

LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION ACT  
SPECIAL MAGISTRATE PROCEEDING

CUTLER PROPERTIES, LC,  
a Florida Limited Liability Company,

Petitioner,

vs.

TOWN OF CUTLER BAY, FLORIDA,

Respondent.

**SPECIAL MAGISTRATE  
FINDINGS OF FACT AND RECOMMENDATION**

This matter came before this Special Magistrate for final hearing on September 20, 2019 upon Cutler Properties, LC's, a Florida limited liability company ("Cutler Properties"), Request for Relief under the Florida Land Use and Environmental Dispute Resolution Act ("FLUEDRA") Fla. Stat. § 70.51, filed against the Town of Cutler Bay, Florida ("Town") for denying Cutler Properties' site plan application for property located at 18551 Old Cutler Road, Cutler Bay, Florida ("Subject Property") rendered on March 5, 2018.

**FINDINGS OF FACT**

**A. History of the Subject Property**

The Subject Property was purchased by Cutler Properties in October 2003 in a transaction involving a 138-acre parcel ("Original Parcel"). At the time of acquisition, the Original Parcel

consisted of various land use designations under the Miami-Dade County Land Use Plan, including Low Density Residential, Estate Density, and Environmentally Protected areas.

Efforts to develop the Original Parcel began shortly after the property was acquired. The site was planned to be developed with 341 residential units known as "Old Cutler Village." Old Cutler Village was to be developed on an approximately 40-acre footprint within the 138-acre Original Parcel. Pursuant to that development plan, the balance of the Original Parcel, which was made up of the easternmost 93.15 acres bordering Biscayne Bay, were to be dedicated and preserved.

During the course of seeking approvals for Old Cutler Village, an Environmental Resource Permit ("ERP") was sought from the South Florida Water Management District ("SFWMD") in March 2005. After two years of working through the approval process, it became apparent through statements and resolutions made by the SFWMD board that pursuit of the ERP was futile; that SFWMD would not approve any development on the property; and that, instead, it intended to acquire the property for its Biscayne Bay Coastal Wetlands project at some point in the future.

Cutler Properties filed an inverse condemnation lawsuit in August of 2008 against the SFWMD for the regulatory taking of the 138-acre Original Parcel. Through settlement discussions that lasted several months, the parties agreed that the SFWMD would acquire the Original Parcel in settlement of all claims. However, at the SFWMD's request, and in an effort to reduce the purchase price to an agreed amount, the 8.43-acre upland property was carved out of the transaction and retained by Cutler Properties. The 8.43 upland acre parcel is the Subject Property of these FLUEDRA proceedings.

In 2014, Cutler Properties pursued a mixed-use development on the Subject Property, however, the plan did not receive the support of the Town's planning consultants. Accordingly,

on February 24, 2016, counsel for Cutler Properties withdrew its pending application and advised the Town that, instead, it would proceed in what it believed was an “as-of-right” development of the Subject Property under the existing Low Density land use and Single-Family Residential zoning classifications.

**B. Site Plan Application and Hearing Before the Town Council**

On July 25, 2016, Cutler Properties submitted a revised letter of intent for site plan approval, seeking to develop a 30-unit, single-family home project on the Subject Property, consistent with the Subject Property’s existing land use and zoning designations. Over the course of two years, Cutler Properties worked with its consultants and the Town’s staff and consultants on the application and approval of the proposed development. The resulting site plan application (“Application”) represented in what Cutler Properties contended was an “as-of-right” proposal that did not require a comprehensive plan amendment, rezoning, special exceptions, variances, or waivers. The Application’s proposed density was 3.55 units per gross acre, which is less than the 5 units per gross acre permitted by the Town’s Comprehensive Plan and Code. Additionally, the Application proposed a 42-foot dedication for road right-of-way, as well as pedestrian and bikeway access and internal pathways.

During the continued review process, Cutler Properties’ consultants, in conjunction with the Town’s professional staff and consultants, discussed access, traffic impacts, and ingress and egress to the Subject Property. The Application proposed two access points in relation to the Subject Property’s location east of Old Cutler Road and south of 184<sup>th</sup> Street. An unimproved theoretical road known as SW 77<sup>th</sup> Avenue lies northeast of the project and would serve to connect the Subject Property to 184<sup>th</sup> Street.

This road is *not* shown as a road on the Town’s Comprehensive plan, although after the Town was incorporated, this road along with other local roads were transferred from Miami-Dade

County to the Town as part of an interlocal agreement with County. In part, the use of 77<sup>th</sup> Avenue would have assisted Miami-Dade Fire Rescue in servicing the proposed development, however, Miami-Dade Fire Rescue did indicate that it could service the proposed development if a turn-around was provided on site.

On February 21, 2018, the Application was considered at the Town Council's quasi-judicial public hearing. The Town staff recommended approval of the application. A number of Town residents, however, objected to the application specifically because of the proposed access utilizing unimproved 77<sup>th</sup> Avenue. The Town Council voted 5 to 0 to deny the Application but waived the filing period to file a new site plan application. On March 5, 2018, the Town entered the development order denying the Application. The Town's denial letter constitutes a development order as defined by Section 163.3164(15) and is actionable under FLUEDRA. After the denial, Cutler Properties filed a Request for Relief on March 23, 2018.

**C. FLUEDRA Process**

The FLUEDRA process consists of two phases: (1) a facilitated mediation session, and (2) a special magistrate hearing. During the mediation session, the property owner and the local government work together to propose a resolution for the use of the property. If the parties reach a mutually agreeable proposal, that proposal is submitted to the local government for approval. The local government then has the authority to approve a resolution resulting from the mediation process at a public hearing. If a resolution cannot be reached at mediation, or if the proposed plan is not approved by the local government, the property owner may move forward with the FLUEDRA process, which requires the special magistrate to hold a hearing to determine whether the local government's action was unreasonable or unfairly burdened the property.

In summary, the positions that the parties took based on Cutler Properties' FLUEDRA Request for Relief and the Town's response was as follows: Cutler Properties believes that there



was no substantial competent evidence to deny their site plan application at the February 21, 2018 hearing. It contends that it had the right to use 77<sup>th</sup> Avenue as access to its property. The Town asserts that the Town has no obligation to provide access through 77<sup>th</sup> Avenue. Indeed, it is the Town's position that 77<sup>th</sup> Avenue is not shown on the Town's Comprehensive Plan and accordingly providing such access for the development would be inconsistent with its Plan. If inconsistent with the Town's Comprehensive Plan, the Town would be without authority to approve such zoning application. *See Machado v. Musgrove*, 519 So2d 629, 631-632 (Fla 3<sup>rd</sup> DCA 1987) ("A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development of property within a county or municipality. [Citation Omitted] The plan is likened to a constitution for all future development within the county or municipality.")

In this case, the positions of the parties set forth in Cutler Properties' FLUEDRA Request for Relief and the Town's Response are no longer relevant because Cutler Properties, in an effort to reach an accommodation with the Town during the FLUEDRA process, no longer chooses to proceed with the site submitted at the public hearing of February 21, 2018.

Cutler Properties and the Town have worked together diligently, with the assistance of the undersigned Special Magistrate, to resolve this dispute. Over the course of the past 16 months, the parties have participated in four mediation conferences (June 18, 2018, July 5, 2018, September 4, 2018, and February 19, 2019) and several conference calls where alternative plans were brainstormed, negotiated, and reviewed. Through this collaborative effort, six (6) different site plans for the Subject Property were developed and considered during the course of the mediated process, which was facilitated and overseen by the undersigned Special Magistrate. Both sides have made an extraordinary effort to reach a compromise. Working together, through the cooperation of Town staff and Cutler Properties, it was concluded that Option F should be

submitted to the Town Council for approval. Among other things, the Option F alternative site plan:

- Reduced the number of units to 29 single-family homes;
- Eliminated vehicular access on SW 77<sup>th</sup> Avenue through to 184<sup>th</sup> Street;
- Provided a 27-foot landscaped walkway from Old Cutler to the wetland area to the east (which would be improved with pavers and landscaping); and
- Provided a utility connection through the unimproved SW 77<sup>th</sup> right-of-way to avoid connection through, and disruption to, Old Cutler Road.

Cutler Properties prepared and submitted a detailed Option F site plan and full application package for review by Town staff and the Town's consultant. Town staff submitted a memorandum to the Town Council recommending approval of Option F, which was to be brought before the Town Council for approval at the quasi-judicial hearing on June 19, 2019. Option F proposed resolution was, however, withdrawn by Town staff on the day of that hearing and the settlement proposal was not presented to the Town Council.

Even with this setback, the parties did not give up and a previous site plan known as Option D was reconsidered. Cutler Properties, in the interest of compromise, further modified this site plan at the Town's request to provide additional setback to the wetlands. Designated as Option D (revise), this site plan:

- Reduces the number of units to 29 single-family homes;
- Does not require Town approval to allow vehicular access onto or through SW 77<sup>th</sup> Avenue;
- Does not require Town approval to pave or improve SW 77<sup>th</sup> Avenue;
- Does not require Town approval to install underground utilities within SW 77<sup>th</sup> Avenue; and
- Provides the suggested (not required) 15-foot buffer from the wetland to the east of the Subject Property.

Site Plan D (as revised) is attached to the Special Magistrate's Findings of Fact and Recommendation. Unlike the other site plans Cutler Properties proffered during the FLUEDRA process, this plan asks nothing of the Town Council with respect to any sort of zoning relief or any

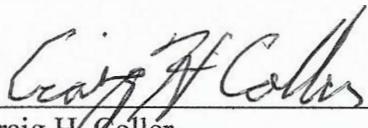
request for the opening of SW 77<sup>th</sup> Avenue for vehicular access or even the placement of underground utilities.

At the FLUEDRA final hearing held on September 20, 2019, Cutler Properties indicated that it was ready to proceed with Option D (as revised) site plan, which the Special Magistrate finds is truly an "as-of-right" site plan. The Town's Counsel, at that final hearing represented that Town Staff would support (as surely it must) an "as-of-right" site plan. Because Cutler Properties' Option D (as revised) site plan is an "as-of-right" site plan, the Special Magistrate takes the Town's position as supporting Option D (as revised) site plan. Of course, such agreement could not be finalized at the September 20th hearing because any site plan approval needs to be adopted by the governing authority, the Town Council.

The statutory framework of FLUEDRA contemplates that the final hearing becomes necessary because no agreement has been reached and the Special Magistrate needs to make a determination whether the Town Council's action to deny the site plan at the February 21, 2018 hearing was unreasonable or unduly burdens the property. Fla. Stat. § 70.51 (17) (a), (b). In this case, the Special Master finds that the February 21, 2018 site plan sought by Cutler Properties is no longer at issue and therefore moot. Accordingly, there simply is no need for the Special Magistrate to make a determination whether the Town Council's February 21, 2018 denial of that site plan, was unreasonable or unduly burdens the property. Indeed, as it became clear at the September 20, 2019 final hearing there is no disagreement between the parties, Cutler Properties and Town staff support an "as-of-right" site plan, which in this case is reflected in Cutler Properties proposed Option D (as revised) site plan.

**RECOMMENDATION**

Upon consideration of Cutler Properties' Request for Relief, the Town's Response together with information presented in these FLUEDRA proceedings and in accordance with Section 70.51, Florida Statutes, the undersigned Special Magistrate recommends that the Town Council approve the site plan designated Option D (as revised), which is attached to the Special Magistrate's Findings of Fact and Recommendation. This site plan proffered by Cutler Properties is an "as-of-right" plan that is consistent with the Town's Comprehensive plan and complies with the Town's Zoning Code. As such, Option D (as revised) site plan requires no zoning relief request nor does it show the opening or access to 77<sup>th</sup> Avenue for either vehicles or utilities. Option D (as revised) site plan represents the culmination of diligent and good faith negotiations over a 16-month period of time between Cutler Properties and the Town's representatives during the FLUEDRA process. At the final hearing held on September 20, 2019, the Town's Counsel indicated that Staff would support an "as-of-right" site plan. Option D (as revised) is unquestionably that site plan. Respectfully, as an "as-of-right" site plan, the failure to adopt Option D (as revised) would indeed be unreasonable and unduly burden the property. Accordingly, the Special Magistrate strongly recommends the Town Council adopt Option D (as revised) site plan and bring a final resolution to this matter.

  
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Craig H. Collier  
FLUEDRA Special Magistrate

Dated: September 23, 2019



