

**SPECIAL MEETING OF THE BOARD OF COUNTY COMMISSIONERS**

**DECEMBER 2, 2010, 5 PM, BOARD CHAMBERS, GOVERNMENT SERVICES BUILDING**

**PURPOSE:** To review proposed settlement agreement from the Developers on the NOPC Appeal for Hammock Dunes DRI. Note: This will NOT be a land use hearing on the NOPC or the merits of the NOPC appeal. This is solely to determine whether the County Commission will vote to proceed with the NOPC trial scheduled for December 15-17, 2010 OR to postpone the trial in order to consider the proposed settlement at a later publicly noticed, quasi-judicial hearing.

**SUMMARY:** This is a special purpose meeting to determine whether the trial now presently scheduled should be postponed to allow consideration of a settlement proposal by the NOPC applicants and also a proposal by Admiral Corporation, one of the intervenors in the case. The Board has two choices, to vote to allow the trial to go forward on its present December 15-17, 2010 timetable or to agree to a postponement of the trial to allow the development of a formal settlement document with a full, detailed review. This special meeting is only a procedural step and is not and cannot be a land use hearing on the NOPC. There will be no testimony at this meeting and no evidence will be taken or allowed about the merits or demerits of the NOPC application. The Board may inquire of the presenters of the settlement proposal for clarification concerning the proposal and may hear from others under public comment who might urge the Board to take either of the options presented above.

If the Board decides at this special meeting to postpone the trial and consider the settlement in a formal proceeding, we will take the present proposal and any relevant input from the meeting to work with the parties to attempt to develop a formal settlement document. If successfully concluded, it will be put into a format that is acceptable in a land use case. (It is not presently in that format.) Then, we will notice and advertise a public hearing for the Board to consider this formal settlement document. The public hearing will be for the purpose of the Board to consider the final product in detail, to hear from interested parties and, finally, to vote to approve it or not.

Based upon the information presently available, we are unsure if this effort will yield a settlement document that will be agreeable to all parties. Presently, the owner associations that are intervenors in the case oppose the proposed settlement. Whether their concerns can be bridged is not determinable.

Regardless, please note that by law the Board is allowed to enter into a settlement agreement with the NOPC applicants even if other parties object.

**BACKGROUND:** The pre-trial instructions issued by the Administrative Law Judge in this case called for the parties to consider the possibility of settlement. The parties through their attorneys complied with this directive. The NOPC applicants offered a proposed settlement that was first presented to the owner associations that are parties to the case. Those groups declined the settlement. The NOPC applicants determined to present their proposal to the County despite that turn down. Admiral Corporation, an ITT subsidiary that was the original developer under the DRI, also determined to present a proposal to the County. The proposals are attached respectively as Exhibits A and B.

Obviously, as your attorneys, we are not authorized to accept any settlement without Board action. We did determine that the offer from the NOPC applicants for settlement is a bona fide offer (meaning made sincerely and not for the purpose of delay and otherwise conforming to the legal principles of the case). We have an obligation to present a bona fide settlement offer for your consideration. We determined to present it at this special meeting with the concurrence of the County Administrator to get direction from the Board, as outlined above. As your attorneys, we did not negotiate any terms or play any part in the negotiations among the other parties that led to this proposal or their positions.

The owner associations and the NOPC applicants have negotiated on and off going back to late 2009. They have not come to an agreement yet and realistically it may be doubtful they will do so. The parties explain their positions in the attached documents, including the owner associations in Exhibit C. Please keep in mind that the purpose of this special meeting is not to debate or consider the parties reasons or their conduct leading to this point. More importantly, the relevant issues for you involve authorizing land use under state and local legal standards. These are decisions that are within the sovereign power of the County to determine subject to compliance with those legal standards. The Board's choice in this matter cannot be dictated by any of the parties, whether the NOPC applicants or the owner associations or Admiral. It is true that if the matter goes to trial, the state reviewing authorities will determine whether the denial of the application was proper or not. If the Board's April 2010 decision is found to have complied with those standards, then the application is officially denied and at an end. On the other hand, if found not compliant, the Board may be ordered to approve the NOPC application as submitted or in whatever modified form as may be determined in these pending review proceedings. (Legal Note: these review proceedings will not result in any determination that is more intensive than the NOPC application. The application is the ceiling so to speak.)

The proposed settlement presents a compromise between these outcomes. There is a certainty to settlement and it avoids the expense of a trial and of further reviews. (Such additional reviews include the Governor and Cabinet and, following them, the District Court of Appeal if one of the parties is aggrieved and wants to continue the case. It may be worth noting that the Governor and Cabinet positions all have new office holders, none of whom have been briefed on this case, as were the previous office holders.)

As for litigation, it likewise produces a certain outcome at an expense and time. Litigating does allow a neutral to determine the rights of the parties. It additionally allows the Board to ascertain the correctness or legality of its determination on the NOPC. In this regard, the Administrative Law Judge will be conducting a de novo review based on the evidence and legal arguments presented at the upcoming December 15-17 hearing.

We cannot give you a recommendation on whether to postpone the trial and pursue this settlement or to stick with the present schedule. We and the parties are all prepared to go to trial if that is what the Board determines. But unlike, for example, a damages case, there is no objective gauge where we can evaluate a dollar figure that takes into account the risk, the cost of trial and the likelihood of prevailing. This is not like an insurance case. In contrast, this case presents policy choices about what can or cannot be developed in this particular area that will impact property rights of all concerned. People may reasonably differ on what should be developed and under what conditions, so it is within your province to decide as the elected local government what you are going to allow, weighing all of the factors you find relevant for this procedural step.

If you determine the proposal is within the range of what you might approve in a formal agreement, then you should vote to continue the trial, and we will proceed accordingly to work on a formal settlement document and if one can be negotiated, then we will set a formal hearing for your consideration. On the other hand, if the proposal is not something you can support then you should vote to proceed with the present trial so as to enable a final decision.

We urge you to study the proposal and ask any questions to clarify its terms in order that you may make an informed decision. Again, this is a limited purpose meeting, and we will do all we can to guide the conduct of the meeting so that we stay within the legal parameters set forth above.

**PROPOSED SETTLEMENT OF NOPC APPLICANTS:** We are hesitant to provide too much in the way of characterizing the settlement proposal, as we do not want to inadvertently create an impression of favoring or disfavoring anyone's position. We will offer this broad outline below

and allow you to review the proposals and objections in the detail presented by the parties as attached hereto in Exhibits A, B and C.

The NOPC applicants are proposing in Exhibit A to this agenda package to reduce the number of oceanfront units to 289 (about a 50% reduction) but wish to retain the ability to transfer the number of its remaining claimed units (272 units) to other lands owned or controlled by the applicants that are outside the DRI. The proposal also provides that the 289 units built on the ocean may be timeshares but with a high standard of operation, as in a Ritz Carlton Destination Club or Hilton Grand Vacations property. The applicants pledge that whatever is constructed on the ocean will preserve as much viewshed for the existing residents and owners as may be geographically and economically feasible. The applicants also seek approval to build an amenity area of one or more structures in the vicinity of the present Lodge parking lot. The buildings may include meeting rooms, conference space, shops and other resort type amenities.

The applicants also wish for 16<sup>th</sup> Road to be realigned in a southerly direction to create more land area for the oceanfront construction of the units. The applicants additionally propose that the 16<sup>th</sup> Road right of way be vacated and no longer be a county owned road. Further, new golf course facilities and amenities may be built within the present golf course areas instead of within the new resort buildings authorized by the acceptance of this proposal. The applicants will pledge to maintain the integrity of the golf course and its designation as a Nicklaus "Signature Course."

The applicants agree to certain height limitations, 77 feet along the ocean excluding architectural features such as towers, cupolas, domes and so forth. The applicants also commit to providing certain other amenities for Club members, including golf locker areas, a new swimming pool, a relocated spinning bicycle facility, and other such amenities.

For all of these improvements, the applicants agree to allow owner association representatives to participate in design charettes prior to submission of specific building and development plans to the County for development approval.

As an editorial comment by us as your lawyers, if the Board does approve going forward to a more formal settlement agreement along the lines proposed by the NOPC applicants, some of the items will not actually be contained in the DRI Development Order. Some of these items are not appropriate for the government to monitor, for example maintaining the designation of the Nicklaus golf course. Such items would have to be contained in separate documents between the applicants and the associations should they approve of same. This aspect is understood by the attorneys in this case and was discussed in our pre-trial conference.

**PROPOSED SETTLEMENT OF ADMIRAL CORPORATION:** Admiral proposes to obtain assurance that any grant of development rights to the NOPC applicants will not extend its obligations under the DRI which presently expire in February 2012. Admiral was the original master developer and continues to have some obligations. The main obligation that it is concerned with is a guaranty to expand the present Hammock Dunes Bridge to four lanes at such time as traffic conditions warrant. Admiral requests that this obligation be transferred to the Dunes Community Development District ("CDD"). It has an agreement with the Dunes CDD which is attached in its correspondence in Exhibit B. The NOPC applicants have no objection to this proposal as long as it does not hinder their development of whatever number of new units it is authorized to build on the DRI lands. The Dunes CDD (a unit of special purpose government) is not a party to this proceeding. If the Board approves this concept going forward, we believe we will have to secure their consent as a unit of government to assume this obligation.


**OBJECTIONS OF OWNER ASSOCIATIONS:** The associations are unable to agree to the proposal submitted to the NOPC applicants. They have detailed their objections point by point in the attached Exhibit C. They are concerned with the height numbers and methods with no certainty about protecting view corridors. They believe that the proposal allows for considerable building mass. The associations are not comfortable with the timeshare aspect of the units to be built. They do complain about the lack of enforceability with the proposal as presented. As an editorial comment from your lawyers, we would be making sure that enforceability was part of any formal settlement should the Board choose to proceed in this direction. Of course, any attempt to capture the essence of agreements is limited by the English language. It is not likely that any black and white test for planning principles will be achieved, although the attorneys can strive to articulate the most objective standards possible.

**RECOMMENDED PROCEDURE FOR MEETING:** We recommend that after an introduction by the Chairman of the special meeting subject, that we describe the general procedure and the objectives and limitations of the meeting. We will summarize what is in this memo essentially for the benefit of the public. Then we would allow each of the parties through their attorneys or representatives present a summary of their points. In the course of each presentation, the Board would be allowed to ask questions but we would suggest you let each get through their presentation before asking your questions. Following that, then the Chairman would open it up to public comment as with any Board meeting. We would encourage representative speakers for any groups that may want to comment. At the conclusion of the public comments, the Board can ask any additional questions of staff or of any of the parties; when that is done the Board should be in a position to act.

If the Board is inclined to vote to proceed with more formal settlement efforts, we recommend a time limit so that discussions among the parties do not go on interminably without a resolution. Our suggestion takes into account the Holiday Season and the fact that we have four sets of lawyers who will want to be involved in "wordsmithing" any formal document. We recommend that the time frame, if the Board wants to go in this direction, be no later than January 13, which is a Thursday and is exactly six weeks from your meeting. If this is the direction the Board wishes to proceed, the suggested motion is: "Move to postpone the trial and instruct our attorneys to proceed with more formal settlement discussions with the parties based on the proposals submitted with a deadline for our attorneys to report to us no later than January 14 on the success or failure of such efforts. If no settlement is reached within the timeframe then to authorize our attorneys to continue with the trial."

If you deem the proposals not what you can support as a final outcome and you wish us to proceed with the trial, then we recommend the following motion: Move to decline to pursue settlement based on these proposals and to proceed with the trial of this matter as presently scheduled."

Respectfully submitted,



Albert J. Hadeed, County Attorney