

**LEE COUNTY RESPONSE TO  
REQUEST FOR RELIEF  
PURSUANT TO §70.51, FLORIDA STATUTES**  
(Kimberly Regenis & Mouracade Regenerative Medicine Center)

Kevin A. Kyle, Trustee, Damascus Trading Company, LLC (formerly known as Damascus Trading Company of Florida, LLC), and Thomas M. Mouracade ("*Petitioner*") filed a Petition for Relief ("*Petition*") under §70.51, Florida Statutes, otherwise known as the Florida Land Use and Environmental Dispute Resolution Act ("*Act*") challenging the denial of its application to rezone 5.15± acres from Agricultural (AG-2) to Community Facilities Planned Development (CFPD). Lee County ("*County*") hereby submits the following as its response to the Petition in accordance with the Act. (Note: The County's response is utilizing the same set of exhibits provided in conjunctions with the Petitioner's Request for Relief.)

**The Property:**

The subject property ("Property") is 5.15 acres in size and located at 6401 Winkler Road, Fort Myers, Lee County, Florida, in the Central Urban Future Land Use Category. It is also identified by the Lee County Property Appraiser as STRAP Number 22-45-24-00-00001.0120.

**Development Request:**

The Petitioner sought to rezone the Property from Agricultural (AG-2) to Community Facilities Planned Development (CFPD). The property is located within the South Fort Myers Planning Community and currently developed with a partially constructed single-family home, along with accessory uses and structures on approximately 5.15 acres. The property is part of an unrecorded residential subdivision known as "Cold Saturday Farms" consisting of a total of 8 lots, each approximately 5 acres in size.

The Petitioner requested to redevelop the existing property and buildings into a holistic medicine center to provide social and health-related services, including the treatment of alcoholism, substance abuse and addiction issues; permitting a maximum of 90 beds (utilizing a central kitchen), 9 additional dwelling units (each with individual kitchens), 9,000 square feet of commercial/office and accessory retail uses, and a maximum building height of 45 feet. Proposed uses also included healthcare facilities, medical offices, a place of worship, religious facilities, private recreational facilities,

social services, specialty retail and a restaurant (with no drive-through). The project would also connect to central water and sewer service. (*Request*)

### **Zoning History:**

A public hearing was convened before the Lee County Hearing Examiner (*Hearing Examiner*) on February 25, 2015. The hearing continued to the next day, February 26, and then concluded on a third day on March 3, 2015. Subsequent to the County's receipt of the Petitioner's zoning application, County Zoning Staff (*Staff*) produced a report (*Staff Report*) containing a recommendation for approval of the Request. The Staff Report included a series of conditions determined by the Staff to be necessary if the Request were to be approved. As a result of the evidence and testimony taken during the public hearing the Hearing Examiner issued a recommendation of approval (*HEX Recommendation*). The HEX Recommendation also included a series of conditions similar to those contained in the Staff Report.

On August 5, 2015, the Lee County Board of County Commissioners (*Board*) considered the HEX Recommendation and took testimony from a number of the members of the public who attended the hearing before the Hearing Examiner, some in favor and some in opposition to the Request. The Petitioner also made a presentation to the Board, including rebuttal in response to public comment.

The Board began their review and evaluation of the proposed rezoning and redevelopment of the site contained in the Request by looking at existing uses adjacent to the subject property, and they observed the following:

1. To the north is vegetation and a drainage easement on vacant property zoned Commercial Planned Development (Winkler Office Park CPD) permitting a maximum floor area of 76,000 square feet and allowable uses including, but are not limited to, administrative offices, medical office, social services (group I), banks, general office, research and development laboratories, schools and business services.
2. To the south is a single-family residential property with an existing home on a 5± acre lot and the remainder of the "Cold Saturday Farms" subdivision. These properties are also zoned Agricultural.
3. To the east are a drainage canal and easement in excess of 50 feet wide and a water retention area owned by Florida Southwestern State College. To the northeast is the Brookedale Senior Living facility, an assisted living facility, and to the southeast is Enclave at Cypress Lake Condominiums and Cypress Lake Estates with residential multi-family uses.

4. To the west is Winker Road, a four-lane arterial roadway with a divided median, to the northwest is Wildwood Hammock a commercial medical office development and to the southwest the Principia subdivision with single-family residential lots. The Principia subdivision is developed with approximately 300 homes at a density of 3.49 units per acre.

As a result of that review the Board concluded the Petitioner has not proven entitlement to the Request as presented and voted unanimously to deny Request. In particular, the Board focused on the County's Comprehensive Plan's ("*Lee Plan*") Policy 5.1.5., with great attention to the protection of residential land uses in the neighborhood.

Lee Plan Policy 5.1.5 provides:

*"Protect existing and future residential areas from any encroachment of uses that are potentially destructive to the character and integrity of the residential environment. Requests for conventional rezonings will be denied in the event that the buffers provided in Chapter 10 of the Land Development Code are not adequate to address potentially incompatible uses in a satisfactory manner. If such uses are proposed in the form of a planned development or special exception and generally applicable development regulations are deemed to be inadequate, conditions will be attached to minimize or eliminate the potential impacts or, where no adequate conditions can be devised, the application will be denied altogether. The Land Development Code will continue to require appropriate buffers for new developments."*

The Board utilized this policy of the Lee Plan to make findings that the Petitioner's Request would be potentially destructive to the character and integrity of the residential neighborhood environment, concluding the Request does not meet the objectives of Policy 5.1.5 of the Lee Plan. The Board then went on to cite a number of reasons for their position, stating, approval of the Request:

1. Would result in the encroachment of commercial uses into an existing residential area;
2. Is incompatible with and not an acceptable transition into the current low density residential area to the south;
3. Is not consistent with the surrounding land uses;
4. Will result in a decrease in appraised property values for surrounding properties;

5. Determined the uses requested are not similar to and do not already exist in the surrounding area;
6. Will not have a positive or neutral impact on the surrounding community; and
7. Found no adequate conditions that could be devised to address the potential impacts of the proposed Request on the surrounding residential neighborhoods.

On September 2, 2015, the Petitioner filed its Petition under the Act. The Petitioner challenges the Board's denial of the requested rezoning. The Petition states the Board's denial is inconsistent with the law; contained no competent substantial evidence to support the denial and denied the Petitioner of an impartial decision-maker when the intent to deny the Request was announced at the beginning of the hearing by one Commissioner.

In response to the assertions above, the Board's decision to deny the Petitioner's requested rezoning was not inconsistent with the law. The Board's decision to deny was based on a review of the evidence and testimony provided to them by the Hearing Examiner, along with the Board's evaluation of Lee Plan Policy 5.1.5., as that policy relates to the Petitioner's proposed intensification of development and uses in the neighborhood.

With respect to whether there existed competent substantial evidence to support the Board's denial, the record provided from the earlier hearing before the Hearing Examiner contained testimony from residents and neighbors expressing concerns about the intensification of the Property as a result of a possible approval from AG-2 to CFPD. The change in zoning would also include a companion increase in types of permitted uses and the intensity of development from the condition currently found at the Property and in the neighborhood. Those same concerns were repeated by neighbors and residents in the final hearing with the Board.

Additionally, while one Commissioner's comment at the beginning of the hearing might seem premature, it is important to remember that the Commissioners are all provided with a copy of the HEX Recommendation (including all exhibits and a transcript of the testimony) prior to the public hearing. While the comment might be considered ill-timed, it is not, in and of itself, an adequate basis to assert a loss of impartiality or due process. At least two other Commissioners have to arrive at the same conclusion to obtain a successful vote to either approve or deny the Request. In this case, the single and final Board motion resulted in a vote to deny the Request 5-0.

The Petitioner must show that the Board's action is either unreasonable or unfairly burdened its property. While the Hearing Examiner was persuaded to recommend approval of the Petitioner's request, the Board was not convinced of the

appropriateness of reaching the same result. The Petitioner (albeit a contract purchaser for the Property) currently has reasonable use(s) for the Property with the AG-2 zoning district designation, and a denial of the Request does not render the Property unusable or without reasonable use(s). The AG-2 zoning district includes approximately 40 permitted uses "by right," and roughly 30 additional uses in conjunction with a Special Exception. (See Lee County Land Development Code §34-653 – Use Regulation Table, incorporated herein by reference.)

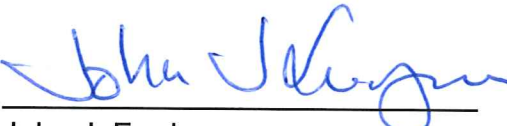
There was significant testimony presented (at both hearings) with respect to the current density and intensity of the existing uses for the Board to conclude the requested rezoning was not appropriate to approve. Lee Plan Policy 5.1.5 requires the Board to "*Protect existing and future residential areas from any encroachment of uses that are potentially destructive to the character and integrity of the residential environment.*"

The intensity of the requested use(s) on the current 5.15-acre site and surrounding properties cannot be ignored. Using the existing property and buildings to create a holistic medicine center to provide social and health-related services, including the treatment of alcoholism, substance abuse and addiction issues; permitting a maximum of 90 beds (utilizing a central kitchen), along with 9 additional dwelling units (each with an individual kitchen), and another 9,000 square feet of commercial/office and accessory retail uses, is a significant increase in the intensity of use(s) on the Property. Although it is a relatively short list of permitted uses being requested, such an approval will result in a great increase in intensity. Approval would permit and included healthcare facilities, medical offices, a place of worship, religious facilities, private recreational facilities, social services, specialty retail and a restaurant (without a drive-through). This would be a dramatic change that is otherwise inconsistent with the requirement found in Lee Plan Policy 5.1.5, and such a change may not be ignored. As a result, it was entirely reasonable for the Board to deny the Petitioner's request.

The Board's denial of the Requested was based on the Petitioner's failure to meet the requirements of the Lee Plan. Florida Statutes Chapter 163 requires local governments to both establish and implement comprehensive planning programs to guide and control future development. The purpose of the Lee Plan is to preserve, promote, protect and improve the public health, safety, comfort, good order, provision of transportation, water, sewer, schools, parks, recreational facilities, housing and other requirements and services; as well as, to conserve, develop, utilize and protect natural resources within their jurisdiction. The Act should not be used to either limit or override the Board's authority to analyze the impacts of any proposed development or redevelopment within an established neighborhood and approve a request that does not comport with the goals, policies or objectives of the Lee Plan.

WHEREFORE, in consideration of the foregoing, the County respectfully submits that the Petitioner has failed to show that it is entitled to relief under §70.51, F.S., and requests the Special Magistrate in these proceedings deny the Petitioner's Request for Relief and find in favor of the County.

LEE COUNTY, FLORIDA

BY:   
John J. Fredyma  
Senior Assistant County Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and regular U.S. Mail this 21<sup>st</sup> day of September, 2015, to Beverly Grady, Esquire, Roetzel & Andress, L.P.A., 2320 First Street, Fort Myers, Florida 33901 and [BGrady@ralaw.com](mailto:BGrady@ralaw.com), respectively.

LEE COUNTY, FLORIDA

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