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September 2, 2015

VIA HAND DELIVERY

Chairman Brian Hamman
Lee County Board of County Commissioners
2120 Main Street
Fort Myers, FL 3390

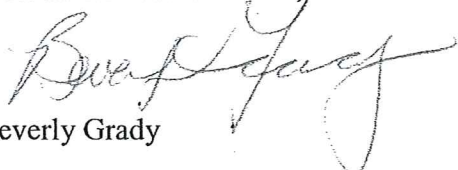
RE: Request for Relief under the Florida Land Use and Environmental
Dispute Resolution Act

Dear Chairman Hamman:

Enclosed please find an original and one (1) copy of a Request for Relief under the Florida Land Use and Environmental Dispute Resolution Act concerning Resolution Z-15-006 denying DCI2014-00025, rezone from AG to Community Facilities Planned Development by hand-delivery.

Very truly yours,

ROETZEL & ANDRESS, LPA


Beverly Grady

BG/ro

Enclosures

cc: Richard Wm. Wesch, Lee County Attorney (via e-mail w/out enc.)

LEE COUNTY, FLORIDA

IN RE: KEVIN A. KYLE, TRUSTEE,
DAMASCUS TRADING COMPANY, LLC, AND
THOMAS M. MOURACADE

Petitioner.

REQUEST FOR RELIEF
UNDER THE FLORIDA LAND USE
AND ENVIRONMENTAL DISPUTE RESOLUTION ACT

TO: CHAIRMAN, LEE COUNTY BOARD OF COUNTY COMMISSIONERS
2115 SECOND STREET
FORT MYERS, FL 33901

Petitioner, Kevin A. Kyle, Trustee, Damascus Trading Company, LLC (formerly known as Damascus Trading Company of Florida, LLC), and Thomas M. Mouracade, (hereinafter "Petitioner") by and through its undersigned attorneys, hereby initiates a proceeding under the Florida Land Use and Environmental Dispute Resolution Act, §70.51 F.S., (the Act) and requests that Lee County (the "County") provide the relief under that Act, including forwarding this request for relief to a special magistrate, selected by agreement of the Petitioner and the County. In support thereof, the Petitioner states as follows:

Background

The Robin Attree Trust ("Trust") is the record owner of 6401 Winkler Road, Lee County, Fort Myers, Florida 33907 (STRAP# 22-45-24-00-00001.0120), a 5.15 acre parcel more specifically described in Exhibit "A" attached hereto and incorporated herein ("Subject Property"). The Trust authorized Kevin A. Kyle, Trustee (by purchase contract and direct authorization), who authorized TDM Consulting, Inc. (TDM), Damascus Trading Company of

Florida, LLC, Thomas M. Mouracade, and Beverly Grady to file and pursue rezoning from agricultural (AG-2) to Communities Facilities Planned Development (CFPD).

After numerous meetings with Lee County Community Development staff to include zoning and development services, and transportation, TDM filed an application for rezoning of the Subject Property from AG-2 to CFPD on November 5, 2014 for the proposed use which is to redevelop the existing 5.15 acre parcel and existing buildings (guest house structure without certificate of occupancy and 17,000 square foot shell structure on County's abandoned property list) to a holistic medicine center to provides social services and health-related services including the treatment of alcoholism, substance abuse, and addiction issues; permitting residential treatment with a maximum of 90 beds utilizing a central kitchen, 9 additional dwelling units (with individual kitchens), 9,000 square feet of accessory medical office and accessory retail/food uses (limited to the facility), place of worship, religious facilities, and private recreational facilities. The application was found sufficient on January 9, 2015 and scheduled for hearing (see Exhibit "B").

The Subject Property is located within the Lee Plan Central Urban designation and the South Lee County Planning Community. Although it was not a requirement, a public information session was held by the Petitioner as part of the meeting of the College Parkway Redevelopment Group, with a summary of that meeting attached as Exhibit "C."

The Lee County staff issued a thorough staff report recommending approval with conditions of the rezoning of the Subject Property to CFPD, which is attached as Exhibit "D." The staff report provided an extensive review of the Subject Property with 35 exhibits, which

established that the application was consistent with the Lee Plan and each criteria in the Land Development Code for rezoning to include compliance with the following criteria:

- a. That the request is consistent with the goals, objectives, policies and intent of the Lee Plan;
- b. That, when applicable, the request will protect, conserve or preserve environmentally critical areas and natural resources;
- c. That the request will be compatible with existing or planned uses;
- d. That the request will not be injurious to the neighborhood or otherwise detrimental to the public welfare; and
- e. That the requested use will be in compliance with all zoning provisions pertaining to the use set forth in this chapter and any other applicable County ordinances or codes.
- f. [not applicable] (wireless communication) (LDC §34-145)

A hearing was held by the Lee County Hearing Examiner on February 25 and 26, 2015, and concluded on March 3, 2015 (“HEX Hearing”). The staff fully supported the rezoning to CFPD. At the hearing, the Petitioner had two (2) minor issues with the staff report and if the Hearing Examiner or Board of County Commissioners ruled against the Petitioner on those two (2) issues that would have enabled the Petitioner to proceed with the development and in compliance with that decision. These two (2) issues were very minor and did not impact the ability of the Petitioner to proceed with the development. The first issue was a condition that the staff attempted to add to a deviation for access location. The staff fully supported granting a deviation for driveway access at the location of the existing access to the Subject Property but attempted to attach a condition that the Petitioner would have to grant an easement across the front of its Subject Property to the adjoining property owner on each side, which created a frontage road for through traffic. The Petitioner found this condition not reasonably related to the deviation. Petitioner understood that the adjacent neighbor to the south would not want a

connection between this CFPD and neighbor's property. The second deviation was approval of a height of forty-five (45) feet with a building setback of fifteen (15) feet and staff recommended keeping the maximum height at thirty-five (35) feet for this new building. During the hearing process, the Hearing Examiner recognized that a number of the staff conditions were repetitively restating requirements of the Lee County Land Development Code as a condition when the Petitioner is required to comply with the Code. Staff raised no objection to the removal of conditions that were repeating the Code requirements. On May 13, 2015, the Hearing Examiner issued a recommendation of approval of the rezoning to CFPD with conditions including a reduction from 90 beds to 72 beds and agreed with the Petitioner's position regarding the two (2) deviations discussed above which reduced the density to 6.4 dupa. The Hearing Examiner addressed every issue raised by the participants at the hearing with the citation of competent substantial evidence and found consistency with the Lee Plan and concluded that "The applicant has proven entitlement to rezone the property to CFPD by demonstrating compliance with the Lee Plan, the LDC, and other codes and regulations." All of the conditions recommended by the Hearing Examiner were acceptable to the Petitioner and acceptable to the staff. A copy of the Hearing Examiner's recommendation of approval is attached as Exhibit "E." The transcript of the HEX Hearing is incorporated by reference to this Request.

Outside of the zoning case, a political action committee (PAC) was created whose purpose was to raise significant funds and to use those funds to support politicians who opposed the application. Numerous ads were placed on local radio stations by the PAC, which had the Sheriff of Lee County, a constitutional officer, urging denial of the rezoning of the Subject Property for this rehabilitation center. (See Exhibit "F" for the substance of ad.)

The Board of County Commissioners (“Commission”) held a hearing on August 5, 2015 to review and consider the Hearing Examiner’s recommendation and issue a final decision. At the beginning of the hearing and prior to hearing any testimony, Commissioner Manning announced that he would be producing competent substantial evidence adverse to this application and would make a motion to deny the application. No Commissioner asked a single question to any staff member regarding their collective recommendation of approval of this rezoning application and finding consistency with the Lee Plan and Land Development Code. The Lee County process permits the applicant, staff, and participants to present errors made by the Hearing Examiner to the Commission at the final hearing. Since there were no errors, the Petitioner provided an overview of the application. Veronica Martin, an expert in land use planning, testified that this application was consistent with the Lee Plan and every criteria in the Land Development Code regarding the rezoning to CFPD.

The staff cited no errors and recommended approval.

The Commissioners then called the participants forth to present their comments.

At the conclusion of the participants’ comments, the Petitioner began to present its rebuttal to the statements made by the participants, when the Chair requested that the Petitioner hurry because the Commission does not usually allow much time for rebuttal. During its presentation, Veronica Martin, land use expert, and Jennifer Feriola, director and administrator of rehabilitation centers for substance abuse, Thomas Mouracade presented the facts contrary to the participants’ testimony to the Commissioners including the Master Concept Plan (“MCP”) and PowerPoint (see composite Exhibit “G” Petitioner exhibits and Commission transcript). At the conclusion of the rebuttal, the Petitioner requested that Commissioner Manning provide due

process by stating for the record the basis of his announced opposition so that Petitioner could have an opportunity to respond. Commissioner Manning stated he would present his objection after the public portion of the hearing had ended. The Commission closed the hearing and a motion was made to deny the application. There was discussion among the Commissioners searching for a basis to deny which included discussion of crime statistics caused by such facilities (there were no such statistics); the diminution of property value caused by such a facility (which is not a criteria nor was there any evidence) and compatibility issues, which allegations had been rebuffed by both the staff experts and the Petitioner's experts and as set forth in the Hearing Examiner's report (Exhibit "E"). Resolution Z-15-006, the Development Order, denying the rezoning was adopted unanimously by the Commission and is attached as Exhibit "H."

Proposed Use of the Property

The Petitioner's proposed use is a holistic residential rehabilitation center on the Subject Property providing a 72-bed medical detoxification and residential rehabilitation center and out-client therapy for the treatment of mind, body and soul related to substance abuse and addiction. A further description of proposed use is attached as Exhibit "I."

There was no issue throughout this case that the treatment and provision of social and health related services including the treatment of substance abuse, alcoholism and addiction issues with in-house residential treatment is desperately needed in Lee County. There was no issue throughout this case that the treatment of substance abuse, alcoholism and addiction issues with detoxification service and in-house residential treatment is only permitted as "Social Services Group IV." None of the conventional commercial districts permit Social Services

Group IV. The Commercial Planned Development District precludes Social Services Group IV as a use that may be requested. The proposed use for the Subject Property is not a commercial use but a type of residential use. The only conventional district where Lee County permits Social Services Group IV is the Community Facility Conventional District (CF) which has been applied to properties that are primarily owned by the government. The only planned development district where one may request Social Services Group IV is CFPD, AOPD (Airport Operations Planned Development), and MPD (Mixed Use Planned Development). In the planned development districts, the Code contains a list of uses that may be requested, however, the schedule of uses that is ultimately approved is tailored for specific sites. Lee County does not have parcels with the appropriate zoning that permit Social Services Group IV to provide detoxification service and in-house residential treatment of substance abuse, alcoholism, and addiction issues. LDC Sections 34-622, 34-813, 34-844 and 34-934 incorporated by reference.

The Impact of the Development Order (Zoning Resolution of Board of County Commissioners)
on the Ability to Achieve the Proposed Use of the Property

The 72-bed medical detoxification and residential rehabilitation center are precluded by the denial. The Subject Property remains with agricultural zoning with a very limited schedule of uses delineated in attached Exhibit "J", which precludes and prohibits the primary use of the proposed residential rehabilitation center and the requested accessory uses. Many of the uses in the AG district are not consistent with the Lee Plan designation of Central Urban, which is the second most intense Lee Plan category. The surrounding uses are appropriate in Central Urban except for the six (6) agricultural lots which the Hearing Examiner termed to be an "anomaly" when reviewing all other surrounding uses. The Subject Property is located on a 4-lane divided arterial highway (Winkler Road). The Subject Property is adjacent to a Commercial Planned

Development located to the north which is approved for 76,000 square feet of medical office and there are medical uses directly to north of that parcel (Planned Parenthood Clinic) and to the northwest. Florida SouthWestern State College, an institutional use, is located to the east and an assisted living facility at a higher density than the density for the Subject Property is located to the northeast. To the south are six (6) lots (then Cypress Lake Methodist Church with a daycare facility and meeting location for Alcoholics Anonymous) zoned agricultural but those lots also abut apartments and condominiums developed at eight (8) to nine (9) units to the acre which is higher density than requested for the Subject Property. The density for the Subject Property recommended by the Hearing Examiner and accepted by the Petitioner is 6.4 units per acre which is lower than the density recommended by staff and is consistent with the Central Urban range of density. The Development Order adopted by the Commission is inconsistent with the law; there was no competent substantial evidence to support the Development Order and the Petitioner was denied an impartial decision-maker when the denial decision was announced prior to holding the hearing.

Section 70.51(3) provides that the request for relief may be filed within thirty (30) days after receipt of the order. LDC Section 34-85, Final Decision; judicial review (a) provides for the purpose of computing the 30-day period, the date that the decision has been rendered is the date the signed resolution is date stamped received by the Minutes Department of the Clerk of Courts. The Development Order was received August 17, 2015 by the Minutes Department of the Clerk of Courts and received by Petitioner on August 18, 2015.

WHEREFORE, based upon the foregoing, Petitioner requests relief under the Florida Land Use and Environmental Dispute Resolution Act, including the forwarding of this Petition to

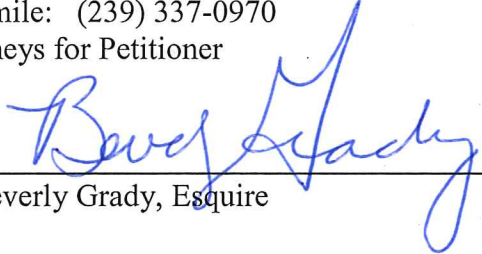
a special magistrate for proceedings required by that Act, together with any and all relief permitted under that Act to conclude with an approval of the rezoning to Community Facilities Planned Development subject to the Hearing Examiner's conditions.

By: 
Beverly Grady, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Petition and one (1) copy was served this 2nd day of September, 2015 by hand-delivery to: Brian Hamman, Chairman, Board of County Commissioners, 2120 Main Street, Fort Myers, Florida 33901.

ROETZEL & ANDRESS, L.P.A.
2320 First Street
Fort Myers, Florida 33901
Telephone: (239) 337-3850
Facsimile: (239) 337-0970
Attorneys for Petitioner

By: 
Beverly Grady, Esquire

INDEX OF EXHIBITS

- Exhibit A – Subject Property legal description
- Exhibit B – Sufficiency letter
- Exhibit C – Public Information Meeting Summary
- Exhibit D – Division of Community Development staff report and testimony of Tony Palermo
Vol II, Pages 123-182 and Vol IV, Pages 504-529 Exhibit K
- Exhibit E – Hearing Examiner recommendation of approval
- Exhibit F – PAC Ad featuring Sheriff
- Exhibit G – PowerPoint and presentation - expert Veronica Martin, Petitioner exhibits including
Master Concept Plan Exhibit L
- Exhibit H – Board of County Commissioner Resolution Z-15-006 Development Order
- Exhibit I – Proposed use description
- Exhibit J – Schedule of Uses (AG)
- Exhibit K – HEX Hearing transcript incorporated by reference
- Exhibit L – Commission hearing transcript will be supplied