



January 17, 2021

VIA ELECTRONIC MAIL

Honorable Milissa Holland
City of Palm Coast
160 Lake Avenue
Palm Coast, Florida 32164

Re: *Proposed Lease Agreement for Palm Harbor Golf Course Wireless Communications Tower*

Dear Mayor Holland:

Our firm represents Protect Palm Coast, LLC, and a consortium of its members who own property within the Covington Park, Cole Place, and Oaks residential subdivisions (collectively, “PPC”). As discussed herein, PPC submits that the Option and Ground Lease Agreement (“Lease Agreement”) for the construction and operation of a 150-foot-tall wireless communications tower at the Palm Harbor Golf Course (“Golf Course Tower”) that the City Council is scheduled to consider at its meeting on January 19, 2021, violates applicable law. Accordingly, our clients object to the proposed Golf Course Tower and respectfully submit that the City Council must deny or otherwise decline to approve the Lease Agreement.

Based upon the verified information the City has provided, the Palm Harbor Golf Course, including, but not limited to, the proposed 2,500 square foot lease site for the Golf Course Tower, is subject to and governed by Ordinance 2007-23. Ordinance 2007-23 approved the Amended and Restated Palm Harbor Golf Course PUD (“Golf Course PUD”) and the Palm Harbor Golf Course First Amended and Restated Planned Unit Development Agreement (“Development Agreement”).¹ As stated in Section 2(b) of Ordinance 2007-23, the Development Agreement “**shall** constitute the regulations for the specific PUD District” – *i.e.*, the Golf Course PUD.

¹ A highlighted copy of Ordinance 2007-23 is attached as Exhibit “A” for your convenience.

Tallahassee 433 North Magnolia Drive Tallahassee, Florida 32308 (850) 224-7332 Fax: (850) 224-7662	Windermere 9100 Conroy Windermere Road, Suite 200 Windermere, Florida 34786 (407) 258-3733 Fax: (407) 264-6132
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Significantly, Section 2.1 of the Development Agreement, entitled “Proposed Development,” states:

Parcel B [*i.e.*, the City’s property] shall only be used as a golf course and associated amenities and uses, including, but not limited to, clubhouse facilities for the first 7 years after the Effective Date . . . of this PUD Agreement and, thereafter, **Parcel B shall be used for either a golf course or any other public recreational use**, either passive or active

(Emphasis supplied). Similarly, 4.3 of the Development Agreement, entitled “Golf Course Use,” states:

Parcel B shall only be used as a public golf course and associated amenities and uses, including, but not limited to, clubhouse facilities for the first 7 years after the Effective Date of this PUD Agreement and, thereafter, **Parcel B shall be used for either a golf course or any other public recreational use**, either passive or active

(Emphasis supplied). Thus, by its plain and unambiguous terms, the Golf Course PUD and the Development Agreement expressly restrict the use of the City’s property, including the area proposed for the Golf Course Tower, to **only** a golf course or a public *recreational* use. A 150-foot-tall wireless communications tower is neither, and, thus, is **not** lawfully permitted to be located on the subject property.²

By way of comparison to the instant case, in *AT&T Wireless Services v. WCI Communities*, 932 So. 2d 251 (Fla. 4th DCA 2005), the appellate court upheld an order requiring the demolition and removal of a wireless communications tower that was built on municipal property in violation of a use restriction. Much like the Golf Course PUD, the property at issue in the *AT&T* case was conveyed to the City of Coral Springs with a limitation that it be used for “passive park purposes.” After the conveyance, Coral Springs adopted regulations (much like Section 4.20 of the City’s Land Development Code (“LDC”) and the City’s Wireless Master Plan) governing the siting of wireless communications towers and listed the subject park property as a potential site for a tower. Coral Springs, like the City Council is considering doing in this case, then entered into a lease agreement for 1,600 square feet of the park property for the installation of a wireless communications tower. Thereafter, WCI filed a lawsuit against Coral Springs and AT&T,

² Notably, the findings in the Staff Report for Ordinance 2007-23, which the City Council adopted and incorporated into the Development Agreement state, in pertinent part, that Parcel B (*i.e.*, the City’s property) is “to be used exclusively as a *golf course* with related facilities.” See Ord. 2007-23 Staff Report at 3. The Staff Report further advises that “City ownership of the golf course **protects** the integrity of the area thereby significantly diminishing potential negative impacts to the health, welfare, safety or morals of the community.” *Id.* at 5 (emphasis supplied). The proposed placement of a 150-foot-tall wireless communications tower within several hundred feet of our clients’ homes, however, degrades and adversely impacts the integrity of the area.

claiming the wireless communications tower constituted an “active commercial use” in violation of the deed restriction that limited use of the property to “passive park purposes.”

In upholding the trial court’s order requiring the demolition and removal of the wireless communications tower, the appellate court stated:

[T]he trial court properly concluded that there was no ambiguity in the deed restriction requiring that the property be “used and maintained solely for passive park purposes” and that the “property herein conveyed is dedicated to the public for use as passive parks.”

....

* * * *

In this case, quite simply, **the use of the park for the telecommunications tower is not related to or in furtherance of “solely for passive park purposes.”** A telecommunications tower does not support a park use. While [Coral Springs and AT&T] argue that the tower supports a park use, like utilities or restrooms, because someone at the park could make a cell call from the park, the tower has no park use. . . .

[T]he telecommunications tower has no park purpose. ATT’s use of the park property is neither passive, nor is it used to support the park. **The lands are being used to fill in ATT’s telecommunications grid for monetary gain.**

Id. at 255-56 (emphasis supplied).

Here, as in the *AT&T* case, the proposed Golf Course Tower does **not** constitute use of the property for a “golf course” or a “public *recreational* use,” as mandated by the Golf Course PUD and the Development Agreement. Indeed, no good faith argument can be made that the proposed 150-foot-tall tower constitutes either a “golf course” or a “public *recreational* use.” To the contrary, Paragraph 1(b) of the proposed Lease Agreement admits that “[t]he Leased Premises will be **utilized to** construct, support and **operate a wireless communications facility**” – **not** a “golf course” or a “public *recreational* use.” (Emphasis supplied). Accordingly, as in the *AT&T* case, the proposed Golf Course Tower and the Lease Agreement related thereto violate the use restrictions imposed upon the property pursuant to the Golf Course PUD and the Development Agreement and may not be approved.³

In addition to a wireless communications tower not being a permissible use on the subject property pursuant to the Golf Course PUD and the Development Agreement, the proposed Golf Course Tower violates the maximum vertical height limitation set forth in the Development Agreement. Specifically, Section 8.2 of the Development Agreement imposes a “Maximum

³ A highlighted copy of the *AT&T* case is attached as Exhibit “B” for your reference.

Vertical Height” of thirty-five (35’) feet. In direct violation of this maximum vertical height limitation, the proposed Golf Course Tower would be 150 feet tall. Nothing in the Golf Course PUD or the Development Agreement allows or otherwise authorizes a wireless communications tower to be installed that exceeds the maximum vertical height restriction imposed upon the Golf Course PUD by 115 feet. Accordingly, on this additional basis, the proposed Lease Agreement for the Golf Course Tower violates the Golf Course PUD and the Development Agreement and must be denied.

Lastly, any suggestion that the Golf Course PUD and the Development Agreement do not govern this matter or otherwise prohibit the City from entering into the Lease Agreement for the proposed Golf Course Tower is without merit. Section 12.0 of the Development Agreement unambiguously states:

This PUD Agreement shall be binding on the City . . . and their respective successors and assigns. . . . The terms and conditions of this PUD Agreement, similarly, shall be binding upon the Property and shall run with the title to same.

(Emphasis supplied). Section 18 of the Development Agreement further specifies that, “[f]ollowing the Effective Date, this PUD Agreement shall remain in effect for as long as this Ordinance is valid.”⁴

Moreover, the City Council cannot rely upon or utilize the City’s Wireless Telecommunications regulations in Section 4.20 of the City’s LDC and the City’s Wireless Master Plan to approve the Lease Agreement for the Golf Course Tower in violation of the express terms and use restrictions of the Golf Course PUD and the Development Agreement. In this regard, Section 4.7 of the Development Agreement mandates:

The development of the Project shall proceed in accordance with the terms of this PUD Agreement. **In the event of an inconsistency between the terms of this PUD Agreement and the City’s Land Development Code (LDC), as it exists now or as it may be amended in the future, the terms of this PUD shall prevail.** . . .

(Emphasis supplied). Thus, the Golf Course PUD and the Development Agreement, including the use restrictions imposed therein, control and govern over inconsistent or conflicting provisions in

⁴ Section 2.09.07.A of the City’s LDC also specifies that “[a]ny active or completed Planned Unit Development (PUD) . . . project approved prior to the adoption of this Code shall continue to be governed by the approved development plan and any development agreements.” Likewise, Section 3.03.01.C of the City’s LDC states, “Projects developed or approved within these former districts [e.g., PUD] are bound to their respective Development Agreements and the uses that were formerly allowed in those districts.”

the City's LDC, which necessarily includes the City's Wireless Telecommunications regulations in Section 4.20 of the City's LDC and the City's Wireless Master Plan incorporated therein.⁵

In sum, as discussed above, the proposed Golf Course Tower and the Lease Agreement violate the express use restrictions in the Golf Course PUD and the Development Agreement and, thus, may ***not*** be lawfully approved. Accordingly, our clients object to the proposed Golf Course Tower and respectfully submit that the City Council must reject the Lease Agreement and consider alternate sites for the proposed 150-foot-tall wireless communications tower.

I appreciate your attention to this matter of great public importance, and our clients thank the City Council in advance for its adherence to the use restrictions prescribed in the Golf Course PUD and the Development Agreement, upon which our clients relied in purchasing their homes. Please do not hesitate to contact me if you have any questions or would like to discuss this matter further.

Sincerely,

S. Brent Spain

S. Brent Spain

Attachments: Ex. A – Ordinance 2007-23

Ex. B – AT&T case

cc: Commissioner Ed Danko (via e-mail)
Commissioner Victor Barbosa (via e-mail)
Commissioner Nick Klufas (via e-mail)
Commissioner Eddie Branquinho (via e-mail)
Matthew Morton, City Manager (via e-mail)
Virginia Smith, City Clerk (via e-mail)
William E. Reischmann, Jr., Esquire (via e-mail)

⁵ Even assuming the City's Wireless Master Plan could be used to violate the use restrictions in the Golf Course PUD and the Development Agreement – which it cannot – the proposed location of the Golf Course Tower does ***not*** comply with the proposed site location depicted within the City's Wireless Master Plan. See City's Wireless Master Plan at 62 (showing aerial depiction of Site 7A for Coverage Area 7). PPC is not aware of any lawfully noticed and adopted amendment to the City's Wireless Master Plan that changed the location of Site 7A, and the City did not provide a copy of any such amendment in response to our client's public records inspection request dated January 5, 2021.

Return to:

 **City Clerk's Office**

City of Palm Coast
2 Commerce Blvd.
Palm Coast, FL 32164

Inst No: 2007053025 10/31/2007
03:00PM Book: 1624 Page: 260 Total Pgs: 32

GAIL WADSWORTH, FLAGLER Co.

ORDINANCE 2007-23
AMENDING AND RESTATING ORDINANCE NUMBER 2005-19
Palm Harbor Golf Course PUD

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM COAST, FLORIDA AMENDING AND RESTATING ORDINANCE NUMBER 2005-19 (ORB 1288, PAGE 529 OF THE PUBLIC RECORDS OF FLAGLER COUNTY, FLORIDA) APPROVING THE PLANNED UNIT DEVELOPMENT (PUD) AGREEMENT BETWEEN CENTEX HOMES (DBA AS CENTEX DESTINATION PROPERTIES) AND THE CITY OF PALM COAST FOR THE PALM HARBOR GOLF COURSE PUD; REZONING PROPERTY (165 +/- ACRES AS DESCRIBED IN THIS ORDINANCE) FROM PUD TO A REVISED PUD; AMENDING THE CITY OF PALM COAST OFFICIAL ZONING DISTRICT MAP; PROVIDING FOR LEGISLATIVE FINDINGS AND INTENT; PROVIDING FOR THE TAKING OF IMPLEMENTING ADMINISTRATIVE ACTIONS; REPEALING ALL CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR NON-CODIFICATION AND PROVIDING FOR A CONTINGENT EFFECTIVE DATE

BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF PALM COAST, FLORIDA:

SECTION 1: LEGISLATIVE FINDINGS AND INTENT.

- (a) The City Council of the City of Palm Coast hereby adopts the City staff report relating to the Development Agreement (DA) of the Palm Harbor Golf Course PUD as findings.
- (b) The City of Palm Coast has complied with all requirements and procedures of Florida law in processing and advertising this Ordinance.
- (c) This Ordinance is consistent with the Goals, Objectives and Policies of the *City of Palm Coast Comprehensive Plan*.
- (d) The PUD DA will not adversely affect the orderly development of the City of Palm Coast.

Cmt

- (e) The PUD DA will not adversely affect the health and safety of the residents or workers in the area proximate to the property described in this Ordinance and will not be detrimental to the use of the adjacent properties or the general neighborhood.

SECTION 2: DEVELOPMENT AGREEMENT

- (a) Upon enactment of this Ordinance the PUD DA, an integral part of the existing Palm Harbor Golf Course PUD, shall affect the following property zoned PUD:

LEGAL DESCRIPTION ATTACHED AS EXHIBIT "A"

- (b) The PUD DA and its exhibits, as attached hereto, with all appropriate signatures and joinders, is hereby adopted and approved by the City Council of the City of Palm Coast and shall constitute the regulations for the specific PUD District.

- (c) The PUD DA shall be recorded in the Official Records of Flagler County, Florida (Land Records) by the City Clerk.

SECTION 3. SEVERABILITY.

If any section, sentence, phrase, word or portion of this Ordinance is determined to be invalid, unlawful or unconstitutional, said determination shall not be held to invalidate or impair the validity, force or effect of any other section, sentence, phrase, word or portion of this Ordinance not otherwise determined to be invalid, unlawful or unconstitutional.

SECTION 4. CONFLICTS.

All ordinances or part of ordinances in conflict with this Ordinance are hereby repealed with regard to the zoning classification assigned to the subject property.

SECTION 5. NON-CODIFICATION.

This Ordinance shall be not be codified in the *City Code of the City of Palm Coast* or the *Land Development Code of the City of Palm Coast*; provided, however, that the actions taken herein shall be depicted on the zoning maps of the City of Palm Coast.

SECTION 6. EFFECTIVE DATE.

This Ordinance shall take effect immediately upon passage and adoption; provided, however, that the change in the zoning from the current PUD to the PUD approved in this Ordinance shall not take effect until the running of the appeal periods relative to appealing the quasi-judicial action of the City in rezoning the property that is the subject of this Ordinance or an action under Section 163.3215, *Florida Statutes* (30 days from the date of rendering) relative to the action taken in this Ordinance, or the successful defense of any timely filed appeal(s); provided, further, however, that that subject property shall not be deemed to be assigned the PUD zoning district until Ordinance Number 2007-24 has become effective and, if Ordinance Number 2007-24 shall not become effective, then the subject property shall retain its current zoning

classification/district; provided, further, however, that if an appeal is not filed as to either ordinance, then this Ordinance and Ordinance Number 2007-~~24~~ shall become effective simultaneously. The effective date of this Ordinance shall be memorialized by the filing of an affidavit by the City Manager in the Public Records of Flagler County evidencing the fact that this Ordinance has become effective consistent with the provisions of this Section.

APPROVED upon first reading the second day of October 2007.

ADOPTED upon second reading after due public notice and public hearing the sixteenth day of October 2007.

CITY OF PALM COAST, FLORIDA

ATTEST:

James V. Canfield, Mayor

Clare M. Hoeni
Clare M. Hoeni, City Clerk

APPROVED TO FORM AND LEGALITY

Lonnie Groot
LONNIE GROOT, CITY ATTORNEY



EXHIBIT "A"

PALM HARBOR GOLF COURSE FIRST AMENDED AND RESTATED PLANNED UNIT DEVELOPMENT AGREEMENT (ORIGINAL AGREEMENT RECORDED AT ORB 1253, PAGE 1884)

1.0 Introduction.

This is an amended and restated Planned Unit Development Agreement (this "PUD Agreement"), which amends and restates the prior agreement that is recorded at Official Records Book 1253, Page 1884, of the Public Records of Flagler County, Florida (the "Original PUD Agreement"). This PUD Agreement provides for the redevelopment of the Palm Harbor Golf Course on approximately 165 +/- acres located in the City of Palm Coast, Florida, south and east of Clubhouse Drive, and north and west of Palm Coast Parkway (the "Property" which is described in Exhibit "1" hereto). The Property is owned by Centex Homes, a Nevada general partnership, d/b/a Centex Destination Properties (herein the "Developer"), whose address is 1064 Greenwood Blvd., Suite 200, Lake Mary, Florida 32751. The Developer and the City of Palm Coast (herein the "City") are collectively referred to herein as the "Parties." The City Council of the City has taken all actions relating to the zoning district change and the rezoning actions set forth herein in accordance with the requirements and procedures mandated by State law. This PUD Agreement is consistent with the goals, objectives and policies of the *Comprehensive Plan of the City of Palm Coast*.

2.0. General Project Description.

2.1 Proposed Development – The redevelopment of the Property may include (i) renovations to the existing golf course, and the construction of a new clubhouse and associated amenities; and (ii) the development of a maximum of 3 single family lots (after the platting thereof) and a 158 unit golf condominium villa multifamily community with amenities including, but not limited to, clubhouse facilities (collectively the "Project"). To accomplish this goal, 2 parcels will be created within the Property by operation of this PUD Agreement, which parcels shall be named and referred to herein as Parcel A and Parcel B and described on Exhibit "1A" and Exhibit "1B" hereto. Parcel A

shall only be developed for residential purposes as described herein. Parcel B shall only be used as a golf course and associated amenities and uses including, but not limited to, clubhouse facilities for the first 7 years after the Effective Date (as hereinafter defined) of this PUD Agreement and, thereafter, Parcel B shall be used for either a golf course or any other public recreational use, either passive or active, as may be approved by the City Council of the City without the requirement of or necessity for a public hearing; provided, however, that the use of Parcel B for an active recreational use other than a golf course shall be subject to the approval of the Developer which approval shall not be unreasonably delayed or denied. The Developer and its successors and assigns hereby perpetually consent to such usage of Parcel B. Each building containing golf condominium villa units is hereinafter referred to as a "Golf Villa Condominium Building" and 2 or more of such buildings are hereinafter referred to as a "Golf Villa Condominium Buildings". Parcel A and Parcel B may sometimes be referred to as a "Parcel".

3.0 Land Use and Zoning.

3.1 Comprehensive Plan Future Land Use - The Future Land Use Designation for the Property set forth in the *City of Palm Coast Comprehensive Plan* is predominantly Greenbelt with a small portion of Residential land, as depicted on the *Comprehensive Plan's* Future Land Use Map. The Greenbelt future land use designation permits a density of 1 residential unit per acre, calculated on the basis of gross developable acreage, as defined by the *Comprehensive Plan*. The Parties agree that density for the Project is determined based on 159.57 acres of upland and credit for 1.38 acres of water surface (25% of 5.51 total acres of water surface), for a total of 160.94 gross developable acres. Within Parcel A, the Developer shall be entitled to develop and construct a maximum of 3 single family lots and 158 golf villa condominium units with associated recreational amenities including, but not limited to, clubhouse facilities. This PUD Agreement and redevelopment of the site as set forth herein is consistent with the *Comprehensive Plan*.

3.2 Zoning - The zoning designation assigned to the Property is and shall be Planned Unit Development ("PUD").

4.0 PUD Conceptual Development Plan; Density Limitation; Golf Course Use.

4.1 Plan Overview - The Conceptual Development Plan attached hereto as Attachment "1" (the "Conceptual Development Plan") generally depicts Project characteristics and depicts the approximate property boundaries, streets, easements, property lines, and intended uses. The Conceptual Development Plan also illustrates the general location of proposed access points, driveways, landscape buffers, and other pertinent information. Within Parcel A, the Developer shall be entitled to develop a maximum of 3 single family lots and 158 golf villa condominium units with associated recreational amenities.

4.2 Density Limitation – The maximum density of 161 residential units, all of which shall be located on Parcel A, represents the total maximum density authorized for the Property (and Project).

4.3 Golf Course Use – Parcel B shall only be used as a public golf course and associated amenities and uses including, but not limited to, clubhouse facilities for the first 7 years after the Effective Date of this PUD Agreement and, thereafter, Parcel B shall be used for either a golf course or any other public recreational use, either passive or active, as may be approved by the City Council of the City without the requirement of or necessity for a public hearing; provided, however, that the use of Parcel B for an active recreational use other than a golf course shall be subject to the approval of the Developer which approval shall not be unreasonably delayed or denied. As stated in Section 2.1, the Developer and its successors and assigns hereby perpetually consent to such usage of Parcel B.

4.4 Architecture – The architectural features of the Project within Parcel A and within Parcel B shall be a combination of Spanish Colonial, Spanish Mission, and Spanish Eclectic styles reflective of St. Augustine's Spanish architectural stylings as substantially depicted on the Conceptual Architectural Character exhibit attached as Attachment "2".

4.5 Modifications to the Conceptual Development Plan – The exact location and number of structures, roadways and other improvements as provided for in the Conceptual Development Plan are subject to change as a result of the development review process and such modifications shall not require amendment of this PUD Agreement. Modifications to the exact location and number of structures, roadways and other improvements may be requested by the Developer and may be approved by the City Manager, acting as the Land Use Administrator ("LUA"), or designee, during review of construction documents, site plans, and/or preliminary plats for the Project or portions thereof; provided, however, that the development standards contained in this PUD Agreement shall be maintained as provided for elsewhere. Moreover, the LUA is authorized to approve modifications to the Conceptual Development Plan, conceptual site plan, construction documents, preliminary plats and final site plans for the Property or portions thereof (collectively, "Plans" and individually, a "Plan"), provided that (i) the total number of units to be constructed on Parcel A are not exceeded, (ii) the maximum building height of any structure is not exceeded, and (iii) the applicable Plan maintains the development standards as provided for elsewhere in this PUD Agreement. All such modifications are hereinafter referred to as "Administrative Modifications".

4.6 Conflicts between this PUD Agreement and Conceptual Development Plan - In the event of a conflict between the terms of this PUD Agreement and the Conceptual Development Plan, the provisions of this PUD Agreement shall prevail.

4.7 Land Development Code Applicability – The development of the Project shall proceed in accordance with the terms of this PUD Agreement. In the event of an inconsistency between the terms of this PUD Agreement and the City's *Land Development Code (LDC)*, as it exists now or as it may be amended in the future, the terms of this PUD Agreement shall prevail. Where specific requirements are not contained in this PUD Agreement, the *LDC* shall apply to the extent that it does not conflict with the provisions of this PUD Agreement or the general intent of the Conceptual Development Plan

4.8 Conceptual Site Plan Approval and Development Review Process – Approval of this PUD Agreement shall constitute conceptual site plan approval for the Project and approval of the Conceptual Development Plan. The Conceptual Development Plan contains a level of detail satisfactory to permit the Project or phases thereof to proceed directly to the processing of construction documents, preliminary plats and final site plans without requiring overall development plan review. The LUA is authorized to approve construction plans, preliminary plats and final site plans for the Project without further review of the Planning and Land Development Regulation Board ("PLDRB") or the City Council. The City Council shall approve all final plats.

5.0 Parcel A Phasing and Duration.

5.1 Phasing - Parcel A may be developed in a single phase or multiple phases, at the discretion of the Developer. Infrastructure necessary to support each phase shall be constructed concurrently with, or prior to, that phase. The Developer shall notify the LUA of proposed phasing at the time of construction document submittal(s). The Developer may, at any time and from time to time, amend the previously submitted Plan(s) including, without limitation, the phasing shown thereon. Such amended Plan(s) shall be subject to approval of the LUA in the same fashion as the initial Plan(s) pursuant to Section 4.5.

5.2 Duration of Construction Activities – The Developer shall not be permitted to commence the construction of a particular Golf Villa Condominium Building unless Developer has applied for the building permit for such Golf Villa Condominium Building within 5 years after Effective Date of this PUD Agreement and thereafter maintains the active status of such permit; provided, however, that extensions of this time period, in increments of 2 years each, shall be granted by the City Council unless it concludes that to do so would adversely affect the health, safety and welfare of the community.

6.0 Project Infrastructure.

Each Parcel of the Project will include infrastructure to support the proposed uses, including water and wastewater service, drainage, roads, vehicular and pedestrian internal access facilities.

6.1 Water/Wastewater - The Project is located wholly within the City Limits and is, therefore, within the City's water and wastewater service areas. All proposed permanent uses within the Project will be served by central water and sewer services and shall meet the level of service concurrency requirements of the *Comprehensive Plan* for water and sewer. The City shall be the potable water and wastewater service provider for the Project upon payment of applicable fees. The City will operate and maintain onsite water utilities dedicated to the City by the Developer. The City is under no obligation to accept the dedication of any facility.

Reclaimed water service is not currently available to the Project. The Developer will meet applicable St. Johns River Water Management District (SJRWMD) rules for consumptive use of water including, but not limited to, requirements pertaining to use of the lowest quality water source as indicated in Rule 40C-2.301(4)(g), *Florida Administrative Code* ("F.A.C."). In the event the existing Consumptive Use Permit (CUP) for irrigation expires, the golf course shall comply with Rule 40C-2.301(4)(f), F.A.C., which requires that "[w]hen reclaimed water is readily available it must be used in place of higher quality water sources unless the developer demonstrates that its use is not economically, environmentally or technologically feasible."

The development on each Parcel may include master irrigation system(s) for common landscape areas. A master irrigation system(s) may utilize water sources as allowed by Chapter 40C-2, F.A.C. including, but not limited to, groundwater, surface water, reclaimed water and potable water. Appropriate permits will be obtained for consumptive uses of water.

6.2 Internal Sidewalks and Vehicular Access – The development on each Parcel shall incorporate pedestrian and bicycle friendly internal sidewalks and vehicular access and shall be substantially as provided in the Conceptual Development Plan.

The Project shall retain its existing access to Palm Coast Parkway by means of Palm Harbor Drive. The Project currently includes a private road for internal movement and circulation. This internal road extends from Palm Harbor Drive at the east side of the Property, westward to the intersection of Casper Drive and Cooper Lane. To avoid construction traffic through the adjacent neighborhood on Cooper Lane, the Project entrance on Cooper Lane shall be closed in order to suspend its use during the Project's construction activities. A new internal roadway shall be constructed by Developer substantially in accordance with the Conceptual Development Plan. Such internal roadway shall be designed and constructed as a local access drive to the golf course serving the Golf Condominium Villa Buildings and adjacent neighborhood and not as a City street. It is anticipated by the parties that some or a portion of Casper Drive and/or Cooper Lane lying within the Property may be relocated and the City agrees to cooperate therewith by considering, in accordance with applicable State law, abandoning and/or vacating such portions of these roads. The City, based

upon the application of generally accepted and applied planning and engineering practices and principles, recognizes the fact that such roads will be recommended for abandonment and vacation by City staff. Upon completion of construction activity within Parcel A, as reasonably determined by the City, such portions of the internal roadway as are reasonably necessary to provide public access between the adjacent neighborhood and the golf course shall be opened to the public. The Developer may elect to dedicate the portions of the internal roadway as are reasonably necessary to provide public access between the surrounding neighborhoods and the golf course, to the City. Thereafter, the City will operate and maintain such roads. The City is under no obligation to accept the dedication of any roads.

6.3 Transportation/Concurrency – A traffic analysis has been submitted to the City and demonstrates that concurrency for the Project will be met. Concurrency for the Project is vested; provided, however, that the Developer shall pay all applicable impact fees as and when otherwise established by City requirements.

6.4 Drainage - The Project shall include a master management and storage of surface waters ("MSSW") system subject to permitting by the SJRWMD. The MSSW system design shall meet and be governed by all applicable SJRWMD rules. The MSSW system shall be jointly planned, designed and permitted by the Developer and the LUA. The owner of each Parcel shall construct and maintain the portions of the MSSW located on or within that parcel. Parcel B is hereby designed to accommodate, from a storage capacity standpoint, stormwater runoff from Parcel A after said stormwater has been treated. The owner of Parcel A shall be responsible for the construction of any modifications to the MSSW as jointly planned and designed as aforesaid, required by the development of Parcel A. The MSSW system will include management of stormwater runoff lakes, structures, piping, and facilities. Best management practices (BMPs) to treat, control, attenuate and convey stormwater and surface waters may include, but are not limited to, vegetated natural buffers, swales, dry retention and wet detention. The Developer shall reserve unto itself and its respective successors and assigns, drainage easements for MSSW system access, construction, operation, repair, maintenance and replacement. Such easements and additional provisions concerning the MSSW may be contained in a declaration of covenants, conditions and easements that is subject to approval by the Developer and the LUA and will be recorded against the Property.

6.5 Landscaping – Landscaping for the Project shall be substantially as provided in the Conceptual Landscaping Plan and Details attached to this PUD Agreement as Attachment "3", which were approved under Ordinance No. 2005-19, and are included within the Plans.

6.6 Lighting - Lighting for the Project shall be substantially as provided in the Conceptual Lighting Plan and Details attached to this PUD Agreement as

Attachment "4", which were approved under Ordinance No. 2005-19, and are included within the Plans.

6.7 Signage – Signage for the Project shall be substantially as provided in the Conceptual Signage Plan and Details attached to this PUD Agreement as Attachment "5", which were approved under Ordinance No. 2005-19, and are included within the Plans.

6.8 Fire Protection - Fire protection requirements for the Project will be met through a system of fire hydrants installed on the site by the Developer in accordance with City standards. The locations of fire hydrants shall be depicted on all construction documents. The water requirements for the fire system will be served by the City. The Project shall comply with the City's fire protection requirements. The City will provide fire protection services to the Project.

6.9 Recreational Amenities – Collectively, Parcel A and Parcel B meet the parks and recreation level of service requirements of the *Comprehensive Plan*. Therefore, Parcel A shall not be required to independently comply with open space, park, impervious surface ratios and other similar requirements of the *Comprehensive Plan*, the same being deemed to have been satisfied by Parcel B notwithstanding the fact that Parcel A and Parcel B are intended to be developed separately.

6.10 Utilities - All internal utility lines for the Project shall be placed underground.

6.11 Interconnectivity - All buildings within each phase shall be interconnected and comply with the *Comprehensive Plan*.

6.12 Construction Trailer(s)/Sales Office(s)/Temporary Clubhouse(s) - Each phase may include temporary construction trailers, which will be removed upon completion of work in each applicable phase. Each phase may also include a temporary real estate sales trailer which shall be removed upon completion of work in each applicable phase or completion of sales activity, whichever occurs later. Parcel B may also include a temporary clubhouse comprised of trailers, which will be removed upon completion of the permanent clubhouse serving the applicable Parcel. Sale's trailers, construction trailers and temporary clubhouses, and their associated parking facilities, shall be reasonably screened to ensure minimization of their view from residential neighborhoods existing at that time.

7.0 Resource Protection.

7.1 Wetlands – Necessary permits shall be obtained from the SJRWMD and the U.S. Army Corps of Engineers, as applicable, before any activity causing such impacts may occur. Unimpacted wetlands shall be buffered consistent with SJRWMD regulations.

7.2 Water Resources - Water conservation strategies, as identified in the LDC, shall be incorporated into the construction, operation and maintenance phases of the Project and shall be included in the covenants and deed restrictions.

7.3 Prohibition of Discharges - The Developer shall comply with the *City of Palm Coast Code of Ordinances*, Article VI, Prohibition of Discharges, and shall comply with all applicable local, State, Federal and City water quality laws, rules, regulations and ordinances.

7.4 Stormwater Pollution Prevention - A stormwater pollution prevention plan ("SWPPP") shall be attached to and incorporated into the construction and permit documents for each Parcel developed, or each phase thereof, pursuant to the requirements of applicable Federal and State regulations.

7.5 Air Quality - The following fugitive dust control measures shall, at a minimum, be undertaken during all construction and demolition activities throughout the construction process of the Project and may be enforced or modified by the LUA to protect the public interest. The Developer shall ensure that all contractors working within the project moisten soil, demolition debris and related materials which shall include, at a minimum, all roads, parking lots or material stockpiles as necessary to control dust and that contractors working within the project remove soil and other dust-generating material deposited on paved streets by vehicular traffic, earth moving equipment or soil erosion. Within 60 days after final grading, the Developer shall ensure that the contractor shall use mulch, hydro-seeding or sod on all open areas to control dust.

7.6 Hurricane Evacuation - All residents of Parcel A shall be provided with information regarding the vulnerability of Project to the impacts of hurricanes at closings. This information shall take the form of educational materials designed to increase evacuation participation.

7.7 Wildlife Protection - Should listed species or species that require permits for their removal be determined to reside on or otherwise be significantly dependent upon the Property, the Developer shall obtain the necessary permits from the Florida Fish and Wildlife Conservation Commission.

8.0 General Building Criteria.

The general building criteria specified below includes minimum setback distances from principal buildings to the property boundary, maximum building height limitations, minimum property widths, off street parking requirements, maximum density, intensity, impervious area and procedures for deviations from the criteria contained herein.

8.1 Setbacks Distances/Criteria

Development Type	Front	Side	Rear
Golf Villa Condominium Buildings	Building Separation 20' Front Setback from back of curb 20' From building to property boundary 20' (side and rear) Note: 150' from northeast corner from Cole Court subdivision		
Single Family Residential	25'	Interior Lots 7.5' From Pool 7.5'	Structure 20' Screen Enclosure 10' Patios 10'
Golf Course Clubhouse	None	None	None

8.2 Building Height.

Development Type	Maximum Vertical Height*
Single Family Residential, Golf Villa Condominium Buildings, Clubhouse and Maintenance Facilities, Recreational Facilities	35'

* Maximum height measured to median roof line. Flags and architectural projection elements shall be in substantial conformity with Attachment "2".

8.3 Property Size.

Development Type	Minimum Lot Width (feet)
Single Family Residential	80'/minimum area 10,000 sf
Golf Villa Condominium Buildings	NA
Clubhouse and Maintenance Facilities	NA
Recreational Facilities	NA
Note: Minimum lot width is measured at the front and rear setback lines.	

Owners of adjacent single-family lots may apply to the City to bind individual properties utilizing the LDC's binding lot provisions. Nothing herein shall prohibit the combining of adjacent lots and waiver of setbacks between adjacent lots.

8.4 Parking.

Development Type	Offstreet Parking
Single Family Residential	A 2 car garage plus 1 additional space per unit. A 20' long driveway counts toward meeting the additional space requirement.
Golf Villa Condominium Buildings	A 1 car garage plus 1 space per unit. A 20' long driveway counts toward meeting the additional space requirement.
Parcel B	Parking requirements shall be as set forth in the LDC. Shared parking with Parcel A is not permitted.

8.5 Finished Floor Elevations - The minimum finished floor elevations for livable heated or cooled area shall be at least 1' above the site's 100-year flood elevation. Garage structures and unlivable spaces, may be constructed at or above the site's 100-year flood elevations.

9.0 Permits and Certificates of Occupancy.

9.1 Golf Villas Condominium Development - For the golf villas condominium development, immediately upon the issuance of a development order for a phase of horizontal construction and upon receipt of a bond for that phase's site improvements, the City will accept applications for building permits for specific buildings or facilities to be constructed in that phase. Vertical construction shall not commence until all health and safety concerns have been satisfied including, but not limited to, assigning appropriate E-911 addressing, adequate water supply and ingress/egress for emergency services. For horizontal and vertical construction to commence concurrently, the Developer shall have obtained the necessary State and Federal permits for the Project or phase including, but not limited to, permits from the SJRWMD and the Florida Department of Environmental Protection (FDEP) prior to construction activities. Certificates of occupancy will be issued by the City upon compliance with building permit requirements when infrastructure improvements that are necessary to serve the specific building(s), rather than the entire phase or Project, have been completed and all Project closeout documentation for such building has been provided to and accepted by the City.

9.2 Single Family Development - Upon issuance of a final plat, the City will accept Building Permit applications for a single-family residential lot so long as sufficient infrastructure exists to support the development and provided the applicant has obtained the necessary State and Federal permits, including permits from the SJRWMD and the FDEP.

10.0 Property Owners' Association. The Developer of Parcel A may establish, in its discretion, 1 or more property owners associations for Parcel A (the "Association"). The Association and/or the Developer shall own and be responsible for maintenance of internal roadways (other than those dedicated to and accepted by the City, lighting, common landscape improvements, fencing, signage, pedestrian easements, the MSSW system components and any common property or facilities within Parcel A. The Association and/or Developer shall have the right to transfer the maintenance obligation and title to any of the common property or facilities to any successor-in-interest. The Association or Developer may transfer title of common property to the City or other entity if so authorized by the City; provided, however, that the City is under no obligation to accept the transfer of title.

11.0 Platting and Guarantees.

11.1 Platting - Platting is required only for the single family residential lot portion of the Project.

11.2 Guarantees/Bonding – Bonds shall not be released until all improvements for the phase have been completed and all closing documents have been filed with the City and accepted. However, the Developer may provide individual bonds for the various phases of the Project and the City will permit the release of those individual bonds when work on an individual phase is complete.

12.0 Successors and Assigns. This PUD Agreement shall be binding on the City and the Developer, and their respective successors and assigns. Each party represents and warrants to the other that it has all necessary power and authority to enter into and consummate the terms and conditions of this PUD Agreement, that all acts, approvals, procedures and similar matters required in order to authorize this PUD Agreement have been taken, obtained or followed, as the case may be, that this PUD Agreement and the proposed performance of this PUD Agreement by such party is not an ultra vires act and that upon the execution of this PUD Agreement by both Parties, this PUD Agreement shall be valid and binding upon the Parties hereto and their successors in interest. The terms and conditions of this PUD Agreement, similarly, shall be binding upon the Property and shall run with the title to same.

13.0 Amendment of this PUD Agreement.

Modifications to the terms of this PUD Agreement, other than those to the Conceptual Development Plan and Administrative Modifications permitted hereunder, shall be made in accordance with the requisite PUD amendment procedures. In addition, *de minimus* amendments to this PUD Agreement may be approved administratively by the LUA.

14.0 Applicable Law; Venue.

14.01 Law - This PUD Agreement shall be construed, controlled and interpreted according to the laws of the State of Florida.

14.02 Venue - Venue for any proceeding arising under this PUD Agreement shall be the Seventh Judicial Circuit in and for Flagler County, Florida.

15.0 Construction; reference to City Ordinances.

15.1 Interpretation - This PUD Agreement shall not be construed against either Party on the basis of it being the drafter of this PUD Agreement. The Parties agree that both herein played an equal part in drafting this PUD Agreement.

15.2 Capitalizations - Capitalized terms contained herein shall have the meaning assigned to them in the City's ordinances and, if not defined in the City's ordinances, shall have no more force or effect than uncanceled terms.

15.3 Captions - Captions and section headings in this PUD Agreement are provided for convenience only and shall not be deemed to explain, modify, amplify or aid in the interpretation or construction of meaning of this PUD Agreement.

15.4 Force Majeure - No party shall be considered in default in performance of its obligations hereunder, and the duty to accomplish such obligation shall be reasonably suspended, to the extent that, and during such period that, performance of such obligations, or any of them, is delayed or prevented by Force Majeure. Force Majeure shall include, but not be limited to, hostility, revolution, civil commotion, strike, epidemic, fire, flood, wind, earthquake, terrorism, hurricane, explosion, any law, permit, approval, proclamation, regulation, or ordinance or other act of government, or any act of God or any cause whether of the same or different nature, existing or future; provided that the cause whether or not enumerated in this Section is beyond the reasonable control and without the fault or negligence of the party seeking relief under this Section.

16.0 Severability.

If any provision of this PUD Agreement, or its application to any person, entity or circumstances is specifically held to be invalid or unenforceable by a court of competent jurisdiction, the remainder of this PUD Agreement and the application of the provisions hereof to other persons, entities or circumstances shall not be affected thereby and, to that end, this PUD Agreement shall continue to be enforced to the greatest extent possible consistent with law and the public interest. Notwithstanding the foregoing, if the effect of a determination or holding by a court that a particular term, clause or provision of this PUD Agreement is invalid or unenforceable is such that either party to this PUD Agreement shall no longer have the substantial

benefit of its respective bargain under this PUD Agreement or any material portion of this PUD Agreement, then, and in such event, whichever of the Parties is thus adversely affected, may, at its option and in its sole and absolute discretion, cancel and terminate this PUD Agreement upon its delivery of written notice thereof to the other party. If practicable, this PUD Agreement shall be modified as necessary to maintain the original intent of this PUD Agreement.

17.0 Attachments.

The Exhibits and Attachments to this PUD Agreement are hereby incorporated herein by the references made thereto and are a part of this PUD Agreement upon which the Parties have relied as if set forth in the text of this PUD Agreement verbatim.

18.0 Effective Date and Duration.

The Effective Date (herein so called) of this PUD Agreement shall be the later to occur of: (i) the expiration date of all appeal periods with respect to passage and/or adoption of Ordinance Number 2007-23 and Ordinance Number 2007-24 (collectively, the "Ordinances"); and (ii) if an appeal is made with respect to the passage, adoption and/or any other element of either of the Ordinances, the date on which any and all such appeals are resolved in favor of the passage and adoption of the Ordinances as initially enacted. If any such appeal is made, the Developer shall have the right, at any time up to the Effective Date, in Developer's sole and absolute discretion, to terminate this PUD Agreement and cease any activities with respect to defending against the appeal. In addition, the Developer may, at its absolute and sole discretion, elect in writing to waive conditions (i) and (ii) above causing the Effective Date of this PUD Agreement to be the same date said written waiver is made. The Original PUD Agreement shall continue in full force and effect, and the Property shall retain its current PUD zoning classification/district, until such time, if any, as the Effective Date shall occur. Following the Effective Date, this PUD Agreement shall remain in effect for as long as this Ordinance is valid. This PUD Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall, together, constitute one and the same instrument.

19.0 Notices.

- (a). Any required notices shall be furnished to the party entitled to such notice at least 30 days prior to the effective date of said notice.
- (b). Any notices required or permitted hereunder shall be in writing and shall be deemed properly made when delivered by certified United States mail, postage prepaid, and addressed as set forth herein, or at such address as shall have been specified by written notice to the other party delivered in accordance herewith:

FOR THE CITY:

James Landon
City Manager
City of Palm Coast
2 Commerce Boulevard
Palm Coast, Florida 32164

FOR THE DEVELOPER:

James Riley
Centex Homes
1274 GranBay Parkway
Suite 2400
Jacksonville, Florida

With a copy to:

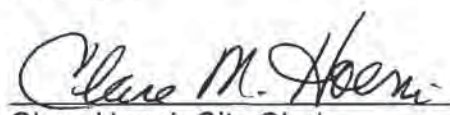
Michael D. Chiumento III, Esquire
Chiumento and Guntharp, P.A.
4 Old Kings Road North, Suite B
Palm Coast, Florida 32137

- (c). The Parties agree not to claim any waiver by the other party of such notice requirements based upon the other party having actual knowledge, implied, verbal or construction notice, lack of prejudice or any other grounds as a substitute for the failure of the other party to comply with the express written notice requirements herein.
- (d). Computer notification (e-mails and message boards) do not constitute proper "written notice" under the terms of this PUD Agreement.
- (e). Either of the parties may change, by written notice as provided herein, the addresses or persons designated for receipt of notice.

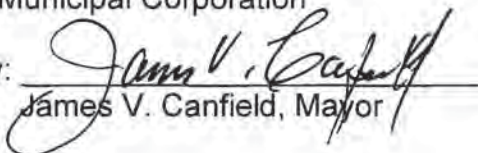
IN WITNESS WHEREOF, the Parties have executed this PUD Agreement on the dates set forth below.

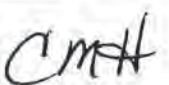
City of Palm Coast Signature Page for Palm Harbor Golf Course PUD

ATTEST:


Clare Hoeni, City Clerk
Date: Oct. 16, 2007

CITY OF PALM COAST, FLORIDA
A Municipal Corporation

By: 
James V. Canfield, Mayor



(CENTEX SIGNATURE PAGE FOLLOW)

Centex Signature Page for Palm Harbor Golf Course PUD

CENTEX HOMES, a Nevada general partnership, d/b/a Centex Destination Properties

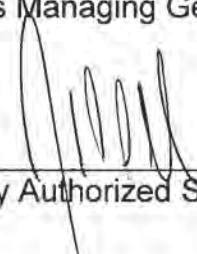
By: **CENTEX REAL ESTATE CORPORATION**,
a Nevada corporation,
its Managing General Partner

ATTEST:

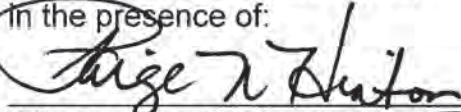


Attesting Authority

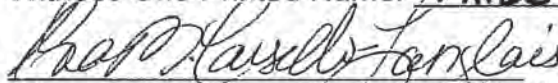
Date: 10/23/07

By: 
Lawfully Authorized Signatory

Signed, sealed and delivered
in the presence of:



Witness One Printed Name: PAIGE N. HARRON



Witness Two Printed Name: BRAM CARSEWOLANGLAIS

ACKNOWLEDGMENT

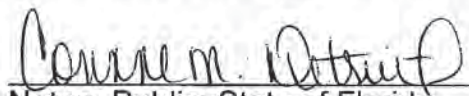
STATE OF Florida)

COUNTY OF Seminole)

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared the above signatories and witnesses the signatories executing on behalf of and stating that they have authority to bind Centex Destination Properties said persons having acknowledged executing the same in the presence of two subscribing witnesses freely and voluntarily under requisite corporate/entity authority and they are personally known to me.

WITNESS my hand and official seal in the County and State last aforesaid this 23rd day of October, 2007.

(Affix Notary Seal)



Notary Public: State of Florida

Print Name: Corinne M. Detruit



**ATTACHMENTS TO PUD AGREEMENT FOR
PALM HARBOR GOLF COURSE**

Exhibit "1":	Legal Description of the Property.
Exhibit "1A":	Legal Description of Parcel A.
Exhibit "1B":	Legal Description of Parcel B.
Attachment "1":	Conceptual Development Plan.
Attachment "2":	Conceptual Architectural Character.
Attachment "3"	Conceptual Landscape Plan and Details.
Attachment "4"	Conceptual Lighting Plan and Details.
Attachment "5"	Conceptual Signage Plan and Details.

[illegible]

1" = 500'
(ON 11x17 PLOT)

EXHIBIT A

[illegible]

LEGAL DESCRIPTION:

[illegible][illegible]

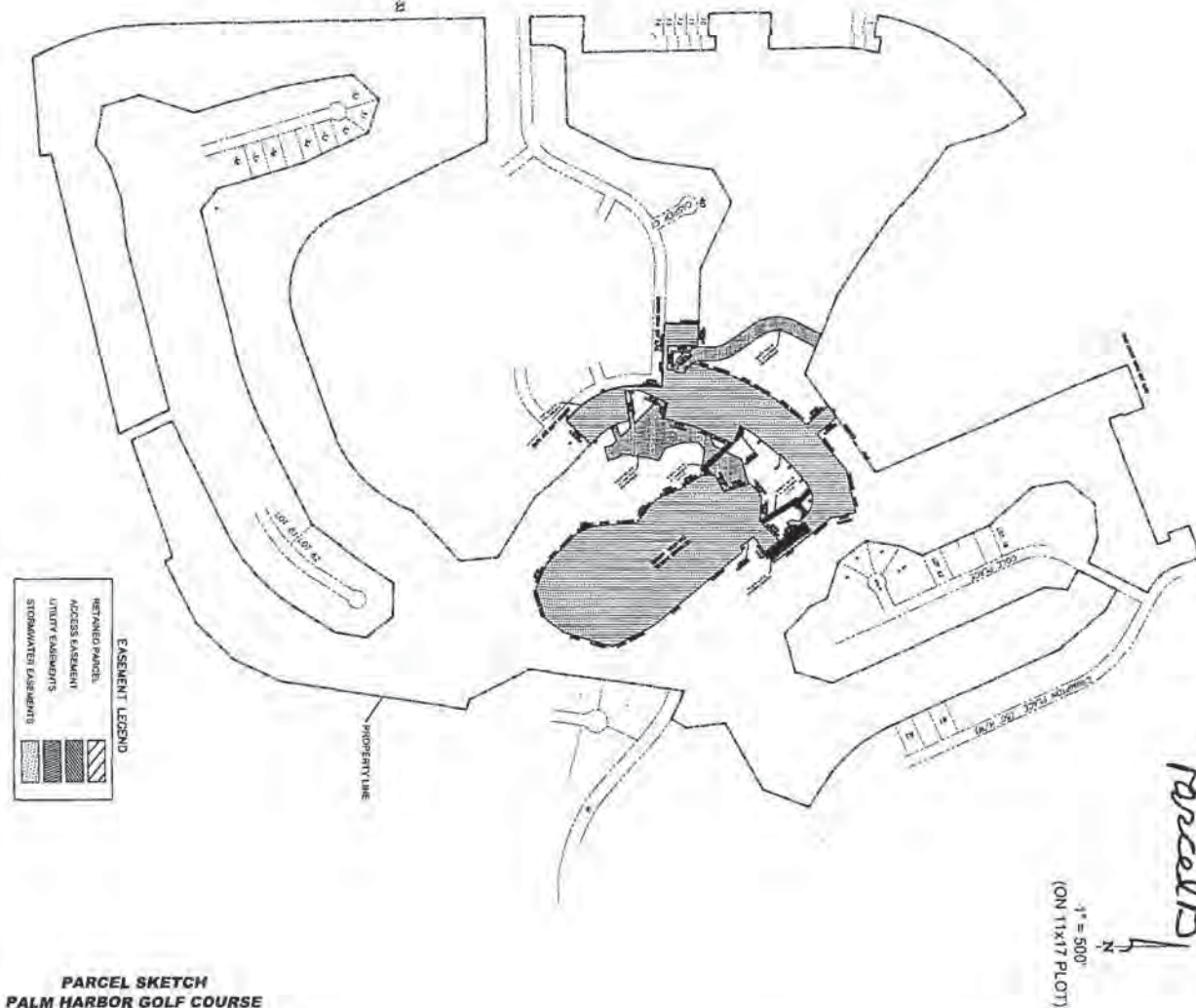
CURVE TABLE				
CURVE	DELTA	LENGTH	BEARING	CHORD RADIUS
C1	1000.46"	112.58	N 07° 28' 32" W	114.32
C2	132.70"	11.56	S 61° 03' 51" W	111.50
C3	1247.16"	219.14	S 28° 30' 22" W	304.72
C4	307.11"	62.37	S 01° 03' 44" E	61.66
C5	159.22"	15.82	N 71° 10' 21" E	156.23
C6	4874.51"	336.00	N 72° 14' 14" W	316.87
				304.63

LINE TABLE		
LINE	BEARING	LENGTH
L1	N03°44'17"E	33.30
L2	N04°10'03"W	57.40
L3	S04°30'07"W	15.60
L4	S02°30'33"E	54.63
L5	S13°33'01"W	11.64
L6	S10°41'41"E	41.60
L7	N44°54'10"W	41.00
L8	N15°33'27"E	65.42
L9	N03°30'50"E	63.80

EASEMENT LEGEND

OVERALL PARCEL ACCESS EASEMENT	
	
	
	

EXHIBIT A

[illegible]

[illegible][illegible][illegible]

CURVE TABLE					
CURVE	DELTA	LENGTH	BEARING	CHORD	RADIUS
C1	100°00'40"	182.36	N79°20'37"W	160.32	104.50
C2	93°02'02"	113.56	S47°01'24"E	113.50	84.15
C3	12°02'40"	200.15	S58°09'22"E	306.77	841.00
C4	6°50'37"	61.87	S03°01'43"E	02.88	36.52
C5	26°54'31"	158.32	S27°17'09"E	156.23	126.52
C6	40°24'31"	378.60	N72°31'40"W	316.87	386.83

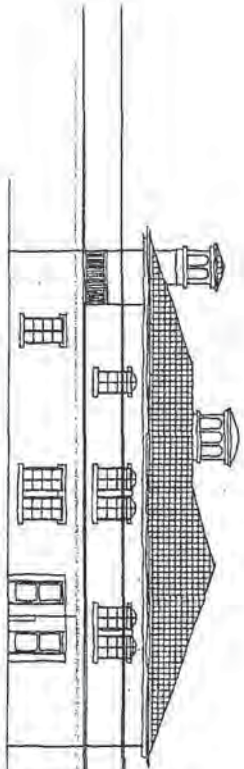
LINE TABLE		
LINE	BEARING	LENGTH
11	N53°41'E	25.70
12	N04°24"E	57.40
13	S84°50.2'W	13.60
14	S82°20.3'W	54.63
15	S15°33.0'W	11.84
16	S48°24.1'E	41.00
17	N44°24.1'W	41.06
18	N45°26.3'W	62.40
19	N52°20.3'E	63.60

OVERALL PARCEL
ACCESS EASEMENT

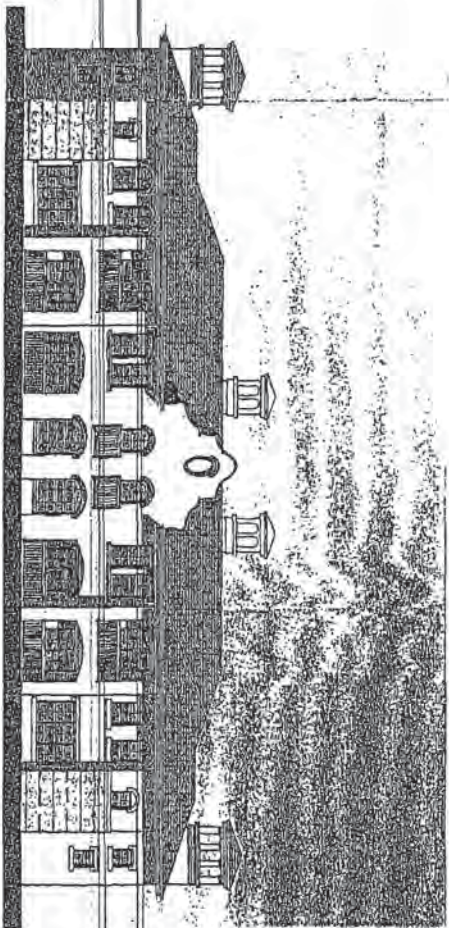
EXHIBIT A

Attachment 2

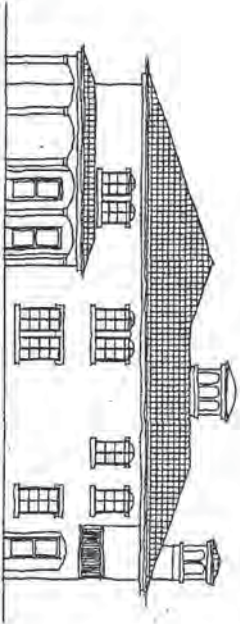
CMAA



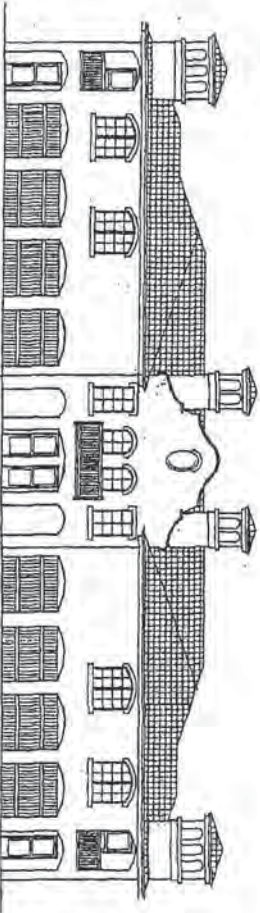
RIGHT ELEVATION



8-PLEX
REAR ELEVATION



LEFT ELEVATION

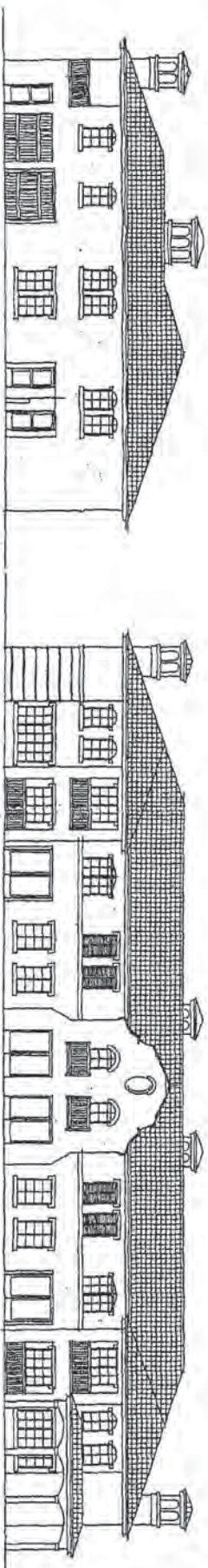


FRONT ELEVATION

EXHIBIT A



Palm Harbor Golf Course
Palm Coast, Florida

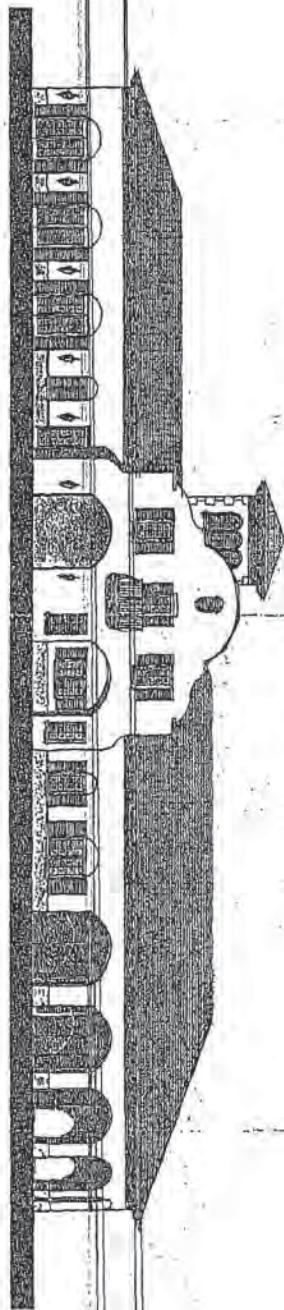


Palm Harbor Golf Course
Palm Coast, Florida

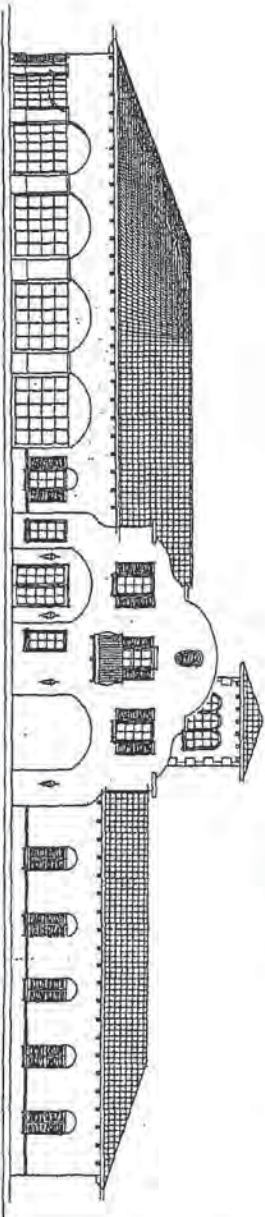
CMH

CMAH

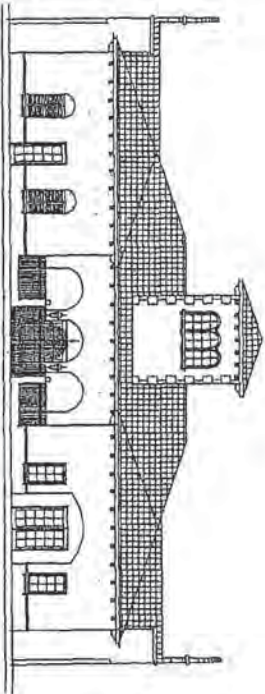
CLUBHOUSE
GOLF COURSE ELEVATION



ENTRY ELEVATION



SIDE ELEVATION



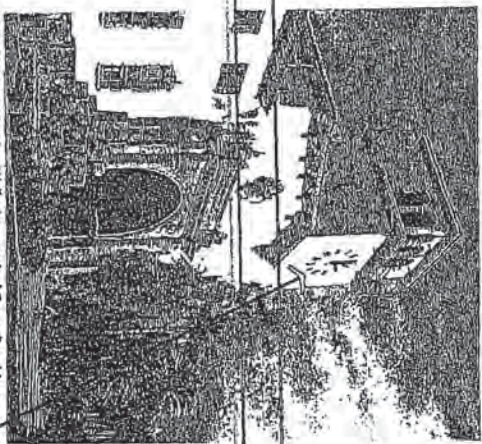
Palm Harbor Golf Course
Palm Coast, Florida



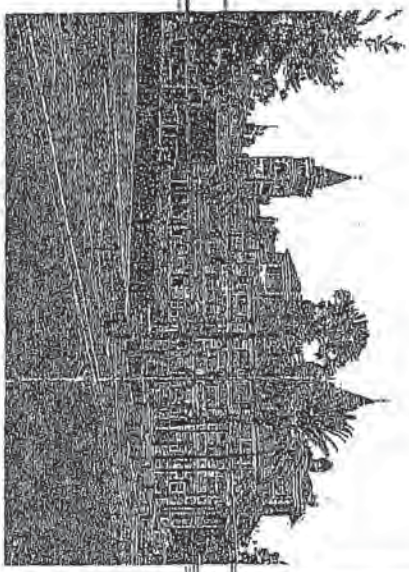
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Conceptual Architectural Character

EXHIBIT A



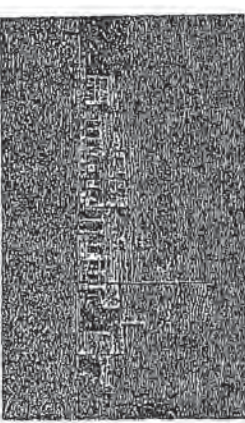
- Clock Tower, Massive Walk, Asymetrical Cascading Mass -



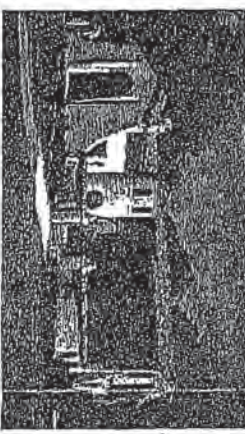
- St. Augustine Flagler College -



- Vertical Tower Dominates Building -



- Well Broken Up Massing -



- Asymetrical Facade -



- Tower Signifies Building Entry -



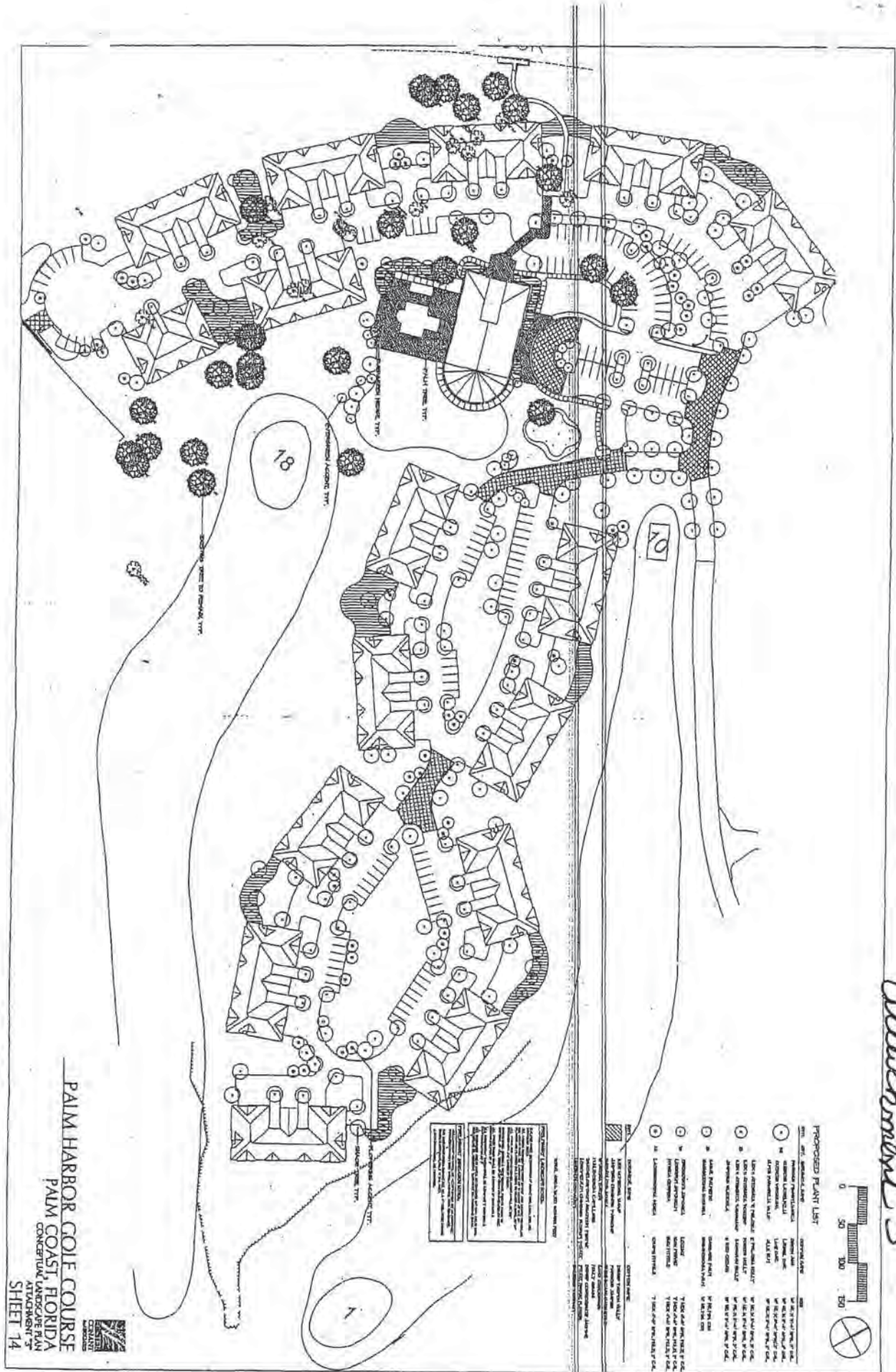
- Iconic Vertical Tower -

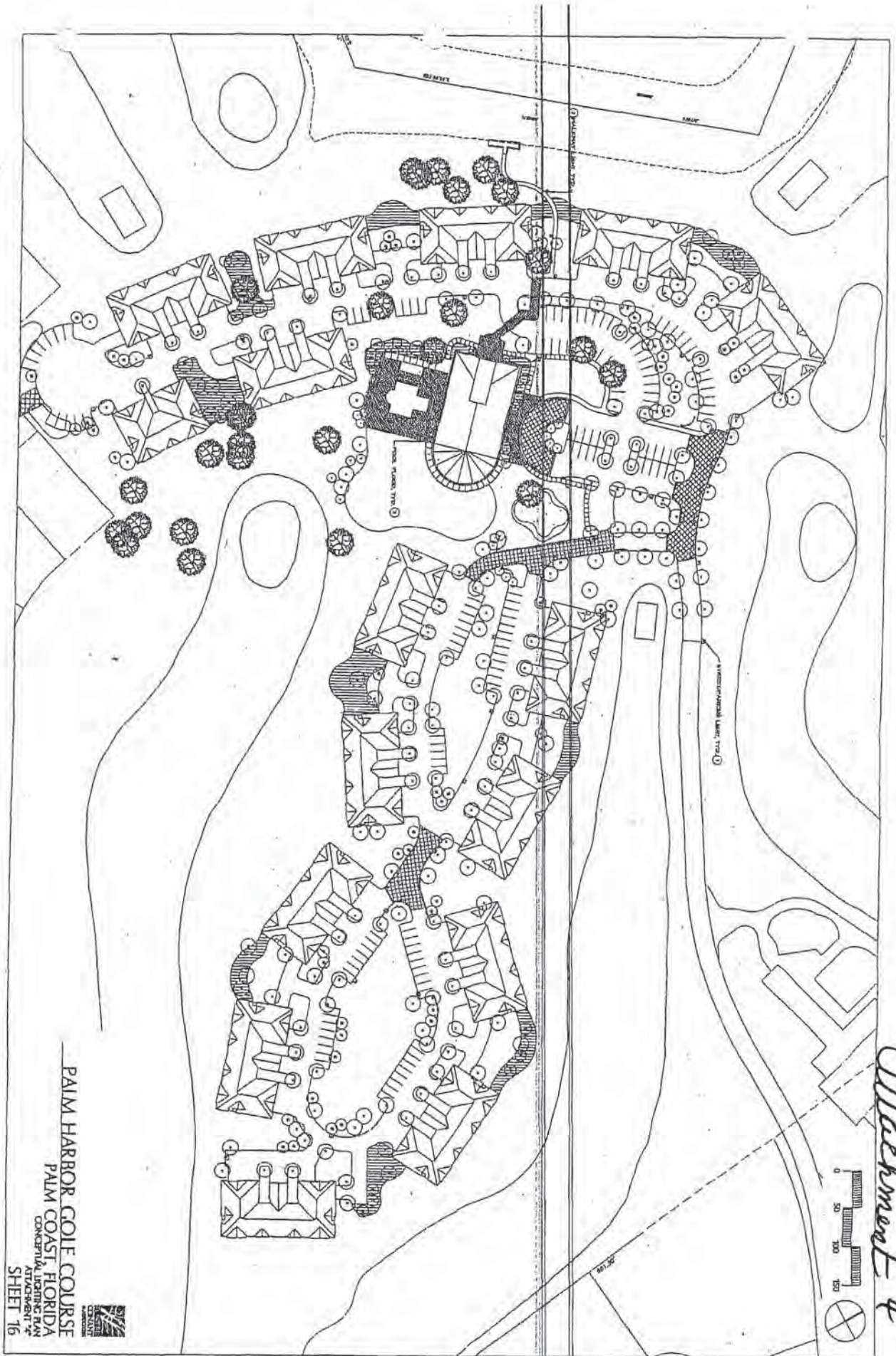
Harborside Inn and Marina
Palm Coast, Florida



Attachment 3

CMH





Attachment 4

CMAA

**Flagler/Palm Coast
NEWS-TRIBUNE**

Published Each Wednesday and Saturday
Flagler County, Florida

**State of Florida,
County of Flagler:**

Before the undersigned authority personally appeared

Linda Pierre

Who, on oath says that she is

Classified Advertising Manager

of The Flagler/Palm Coast NEWS-TRIBUNE, a twice
weekly newspaper published Flagler County, Florida;
that the attached copy of advertisement, being a

Notice of Public Hearing

in the matter of 2007-xx Notice PUD Amendment-
Harborside Inn Marina

in the Court
was published in said newspaper in the issues
October 6, 2007

Affiant further says that The Flagler/Palm Coast
News-Tribune is a newspaper published in said
Flagler County, Florida, and that the said newspaper
has heretofore been continuously published in said
Flagler County, Florida, each Wednesday and
Saturday and has been entered as second-class mail
matter at the post office in Flagler Beach, in said
Flagler County, Florida, for a period of one year next
preceding the first publication of the attached copy of
advertisement; and affiant further says that he has
neither paid nor promised any person, firm or
corporation any discount, rebate, commission or
refund for the purpose of securing this advertisement
for publication in the said newspaper.

Linda Pierre

Sworn to and subscribed before me

this 8th day of October

A.D. 2007

Anita Marie Saunders



ANITA MARIE SAUNDERS
Notary Public, State of Florida
My Comm. Expires Aug. 30, 2011
Comm. No. DD 687764

LEGAL ADVERTISEMENT

**CITY OF PALM COAST
NOTICE OF PUBLIC HEARING**

**ORDINANCE NO: 2007-XX
APPLICATION NO. RZ-PUD-05-07a
MODIFICATIONS TO THE PALM HARBOR
GOLF COURSE PLANNED UNIT
DEVELOPMENT AGREEMENT (REZONING)**

Notice is hereby given that a public hearing will be held before the City Council of the City of Palm Coast on October 16, 2007 beginning at 9:00 a.m., in Council Chambers, at 305 Palm Coast Parkway North, Palm Coast, Florida. The purpose of the hearing is to hear all interested parties and act upon the adoption of Ordinance Number 2007-xx entitled:

"AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM COAST, FLORIDA AMENDING AND RESTATING ORDINANCE NUMBER 2005-19 (ORB 1253, PAGE 1884 OF THE PUBLIC RECORDS OF FLAGLER COUNTY, FLORIDA) APPROVING THE PLANNED UNIT DEVELOPMENT (PUD) AGREEMENT BETWEEN CENTEX HOMES (DBA AS CENTEX DESTINATION PROPERTIES) AND THE CITY OF PALM COAST FOR THE PALM HARBOR GOLF COURSE PUD; REZONING PROPERTY (165 +/- ACRES AS DESCRIBED IN THIS ORDINANCE) FROM PUD TO A REVISED PUD; AMENDING THE CITY OF PALM COAST OFFICIAL ZONING DISTRICT MAP; PROVIDING FOR LEGISLATIVE FINDINGS AND INTENT; PROVIDING FOR THE TAKING OF IMPLEMENTING ADMINISTRATIVE ACTIONS; REPEALING ALL CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR NON-CODIFICATION AND PROVIDING FOR A CONTINGENT EFFECTIVE DATE."

The applicant is requesting modifications to the PUD to provide for potential separate ownership and use of the PUD property by creating two (2) parcels: Parcel "A" (Developer property) would only be developed for residential purposes as specified in the PUD Agreement approved by the Ordinance and Parcel "B" (golf course property) would only be used as a golf course with related facilities as specified in the PUD Agreement approved by the Ordinance. Other modifications to the PUD Agreement provide definitive language as to development standards as to the PUD, approved uses and related matters. A location map is set forth below.

Interested parties may appear at the meeting and be heard, or submit written comments, regarding the proposed zoning change. Interested parties may also submit written comments regarding the proposed rezoning prior to the meeting by means of mail or hand delivered to the City Clerk's office located at 2 Commerce Boulevard, Palm Coast, Florida 32164. The public is encouraged to appear at the hearing and be heard regarding the proposed ordinance or to submit written comments.

A complete application package, which includes the full ordinance, is on file at the Community Development office located at City Hall, 2 Commerce Boulevard, Palm Coast, Florida and may be inspected by the public. Also, in the event that a person desires to obtain a copy of the proposed ordinance, he or she may obtain a copy from the City Clerk's Office. The public is encouraged to participate in the processes and procedures of the City and to request copies of the proposed ordinance. Additionally, the proposed Ordinance and this Notice have been published on the City Web site: www.ci.palm-coast.fl.us. The Public is encouraged to visit the City's Web site to obtain information relative to this or any other matter relating to City government.

In accordance with the Americans with Disabilities Act, persons needing assistance to participate in these proceedings should contact the City Clerk's Office at 386-986-3713 at least 48 hours prior to the meeting.

If any person decides to appeal any decision made by Council with respect to any matter considered at such hearing, he or she will need a record of the proceedings, and for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.



**Flagler/Palm Coast
NEWS-TRIBUNE**

Published Each Wednesday and Saturday
Flagler County, Florida

State of Florida,
County of Flagler:

Before the undersigned authority personally appeared

Linda Pierre

Who, on oath says that she is

Classified Advertising Manager

of The Flagler/Palm Coast NEWS-TRIBUNE, a twice
weekly newspaper published Flagler County, Florida;
that the attached copy of advertisement, being a

Notice of Zoning Change

in the matter of Application No. RZ-PUD-05-07a
in the Court
was published in said newspaper in the issues
September 15, 2007

Affiant further says that The Flagler/Palm Coast
News-Tribune is a newspaper published in said
Flagler County, Florida, and that the said newspaper
has heretofore been continuously published in said
Flagler County, Florida, each Wednesday and
Saturday and has been entered as second-class mail
matter at the post office in Flagler Beach, in said
Flagler County, Florida, for a period of one year next
preceding the first publication of the attached copy of
advertisement; and affiant further says that he has
neither paid nor promised any person, firm or
corporation any discount, rebate, commission or
refund for the purpose of securing this advertisement
for publication in the said newspaper.

Sworn to and subscribed before me

this 17th day of September

A.D. 2007



ANITA MARIE SAUNDERS
Notary Public, State of Florida
My Comm. Expires Aug. 30, 2011
Comm. No. DD 687784

LEGAL ADVERTISEMENT

**CITY OF PALM COAST
NOTICE OF ZONING CHANGE
ORDINANCE NO. 2007-XX
APPLICATION NO. RZ-PUD-05-07a
MODIFICATIONS TO THE
PALM HARBOR GOLF COURSE
PLANNED UNIT DEVELOPMENT
AGREEMENT (REZONING)**

The City Council of the City of Palm Coast will consider the adoption of Ordinance
Number 2007-XX entitled:

"AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM
COAST, FLORIDA AMENDING AND RESTATING ORDINANCE
NUMBER 2005-19 (ORB 1253, PAGE 1884 OF THE PUBLIC RECORDS
OF FLAGLER COUNTY, FLORIDA) APPROVING THE PLANNED
UNIT DEVELOPMENT (PUD) AGREEMENT BETWEEN CENTEX
HOMES (DBA AS CENTEX DESTINATION PROPERTIES) AND THE
CITY OF PALM COAST FOR THE PALM HARBOR GOLF COURSE
PUD; REZONING PROPERTY (165 +/- ACRES AS DESCRIBED IN
THIS ORDINANCE) FROM PUD TO A REVISED PUD; AMENDING
THE CITY OF PALM COAST OFFICIAL ZONING DISTRICT MAP;
PROVIDING FOR LEGISLATIVE FINDINGS AND INTENT;
PROVIDING FOR THE TAKING OF IMPLEMENTING
ADMINISTRATIVE ACTIONS; REPEALING ALL CONFLICTING
ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING
FOR NON-CODIFICATION AND PROVIDING FOR A CONTINGENT
EFFECTIVE DATE."

Notice is hereby given of the following hearing on the proposed ordinance to be held
by the City Council:

1st reading of Ordinance 2007-XX - October 2, 2007 at 6:30 p.m. or as soon
thereafter as practicable.

The public hearing will be held in the large meeting room in the Palm Coast
Community Center located at 305 Palm Coast Parkway NE, Palm Coast, Florida.

The applicant is requesting modifications to the PUD to provide for potential separate
ownership and use of the PUD property by creating two (2) parcels. Parcel "A"
(Developer property) would only be developed for residential purposes as specified in
the PUD Agreement approved by the Ordinance and Parcel "B" (golf course property)
would only be used as a golf course with related facilities as specified in the PUD
Agreement approved by the Ordinance. Other modifications to the PUD Agreement
provide definitive language as to development standards as to the PUD, approved uses
and related matters. A location map is set forth below.

Interested parties may appear at the meeting and be heard, or submit written comments,
regarding the proposed zoning change. Interested parties may also submit written
comments regarding the proposed rezoning prior to the meeting by means of mail or
hand delivery to Ray Tyner, Planning Manager, 2 Commerce Boulevard, Palm Coast,
Florida 32164. The public is encouraged to appear at the hearing and be heard
regarding the proposed ordinance or to submit written comments.

A complete application package, which includes the full ordinance, is on file at the
office of the Planning Manager located at City Hall, 2 Commerce Boulevard, Palm
Coast, Florida and may be inspected by the public. Also, in the event that a person
desires to obtain a copy of the proposed ordinance, she or he may obtain a copy from
the City Clerk or Mr. Tyner. The public is encouraged to participate in the processes
and procedures of the City and to request copies of the proposed ordinance.
Additionally, the proposed ordinance, and this Notice, have been published on the City
of Palm Coast Web site: www.ci.palm-coast.fl.us. The Public is encouraged to visit the
City's Web site to obtain information relative to this or any other matter relating to City
government.

In accordance with the Americans with Disabilities Act, persons needing assistance to
participate in any of these proceedings should contact Pam Barrett at 386-986-3720 at
least 48 hours prior to the meeting or may contact Ms. Barrett at City Hall, 2
Commerce Boulevard, Palm Coast, Florida.

The decision made by the PLDRB is a recommendation that shall be forwarded to the
City Council for a final decision. The specific dates for the City Council hearings shall
be advertised at a later date.

If any person decides to appeal any decision made with respect to any matter
considered at such hearing, he or she will need a record of the proceedings, and for
such purpose, he or she may need to ensure that a verbatim record of the proceedings
is made, which record includes the testimony and evidence upon which the appeal is
to be based.



Legal NT5601, September 15, 2007 '11.

**Flagler/Palm Coast
NEWS-TRIBUNE**

Published Each Wednesday and Saturday
Flagler County, Florida

State of Florida,
County of Flagler:

Before the undersigned authority personally appeared

Linda Pierre

Who, on oath says that she is

Classified Advertising Manager

of The Flagler/Palm Coast NEWS-TRIBUNE, a twice
weekly newspaper published Flagler County, Florida;
that the attached copy of advertisement, being a

Notice of Zoning Change

in the matter of Application of No. RZ-PUD-05-07a
in the Court
was published in said newspaper in the issues
September 1, 2007

Affiant further says that The Flagler/Palm Coast
News-Tribune is a newspaper published in said
Flagler County, Florida, and that the said newspaper
has heretofore been continuously published in said
Flagler County, Florida, each Wednesday and
Saturday and has been entered as second-class mail
matter at the post office in Flagler Beach, in said
Flagler County, Florida, for a period of one year next
preceding the first publication of the attached copy of
advertisement; and affiant further says that he has
neither paid nor promised any person, firm or
corporation any discount, rebate, commission or
refund for the purpose of securing this advertisement
for publication in the said newspaper.

Sworn to and subscribed before me

this 4th day of September

A.D. 2007 8



ANITA MARIE SAUNDERS
Notary Public, State of Florida
My Comm. Expires Aug. 30, 2011
Comm. No. DD 687764

LEGAL ADVERTISEMENT

**CITY OF PALM COAST
NOTICE OF ZONING CHANGE**

**ORDINANCE NO. 2007-XX
APPLICATION NO. RZ-PUD-05-07a
MODIFICATIONS TO THE PALM HARBOR
GOLF COURSE PLANNED UNIT
DEVELOPMENT AGREEMENT (REZONING)**

The Planning and Land Development Regulation Board (PLDRB) of the City of Palm Coast will consider the adoption of Ordinance Number 2007-XX entitled:

"AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM COAST, FLORIDA AND AMENDING AND RESTATING ORDINANCE NUMBER 2005-19 (ORB 1253, PAGE 1884 OF THE PUBLIC RECORDS OF FLAGLER COUNTY, FLORIDA) APPROVING THE PLANNED UNIT DEVELOPMENT (PUD) AGREEMENT BETWEEN CENTEX HOMES (DBA AS CENTEX DESTINATION PROPERTIES) AND THE CITY OF PALM COAST FOR THE PALM HARBOR GOLF COURSE PUD; REZONING PROPERTY (165 +/- ACRES AS DESCRIBED IN THIS ORDINANCE) FROM PUD TO A REVISED PUD; AMENDING THE CITY OF PALM COAST OFFICIAL ZONING DISTRICT MAP; PROVIDING FOR LEGISLATIVE FINDINGS AND INTENT; PROVIDING FOR THE TAKING OF IMPLEMENTING ADMINISTRATIVE ACTIONS; REPEALING ALL CONFLICTING ORDINANCES; PROVIDING FOR SEVERABILITY; PROVIDING FOR NON-CODIFICATION AND PROVIDING FOR A CONTINGENT EFFECTIVE DATE."

Notice is hereby given of the following hearing on the proposed ordinance to be held by the PLDRB on September 19, 2007 at 6:30 p.m. or as soon thereafter as practicable. The public hearing will be held in the large meeting room in the Palm Coast Community Center located at 305 Palm Coast Parkway NE, Palm Coast, Florida.

The applicant is requesting modifications to the PUD to provide for potential separate ownership and use of the PUD property by creating two (2) parcels. Parcel "A" (Developer property) would only be developed for residential purposes as specified in the PUD Agreement approved by the Ordinance and Parcel "B" (golf course property) would only be used as a golf course with related facilities as specified in the PUD Agreement approved by the Ordinance. Other modifications to the PUD Agreement provide definitive language as to development standards as to the PUD, approved uses and related matters. A location map is set forth below.

Interested parties may appear at the meeting and be heard, or submit written comments, regarding the proposed zoning change. Interested parties may also submit written comments regarding the proposed rezoning prior to the meeting by means of mail or hand delivery to Ray Tyner, Planning Manager, 2 Commerce Boulevard, Palm Coast, Florida 32164. The public is encouraged to appear at the hearing and be heard regarding the proposed ordinance, or to submit written comments.

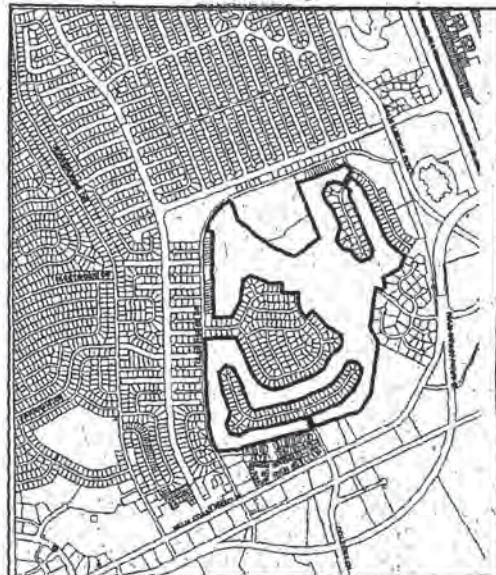
A complete application package, which includes the full ordinance, is on file at the office of the Planning Manager located at City Hall, 2 Commerce Boulevard, Palm Coast, Florida and may be inspected by the public. Also, in the event that a person desires to obtain a copy of the proposed ordinance, she or he may obtain a copy from the City Clerk or Mr. Tyner. The public is encouraged to participate in the processes and procedures of the City and to request copies of the proposed ordinance. Additionally, the proposed ordinance, and this Notice, have been published on the City of Palm Coast Web site: www.ci.palm-coast.fl.us. The Public is encouraged to visit the City's Web site to obtain information relative to this or any other matter relating to City government.

In accordance with the Americans with Disabilities Act, persons needing assistance to participate in any of these proceedings should contact Pam Barrett at 386-986-3720 at least 48 hours prior to the meeting or may contact Ms. Barrett at City Hall, 2 Commerce Boulevard, Palm Coast, Florida.

The decision made by the PLDRB is a recommendation that shall be forwarded to the City Council for a final decision. The specific dates for the City Council hearings shall be advertised at a later date.

If any person decides to appeal any decision made with respect to any matter considered at such hearing, he or she will need a record of the proceedings, and for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

Location Map



Legal NT5498, September 1, 2007 lt.

EXHIBIT A

[10, 11] While the denial or restriction of visitation rights is generally disfavored, it is within the court's discretion to restrict or limit visitation, as may be necessary, to protect the welfare of the child. *See Allen v. Allen*, 787 So.2d 215, 217 (Fla. 5th DCA), *review denied*, 800 So.2d 612 (Fla. 2001). A ruling limiting visitation will not be disturbed absent a finding of abuse of discretion. *See Damiani v. Damiani*, 835 So.2d 1168, 1169 (Fla. 4th DCA 2002). The privilege of visiting the minor children of the parties to a divorce proceeding should never be denied either parent so long as he or she conducts himself or herself, while in the presence of such children, in a manner which will not adversely affect the morals or welfare of such progeny. *See id.* (quoting *Yandell v. Yandell*, 39 So.2d 554 (Fla.1949)). Based on the testimony adduced at trial, the trial court did not abuse its discretion in limiting former husband's visitation.

Accordingly, we reverse that part of the amended final judgment which imputes income to appellant for purposes of awarding child support and requiring the repayment of funds by appellant and remand for further proceedings in accordance with this opinion. We also reverse the trial court's finding of sole parental responsibility and remand for the court to make a specific finding whether, in accordance with *Grimaldi*, shared parental responsibility is detrimental to the children. We affirm the trial court's ruling in limiting former husband's visitation.

Affirmed in part; Reversed in part, and Remanded.

STONE and MAY, JJ., concur.



AT & T WIRELESS SERVICES OF FLORIDA, INC., a Florida corporation, and City of Coral Springs, a municipal corporation, Appellants,

v.

WCI COMMUNITIES, INC., Appellee.

Nos. 4D04-3285, 4D04-3286.

District Court of Appeal of Florida,
Fourth District.

Sept. 7, 2005.

Background: Successor in interest of grantor of land to city for use as park brought action against city and telecommunications company seeking the removal of telecommunications tower constructed in park. **The Seventeenth Judicial Circuit Court, Broward County, Robert A. Rosenberg, J., found tower to be a violation of deed restriction requiring land to be used "solely for passive park purposes,"** and entered injunction requiring city and telecommunications company to find alternate location for tower within 24 months. City and telecommunications company appealed.

Holdings: The District Court of Appeal, Shahood, J., held that:

- (1) lease violated deed restriction;
- (2) grantor's successor was entitled to injunctive relief;
- (3) city's assertion that tower served public interest did not prevent enforcement of deed restriction; and
- (4) injunction did not require court's ongoing supervision.

Affirmed.

1. Dedication ⚡55

City's lease of land in park to telecommunications company for construction and

operation of telecommunications tower violated restriction in deed by which land was granted to city, which required land to be used "solely for passive park purposes"; telecommunications tower had no park use, and construction of tower and associated equipment resulted in restricting portion of park from public's use.

2. Covenants ⚡49

Deed restrictions on lands are deemed contractual in nature and subject to the same rules of interpretation as are contracts.

3. Contracts ⚡176(2)

Evidence ⚡448

When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties.

4. Covenants ⚡49

Although restrictive covenants should be narrowly construed, they should not be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction.

5. Covenants ⚡49

Restrictive covenants will be enforced where their intent is clear and their restrictions are reasonable.

6. Covenants ⚡49

In construing restrictive covenants the question is primarily one of intention and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant.

7. Injunction ⚡62(3)

Successor in interest to grantor of land that was deeded to city for use as park was entitled to injunctive relief arising

out of city's leasing of portion of land to telecommunications company for construction of telecommunications tower, in violation of deed restriction requiring that land be used "solely for passive park purposes," despite contention that tower had only a minimal impact on recreational use of park; tower was not reasonably incidental to passive park purposes, grantor's successor had clear legal right to enforce deed restriction, and public interest was best served by maintaining parks as dedicated.

8. Injunction ⚡62(1)

A minor violation of a deed restriction is still a violation of the deed restriction, for purposes of entitlement to injunctive relief.

9. Easements ⚡42

The scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor.

10. Easements ⚡54

The scope of an express easement for a stated purpose cannot be expanded to include any use merely because such use does not impose an added burden on the servient estate.

11. Dedication ⚡55

City's assertion that telecommunications tower in public park served public interest by providing reception for 911 calls made on cellular telephones in the area did not prevent successor in interest of grantor of park land from enforcing deed restriction requiring land to be used "solely for passive park purposes"; city could not negate successor's property and legal rights based on public safety decision, city chose to limit location of telecommunications towers to city park lands, and city removed telephone service previously available to park users due to low revenue.

12. Injunction ⇌205

Injunction entered by court that found city's lease of property in park for construction of telecommunications tower to be a violation of deed restriction limiting park land to "passive park purposes," which gave city and telecommunications company 24 months to find alternate location for tower, did not require court's ongoing supervision; court did not assume day-to-day management responsibility for tower, but rather balanced the competing interests by allowing city to relocate tower in a manner that minimized harm to parties and the public.

David P. Ackerman and Michael A. Weeks of Ackerman, Link & Sartory, P.A., West Palm Beach, for appellant AT & T Wireless Services of Florida, Inc.

Kerry L. Ezrol and Michael D. Cirullo, Jr., of Goren, Cherof, Doody & Ezrol, P.A., Fort Lauderdale, and John J. Hearn of Office of the City Attorney, Coral Springs, for appellant City of Coral Springs.

James C. Brady of James C. Brady & Associates, Fort Lauderdale, for appellee.

SHAHOOD, J.

We affirm the final judgment ordering the demolition and removal of a telecommunications tower from Sherwood Forest Park and permanently enjoining appellants from maintaining a tower on that property.

FACTS

On April 19, 2002, appellee, WCI Communities, Inc. (WCI), sought injunctive relief against appellants, AT & T Wireless Services of Florida, Inc. (ATT) and the City of Coral Springs (the City), to prohibit the violation of a deed restriction relative to certain lands deeded to the City.

In 1975, Florida National Properties, Inc., conveyed, by Warranty Deed, certain property to the City, including the subject "Sherwood Forest Park." WCI, a major landowner and developer in the City, was the successor-in-interest to the grantor of the Warranty Deed. The Warranty Deed contained the following restriction:

In consideration of this conveyance, by acceptance hereof, the Grantee [City] agrees and understands and assures to Grantor that the above described property would be used and maintained solely for passive park purposes unless the express written consent of Grantor, its successors or assignees, is first obtained.

The property herein conveyed is dedicated to the public for use as passive parks.

SUBJECT to easements, restrictions, covenants, limitations and conditions of record.

(Emphasis added).

In October 1996, the City passed Ordinance 96-137 with the intent to: (1) promote the health, safety and general welfare of the citizens by regulating the siting of telecommunications towers; (2) provide for the appropriate location and development of telecommunications towers and antennas within the city; and (3) minimize adverse visual effects of telecommunication towers and antennas through careful design, siting, landscape screening and innovative camouflaging techniques. The Ordinance allowed freestanding telecommunications towers to be placed in parks and recreation areas greater than five acres. Sherwood Forest Park was listed on the City's list of parks as potential sites for cellular towers.

On July 9, 2001, the City, over WCI's protest, entered into a lease agreement with ATT to install a telecommunications tower in Sherwood Forest Park. The City

leased to ATT 1600 square feet of park land for the construction of a “Stealth Tree type tower,”¹² equipment building, black chain-link fencing and associated equipment. WCI protested on the grounds that the City’s approval for the construction of the telecommunications tower was in violation of the deed restriction on the park’s use. In January 2002, the City processed and approved an application for the issuance of a building permit to ATT to construct an eighty-five (85) foot telecommunications tower, a maintenance building and access ways, supporting structures, and hard-surface areas.

In its complaint, WCI alleged that the use contemplated by ATT and the structure submitted for a building permit was an active commercial use and not a passive use, and thus, the use and construction thereof are violative of the deed restriction. Moreover, neither the City nor ATT requested or received WCI’s express written consent for the construction of the tower.

On July 22, 2004, the trial court granted injunctive relief to WCI. In its order, the court set forth the deed restriction governing the park, that the park was conveyed to the City by Warranty Deed and that WCI was the successor-in-interest to the grantor. The court found that both ATT and the City investigated the status of the title of the park prior to entering the lease agreement for the construction of the telecommunications tower, and that they were aware of the applicable deed restriction. “Neither the City, nor AT & T Wireless, made a request to WCI Communities, Inc. for consent to waive the restriction, or to place a communication tower in the park.” The court noted that the public was physically excluded from the leased property

and that the City was receiving a financial benefit from its commercial venture. The court held that there was no ambiguity in the deed restriction and that the park was to be used for “passive park purposes only.” The court held that the use of the park space was a direct violation of the deed restriction, and therefore, impermissible.

In granting injunctive relief, the court found that “it is impractical, and unwise, to order the immediate destruction of the cellular communication tower. That would, no doubt, affect the public negatively. Thus, the injunctive relief provided is modified from that sought by plaintiff.” The court ordered that ATT search for, and attempt to acquire or lease an alternate location for a communications tower which would provide suitable coverage to residents and the police, within a 24-month period. The parties were directed to return to the court at least quarterly to report on the status of the matter.

ANALYSIS

[1] We affirm the trial court’s findings that the City violated the deed restriction by using the park property for a telecommunications tower and that injunctive relief was warranted.

[2] Deed restrictions on lands are deemed contractual in nature and subject to the same rules of interpretation as are contracts. See generally *Hill v. Palm Beach Polo, Inc.*, 717 So.2d 1080, 1081 (Fla. 4th DCA 1998). The construction of a contract is a question of law for the courts. See *Turner Constr. Co. v. Cent. Fla. Equip. Rental*, 904 So.2d 474, 475 (Fla. 3d DCA 2005); *Land O’Sun Realty*

1. The City required ATT to construct the “stealth tree tower” in the form of a pine tree to blend in with the park’s aesthetics.

2. ATT paid the City a one-time payment of \$10,000 to be used at the park and pays annual rent in the amount of \$24,000.

Ltd. v. REWJB Gas Inv., 685 So.2d 870, 871 n. 3 (Fla. 3d DCA 1997).

[3–5] When a contract is clear and unambiguous, the actual language used in the contract is the best evidence of the intent of the parties, and the plain meaning of the language controls. *See Fecteau v. Southeast Bank, N.A.*, 585 So.2d 1005, 1007 (Fla. 4th DCA 1991); *see also Jones & Scully, Inc. v. O’Connell*, 604 So.2d 867, 868–69 (Fla. 3d DCA 1992), *review denied*, 618 So.2d 210 (Fla.1993). When a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties. *See Fecteau*, 585 So.2d at 1007. Although restrictive covenants should be narrowly construed, they should not be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction. *See McMillan v. The Oaks of Spring Hill Homeowner’s Ass’n*, 754 So.2d 160, 162 (Fla. 5th DCA 2000). Restrictive covenants will be enforced where their intent is clear and their restrictions are reasonable. *See Imperial Golf Club, Inc. v. Monaco*, 752 So.2d 653, 654 (Fla. 2d DCA 2000) (construction of a restroom facility on a golf course violated restrictive covenant requiring complete visibility of golf course).

In this case, the trial court properly concluded that there was no ambiguity in the deed restriction requiring that the property be “used and maintained solely for passive park purposes” and that the “property herein conveyed is dedicated to the public for use as passive parks.” The court held that “[t]he park was to be used for passive park purposes only. Fractional use was not specified. Presently, a fraction of the park is not being used for passive purposes.”

[6] Here, the actual issue turns not on whether the telecommunications tower’s use was passive, as argued by appellants, but whether the use was consistent with the deed restriction that limits use “solely” to “passive park purposes.” “In construing restrictive covenants the question is primarily one of intention and the fundamental rule is that the intention of the parties as shown by the agreement governs, being determined by a fair interpretation of the entire text of the covenant.” *White v. Metro. Dade County*, 563 So.2d 117, 123 (Fla. 3d DCA 1990) (quoting *Thompson v. Squibb*, 183 So.2d 30, 32 (Fla. 2d DCA 1966)). Courts have unfailingly guarded against encroachments on public park land where such park land is under the protection of a deed restriction or restrictive covenant. *See id.*

In this case, quite simply, the use of the park for the telecommunications tower is not related to or in furtherance of “solely for passive park purposes.” A telecommunications tower does not support a park use. While appellants argue that the tower supports a park use, like utilities or restrooms, because someone at the park could make a cell call from the park, the tower has no park use. *See, e.g., White*, 563 So.2d at 124 (the operation of the Lipton tournament violated the deed restriction “public park purposes only” because it deprived the public of the use and enjoyment of the park, including the tennis facilities, during the tournament for an extended period of time).

The City devoted a portion of deed-restricted park lands to a private commercial enterprise and as a result restricted access of park lands from the public’s use. While courts have consistently ruled that commercial benefit does not defeat a park purpose, the telecommunications tower has no park purpose. *See id.* ATT’s use of the park property is neither passive, nor is

it used to support the park. The lands are being used to fill in ATT's telecommunications grid for monetary gain.

[7] Next, we reject appellants' claim that injunctive relief is not available for a "de minimis" violation. They claim that the impact of the "tree tower" on the passive recreational use of the park was minimal and that WCI was unaffected by the use. Appellants rely upon *Thompson* which held that property restricted to use for residential purposes, so long as it is in good faith used for such, may also be used to a minor extent for the transaction of some classes of business or other pursuits so long as such is merely casual or unobtrusive and results in no appreciable damage to neighboring property. 183 So.2d at 32. However, such use must be reasonably incidental to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants. See *id.* at 32.

[8-10] A minor violation of the deed restriction is still a violation of the deed restriction. "The scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor." *City of Orlando v. MSD-Mattie, L.L.C.*, 895 So.2d 1127, 1130 (Fla. 5th DCA 2005). "The scope of an express easement for a stated purpose cannot be expanded to include any use merely because such use does not impose an added burden on the servient estate." *Id.* In this case, while the impact of the tower to the neighborhood is minimal, the telecommunications tower is not reasonably incidental to "passive park purposes."

Accordingly, we hold that the trial court did not err in granting permanent injunctive relief. See *St. Lucie County v. St. Lucie Village*, 603 So.2d 1289, 1292 (Fla. 4th DCA), *review denied*, 613 So.2d 12 (Fla.1992) (a party seeking injunctive relief

in Florida must demonstrate: (1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy; and (4) consideration of the public interest); *White*, 563 So.2d at 126 (an injunction is a proper remedy for violation of a restrictive covenant).

WCI, as the successor-in-interest to the grantor of the Warranty Deed, not only had a continuing interest in the property and a clear legal right to enforce the deed restriction, but appellants violated that deed restriction without obtaining WCI's express written consent.

Further, we reject appellants' claim that the trial court found that the public interest would not be served by granting the relief sought. Although the trial court held that the immediate destruction of the cellular telecommunications tower "would, no doubt, affect the public negatively," that does not support appellants' claim. The order granting the injunction clearly stated that the public was physically excluded from the leased property. This exclusion cut off access to park property to the very members of the public for whose benefit the park was given. This exclusion was inconsistent with the deed restriction. Further, the public interest was served by the maintenance of WCI's common plan for development. While appellants characterize the telecommunications tower as a de minimis violation, it was nevertheless a violation of which they were aware and which they ignored. The public interest is best served by the maintenance of the parks, as dedicated and restricted, particularly where there is a common plan served by the parks.

[11] Appellants further argued that the public interest would be harmed if the injunction were entered where the telecommunications tower served the public interest by providing safety to its citizens through the reception of 911 calls made

from the area. Appellant cannot negate the property and legal rights of others based on a decision regarding public safety. See generally *Daniel v. May*, 143 So.2d 536, 537 (Fla. 2d DCA 1962) (a mandatory injunction to remove structures in violation of restrictive covenants may be granted without taking into consideration the relative amount of inconvenience or injury to be suffered by the parties). Here, the City circumscribed the location of telecommunications towers to City park lands and presented ATT with Sherwood Forest Park as the only candidate site. Clearly, public safety was not the City's most paramount concern as evidenced by its removal of phone service previously available to park users due to the low revenue it generated.

[12] Lastly, we reject appellants' claim that the injunction improperly requires the trial court's continuing on-going supervision. The trial court did not contemplate assumption of day-to-day management responsibility for the use of the telecommunications tower. Rather, in an effort to balance the competing interests and ensure fairness to all involved, the court properly ordered the removal to take place over time, allowing ATT and the City to relocate the necessary cellular telecommunications tower. The two-year transition period was intended to allow for the removal of the tower in a manner that minimizes potential harm to the parties and the public.

As to all other issues, we affirm without comment.

Affirmed.

STEVENSON, C.J., and GROSS, J.,
concur.



Curtis Harold KNARICH, Appellant,

v.

STATE of Florida, Appellee.

No. 2D04-4141.

District Court of Appeal of Florida,
Second District.

Sept. 9, 2005.

Background: Defendant was convicted of lewd and lascivious contact with a child under 16 years of age, and he was sentenced to 40 years in prison. Defendant appealed. The District Court of Appeal, 766 So.2d 404, affirmed in part, reversed in part, and remanded for resentencing. On remand, defendant was sentenced to 35 years in prison. He appealed, and the District Court of Appeal, 866 So.2d 165, reversed and remanded for resentencing. On second remand, the Circuit Court, Pinellas County, R. Timothy Peters, J., imposed upward-departure sentence of 15 years in prison. Defendant appealed.

Holding: The District Court of Appeal, Wallace, J., held that defendant's prior military convictions, which were nonscoreable as prior record, did not constitute aggravating circumstance so as to justify upward-departure sentence.

Reversed and remanded for resentencing.

1. Criminal Law ⇌1139

Whether a defendant's prior nonscoreable military convictions constitute a valid legal ground for a departure sentence is a question of law that an appellate court reviews de novo.

2. Sentencing and Punishment ⇌793

In determining whether a conviction from another jurisdiction is analogous to a