

AUSLEY McMULLEN

ATTORNEYS AND COUNSELORS AT LAW

123 SOUTH CALHOUN STREET
P.O. BOX 391 (ZIP 32302)
TALLAHASSEE, FLORIDA 32301
(850) 224-9115 FAX (850) 222-7560

January 26, 2021

Via Electronic Mail

Honorable Mayor and Members of the City Council
City of Naples City Council
c/o James D. Fox, City Attorney
JFox@ralaw.com

Re: Naples Beach Hotel & Golf Club/Perpetual Preservation of Golf Course Property

Dear Madame Mayor and Members of the City Council:

This law firm has been retained by the City of Naples (“City”). Our assignment was to explore options for the perpetual preservation and protection of a portion of the golf course property at the Naples Beach Hotel & Golf Club (“Property”). In connection with our engagement, we have visited the Property and reviewed publicly available information related to the Property. We have also reviewed City staff reports and agenda memoranda and the water management district permit, application, and engineering report for the proposed redevelopment project on the Property, as well as various articles, publications, and communications. In addition, we have had discussions with the City Attorney and planning staff, representatives of the South Florida Water Management District, representatives of several land trusts, the developer’s local counsel, members of neighborhood coalitions, and members of the City Council. We have also reviewed the Florida Statutes and Internal Revenue Code sections related to conservation easements, and certain provisions of the City’s Comprehensive Plan and Code of Ordinances related to parks, recreation, open space, and conservation.

We understand that the prior City Council approved the form of a non-statutory perpetual easement without a third-party right of enforcement in order to afford some protection to the Property. We understand that the form has not been executed or recorded, and the current City Council would like to consider other options for the perpetual preservation and protection of the Property. The purpose of this letter is to outline options for the City Council’s consideration. Further discussions with the developer and others will likely be necessary to determine which option is in the best interest of the City. In conjunction with your review of the options below, we would be glad to answer questions and conduct further analysis as requested.

After conducting our review, we have identified four potential options for preserving and protecting the Property in perpetuity. Those options include: (1) a statutory conservation easement to a land trust with a third-party right of enforcement in favor of the City; (2) a statutory conservation easement to a land trust without a third-party right of enforcement; (3) a non-statutory perpetual easement to the City with a third-party right of enforcement in favor of an entity with long-term enforcement ability; and (4) a non-statutory perpetual easement to the City without a third-party right of enforcement. The prior City Council chose the fourth option.

In this report, we have endeavored to summarize the main features of each option. Unfortunately, there is no option that guaranties perpetual preservation and protection. Even under the best option, the holder may release the easement and the third-party may consent to the release or otherwise be unable or unwilling to enforce the terms of the easement. Each option is presented below in the order we recommend.

(1) Statutory Conservation Easement with Third-Party Right of Enforcement

The best option to achieve the perpetual preservation and protection of the Property is a statutory conservation easement to a land trust, with a third-party right of enforcement in favor of the City, in accordance with Section 704.06, Florida Statutes (the “Conservation Easement Statute” or “Statute”). The Conservation Easement Statute was originally adopted in 1976 and provides a comprehensive statutory framework for conservation easements in Florida. A statutory conservation easement is the best option because the Statute expressly addresses issues related to the easement’s validity, enforceability, assignment, and duration that may be unresolved or uncertain under Florida common law. In other words, a statutory conservation easement provides more certainty than a non-statutory perpetual easement.

In addition, a third-party enforcement right in favor of the City provides an additional layer of protection. As long as the statutory conservation easement allows the City to enforce the terms as written and requires the City’s written consent for any amendment, termination, release, or reconveyance, the City would be able to enforce the terms if the land trust ceases to exist or fails to do so.

Some people have referred to this option as “trying to fit a square peg in a round hole.” However, as discussed below, the dual uses of the Property as a golf course and for conservation purposes are not mutually exclusive.

In defining the term “conservation easement,” the Conservation Easement Statute identifies numerous conservation purposes that do not require the maintenance of property in its original natural state. The identified conservation purposes include the retention of land or water areas predominantly in their scenic or open condition or as suitable habitat for fish, plants, and wildlife. The purposes also include the retention of the structural integrity or physical appearance of property with historical, architectural, or cultural significance. The Statute additionally recognizes that maintaining existing land uses while prohibiting or limiting additional

development or activities detrimental to drainage, flood control, water conservation, or fish and wildlife habitat preservation constitutes a conservation purpose.

The conservation purposes recognized by the Statute are consistent with several provisions of the City's Comprehensive Plan and Code of Ordinances related to parks, recreation, open space, and conservation. These provisions show that property can achieve conservation purposes even if it is not in its original natural state.

The Parks, Recreation, and Open Space Element of the Comprehensive Plan includes goals, objectives, and policies that address the provision of recreational facilities and the preservation of open space in the City. The Parks, Recreation, and Open Space Element expressly provides that it must "be consistent with the Conservation and Coastal Management Element, particularly in regard to developing public or private sites."

The Conservation and Coastal Management Element of the Comprehensive Plan includes numerous goals, objectives, and policies that address the management and utilization of the City's natural resources. The goals, objectives, and policies are expressly intended to be consistent with county, regional, and state regulations. They do not prohibit development but seek to minimize development impacts through effective stormwater management, drainage, flood control, water conservation, and water quality standards. They further seek to minimize impacts through bird, marine, and wildlife habitat protection, and protection of vegetation and natural resources. They additionally recognize the importance of opportunities for recreation and aesthetic enjoyment of coastal resources. In accordance with the goals, objectives, and policies, Conservation Lands under the Conservation and Coastal Management Element may include ". . . improved or unimproved lands that may be useful and lands that contain conservation easements, scenic easements or any other similar designations . . ."

Chapter 28 of the City's Code of Ordinances is titled "Parks and Recreation." Article III of Chapter 28 is titled "Conservation and Preservation of Land" and establishes the City's Land Conservation Program. Consistent with the Conservation and Coastal Management Element of the Comprehensive Plan, the objectives of the City's Land Conservation Program include the acquisition, conservation, preservation, restoration, and maintenance of improved or unimproved lands that may be useful; and interests in lands such as conservation easements, scenic easements, and any other interests for the benefit of present and future generations. The purpose and intent of the program include the preservation of environmentally sensitive lands for protection of habitat and water resources, flood control, natural resource-based recreation, and aesthetics. The program is additionally designed to preserve lands that may not qualify as environmentally sensitive but are worthy of restoration and preservation for the health, safety, and welfare of the citizens; and to acquire and manage interests in land such as conservation easements, scenic easements and any other interests that may assist in conservation or preservation.

The forgoing provisions and others show that recreational land is not required to be maintained in its original natural condition in order to serve conservation purposes under the City's Comprehensive Plan and land development regulations.

The conservation purposes identified in the Conservation Easement Statute are also consistent with the purposes identified in the Internal Revenue Code section that governs tax deductions for charitable contributions. See 26 U.S.C. § 170(h)(4)(A). Those purposes include: the preservation of land for outdoor recreation by, or education of, the general public; the protection of a relatively natural habitat for fish, wildlife, plants, or similar ecosystem; the preservation of open space where the preservation is for the scenic enjoyment of the general public or pursuant to a governmental conservation policy, and will yield a significant public benefit; and the preservation of an historically important land area or a certified historic structure. Id.

We have not located any judicial decisions addressing the propriety of a conservation easement over golf course property under the Conservation Easement Statute. However, there are judicial decisions addressing a taxpayer's ability to claim a charitable deduction under the Internal Revenue Code for the value of a donated conservation easement over property that included a golf course. Most recently, the Eleventh Circuit Court of Appeals found that a taxpayer could claim a deduction for the value of a donated conservation easement over a golf course and additional undeveloped land. See Champions Retreat Golf Founders, LLC v. Comm'r of IRS, 959 F.3d 1033 (11th Cir. 2020). In that case, the Court found that the taxpayer was entitled to a deduction because the donation was made for conservation purposes, as that term is defined under the Internal Revenue Code. Id. Specifically, the Court found that the donation of the conservation easement over the specific property at issue was made for the protection of a relatively natural habitat of fish, wildlife, plants, or similar ecosystem and for the preservation of open space for the scenic enjoyment of the general public that will yield a significant public benefit. Id.

The Court's holding in Champions Retreat was limited to an analysis of the specific facts and circumstances related to the Georgia property at issue under the conservation purposes identified in the Internal Revenue Code. However, it supports the proposition that a conservation easement over property that includes a golf course may qualify for a tax deduction under the Internal Revenue Code if there are demonstrable conservation purposes, as that term is defined in the Code.

Additionally, from our conversations with representatives of several land trusts and our independent research, we have identified conservation easements over numerous golf course properties across the country. We have not reviewed the entire State of Florida, but we have found conservation easements over the Kelly Plantation golf course in Destin and the Cypress Creek golf course in Sun City Center. We also understand that the City of Sarasota has been considering the potential grant of a conservation easement over its municipal golf course for the past couple of years.

The City staff reports and agenda memoranda and the water management district permit, application, and engineering report demonstrate that there are conservation purposes for the perpetual preservation of the Property. The staff reports and memoranda show that the future land use designation of the Property under the Comprehensive Plan has been Recreation and Open Space, or some variation thereof, since the 1960s. They also indicate that the land and water areas

have been maintained in their predominantly scenic and open condition for 70 years, and that the Property may have historical significance. They also show that the City has utilized approximately 70 acres of the golf course property for open space credit in the Community Rating System (CRS) program, which allows the City to receive a discount on its flood insurance policy under the National Flood Insurance program. In addition, they show that the golf course is visible from the surrounding public roads.

The water management district records further show that there are several lakes on the Property that are important for drainage and flood control, particularly given the Property's proximity to the Gulf of Mexico. The South Florida Water Management District Individual Environmental Resource Permit for the Property requires stormwater detention and treatment with reasonable assurances that discharge will not cause or contribute to violations of State water quality standards for Outstanding Florida Waters. The permit includes implementation of an Urban Stormwater Management Plan with methodologies and procedures that are best management practices for attenuating pollutants in urbanized settings, but optimized to reflect the unique character of the Property and the surrounding hydraulic features.

From the water management district records and various articles and conversations, it also appears that the Property contains suitable habitat for plants, birds, or wildlife, particularly in light of the lack of other open space in the vicinity. We understand that there are various aquatic plants in the lakes and that birds and certain wildlife have been seen on the Property.

For all of these reasons, it appears there are sufficient demonstrable conservation purposes to justify a statutory conservation easement over the Property. If that is the case, a statutory conservation easement to a land trust with a third-party right of enforcement in favor of the City in accordance with the Conservation Easement Statute would be the best option for perpetual preservation. As stated above, the Statute addresses issues related to the validity, enforceability, assignment, and duration that may be unresolved or uncertain under Florida common law. Statutory treatment of these issues is preferable because it provides more certainty than the common law that governs non-statutory easements.

The third-party enforcement rights in favor of the City would afford additional protection in the event the land trust ceases to exist or is unable or unwilling to enforce the terms of the easement. However, for the third-party enforcement to provide meaningful protection, the terms of the easement should provide the City with the right to enforce the terms as written and require the City's written consent for any amendment, termination, release, or reconveyance.

The Conservation Easement Statute provides that conservation easements may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument. Fla. Stat. § 704.06(2) (2020). In order to demonstrate intent, we recommend labeling the document a conservation easement and specifically stating in the document that it constitutes a conservation easement under Section 704.06, Florida Statutes. However, the Statute suggests that it may not be necessary to label the document a conservation easement if it expressly sets forth the conservation purposes and otherwise complies with the Statute.

We have discussed the possible establishment of a conservation easement over the Property with several national, statewide, and regional land trusts. Some of the land trusts have conducted a “desktop review” of the Property and are potentially interested in holding the easement. We have not researched the long-term viability or qualifications of the land trusts, but at least one has experience with conservation easements over golf course properties and has held easements over courses in Florida and other states for a number of years. If the City and the Property owner/developer decide to move forward with this option, we can continue our conversations with the land trusts and provide support in establishing the easement.

(2) Statutory Conservation Easement without Third-Party Right of Enforcement

The next best option for perpetual preservation of the Property is a statutory conservation easement to a land trust without a third-party right of enforcement. This option would include all of the benefits associated with the first option, but without the additional protection of a third-party right of enforcement.

The Conservation Easement Statute expressly allows for, but does not require, a third-party right of enforcement. See Fla. Stat. 704.06(8) (2020). Without a third-party right of enforcement, the statutory conservation easement would still have the benefit of statutory recognition and treatment of issues related to validity, enforceability, assignment, and duration. However, the enforcement of the terms of the easement would be left in the hands of the land trust. The City would not have the ability to enforce the terms of the easement and it would be subject to amendment, termination, release, or reconveyance at the will of the land trust and Property owner. Accordingly, the selection of a land trust with a strong history and anticipated long-term viability would be even more important.

(3) Non-Statutory Perpetual Easement with Third-Party Right of Enforcement

The third best option for perpetual preservation is a non-statutory perpetual easement to the City, with a third-party right of enforcement in favor of an entity with long-term enforcement ability. The primary differences between the statutory conservation easement and the non-statutory perpetual easement are the lack of expressly identified conservation purposes in the easement and the donation to a non-land trust grantee. In other words, unlike a statutory conservation easement, a non-statutory perpetual easement would impose restrictions on the Property without reciting the conservations purposes and values realized by imposing the restrictions. Without the stated conservation purposes, the easement likely would not qualify as a conservation easement or be accepted by a land trust.

Although the other terms of the statutory and non-statutory easement may not differ, the non-statutory easement is inferior because issues related to validity, enforceability, assignment, and duration would be governed by State common law rather than the Conservation Easement Statute. As stated above, those issues may be unresolved or uncertain under State common law. The lack of certainty creates a greater potential for disputes and litigation.

Statutory treatment of these issues is particularly preferable because of the nature of the easement, as discussed below. Since the easement would not benefit another property, it would be an “easement in gross” or “personal easement” rather than an “easement appurtenant.” In addition, the easement would be a “negative easement” (one that restricts the use of property) rather than a “positive easement” (one that affords another the right to use the property in some manner).

Under State common law, courts have found that easements in gross are personal to the holder and therefore may not run with the land and may not be assignable or enforceable against subsequent owners or in perpetuity. A negative easement in gross is more likely to be unassignable, ineffective, or unenforceable in perpetuity, as restrictions on property are generally disfavored and strictly construed because they may be considered in derogation of private property rights and the reasonable use of property.

In contrast, the Conservation Easement Statute provides certainty with respect to these issues by providing that “[c]onservation easements are perpetual, undivided interests in property . . . and shall not be unassignable . . . for lack of benefit to a dominant estate.” Fla. Stat. § 704.06(2) (2020). The Statute further provides that “[c]onservation easements shall run with the land and be binding on all subsequent owners of the servient estate.” Fla. Stat. § 704.06(4) (2020). It additionally provides that “[n]o conservation easement shall be unenforceable on account of lack of privity of contract or lack of benefit to particular land or on account of the benefit being assignable.” *Id.* Moreover, the Statute specifically allows for third-party right of enforcement in favor of governmental bodies and charitable corporations and trusts, Fla. Stat. § 704.06(8) (2020), eliminating any question as to third-party enforcement.

(4) Non-Statutory Perpetual Easement without Third-Party Right of Enforcement

The last option is a non-statutory perpetual easement to the City without a third-party right of enforcement. This is the option that was approved by the prior City Council. It is an inferior alternative to a statutory conservation easement because issues related to validity, enforceability, assignment, and duration will be governed by State common law rather than the Conservation Easement Statute. It lacks the statutory framework and certainty of a statutory conservation easement, creating a greater potential for disputes and litigation.

The easement also lacks the additional protection of third-party enforcement, so the long-term viability and effectiveness of the easement are at the discretion of the City and the Property owner. There is no third-party protection, so the City and Property owner could elect to amend or terminate the easement at any time.

Conclusion

After conducting our review and considering the various options for the perpetual preservation and protection of the Property, we believe that the four identified options warrant consideration, in the order of preference set forth above.

Thank you for the opportunity to assist with this matter of public importance. We encourage you to contact us with any questions or to discuss issues that may require additional consideration and analysis, and look forward to continuing to work with the City on this matter.

Sincerely,

/s/ Ken Hart

Ken Hart

cc: Robert N. Clarke, Jr.