will visit the site and provide more information.

The specific location of the culvert and further south towards Chamberlain Road was not in one of the locations that was challenged by the Counties for inconsistencies or wetland impacts in the administrative petition. The 2nd track installation is near the middle of the 100' ROW that FEC owns and the elevations are very flat, so no apparent parallel drainage feature exists in the FEC ROW here.

Patrick Dayan, P.E.
Water Quality and Development Review
Division Director

St. Lucie County Water Quality Division
3071 Oleander Avenue
Fort Pierce, FL 34982
Main: (772) 462-2511 M Direct: (772) 462-2767 Fax: (772) 462-2363
Email: dayanp@stlucieco.org Website: www.stlucieco.org

-----Original Message-----
From: Don West
Sent: Thursday, October 17, 2019 4:58 PM
To: Patrick Dayan <DayanP@stlucieco.org>
Cc: Christopher Lestrange <lestrangec@stlucieco.org>; Kimberly Graham <Grahamk@stlucieco.org>
Subject: FW: Message from KING DAVID (7729796068)

Patrick,

Can you please have your Staff perform a field assessment of the referenced culvert pipes and the surrounding conditions. Also, if you can research the SFWMD permits to see if a permit was obtained. This may be an enforcement issue for SFWMD to deal with, especially since it is the FEC Railroad.
Thanks.

Don

Don West
Public Works Director

St. Lucie County Public Works Dept.
2300 Virginia Ave., Rm. 229
Fort Pierce, FL 34982
Main: (772) 462-1485 M Fax: (772) 462-2362
Email: westd@stlucieco.org Website: www.stlucieco.org

-----Original Message-----
From: Chris Dzadovsky
Sent: Thursday, October 17, 2019 3:53 PM

To: Robert Delgadillo <DelgadilloR@stlucieco.org>; Don West <westd@stlucieco.org>; Christopher Lestrange <lestrangec@stlucieco.org>; Patrick Dayan <DayanP@stlucieco.org>; Kimberly Graham <Grahamk@stlucieco.org>
Subject: FW: Message from KING DAVID (7729796068)

Don, Chris, Patrick, and Kim

I just spoke with Mr. King.

His issue and concern is he just built a home on 3103 N Indian River Drive.
At some point FEC placed two 24" culvert pipes under the tracks at about
3185 Old Dixie Hwy which has been reported to, and has resulted in new flooding up to the backs of the house near his.
All of the home are reporting never before seen water intrusion to their properties and they all attribute to the new FEC pipes.

Is there a permit that was achieved to place those pipes?
Did SFWMD approve that new flow area?
What alternatives are available to prevent flooding in the area (as these homes have never seen the water come to them from the western side) as most flooding came from the lagoon.
What if anything can the county do to help resolve these concerns?

Respectfully,

Chris Dzadovsky
St. Lucie County Commission
District 1
Office: (772) 462-1410
Mobile (772) 323-5346

Aviation and Business Park Opportunities:

-----Original Message-----
From: Cisco Unity Connection Messaging System [mailto:unityconnection@slc-rr-cucpub.stlucieco.org]
Sent: Thursday, October 17, 2019 3:11 PM
To: delgadillor@slc-rr-cucpub.stlucieco.org
Subject: Message from KING DAVID (7729796068)

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RESOLUTION 2019-13

A RESOLUTION OF THE BOARD OF ALDERMEN OF THE TOWN OF ST. LUCIE VILLAGE APPROVING THE ATTACHED CODIFICATION OF REVISIONS TO THE 1995 ZONING ORDINANCE OF THE TOWN OF ST. LUCIE VILLAGE, WHICH WAS ORIGINALLY ADOPTED PERSUANT TO ORDINANCE 1995-3 AND AMENDED PURSUANT TO ORDINANCE 1996-3, AND HAS SINCE BEEN AMENDED ON MULTIPLE OCCASIONS, SO THAT ALL AMENDMENTS FROM THE TIME OF ADOPTION THROUGH ORDINANCE 2015-1, HAVE BEEN INCORPORATED INTO A SINGLE DOCUMENT, AND DIRECTING THE MAYOR, STAFF AND THE VILLAGE ATTORNEY CONCERNING A FURTHER UPDATE.

WHEREAS, The Board of Aldermen of the Town of St. Lucie Village, Florida, previously adopted the Town of St. Lucie Village 1995 Zoning Ordinance ("1995 Zoning Ordinance") pursuant to Ordinance 1990-3 and initially amended pursuant to Ordinance 1996-3;

WHEREAS, The Board of Aldermen subsequently amended the 1995 Zoning Ordinance pursuant to Ordinance 2005-1, 2006-11, 2012-3, 2012-4, 2013-8, 2015-1, and 2018-6;

WHEREAS, the amendments previously adopted through Ordinance 2015-1 have been incorporated into the attached version of the 1995 Zoning Ordinance but the amendments set forth in Ordinance 2018-6 have yet to be incorporated; and,

WHEREAS, The Board approves the attached codification of the 1995 Zoning Ordinance with those amendments and desires to provide for the future incorporation of the amendments in Ordinance 2018-6 into this codification.

NOW, THEREFORE, the Board of Aldermen of the Town of St. Lucie Village, Florida hereby resolves as follows:

1. The attached codification including the amendments to the 1995 Zoning Ordinance up through Ordinance 2015-5 is hereby approved. The Village Attorney shall accept the changes approved in the attached codification and post a clean copy of the updated Ordinance online, noting the Ordinances which have now been incorporated.

2. The Mayor, staff, and Village Attorney are authorized and directed to incorporate the amendments encompassed within

Ordinance 2018-6, including renaming the document, into this codification.

3. The Village Attorney shall, thereafter, provide the Board with a further updated codification incorporating and tracking the changes encompassed within Ordinance 2018-6.

PASSED AND APPROVED by the Board of Aldermen of the Town of St. Lucie Village on this______day of November, 2019.

APPROVED:
BOARD OF ALDERMEN OF THE TOWN
OF ST. LUCIE VILLAGE, FLORIDA

By:

____
William G. Thiess, Mayor

ATTESTED:

By: ______________________________
Donna Dennis, Clerk

I, DONNA DENNIS, Clerk of the TOWN OF ST. LUCIE VILLAGE, FLORIDA, do hereby certify that this is a true and accurate copy of Resolution 2019-3 which was duly introduced, read and adopted at the regular meeting of the Board of Aldermen of the TOWN OF ST. LUCIE VILLAGE, FLORIDA, held this ______day of ______________, 2019.

____
Donna Dennis, Clerk

Richard V. Neill, Jr.

From: Melissa Solis <MSolis@flcities.com>
Sent: Friday, October 25, 2019 2:13 PM
To: Richard V. Neill, Jr.
Cc: Donna Dennis (donna.dennis@stlucievillagefl.gov); Laura Marotta
Subject: RE: Town of St Lucie Village
Attachments: FMIT P&L Definition.pdf; FMIT WC Definition.pdf

Richard,

Thank you for confirming and that is good.

The FMIT property & liability and work comp coverage definitions do include volunteers – see attached.

As long as the volunteer is acting within the direction and scope of Village duties, there is no other coverage the Village needs to obtain and nothing you need to submit to us.

Thank you,
Melissa

From: Richard V. Neill, Jr. <RNeillJr@neillgriffin.com>
Sent: Friday, October 25, 2019 2:02 PM
To: Melissa Solis <MSolis@flcities.com>
Cc: Donna Dennis (donna.dennis@stlucievillagefl.gov) <donna.dennis@stlucievillagefl.gov>; Laura Marotta <LMarotta@neillgriffin.com>
Subject: RE: Town of St Lucie Village

Yes, Melissa. It's Village owned and the Clerk confirms that the car is under the Auto Liability Coverage and Auto Physical Damage portions of the insurance. Richard

Richard V. Neill, Jr., of
Neill Griffin Marquis, PLLC
Post Office Box 1270
Ft. Pierce, FL 34954
Telephone: 772-464-8200
Fax: 772-464-2566
rneilljr@neillgriffin.com

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From: Melissa Solis [mailto:MSolis@flcities.com]
Sent: Friday, October 25, 2019 12:35 PM

To: Richard V. Neill, Jr.
Cc: Laura Marotta
Subject: RE: Town of St Lucie Village

Good afternoon Richard,

Does the Village own the Marshal's vehicle and its on the Villages auto schedule?

Thank you,
Melissa

From: Richard V. Neill, Jr. <RNeillJr@neillgriffin.com>
Sent: Friday, October 25, 2019 10:17 AM
To: Melissa Solis <MSolis@flcities.com>
Cc: Laura Marotta <LMarotta@neillgriffin.com>
Subject: Town of St Lucie Village

Ms. Solis,

You are the Florida Municipal Insurance Company person for whom I have an email address in my system, so I am directing this query to you. Please refer me to someone else if that is appropriate.

The Village Board is considering allowing a volunteer to do rounds in the Village with the Village Marshal's vehicle when the Marshal is out of town.

You'll recall that our Marshall is primarily involved in code enforcement and does periodic rounds of the Village and does not actively engage in law enforcement, but rather notes a violation or calls the Sheriff's Department or 911 as needed.

Does having someone else fill in periodically create coverage issues? Do you need additional information or forms from us in order to address this?

Thanks in advance for your consideration and response.

Regards,

Richard

Richard V. Neill, Jr.
Town Attorney
Town of St. Lucie Village, Florida

Neill Griffin Marquis, PLLC
Post Office Box 1270
Ft. Pierce, FL 34954
Telephone: 772-464-8200
Fax: 772-464-2566
richard.neill@stlucievillagefl.gov

Please Note: Florida has very broad public records laws. Most written communications to or from myself of Village officials regarding Village business are public records available to the public and media upon request. It

1. medical, surgical, dental, x-ray or nursing service or treatment or the furnishing of food or beverages in connection therewith; or

2. the furnishing or dispensing of drugs or medical, dental or surgical supplies or appliances.

P. **Interlocal Agreement,** means an agreement that is authorized by and entered pursuant to Chapter 163, Fla. Stat. and that complies with the express provisions of Section 768.28 Fla. Stat.

Q. **Inverse Condemnation,** means any affirmative regulatory action by a Designated Member resulting in the deprivation of substantially all economically beneficial or productive use of private property and the resulting cause of action by the affected property owner to recover any loss in monetary value resulting from the regulatory action.

As defined, "inverse condemnation" excludes any physical taking of property or diminution of access to property, by whatever means and whatever name called.

R. **Loading or unloading,** means the handling of property:

1. after it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto;"

2. while it is in or on an aircraft, watercraft or "auto;" or

3. while it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto."

S. **Member,** as used herein means:

1. the Designated Member; and

2. while acting within the scope of his employment, any officer (except constitutional officers), volunteer, servant, or employee of the Designated Member, including elected and appointed officials, and members of Boards or Commissions created by the Designated Member. However, the coverage so provided any officer, servant, or employee does not apply to bodily injury to another officer, servant or employee of the Designated Member injured in the course of and arising out of his employment.

The coverage afforded applies separately to each Member against whom Claims are made or Suits are brought, except with respect to the limits of liability of the Trust and does not apply to any Claim, Suit or liability arising out of the conduct of any partnership or joint venture of which a Member is a partner or participant and which is not specified in this Coverage Agreement as a Designated Member.

T. **Mobile Equipment,** means a land vehicle (including any machinery or apparatus attached thereto), whether or not self propelled, (a) not subject to motor vehicle registration, or (b) maintained for use exclusively on premises owned by or rented to the Designated Member, including the ways immediately adjoining, or (c) designed for use principally off public roads, or (d) designed or maintained for the sole purpose of affording mobility to equipment

DEFINITIONS

Designated Member, means the entity, organization or constitutional officer named in Item I. of the Declarations of this Agreement; Designated Member does not include employees or agents of that entity or organization.

Member, as used herein means:

1. the Designated Member;

2. while acting within the scope of his employment, any officer, volunteer, servant, or employee of the Designated Member, including elected and appointed officials, and members of Boards or Commissions.

II. COVERAGE A - WORKERS COMPENSATION

A. The Member and the Trust agree that the Trust will pay any sum a Member becomes legally obligated to pay under the workers compensation laws of the state of Florida, including Employers liability as discussed within Coverage B attached hereto for accidents which occur during the period of this Agreement; and the Trust further agrees to pay all administration assessments as may be required in accordance with Florida Law;

B. The Trust is to defend in the name of and on behalf of the Members any suits or other proceedings which may at any time be instituted against them on account of injuries or death within the purview of the Florida Workers Compensation Law or on the basis of Employers liability, including suits or other proceedings alleging such injuries and demanding damages or compensation therefore, although such suits, other proceedings, allegations or demands are wholly groundless, false, or fraudulent, and to pay all costs taxed against Members in any legal proceeding defended by the Members, all interest accruing after entry of judgment and all expenses incurred for investigation, negotiation or defense;

C. Liability of the Trust to the employees of any employer is specifically limited to such obligations as are imposed by the Florida law against the employer for workers compensation and/or employers liability as provided in Coverage B. The Trust's liability is further limited to only the obligations it assumes under this Agreement;

D. The Member agrees the Trust shall not be liable for any additional compensation imposed by Section 440.54, and Section 440.15 (11), Florida Statutes; and

E. The Member agrees that the Board is authorized to set aside from the contributions and monies collected a reasonable sum for the operating or administrative expenses of the Trust. All remaining funds collected during any one fiscal year of the Trust shall be set aside and shall be used only for the following purposes: payment of a fee for the administrator and claims agent for said Trust; payment for claims, expenses, payments of compensation to employees covered by this contract, including but not limited to settlements, awards, judgements, legal fees, and costs in contested cases; payment of administrative and other assessments as required by Florida law; payment of cost of all bonds; actuarial, and auditing expenses required of the Trust or its agency or employees under Florida law; or other reasonable operating costs or expenses necessary for the administration of the Trust.

From: Richard V. Neill, Jr.
Sent: Friday, October 18, 2019 10:31 AM
To: Laura Marotta
Subject: FW: [Locgovtopics] Tree abuse statute 163.045

From: LocGovTopics [mailto:locgovtopics-bounces+rneilljr=neillgriffin.com@listserve.com] **On Behalf Of** Terrell Arline via LocGovTopics
Sent: Thursday, October 17, 2019 10:18 AM
To: Cichon, Pamela
Cc: locgovtopics@listserve.com
Subject: Re: [Locgovtopics] Tree abuse statute 163.045

Pamela,
This sounds like a good issue to raise by a declaratory action.
You would need a current proposal to cut down a tree.
Thank you.

Terrell K. Arline
Office: (850) 262-7928
Cell: (850) 321-8726
1819 Tamiami Drive
Tallahassee, FL 32301
arlinelaw.com

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On Thu, Oct 17, 2019 at 9:57 AM Cichon, Pamela via LocGovTopics <locgovtopics@listserve.com> wrote:

Dear Local Government Attorneys:

The legislature, as you know, wiped out local government's ability to monitor and protect Florida's tree canopy. The sketchiness of the below Statute does not even require that the arborist for hire view the tree at its site before rendering a decision that the tree poses a danger. Cities are being faced with destroyed trees based upon opinions from arborists with questionable credentials and training. The fact that not even "notice" can be required leads to butchering any and all trees with impunity.

My Question: Has anyone created a new tree ordinance or amended an existing one to give the City some muscle in protecting trees that are being incorrectly declared a danger by an arborist or landscape architect who has no training in risk assessment related to trees or is simply selling their opinion?

Chapter 163

INTERGOVERNMENTAL PROGRAMS

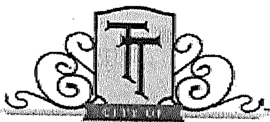
163.045 Tree pruning, trimming, or removal on residential property.—

(1) A local government may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to persons or property.

(2) A local government may not require a property owner to replant a tree that was pruned, trimmed, or removed in accordance with this section.

Given that (1) states that govt may not require notice or approval for removal of a tree **IF** the property owner obtains documentation, it would seem that the government would have to KNOW the documentation existed first in order to "not require a notice, application, approval," etc. Therefore, would an ordinance requiring that all documentation be submitted to the City 24 hours prior to the removal of the tree be in violation of the statute. At least then, the City could check the credentials of the arborist and perhaps have its own arborist view the tree and make contact with the owner.

Thank you!



TEMPLE TERRACE

Amazing City. Since 1925.

Pamela D. Cichon

City Attorney

City of Temple Terrace

11250 N. 56th Street

Temple Terrace, Fl 33617

Phone: (813) 506-6474

Richard Neill

From: Richard Neill
Sent: Tuesday, October 29, 2019 5:42 AM
To: 'William Thiess'; Donna Dennis (donna.dennis@stlucievillagefl.gov)
Cc: 'paramountfarms@comcast.net'
Subject: Cartwright - 465 Rouse Rd
Attachments: 2-23-2004 Letter to Cartwright.pdf

Bill and Donna,

I spoke to Mr. Cartwright last week; and, Laura and I have looked at our files.

One thing that became apparent is that my copies of the Minutes and the Board packages (which include the Minutes) are no longer at my office but are in storage at the Village Hall; so, I don't have those to look at.

We did find one reference of significance in the Attorney's Report of March 8, 2004, which attached a letter. A copy of the letter is attached to this email. This suggests to me that the discussion of an additional structure occurred possibly in 2003, that at the time we had contemplated an ordinance permitting that activity but that the ordinance did not pass, and our thought was that they had specific permission so it should not be a problem for them. (There was an ordinance eventually passed, but I don't know if it would apply to Mr. Cartwright's property.)

Mr. Cartwright did indicate that he would be willing to pay for a public records search, and I think that, to find information to support the point in question, Donna probably needs to go through the Minutes and see what we can find, and that Mr. Cartwright should pay for that effort. (I would suggest pulling all references in the time period in order to get a full understanding.)

One thing I'll note before closing, for Mr. Cartwright who is copied on this, is I did look at the property appraiser's website and it did not appear to me that the property was being treated as two parcels, so I'm not sure where that is coming from . . . ?

Richard V. Neill, Jr.
Town Attorney
Town of St. Lucie Village, Florida

Neill Griffin Marquis, PLLC
Post Office Box 1270
Ft. Pierce, FL 34954
Telephone: 772-464-8200
Fax: 772-464-2566
richard.neill@stlucievillagefl.gov

Please Note: Florida has very broad public records laws. Most written communications to or from myself of Village officials regarding Village business are public records available to the public and media upon request. It is the policy of St. Lucie Village that all Village records shall be open for personal inspection, examination and / or copying. Your e-mail communications will be subject to public disclosure unless an exemption applies to the communication. If you received this email in error, please notify the sender by reply e-mail and delete all materials from all computers.

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February 23, 2004

Mr. Brooks Peed
2709 North Indian River Drive
Fort Pierce, FL 34946

Mr. William Cartwright
465 Rouse Road
Fort Pierce, FL 34946

RE: Town of St. Lucie Village

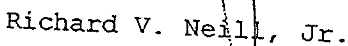
Gentlemen:

You were both before the Board of Aldermen some time ago and were granted permission to build an additional residential structure on your property.

At that point, the Board contemplated passing an ordinance which clearly permitted the same. That ordinance was never passed.

Since you had specific permission for your project, I don't see that it creates any problem for you, but felt that I should make you aware of this circumstance and apologize for not doing so sooner.

With best regards.



Yours very truly,

Richard V. Neill, Jr.

RVNjr/mkl
cc: William G. Thiess, Mayor
Diane C. Orme, Clerk