IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

DENNIS K. MCDONALD, **CASE NO.: 2013-CA-816**

Plaintiff,

v.

CITY OF PALM COAST,

Defendant.
_____/

DEFENDANT'S MOTION FOR SANCTIONS PURSUANT TO SECTION 57.105 FLORIDA STATUTES

Defendant, City of Palm Coast files this Motion for Sanctions pursuant to section 57.105, Florida Statutes and requests this Court award sanctions to the Defendant based upon Plaintiff's filing of his Complaint for Injunctive Relief, and states as follows:

Section 57.105, Florida Statutes provides that the court

> shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
> (b) Would not be supported by the application of then-existing law to those material facts.

Section 57.105(4), requires a party seeking sanctions under this section to serve a motion upon the other party and to provide the other party 21 days to withdraw or correct the challenged claim.

Plaintiff filed his Complaint on or about August 8, 2013 and it was served on the City on

September 4, 2013. The Complaint sets forth absolutely no facts supporting an injunction and the request for injunctive relief is not supported by existing law.

I. FACTUAL ALLEGATIONS ARE FALSE AND UNSUPPORTED

Paragraph 5 of the Complaint contains a mix of false facts and legal conclusions. Plaintiff alleges that the City is "bound and beholden to a certain Declaration of Restrictive Covenants and Easements." This is untrue, factually and legally. The Declaration of Restrictive Covenants and Easements attached as Exhibit A to the Complaint ("Declaration") is inapplicable to either property owned by the City or to the City's actions regarding privately owned property. First, from a factual perspective, the description of the property governed by the Declaration lies to the *west* of I-95, as is apparent from reviewing the map attached to the Declaration. The Palm Harbor shopping center property lies *east* of I-95 and was never governed by the Declaration.

Second, even if the Declaration covered the property in question, the property *obviously* became part of an incorporated municipality in 1999 and is now governed by the City of Palm Coast's comprehensive plan, land use regulations and codes, which is required by Florida law. "A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. The plan is likened to a constitution for all future development within the governmental boundary." *Machado v. Musgrove*, 519 So. 2d 629, 631–32 (Fla. 3d DCA 1987) (citations omitted). *See also* § 163.3167, Fla. Stat. Once a comprehensive plan has been adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, "all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan" must be consistent with that plan. § 163.3194(1)(a), Fla. Stat. (2007); *see also* § 163.3164(7), Fla. Stat.

The City of Palm Coast has adopted a comprehensive plan and development regulations. Section 1.02 of the City's Land Development Code ("LDC") states, "[t]his Land Development Code is adopted under authority of the City of Palm Coast by virtue of the constitution and laws of the State of Florida including particularly F.S. §§ 163.3201 and 163.3202, (the Local Government Comprehensive Planning and Land Development Regulation Act) and the general authority granted in Article VIII, Section 2, of the Constitution of the State of Florida and F.S. chs. 163 and 166." Further, section 1.03 of the LDC states:

> The City has developed this Unified LDC to implement its Comprehensive Plan and to streamline the development review process. This LDC sets forth regulations, requirements, and procedures governing the use and development of land for the purpose of protecting the health, safety, and general welfare of the citizens of the City and to enhance the appearance, function, and livability of the City, to the end of improving the overall quality of life within the community.
>
> As required by F.S. ch. 163, this LDC contains specific and detailed provisions which regulate the subdivision of land; the use of land and water; areas subject to flooding; environmentally sensitive lands; signage; landscaping; stormwater management; and protection of potable water well fields. This LDC also requires that all development be reviewed for its impact on public facilities and services, and that adopted levels-of-service are maintained.
>
> The provisions of this LDC establish the full range of land development regulations necessary to adequately regulate the use of real property and implement, in conjunction with and subordinate to the Comprehensive Plan, sound growth management within the City and oversee the transition of any land development authority from the Palm Coast Community Services Corporation to the City.

Thus, it is apparent that development in Palm Coast is governed by the City's comprehensive plan and LDC.

Plaintiff does not allege that the City has taken any actions in violation of its comprehensive plan or LDC; rather, Plaintiff alleges only that the City failed to follow the former Declaration governing some other property prior to incorporation into the City.

Third, to the extent Plaintiff suggests property owned by the City is subject to any covenants and restrictions, this Plaintiff is completely wrong. Case law clearly provides that municipalities are not bound by restrictive covenants. *Ryan v. Town of Manalapan*, 414 So. 2d 193 (Fla. 1982); *Inlet Shores Civic Assoc., Inc. v. City of New Smyrna Beach*, 443 So. 2d 118 (Fla. 5th DCA 1983).

The allegation in paragraph 6 of the Complaint that "the canopy trees and all other landscaping designs were considered to be an integral part of the overall design in order to preserve the existing aesthetic integrity of the Parkway East area, in particular the Palm Harbor Shopping Center, and its surrounding outparcels" is simply untrue and no such language is contained in the Declaration (even if the Declaration was applicable). Nothing in paragraph 6 is a valid basis for injunctive relief.

There are numerous false, misleading and unsupported allegations in paragraph 7. First, it is unclear to what property these allegations relate. Paragraph 7 references three different pieces of property: Palm Harbor Shopping Center, the Dunkin Donuts property in Exhibit B and the Wells Fargo property in Exhibit C. Second, the City Council did not approve any setback variances on the dates alleged, either for the shopping center property or the properties in Exhibits B and C, and Plaintiff failed to attach any document supporting the allegation that the City Council approved setback variances on any of these properties. No setback variances have been granted by anyone from the City regarding the shopping center property. Exhibits B and C granted setback variances to Dunkin Donuts and Wells Fargo for potential future development but one was granted by the PLDRB and one was granted administratively by the City Manager. The setback variances granted were not for any particular development, but, instead, were granted in anticipation of potential future development to address the potential that the two properties were made non-conforming by the City's acquisition of portions of the Dunkin Donuts and Wells Fargo properties. Plaintiff's allegations

regarding these variances are far off base and just plain false. Third, no one from the City has approved the removal of any trees on the premises of the Palm Harbor Shopping Center; the City has received no site plan or any other request calling for the removal of trees. Fourth, no one from the City has approved the removal of any trees on the properties described in Exhibits B and C. Nothing in Exhibits B and C concern or contemplate the removal of trees on either remainder properties. Fifth, although paragraph 7 alleges that City Council meeting minutes are attached to the Complaint, no meeting minutes are attached. Nothing in the exhibits attached to the Complaint indicate that trees are to be cut down in or around the referenced properties. Paragraph 7 is full of inaccuracies and does not support injunctive relief.

Paragraph 8 of the Complaint alleges the City's approval of a setback variance to allow the aforementioned tree removal was done without receiving a recommendation from the Planning and Land Regulation Board or Architectural Review Committee. First, there was no setback variance approval to remove any trees. Second, the City Council did not, and was not required to, approve the agreement to waive any potential future setback issues caused by the City's acquisition of a portion of the Dunkin Donuts and Wells Fargo properties. Plaintiff does not cite to any code provision, rule, or policy that would have required the City Council to approve the variances approved in Exhibits B and C following recommendations from any boards or committees. Third, it is apparent from reading Exhibit B, that the City's PLDRB did approve that variance. Fourth, there is no such entity as the Architectural Review Committee so the approval of such a committee would be impossible. Fifth, Plaintiff's allegation that such recommendations are required in the "original Planned Unit Development" is untrue. The shopping center property lost its PUD status in 2005 and was rezoned as COM 2, following all the regulations concerning that zoning district. Notably, even though

Plaintiff alleges PUD requirements apply, Plaintiff failed to attach a copy of the PUD upon which he relies as required pursuant to rule 1.130(a), Florida Rules of Civil Procedure. Paragraph 8 is also full of inaccurate, false facts and provides no basis for injunctive relief.

Paragraph 9 also contains false allegations because there are no site plans or approvals for the removal of any trees from the shopping center, Dunkin Donuts property or Wells Fargo property, which are the only properties referenced in the Factual Allegations and attachments to the Complaint. Further, Plaintiff's reference to the Declaration's prohibition against removing any live tree with a trunk of 4 inches or more in diameter is inapplicable because the Declaration clearly does not apply to the subject property; however, even if it did, Plaintiff misstates the language in the Declaration. There is no absolute prohibition against removing trees. The Complaint fails to allege any truthful, supported fact proving that any "CNR" was violated by the City's actions (even if such "CNRs" were valid).

Paragraph 10's allegation that trees have been "marked" and their destruction is "imminent" is patently false and Plaintiff knows this allegation is false. Again, it is unclear what property is being referenced in this paragraph. If Plaintiff is referring to the trees located in the Palm Harbor Shopping Center, as Plaintiff is well aware, trees were marked as part of a *tree count* by the property owner. There are no current site plans or any other request to remove trees in the shopping center; there are no requests or applications with the City to remove trees in the shopping center; and the City has not approved the removal of any trees as part of any redevelopment of the shopping center. Plaintiff has not cited to a single document showing that trees in the shopping center have been marked for removal and that removal is "imminent." Plaintiff and his attorney should be sanctioned for these knowingly false and unsupported claims.

Paragraph 11 alleges that the City's variance allows trees to be replaced with sapling palm trees. There is no support for this allegation and the allegation is false in all respects.

Therefore, the Complaint is riddled with unsupported, inaccurate facts and sanctions should be imposed.

II. ALLEGATIONS NOT SUPPORTED BY EXISTING LAW

In addition to the false and unsupported factual allegations, the claim for injunctive relief is not supported by existing law.

A. Plaintiff Lacks Standing to Sue

Plaintiff lacks standing to bring this action because he alleges no special injury to himself, as opposed to the community. Plaintiff alleges he is a resident of Palm Coast and owns property "less than three (3) miles from the Harbor Place Shopping Center area in which the trees are scheduled to be cut down." (Compl. ¶ 16). He further alleges he and "other residents of the Parkway East area of Palm Coast will be permanently and irreparably damaged by the loss of mature canopy (shade) trees in an area where residents and visitors, including Plaintiff, ingress and egress the Parkway East area of town on a regular basis." (¶14). Plaintiff alleges his damages include the "loss of privacy and aesthetic beauty" as well as the "likely diminution of property values, including Plaintiff's property, resulting from the loss of mature shade trees and the sense of privacy and aesthetic beauty which are a prime attraction to persons looking to Palm Coast as a place to live and raise their families." ¶¶ 15, 16).

Determining whether a party has standing is a pure question of law to be reviewed de novo. *See Edgewater Beach Owners Ass'n, Inc. v. Walton County,* 833 So. 2d 215, 219 (Fla. 1st DCA 2002). When standing is raised as an issue, the trial court must determine whether the plaintiff has a

sufficient interest at stake in the controversy which will be affected by the outcome of the litigation. *Alachua County v. Scharps,* 855 So. 2d 195, 198 (Fla. 1st DCA 2003). Generally, in order to have standing to bring an action, the plaintiff must allege that he has suffered or will suffer a special injury. *See Rickman v. Whitehurst,* 73 Fla. 152, 157, 74 So. 205, 207 (1917); *Godheim v. City of Tampa,* 426 So.2d 1084, 1086–88 (Fla. 2d DCA 1983). *Id.* "A private citizen can seek redress for a violation of a municipal ordinance where he or she proves special damages differing in kind from the damages suffered by the community as a whole." *Messett v. Cohen,* 741 So. 2d 619, 622 (Fla. 5th DCA 1999); *see also Skaggs–Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc.,* 332 So. 2d 113 (Fla. 2d DCA 1976).

"In order to sustain a complaint for relief against threatened or consummated municipal action . . . the injury suffered by the complaining individual must be special and peculiar to himself and not merely different in degree from that suffered by the remainder of the community. . . [T]he complaining citizen is without redress in equity unless he can allege and prove special damages peculiar to himself and differing in kind rather than in degree from the damages suffered by the people as a whole." *Boucher v. Novotny,* 102 So. 2d 132, 135 (Fla. 1958). "We, therefore, align ourselves with the authorities which hold that one seeking redress, either preventive or corrective, against an alleged violation of a municipal zoning ordinance must allege and prove special damages peculiar to himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole." *Id.* at 135 - 136.

In *Boucher*, the City of Clearwater permitted a setback variance to Novotny to allow him to construct a building that violated the setback requirements of the city's zoning ordinance. Plaintiffs owned property across the street and brought suit against the city and Novotny seeking injunctive

relief to compel the removal of the allegedly illegal encroachment. The plaintiffs alleged they suffered special damage by reason of the building's "proximity to their property" and the violation "depreciates the value of plaintiffs' property in that its continued existence destroys the protection of the zoning ordinance on the faith of which plaintiffs and others have purchased and improved their properties located within the limits of the zone's area." *Id.* at 134. The appellate court determined that one seeking this type of relief should "distinctly allege facts showing the special and peculiar injury. This should be done with sufficient clearness to enable the court to determine whether the complainant is entitled to maintain the suit." *Id.* at 136. The injuries alleged by the plaintiffs were found to be injuries suffered by the community as opposed to a peculiar injury to plaintiffs. *Id.* "[W]e find from this complaint the substance of an allegation which points out that a failure to enforce a zoning ordinance produces a depreciation in land values throughout the community. While this may logically follow, it does not necessarily follow that a right of action springs into being in favor of a particular property owner unless it be shown that the violation of the ordinance results in a peculiar injury or special damages to that property owner different in kind from that suffered by the community as a whole." *Id.* The court affirmed the trial court's dismissal of the complaint with prejudice.

In the present case, Plaintiff has not alleged anything more concrete or personal than the plaintiff in *Boucher*, and Plaintiff's property is located no where near the subject properties.

Florida case law clearly requires more concrete injury than that alleged in the Complaint. On this point the U.S. Supreme Court has previously recognized the requirement of an injury is specific—it requires a "concrete and particularized" injury in fact which "must affect the plaintiff in a personal and individual way," does not allow legal redress for any imaginable injury, and is not "an

ingenious academic exercise in the conceivable." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 566 (1992). In *Lujan,* Justice Scalia expressed doubts that the Defenders of Wildlife had alleged sufficient injury to demonstrate standing, simply because a person's aesthetic viewing of a particular species in a particular area of the world was in danger of becoming less pleasurable. *Id.* at 566. This argument is "pure speculation and fantasy." *Id.*

Similarly, in the present case, Plaintiff has not alleged any concrete, particularized injury affecting him in an individual way. His allegations of lost aesthetic beauty, loss of privacy, and diminished property values are speculative at best, and apply to the community as a whole. Plaintiff has no standing, and cannot possibly amend the Complaint to sufficiently allege standing as it is clear Plaintiff's property is three miles from the property at issue.

B. Elements of Injunction Not Met

The essential elements necessary to establish entitlement to a preliminary injunction are: 1) the likelihood of irreparable harm; 2) the unavailability of an adequate remedy at law; 3) a substantial likelihood of success on the merits; and 4) consideration of the public interest. *Dragomirecky v. Town of Ponce Inlet,* 882 So. 2d 495, 497 (Fla. 5th DCA 2004). The Complaint contains no allegations to support this criteria, other than conclusory statements.

The Complaint does not allege any facts establishing irreparable harm. Plaintiff alleges he and other residents will be "permanently and irreparably damaged" by the loss of shade trees that are three miles away from his property. He speculates that diminution of property values are "likely" from the loss of mature shade trees. Plaintiff has an entirely misguided view of the facts, but, even under Plaintiff's mistaken scenario, trees allegedly being removed will be replaced. Removing trees and replacing trees on property Plaintiff does not own is not an irreparable harm to Plaintiff.

Plaintiff also cannot establish the unavailability of an adequate remedy at law. Plaintiff alleges his ultimate harm is the potential diminution in his property value – a relatively quantifiable harm if Plaintiff's fantastical scenario is accepted as true. Therefore, *if* Plaintiff's version of the facts was correct, and *if* Plaintiff had standing to sue, and *if* Plaintiff's property three miles away was irreparably harmed, and *if* such harm to his property resulted in a diminution of his property value, and *if* the removal of trees by the City or a private property owner was determined to violate some law, then Plaintiff *might* be able to sue someone for damages.

Plaintiff is not likely to succeed on the merits of this case because he does not have standing to sue and his version of the facts is simply wrong. Under no set of facts would Plaintiff be entitled to an injunction against the City of Palm Coast.

Finally, the public interest would not be served in this case because the City has properly followed all procedures of its code and there is no allegation that the City has violated its Code in any way.

C. Failure to Join Indispensable Parties

Although Plaintiff's factual allegations are convoluted, Plaintiff appears to complain that trees will be removed from private property. Plaintiff has not sued any private property owner. The court cannot enjoin a property owner from removing trees from its property if the property owner is not named in the suit. If Plaintiff believes Dunkin Donuts, or Wells Fargo, or the shopping center is or will be removing trees in violation of an inapplicable document, then Plaintiff should sue these private property owners, not the City of Palm Coast.

"A court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. An injunction can lie only when its scope is limited in effect

to the rights of parties before the court." *Generation Investments, LLC v. Al-Jumaa, Inc.*, 53 So. 3d 372, 375 (Fla. 5th DCA 2011) (tenant was indispensable party to injunction action to enforce association's covenants and restrictions). "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants so that a complete decree may be made binding upon all parties." *Id.* at 375-76.

For a variety of reasons, the Complaint has no foundation in facts or law and cannot be amended to cure these deficiencies.

On or about September 12, 2013, Defendant served upon Plaintiff's counsel a copy of this Motion for Sanctions. To date, Plaintiff has failed to dismiss the Complaint with prejudice.

Twenty-one (21) days have passed since the service of this Motion.

WHEREFORE, Defendant seeks attorney's fees as sanctions under section 57.105, Florida Statutes against Plaintiff and his attorney for filing a frivolous lawsuit that was not supported by the material facts or existing law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via email delivery on September ____ 2013, to Joshua Knight, Esquire, Law Office of Joshua Knight, 9 Park Drive, Palm Coast, FL 32137 at jknight@knight-legal.com.

/s/ Debra S. Nutcher
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DENNIS K. MCDONALD, **CASE NO.: 2013-CA-816**

Plaintiff,

v.

CITY OF PALM COAST,

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DEFENDANT'S MOTION TO DISMISS COMPLAINT

Defendant, City of Palm Coast, files its Motion to Dismiss Complaint pursuant to Rule 1.140(b), Florida Rules of Civil Procedure for failure to state a cause of action, and failure to join indispensable parties, and states:

The purpose of a motion to dismiss is to "test the legal sufficiency of a complaint, not to determine factual issues." *Sealy v. Perdido Key Oyster Bar and Marina, LLC*, 88 So. 3d 366, 368 (Fla. 1st DCA 2012). "For purposes of ruling on a motion to dismiss, the trial court may look no further than the four corners of the complaint, and all allegations in the complaint must be accepted as true." *Id.* "In testing the complaint to see if it can withstand a motion to dismiss for failure to state a cause of action for injunctive relief, the well-pleaded facts are admitted, but not conclusions of law or the opinions of the pleader . . . there must be something more than this in order for a court to intervene by injunction." *First Nat. Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 424 (Fla. 2d Dist. 1963).

The Complaint seeks injunctive relief against the City to prevent the "imminent" destruction of shade trees located on property three miles away from Plaintiff's property. Even if the allegations in the Complaint are true, Plaintiff failed to attach relevant documents upon which he relies, lacks

standing to sue, failed to allege the necessary elements for injunctive relief, and failed to join indispensable parties. The Complaint should be dismissed prejudice as no amendment can cure Plaintiff's lack of standing.

I. FAILURE TO ATTACH RELEVANT DOCUMENTS

Rule 1.130(a), Florida Rules of Civil Procedure, requires that all "documents upon which action may be brought . . . shall be incorporated in or attached to the pleading."

The Complaint alleges that trees are due to be removed in violation of a certain Declaration of Restrictive Covenants and Easements ("Declaration of Covenants") (Compl. ¶ 5, 8, 9, 13). Plaintiff attaches what purports to be a Declaration of Restrictive Covenants to the Complaint as Exhibit A; however, the property described in Exhibit A is not the same property as the property described in the Complaint. Plaintiff has failed to attach any Declaration of Covenants applicable to the property he describes in the body of the Complaint.

The Complaint also alleges the removal of the trees violates a Planned Development Unit ("PUD") (Compl. ¶ 8, 13). However, no PUD is attached as an exhibit to the Complaint nor is any PUD language incorporated into the Complaint.

Plaintiff has failed to attach the key documents supporting his entire case and the Complaint should be dismissed.

II. PLAINTIFF LACKS STANDING TO SUE

Plaintiff lacks standing to bring this action because he alleges no special injury to himself, as opposed to the community. Plaintiff alleges he is a resident of Palm Coast and owns property "less than three (3) miles from the Harbor Place Shopping Center area in which the trees are scheduled to be cut down." (Compl. ¶ 16). He further alleges he and "other residents of the

Parkway East area of Palm Coast will be permanently and irreparably damaged by the loss of mature canopy (shade) trees in an area where residents and visitors, including Plaintiff, ingress and egress the Parkway East area of town on a regular basis." (¶14). Plaintiff alleges his damages include the "loss of privacy and aesthetic beauty" as well as the "likely diminution of property values, including Plaintiff's property, resulting from the loss of mature shade trees and the sense of privacy and acsthetic beauty which are a prime attraction to persons looking to Palm Coast as a place to live and raise their families." ¶¶ 15, 16).

Determining whether a party has standing is a pure question of law to be reviewed de novo. *See Edgewater Beach Owners Ass'n, Inc. v. Walton County,* 833 So. 2d 215, 219 (Fla. 1st DCA 2002). When standing is raised as an issue, the trial court must determine whether the plaintiff has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation. *Alachua County v. Scharps,*855 So. 2d 195, 198 (Fla. 1st DCA 2003). Generally, in order to have standing to bring an action, the plaintiff must allege that he has suffered or will suffer a special injury. *See Rickman v. Whitehurst,* 73 Fla. 152, 157, 74 So. 205, 207 (1917); *Godheim v. City of Tampa,* 426 So.2d 1084, 1086–88 (Fla. 2d DCA 1983). *Id.* "A private citizen can seek redress for a violation of a municipal ordinance where he or she proves special damages differing in kind from the damages suffered by the community as a whole." *Messett v. Cohen,* 741 So. 2d 619, 622 (Fla. 5th DCA 1999); *see also Skaggs–Albertson's Properties, Inc. v. Michels Belleair Bluffs Pharmacy, Inc.,* 332 So. 2d 113 (Fla. 2d DCA 1976).

"In order to sustain a complaint for relief against threatened or consummated municipal action . . . the injury suffered by the complaining individual must be special and peculiar to himself and not merely different in degree from that suffered by the remainder of the community. . . [T]he

complaining citizen is without redress in equity unless he can allege and prove special damages peculiar to himself and differing in kind rather than in degree from the damages suffered by the people as a whole." *Boucher v. Novotny,* 102 So. 2d 132, 135 (Fla. 1958). "We, therefore, align ourselves with the authorities which hold that one seeking redress, either preventive or corrective, against an alleged violation of a municipal zoning ordinance must allege and prove special damages peculiar to himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole." *Id.* at 135 - 136.

In *Boucher*, the City of Clearwater permitted a setback variance to Novotny to allow him to construct a building that violated the setback requirements of the city's zoning ordinance. Plaintiffs owned property across the street and brought suit against the city and Novotny seeking injunctive relief to compel the removal of the allegedly illegal encroachment. The plaintiffs alleged they suffered special damage by reason of the building's "proximity to their property" and the violation "depreciates the value of plaintiffs' property in that its continued existence destroys the protection of the zoning ordinance on the faith of which plaintiffs and others have purchased and improved their properties located within the limits of the zone's area." *Id.* at 134. The appellate court determined that one seeking this type of relief should "distinctly allege facts showing the special and peculiar injury. This should be done with sufficient clearness to enable the court to determine whether the complainant is entitled to maintain the suit." *Id.* at 136. The injuries alleged by the plaintiffs were found to be injuries suffered by the community as opposed to a peculiar injury to plaintiffs. *Id.* "[W]e find from this complaint the substance of an allegation which points out that a failure to enforce a zoning ordinance produces a depreciation in land values throughout the community. While this may logically follow, it does not necessarily follow that a right of action

springs into being in favor of a particular property owner unless it be shown that the violation of the ordinance results in a peculiar injury or special damages to that property owner different in kind from that suffered by the community as a whole." *Id.* The court affirmed the trial court's dismissal of the complaint with prejudice.

In the present case, Plaintiff has not alleged anything more concrete or personal than the plaintiff in *Boucher*, and Plaintiff's property is located no where near the subject properties.

Florida case law clearly requires more concrete injury than that alleged in the Complaint. On this point the U.S. Supreme Court has previously recognized the requirement of an injury is specific—it requires a "concrete and particularized" injury in fact which "must affect the plaintiff in a personal and individual way," does not allow legal redress for any imaginable injury, and is not "an ingenious academic exercise in the conceivable." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 566 (1992). In *Lujan,* Justice Scalia expressed doubts that the Defenders of Wildlife had alleged sufficient injury to demonstrate standing, simply because a person's aesthetic viewing of a particular species in a particular area of the world was in danger of becoming less pleasurable. *Id.* at 566. This argument is "pure speculation and fantasy." *Id.*

Similarly, in the present case, Plaintiff has not alleged any concrete, particularized injury affecting him in an individual way. His allegations of lost aesthetic beauty, loss of privacy, and diminished property values are speculative at best, and apply to the community as a whole. Plaintiff has no standing, and cannot possibly amend the Complaint to sufficiently allege standing as it is clear Plaintiff's property is three miles from the property at issue.

II. CITY IS NOT THE PROPER PARTY AND INDISPENSABLE PARTIES NOT JOINED

Plaintiff seeks a preliminary and permanent injunction enjoining the *City of Palm Coast* from removing trees from property that is evidently private property. There is nothing in the Complaint showing that the City is about to cut down any trees. Although Plaintiff's factual allegations are convoluted, the Complaint references three different pieces of property: Palm Harbor Shopping Center, the Dunkin Donuts property in Exhibit B and the Wells Fargo property in Exhibit C. (Compl. ¶ 7). Plaintiff has not sued any private property owner. The court cannot enjoin the City from removing trees from private property because there is no allegation that the City is the one removing trees from private property. Likewise, the court cannot enjoin a property owner from removing trees from its property if the property owner is not named in the suit. If Plaintiff believes Dunkin Donuts, or Wells Fargo, or the shopping center is or will be removing trees in violation of some law or contract, then Plaintiff should sue these private property owners, not the City of Palm Coast.

"A court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action. An injunction can lie only when its scope is limited in effect to the rights of parties before the court." *Generation Investments, LLC v. Al-Jumaa, Inc.*, 53 So. 3d 372, 375 (Fla. 5th DCA 2011) (tenant was indispensable party to injunction action to enforce association's covenants and restrictions). "The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, must be made parties either as complainants or defendants so that a complete decree may be made binding upon all parties." *Id.* at 375-76.

Therefore, the Complaint should be dismissed.

III. ELEMENTS OF INJUNCTION NOT MET

The Complaint seeks preliminary and permanent injunctive relief to enjoin the City of Palm Coast from removing trees. Even if the City was the proper party to enjoin, Plaintiff does not allege ultimate facts to support an injunction.

The essential elements necessary to establish entitlement to a preliminary injunction are: 1) the likelihood of irreparable harm; 2) the unavailability of an adequate remedy at law; 3) a substantial likelihood of success on the merits; and 4) consideration of the public interest. *Dragomirecky v. Town of Ponce Inlet,* 882 So. 2d 495, 497 (Fla. 5th DCA 2004). The Complaint contains no allegations to support this criteria, other than conclusory statements.

A complaint alleging irreparable injury "must state facts which will enable the court to judge whether the injury will in fact be irreparable, and mere general allegations of irreparable injury will not suffice." *First Nat. Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 424 (Fla. 2d DCA 1963). "The facts comprising such injury must be presented clearly so that the court may determine the exact nature and extent of the possible injury... If the injury complained of is doubtful, eventual, or contingent, injunctive relief will not be afforded." *Id.*

The Complaint does not allege any facts establishing irreparable harm. Plaintiff alleges he and other residents will be "permanently and irreparably damaged" by the loss of shade trees that are three miles away from his property. He speculates that diminution of property values are "likely" from the loss of mature shade trees. Plaintiff has an entirely misguided view of the facts, but, even under Plaintiff's mistaken scenario, trees allegedly being removed will be replaced. Removing trees and replacing trees on property Plaintiff does not own is not an irreparable harm to Plaintiff.

Plaintiff also cannot establish the unavailability of an adequate remedy at law. "[T]here must be a lack of an adequate remedy at law, and injunctive relief will not lie unless irreparable injury will result otherwise." *Ferris*, 156 So. 2d at 423. The injury must be of a "peculiar nature, so that compensation in money cannot atone for it; or, as the rule has been otherwise stated, it must be of such a nature that it cannot be redressed in a court of law." *Id.* Plaintiff alleges his ultimate harm is the potential diminution in his property value – a relatively quantifiable harm if Plaintiff's fantastical scenario is accepted as true. Therefore, *if* Plaintiff's version of the facts was correct, and *if* Plaintiff had standing to sue, and *if* Plaintiff's property three miles away was irreparably harmed, and *if* such harm to his property resulted in a diminution of his property value, and *if* the removal of trees by the City or a private property owner was determined to violate some law, then Plaintiff *might* be able to sue someone for damages.

In addition, Plaintiff is not likely to succeed on the merits of his case. "The writ of injunction is an extraordinary remedy, harsh and drastic, particularly in its mandatory form, where equity goes beyond mere restraint and commands that acts be done or undone. Such injunctions are looked upon with disfavor by the courts and are granted but sparingly and cautiously." *Ferris*, at 423. Given this standard, Plaintiff is not likely to succeed on the merits of this case. First, Plaintiff does not have standing to sue and that alone prohibits injunctive relief. Second, Plaintiff has not plead any facts justifying an injunction against the City, as opposed to the owners of the shopping center, Dunkin Donuts and Wells Fargo properties where the trees allegedly exist. The Complaint merely alleges that the City "approved a setback variance, which would allow for the cutting down and/or destruction of mature trees on the premises of and surrounding the Palm Harbor Shopping Center...." (Compl. ¶7). Based on these allegations, the City should not be enjoined from doing anything

relating to trees on private property.

Third, Plaintiff simply has not plead any facts showing that cutting down trees, wherever they may be, is wrong pursuant to any law, agreement, or other relevant document. Plaintiff only attached the Declaration, to which the City is not a party. Nothing in the Complaint alleges how the City is bound by this document. Under no set of facts would Plaintiff be entitled to an injunction against the City of Palm Coast.

Finally, the public interest would not be served in this case by enjoining the City from cutting down trees because there are no allegations the City failed to follow all procedures of its code and there is no allegation that the City has violated its Code in any way.

WHEREFORE, the City of Palm Coast respectfully requests this Court dismiss Plaintiff's Complaint with prejudice and award the City its attorney's fees and costs in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via email delivery on September 16th 2013, to Joshua Knight, Esquire, Law Office of Joshua Knight, 9 Park Drive, Palm Coast, FL 32137 at jknight@knight-legal.com.

/s/ Debra S. Nutcher

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