

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

CAPTAIN'S BAIT, TACKLE & BBQ, LLC.  
A Florida limited liability corporation,

Plaintiff,

v.

CASE NO. 2019 CA 000381  
DIVISION 49

FLAGLER COUNTY, a political subdivision of  
the state of Florida,

Defendant.

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**RESPONSE TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Captain's Bait, Tackle & BBQ, LLC ("Captain's BBQ"), hereby responds to the Defendant's Motion for Summary Judgment ("Motion").

**County's Grounds for Summary Judgment**

The Defendant, Flagler County ("the County"), seeks summary judgment on the following grounds:

1. The Amended and Restated Captain's Bait, Tackle & BBQ Lease at Bings Landing ("Amended/Restated Lease") between Captain's BBQ and the County executed November 19, 2018 is an illegal and void contract and therefore invalid and unenforceable because the County did not use the "highest and best bidder" process of Fla. Stat. § 125.35; and

2. Even if the Amended/Restated Lease is valid and enforceable the County has not breached it because the time for performance has not occurred.

### **Counterpoints to Grounds of the County**

The grounds for summary judgment of the County lack merit for the reasons set forth below. Accordingly, the Motion should be denied.

The defense of illegal and void contract is an affirmative defense which must be raised in the answer or is waived. *Busot v. Busot*, 338 So. 2d 1332, 1334 (Fla. 2<sup>nd</sup> DCA 1976 (internal citations omitted) (where an agreement appears on its face to be valid the defense of illegality must be alleged and proved). The County did not raise the affirmative defense.

The County did, however, raise two affirmative defenses to the effect that they were entitled to rescind the Amended/Restated Lease, even while contending in the Motion that it did not rescind it. Clearly, they are taking a diametrically opposed position now to what they have taken in their pleadings.

The County asserts that they were required to utilize the “highest and best bidder” process of Fla. Stat. § 125.35. Stated otherwise, the County maintains that they should be excused from performing the obligations they voluntarily agreed to with Captain’s BBQ because they were so incompetent that they did not comply with statutory bidding requirements.

The bidding process was used when Captain's BBQ and the County entered the original agreement to which the Amended/Restated Lease is an amendment ("2011 Lease"). See pages 21–25 of the Flagler County Board of County Commissioners August 1, 2011 Meeting Minutes attached as Exhibit A where references to an RFP and the proposal of Captain's BBQ are made. However, this process was not used for the two subsequent amendments in 2015 and 2016. Apparently, the County does not believe the bidding process was needed for those amendments.

Furthermore, there is nothing in Fla. Stat. § 125.35 which requires a new bidding process whenever a lease which was previously bid is amended. The language cited by the County in the Motion, at Fla. Stat. § 125.353(b) pertaining to the modification or extension of a lease, applies to leases which were not originally subject of a bidding process. That is an express exemption to the statutory bidding requirements.

In 1999, at the request of Flagler County Attorney, Gary Eckstine, a Florida Attorney General Opinion was obtained with respect to whether the County could lease a non-aviation portion of the local airport to a private party without a competitive bid. The Opinion concluded by stating: "However, the county may grant a lease on real property in excess of thirty years if the governing body determines that such a lease is in the best interest of the county and the conditions in section 125.35, Florida Statutes, are met. Op. Att'y Gen. Fla. 99-35 (1999), a copy of which is attached as Exhibit B. Attorney General opinions are persuasive authority for statutory construction. *Hardee Cnty. v. Finr*

*II, Inc.*, 221 So. 3d 1162, 1166 (Fla. 2017) citing *McKenzie Check Advance of Fla., LLC v. Betts*, 928 So. 2d 1204, 1214 (Fla. 2006). Therefore, clearly, had the County wished to agree to a total term of thirty years or more in the 2011 Lease it could have done so. Including the renewal options in the 2011 Lease, and the Amended/Restated Lease, the total term would be thirty years.

In the fifth “Whereas” paragraph of the Amended/Restated Lease, on page 1, it is stated that: “WHEREAS, the Parties have discovered that the Original Location suffers from significant structural deficiencies, defects, and deterioration, which is well beyond normal wear and tear and not caused by lack of maintenance or repair, **that renders the Original Location unsuitable for the Lessee’s intended use and occupancy for the remainder of the present term of the Lease Agreement**”. (emphasis supplied). Accordingly, the County recognized that it simply could not deliver the leased premises which it was legally obligated to provide under the 2011 Lease. Either the County was going to be in breach of the 2011 Lease or a remedy needed to be crafted between the parties. The remedy was the Amended/Restated Lease which entailed the design, permitting, and construction of a new building at the expense of Captain’s BBQ which would then be occupied by Captain’s BBQ in lieu of the building which was no longer suitable for occupancy.

In the second “Whereas” paragraph of the Amended/Restated Lease, on page 2, it is stated: “WHEREAS, the Lessee anticipates that the cost to Lessee for the design,

permitting and construction of the New Location will be approximately \$1,000,000". In the sixth "Whereas" paragraph of the Amended/Restated Lease, on page 2, it is stated that: "WHEREAS, the Parties agree to extend the term of the Lease Agreement to allow the Lessee to amortize the significant costs to design, permit and construct the New Location". Based on the foregoing, the amendment to the 2011 Lease incorporated in the Amended/Restated Lease was a logical reformation of the 2011 Lease terms which, under the circumstances, not only made sense but were mutually beneficial to the parties. There was nothing which would suggest that this was the sort of amendment which ought to be the subject of a new bidding process as has been suggested by the County in the Motion.

More particularly, Fla. Stat. § 125.35 relates to the lease of real property owned by the County. The new building to be constructed by Captain's BBQ is not and was not at the time the Amended/Restated Lease was executed, owned by the County. Ultimately, if the County is required to, and does, fulfill the obligations it committed to in the Amended/Restated Lease, then the County will own the building. But at this juncture Fla. Stat. § 125.35 is simply inapplicable to the contemplated building because the County does not own it.

Moreover, Fla. Stat. § 125.35 will never be applicable because the Amended/Restated Lease is a contract with a specific contingency which renders it inapplicable i.e. the County has the opportunity to acquire a valuable building, suited to

purposes which compliment a unique property owned by County, on the condition that Captain's BBQ is the tenant of the building they are paying for and conveying to the County. That is not the sort of scenario which Fla. Stat. § 125.35 contemplates.

Although the County contends that it has not breached the Amended/Restated Lease and, in turn, Captain's BBQ has not alleged sufficient allegations of breach, there are more than ample allegations of an anticipatory breach of contract by the County in paragraphs 21-29 of the Complaint.<sup>1</sup> These paragraphs include allegations of the County expressing in numerous ways, commencing soon after the Amended/Restated Lease was executed, that they had no intention whatsoever of fulfilling their legal obligations under the Amended/Restated Lease.

The fact that the time for performance by the County under the Amended/Restated Lease may not have occurred is of no consequence given its clear indication numerous times, in numerous ways, that they have absolutely no intention of fulfilling their legal obligations under the Amended/Restated Lease. "[A]n anticipatory repudiation creates a cause of action for breach of contract distinct from any defense . . . ". *Twenty-Four Collection v. M. Weinbaum Constr.*, 427 So. 2d 1110, 1112 (Fla. 3<sup>rd</sup> DCA 1983) (internal citation omitted).

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<sup>1</sup> The year in the dates in paragraphs 22, 23, and 25 of the Complaint should be 2018 rather than 2019. The County realizes as much and has made argument accordingly.

To the extent that the County contends that Captain's BBQ failed to perform conditions precedent that is of no consequence because failure to perform conditions precedent is an affirmative defense which must be raised in the answer and it was not raised by the County. *Bank of Am., N.A. v. Nash*, 200 So. 3d 131 (Fla. 5<sup>th</sup> DCA 2016).

### **Conclusion**

Based on the foregoing the Motion should be denied.

WHEREFORE, The Plaintiff, Captain's Bait, Tackle & BBQ, LLC, respectfully requests that the Defendant's Motion for Summary Judgment be denied along with such other and further relief as the Court deems just and proper.

**SNELL LEGAL PLLC**  
Attorney for the Plaintiff  
Captain's Bait, Tackle & BBQ, LLC  
1651 N. Clyde Morris Blvd.  
Suite 1  
Daytona Beach, FL 32117  
(386) 265-5044  
By: /s/Gregory D. Snell  
Gregory D. Snell  
Florida Bar No. 442356  
gsnell@snell-legal.law

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on this 9th day of November, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the Florida Court eFiling Portal and has also been served by using the eFiling Portal.

**SNELL LEGAL PLLC**

Attorney for the Plaintiff

Captain's Bait, Tackle & BBQ, LLC

1651 N. Clyde Morris Blvd.

Suite 1

Daytona Beach, FL 32117

(386) 265-5044

By: /s/Gregory D. Snell

Gregory D. Snell

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August 1, 2011  
Regular Meeting

**ITEM 12 – LEASE AGREEMENT BETWEEN FLAGLER COUNTY AND CAPTAIN'S  
BAIT, TACKLE AND BBQ, LLC.**

The following information was provided by Heidi Petito, General Services Director:

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS  
CONSENT / AGENDA ITEM # 12**

**SUBJECT:** Approval of Lease Agreement with Captain's Bait, Tackle and BBQ, LLC for Bing's Landing Concessions.

**DATE OF MEETING:** August 1, 2011

**OVERVIEW/SUMMARY:** At the June 6, 2011 regular meeting of the Board of County Commissioners, acceptance of Captain's Bait, Tackle and BBQ proposal was made. The Board also provided direction to staff to negotiate a contract that would be brought back to the Board for their review and subsequent approval.

Staff has worked very diligently with the proposed vendor to develop the terms and conditions of the attached lease agreement between Flagler County and Captain's Bait, Tackle and BBQ. This Agreement is for an initial term of five years beginning on September 1, 2011, and ending on August 31, 2016 with an option to renew for one additional five year period. If the lessee exercises its renewal option described previously, then at the end of the ten year period, the lease may be renewed for an additional five year period upon mutual agreement of both parties.


**FUNDING INFORMATION:** This lease agreement allows for base rent payments in the amount of \$500.00 a month, \$6,000.00 annually. This monthly rent will increase by \$30.00 each annual anniversary over the term of this agreement.


**DEPT./CONTACT/PHONE #:** General Services, Heidi Petito, 313-4185

**RECOMMENDATIONS:** Request the Board approve the lease agreement with Captain's Bait, Tackle and BBQ, LLC for Bing's Landing Concessions.

**ATTACHMENT:**

1. Lease Agreement for Bing's Landing Concessions

  
Heidi Petito, General Services Director  
Date 7/29/11

  
Craig M. Coffey, County Administrator  
Date 29 July 2011

**(Item 12 – continued)**

Commissioner Revels referred to page 8 of the Lease Agreement and asked if the County would do all the labor if the applicant decided to construct the improvements cited.

Mr. Coffey stated the improvement was a 30'x31' area for the outside cooker, firewood, storage, etc. Noted it would be easier for the County to add onto the building if the applicant paid all the costs giving the County a permanent structure.

Commissioner Revels questioned the grease separation system and felt the applicant should pay for all improvements, labor and materials.

Mr. Coffey spoke about having a licensed plumber on staff that could easily complete the work. Stated staff was trying to work with the applicant to make this a win-win situation.

Commissioner Revels felt this would be a great addition to the park, but the County was giving the applicant a five-year lease at \$500.00 a month and then another five years and by the time the applicant recouped through the income, the County would still be receiving \$500.00 a month.

Mr. Coffey explained there was a rent escalator clause, which increased the rent approximately \$30.00 every year.

Commissioner Holland also felt the rent was too low for waterfront property being utilized by boaters and residents and that the escalator was not enough. Voiced her concerns about protecting the County's parks systems and natural views and did not want any addition to take away from this park. Wanted to make sure they would protect what was there.

Mr. Coffey stated the rent was somewhat low because of the size of the applicant's investment.

Commissioner Holland spoke about having separate vendor agreements. Stated the County had a historic element there and did not know how it was going to keep that as special as it was now.

Mr. Coffey agreed there could have been separate vendor agreements, but felt lumping them together would make it successful. Explained the cooker would be behind a fully enclosed fence and would not be seen. Continued to say eco-tourism required more infrastructure and they were building new paths and kayak launches on the north side and more parking on the south side, which would support the additional tourism.

Commissioner Holland asked about the signage.

Mr. Coffey replied the applicant was proposing a sign along A1A, one along the water, and up to two signs on the building and noted they would have to meet the County's sign code. He proposed to bring it to the A1A Scenic PRIDE Committee for approval.

**(Item 12 – continued)**

Commissioner Holland stated she was not in favor of putting a tremendous amount of signage on this property and felt it would take away from the aesthetics of Bings Landing.

Mr. Coffey suggested the BCC give staff specific guidance to what it would like to see changed so that could be addressed.

Commissioner Revels asked if the proposed covered area, awning and smoker area would have new concrete or an impervious surface. Wanted staff to remember this park had no concrete parking and a tree canopy with exposed roots.

Mr. Coffey replied the 30'x31' area would either be a concrete pad or pavers. Noted the awning was already over an existing wood deck. Stated there was one tree in the way of the addition.

Commissioner Revels did not want one tree to come down.

Chairman Peterson felt there needed to be a parking assessment.

There was further discussion on the parking.

Commissioner Hanns noted this was a historic site and felt the services were right on track. Agreed the rent was low. He also did not want one tree cut down and suggested building around the trees. Mentioned once the word got around there was a bait shop, signage would not be an issue. Stated he did not want the applicant to be discouraged, but the BCC had to protect what it had in this County.

Chairman Peterson stated he would not approve this lease unless the ability to sell alcoholic beverages was removed. Felt this was far from the original RFP because what the County wanted to do was establish a bait shop to complement fishing in a park and now it had been turned into a restaurant.

Mr. Coffey explained the County allowed beer and wine in all the parks, therefore, this would be in keeping with all the other County parks.

Chairman Peterson stated what bothered him was the County was permitting, at a very low rent, an individual to use public property to compete with the private sector.

Mr. Coffey requested guidance from the BCC on the rent issue.

Commissioner McLaughlin spoke about encouraging people to come to the parks and commended staff on the lease. Spoke about ways used by businesses to bring in customers.

**(Item 12 – continued)**

There was further discussion on the signage.

**A motion was made by Commissioner Revels to approve the lease subject to the following changes:**

- **The County would bear no expense on any of the additions, except for labor**
- **The lease amount would increase 10% annually**
- **Signage to be worked out between the lessee and staff, taken to A1A Scenic PRIDE and back to the BCC for approval**
- **“Take-out” parking spaces to be designated and signage placed in the basin along the sidewalk indicating limited parking time for take-out**
- **No trees to be taken down**

**Seconded by Commissioner Holland.**

Commissioner McLaughlin suggested staff come back to the BCC with a signage style.

Chairman Peterson wanted to amend the lease to have alcoholic beverages sold only to those who purchased food.

Commissioner Revels did not agree to that amendment.

Commissioner Hanns asked about handicapped accessibility and if the utilities were the applicant's responsibility.

Mr. Coffey noted there was handicap accessibility and the utilities would be broken out so the applicants would be responsible for their space, which would be in addition to the rent.

Commissioner Holland asked that any structure built would not take away from the natural scenic environment.

Mr. Coffey stated the addition would be in line with the existing structures. Spoke about a 22" oak tree next to the building that would prevent any addition.

There was discussion about building the addition around the tree.

Mike Goodman, applicant, stated they were looking to do this to make the County a better place. Both he and Chris Herrera, his business partner, lived in Flagler County and were fishermen. They wanted to hold seminars and teach people how to fish. Continued the food aspect was being overblown because their main concern was to bring people into the bait shop to sell fishing materials and bait. Commented they were asked to incorporate kayak and bike rentals and agreed because they felt there would be a need. Spoke about getting a return on his investment.

August 1, 2011  
Regular Meeting

**(Item 12 – continued)**

Chris Herrera noted they wanted to work with the Scenic AIA PRIDE members regarding the signage issue and were willing to work with the BCC to attain the proper signage.

Mr. Goodman stated in his original proposal he offered a small escalator every year plus an additional amount depending on the volume they did, but that was not accepted. Commented a 10% escalator could be very difficult over time and he would appreciate some other alternative.

There was further discussion on the rent and an option to renew after five years.

Jay Livingston, attorney for the applicant, spoke about obtaining data from other areas regarding the rent issue and noted a standard commercial lease usually had a Libor or CPI increase, which would be significantly less than what was proposed.

Chairman Peterson asked after the applicants obtained more data if they would then want to discuss what would be a fair rent and escalator.

Mr. Livingston commented if the rent was fixed with the 10% for ten years, they would agree to move forward.

After further discussion, the applicants agreed to accept the BCC's motion and move forward.

Chairman Peterson requested public comments.

Joan Affatato, Flagler County, objected to the County providing labor or paying for anything.

Mr. Coffey replied using the existing County labor was a way to get a better quality facility and have it built the way the BCC would expect.

There were no further public comments.

**Chairman Peterson called the question. Motion carried 4 to 1, with Chairman Peterson dissenting.**

(The Revised Lease Agreement was brought back for approval at the August 15, 2011 meeting.)

**Florida  
Attorney  
General  
Advisory Legal  
Opinion**

**Number: AGO 99-35**

**Date: June 8, 1999**

**Subject: Bids, county's lease of non-aviation property**

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Mr. Gary E.  
Eckstine  
Flagler County  
Attorney 1200  
East Moody  
Boulevard  
Number 11  
Bunnell, Florida 32110

RE: AIRPORTS--COUNTIES--LEASES--county's authority to lease  
non-aviation real property without competitive bid. s.  
125.35, Fla. Stat.

Dear Mr. Eckstine:

On behalf of the Flagler County Board of County  
Commissioners you ask substantially the following  
question:

May the county commission lease the non-aviation portion of an  
airport site to a private developer without competitive bid  
and, if so, are there limitations on such a lease?

In sum:

The board of county commissioners may negotiate a lease for an  
airport facility without competitive bid for such length of  
term and under such conditions as the governing body in its  
discretion determines to be beneficial to the county. However,  
the lease of the non-aviation portion of an airport site must

be competitively bid pursuant to section 125.35, Florida Statutes. Such lease may be for a term in excess of thirty years.

You state that Flagler County owns a 1,400 acre parcel of real property composing the Flagler County Airport. A portion of the property contains two active airstrips for public use. The county proposes to lease all of the property except the landing strips and contiguous aviation related property to a single development company on a long-term basis. The development company intends to subdivide the property, leasing to individual businesses, and develop a high technology office and industrial park, hotels, culinary school and a transportation and aviation center.

The developer would be responsible for the construction of all infrastructure, including roadways, curbs, lighting, water, electricity, sewer and gas service connections, parking lots, and buildings. The county would share in the revenue generated by the leasing of each subdivided parcel. The proposed lease would be for an initial term of thirty years, with two thirty-year options.

Section 125.35, Florida Statutes, provides:

"The board of county commissioners is expressly authorized to sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is in the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best or, alternatively, *in the case of an airport or seaport operation or facility lease, or a modification of an existing lease of real property, or a new extension thereof for an additional term not to exceed 25 years, where the improved leasehold has an appraised value in excess of \$20 million, after negotiation, for such length of term and such conditions as the governing body may in its discretion determine. . . .*"[1] (e.s.)

This office has interpreted the terms of this section to allow a board of county commissioners to lease county airport property for a term determined by the commission to be in the best interest of the county, when the factors set forth in the statute have been met.[2] While section 332.08, Florida Statutes, makes provisions for the lease of airport property by a county, this office has concluded that the more recent and specific provisions in section 125.35, Florida Statutes,

dealing particularly with the power of counties to lease airport facilities, would apply when a county is contemplating the lease of such property.

During the 1999 Legislative Session, Senate Bill 1534, amending but not changing the substance of section 125.35, Florida Statutes, was passed. The Governor signed the bill on May 26, 1999. The changes to section 125.35, Florida Statutes, clarify that counties are authorized to negotiate leases with airport and seaport facilities.[3] As amended, section 125.35, Florida Statutes, provides in part:

"(1) (a) The board of county commissioners is expressly authorized to sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is to the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best, for such length of term and such conditions as the governing body may in its discretion determine.

(b) Notwithstanding the provisions of paragraph (a) the Board of County Commissioners is expressly authorized to:

1. Negotiate the lease of an airport or seaport facility;
2. Modify or extend an existing lease of real property for an additional term not to exceed 25 years, where the improved value of the lease has an appraised value in excess of \$20 million; or
3. Lease a professional sports franchise facility financed by revenues received pursuant to s. 125.0104 or s. 212.20;

under such terms and conditions as negotiated by the board."

There is no statutory requirement that the county use competitive bidding in leasing airport or seaport facilities. Absent such statutory prescription and as reflected by the clear intent of the recent amendments to section 125.35, Florida Statutes, the county is not required to use a



competitive bidding procedure for the lease of the county's airport facility.[4]

However, to the extent that property subject to the lease is not for airport or seaport facilities, the county would be bound by the competitive bid requirements contained in section 125.35(1)(a), Florida Statutes.[5] The determination of whether property falls within the airport facility category is a mixed question of fact and law that may not be resolved by this office.

Accordingly, it is my opinion that while the board of county commissioners may negotiate a lease for an airport or seaport facility for such length of term and such conditions as the governing body in its discretion determines to be beneficial to the county, the lease of non-aviation property is subject to the competitive bidding requirements in section 125.35, Florida Statutes. However, the county may grant a lease on real property in excess of thirty years if the governing body determines that such a lease is in the best interest of the county and the conditions in section 125.35, Florida Statutes, are met.[6]

Sincerely,

Robert A.  
Butterworth  
h Attorney  
General

RAB/tls

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[1] Section 125.35(1)(a), Fla. Stat.

[2] Attorney General Opinion 94-96 (1994) (Dade County authorized to lease to a private party for development and operation of non-airfield portion of the county airport for a term of more than 30 years if governing body determines it to be in the best interest of the county and the conditions set forth in s. 125.35, Fla. Stat., are met).

[3] See Title to Senate Bill 1534, signed by the Governor, May 26, 1999.

[4] See *William A. Berbusse, Jr., Inc. v. North Broward Hospital*

*District,*  
117 So. 2d 550 (Fla. 2d DCA 1960) (absent statutory requirement, a public body has no legal obligation to let a contract under competitive bidding or to award a contract to the lowest bidder), and Ops. Att'y Gen. Fla. 77- 22 (1977), 74-07 (1974) and 71-366 (1971).

[5] See Op. Att'y Gen. Fla. 88-34 (1988) (county is required to competitively bid leases of property it owns). *Cf. Frunams v. Santa Rosa Island Authority*, 377 So. 2d 983, 987 (Fla. 1st DCA 1979), *aff'd* 399 So. 2d 1142 (Fla. 1981) (competitive bid requirements in s. 125.35, Fla. Stat., when county is selling property not applicable to statutorily created authority leasing property under terms of enabling special act).

[6] See Op. Att'y Gen. Fla. 94-96 (1994).