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April 12, 2019

Via U.S. Mail & Email

Al Hadeed
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Re: Captain's Bait, Tackle & BBQ, LLC ("Captain's") Lease at Bings Landing.

Mr. Hadeed,

It was a pleasure meeting you at our recent meeting. At your request and per your conversation with Mr. Livingston, I write to provide a synopsis of Captain's legal position regarding the November 18, 2018 Amended lease at Bings Landing (the "Lease").

The Board of County Commissioners of Flagler County has adopted its own Rules of Procedure for its meetings ("BOCC Rules"). The Commission must follow those rules and Robert's Rules of Order Newly Revised ("Robert's Rules") to the extent they do not conflict with the BOCC Rules. Section 8(d), BOCC Rules.

Under Robert's Rules motions to rescind or to amend something previously adopted are governed by the same rules. The only difference between the two is that an action to rescind strikes the previously action entirely while an action to amend only changes part of the text or substitutes a different version of what was adopted before. Section 35, Robert's Rules. A motion to reconsider, on the other hand, is governed by entirely different rules. Section 37, Robert's Rules.

Motions to rescind under Robert's Rules can be applied to any prior action. However, a motion to reconsider is out of order and improper if applied to an action that cannot be rescinded or amended. These include, inter alia, something that has been done that is impossible to be undone. Section 35, Robert's Rules. For example, a binding bilateral contract cannot be amended or undone except by (1) its own terms, (2) the mutual consent of the parties, or (3) judicial intervention.

The BOCC Rules follow the above with some slight refinements and variations. The provisions are a bit ambiguous but suggest that a motion to reconsider can only be made at the same meeting the action being reconsidered was taken or can be made at another meeting but only if the motion is made by a Commissioner that voted to approve the prior action. Section 14, BOCC Rules.

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Robert's Rules only allows motions to reconsider during the same continuous meeting where the action to be considered was made.

The BOCC Rules for rescission are more precise. Section 14 of the BOCC Rules is clear that a "Commission action may be rescinded by a majority vote if the motion to reconsider is made by a Commissioner who voted on the prevailing side." If a motion to reconsider has been adopted, then any Commissioner at the next regular Commission meeting may move to rescind the previous action. It is, therefore, a two-step process. First a motion to reconsider must be adopted and then the action to rescind can be taken up at the next available meeting. Exhibit A of the BOCC Rules, which provides examples of how motions must be brought, is consistent with this explanation. The BOCC Rules makes not changes to the provisions of Robert's Rules regarding actions that cannot be rescinded.

In the case of the Captain's Lease a motion to rescind would have been improper and out of order because there had been no previous motion to reconsider adopted at the meeting when the Lease was approved. If a motion to reconsider can be made at any time by a Commissioner that voted for the action to be reconsidered there was not a subsequent vote to rescind at the next meeting. In summary, if the action at the December 3, 2018 meeting was to reconsider the approval of the Lease it was either out of order because it was not made at the same meeting or was valid but was not followed by a subsequent vote to rescind at the next meeting. If the action taken at the December 3, 2018 meeting was on a motion to rescind then it was out of order because there was not a preceding decision to reconsider the approval of the Lease. However, even if the procedures were properly followed the Lease is something that cannot be undone by unilateral vote of the BOCC and therefore is not something that can be rescinded. There are no provisions or caveats contained in the lease that would permit the County to unilaterally terminate the Lease via a rescission/reconsideration vote. *Schloesser v. Dill*, 383 So. 2d 1129 (Fla. Dist. Ct. App. 1980) (When board of county commissioners accepted proposal and plaintiff was notified of acceptance by authorized agents of county, contract resulted, without written lease agreement, and attempted rescission of agreement by board was unlawful.); *Dedmond v. Escambia Cty.*, 244 So. 2d 758 (Fla. Dist. Ct. App. 1971); *City of Homestead v. Raney Const., Inc.*, 357 So. 2d 749, 752 (Fla. Dist. Ct. App. 1978) ("[A] county board could rescind its action in awarding a contract at the same meeting where it was awarded. But the clear import of the decision was that a binding contract did come into being with the acceptance of a bid unless the action was rescinded at the same continuous meeting.... The City, because of a change in the personnel of the Council, ought not be allowed to use the technicality of the direction provisions of its code to defeat the contract that came into being with the acceptance of plaintiff's bid.").

There is no question that the Lease was fully executed on November 19, 2018, and is a viable contract. Contracts with a county are treated exactly the same (with the same available damages and rights) as contracts between private individuals. The County is specifically bound as any other individual would be to the contract. *City of Miami v. Bus Benches Co.*, 174 So. 2d 49, 52-53 (Fla. 3d DCA 1965) (citing *Williams v. City of Jacksonville*, 160 So. 15 (Fla. 1935)).

Further, a party to a contract with a municipality is entitled to the constitutional protection against impairment of it if the municipality attempts to unilaterally change its obligations under a valid agreement. *Id.* The Constitutions of both the state of Florida and of the United States provide that no person shall be deprived of his property without due process of law. Section 12, Declaration of Rights, Florida Constitution; Fifth Amendment, United States Constitution. These constitutional provisions fully protect any impairment of vested rights. *City of Sanford v. McClelland*, 163 So. 513, 515 (Fla. 1935).

If the Commission moves and votes to rescind the Lease, this will be viewed as further non-performance and considered a material breach of the Lease – notwithstanding the County’s prior actions, which would constitute a material breach. Captain’s will consider all remedies available under the lease and Florida law, whether equitable or monetary.

Under section 768.28, Florida Statutes, the legislature authorized state entities to enter into contracts and waived sovereign immunity as to express contracts in actions for breach of contract or breach of the implied covenant of good faith and fair dealing. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984); *Cty. of Brevard v. Miorelli Eng'g, Inc.*, 703 So. 2d 1049, 1050 (Fla. 1997). As long as an express written agreement exists, the basis for a breach of contract suit also exists and may include claims based upon implied covenants within the agreement. *Interamerican Engineers & Constructors Corp. v. Palm Beach Cty. Hous. Auth.*, 629 So. 2d 879, 881–82 (Fla. 4th DCA 1993). Finally, the lessee can sue and the County can be liable for interest on any claim against it. *Dade Cty. v. Am. Re-Ins. Co.*, 467 So. 2d 414, 418 (Fla. 3d DCA 1985); *Florida Livestock Board v. Gladden*, 86 So.2d 812 (Fla. 1956).

It should be noted that, a loss of future business claim for breach of a commercial lease is a viable claim. *Victoriana Bldg., LLC v. Ft. Lauderdale Surgical Ctr., LLC*, 166 So. 3d 861, 862 (Fla. 4th DCA 2015). “The general rule is that anticipated profits of a commercial business are too speculative and dependent upon changing circumstances to warrant a judgment for their loss.” *Levitt-ANSCA Towne Park P'ship v. Smith & Co., Inc.*, 873 So.2d 392, 396 (Fla. 4th DCA 2004). However, “if profits can be established with reasonable certainty, they are allowed.” *Id.*

A business can recover lost prospective profits regardless of whether it is established or has any “track record.” The party must prove that 1) the defendant's action caused the damage and 2) there is some standard by which the amount of damages may be adequately determined. *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1351 (Fla. 1989). Uncertainty as to the exact amount of the lost profits is not fatal, either: “if prospective profits form an elemental constituent of the contract, their loss, the natural result of its breach, and the amount can be established with reasonable certainty, such certainty as satisfied the mind of a prudent and impartial person, they are allowed.” *Paul Gottlieb & Co., Inc. v. Alps South Corp.*, 985 So. 2d 1, 9 (Fla. 2d D.C.A. 2007) (lost profits “must be proven with a reasonable degree of certainty before [the loss] is recoverable” [and the] “mind of a prudent impartial person should be satisfied that the damages are not the result of speculation or conjecture.”).

I implore you to ensure that the County Commission grasps these concept and understands the potential legal effect. If the Commission takes action to further harm Captain's or unilaterally repudiate its legal and binding contractual obligations, Captain's will have no choice but to take legal action.

I also want to advise that the members of Captain's consulted with each other after our meeting on Tuesday, April 9, 2019, and determined that they will not support any amendment to the Lease which will place additional financial obligation on Captain's. Specifically, Caption's will not agree to pay for a sewer and water connection, if they incur the financial obligation of constructing a new building to their specifications. This is simply not financially feasible for a small business. If the County would like to review the possibility of amending the Lease, Captain's is willing to agree to an amendment in which the County will pay for and build a new building with the same capacity as the existing restaurant on the option 2 site. Otherwise, Captain's remains ready, willing and able to perform under the terms of the current Lease.

As always. Mr. Livingston and I are happy to discuss these issues with you at your convenience.

Captain's reserves all rights under the terms of the Lease and Florida Law, and nothing contained herein shall be viewed as a waiver thereof.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Casey W. Arnold', with a large, stylized flourish at the end.

Casey W. Arnold

Cc: Jay Livingston, Esq.