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In The Supreme Court of Florida

CASE NO, 87,403

The School Board of Volusia County,

Petitioner,

v.

James B. Clayton,

Respondent,

DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT ON CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER
THE SCHOOL BOARD OF VOLUSIA COUNTY

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STATEMENT OF THE CASE AND FACTS

This is an appeal from a decision of the District Court of Appeal, Fifth District, certifying a question of great public importance, Although jurisdictional briefs are not required, the decision of the District Court also expressly affects a class of constitutional officers, and is expressly acknowledged to be in conflict with prior decisions of this Court and of other District Courts.

The School Board of Volusia County (hereafter "Board") suffers from overcrowded schools in southwestern Volusia County. Numerous sites had been considered for proposed "Elementary School S" over a period of several years (Appendix -Tab 1). The Board ordered appraisals of the most desirable site, disclosed them to the owners, and offered an option contract, but the owners did not respond (Appendix -2). In June 1994, the Board resolved to commence eminent domain proceedings. After final revisions to the site description were approved in August, the Board in September 1994 filed suit to condemn "Site S" (Appendix - 3).

The condemnation was vigorously opposed by the condemnee, including assertion of substantial severance and business damages and a motion (later withdrawn) for disqualification of the Board's attorneys, As a result of mediation, the condemnee and the Board's representatives revised the "footprint" of the school and developed other conditions to mitigate the condemnee's alleged severance and business damages A further round of mediation then produced agreement on damages, attorneys' fees and costs, conditioned on Board approval. On December 7, 1994, staff recommended to the Superintendent and Board that the settlement be approved (Appendix - 5). Counsel also recapped the legal position of the Board, including

particularly the owner's claims of severance and business damages, and the divergence of views of the appraisers (Appendix - 6). On December 13, 1994, in regular session, the Board approved the recommended settlement by a 3-2 vote. The parties thereupon submitted a stipulated Order of Taking and Final Judgment, which was ultimately entered by the trial court in February 1995, (Appendix - 8) after its judgment in this cause. Pursuant to the Board's ratification of the settlement, the Final Judgment recited that the legal description being taken was deemed amended to reflect the revised footprint. No appeal was taken. The Board has paid into the court registry the sum required by the Final Judgment, has taken possession and has awarded a construction contract. The condemnee is not a party here. The school is nearing completion.

James B. Clayton, respondent here (hereafter "Clayton"), sued for a writ of mandamus, In his amended petition, he alleged that he had standing "to represent all persons in his situation as a voter and taxpayer" (Appendix - 9 ¶7). He sought an order "directing the Board to rescind as void its action taken December 13, 1994 exercising the option to purchase Site S". He asserted that under Fla. Stat. 235.054, a supermajority of the Board was required to approve a "purchase" at more than the average of two appraisals.

The trial court issued the alternative writ, After final hearing, the trial court quashed the writ and dismissed the complaint with prejudice (Appendix - 11). The trial court found Clayton to be without standing under the current standards of this Court. It further found that Fla. Stat. 235.054 did not apply to eminent domain actions. Finally, the court found his suggestions of "claimed defects in the eminent domain proceedings . . . unsubstantiated and not supported by the record."

Clayton appealed the first two points. The Board filed a motion to dismiss, pointing out that the judgment in the eminent domain case had not been timely appealed, and that the condemnee was indispensable to any collateral attack on the condemnation judgment (Appendix - 12). The District Court denied the motion, and ultimately entered its decision now reviewed here. (Appendix - 13).

The majority of the District Court found that, notwithstanding ***North Broward Hospital District*** v. ***Forms,*** 476 So.2d 154 (Fla. 1985) Clayton had standing, and "respectfully request[ed] that [this Court] reconsider the *Fornes* decision." It then construed ***Forms*** not to be controlling, and certified the following questions as being of great public importance:

> DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?
>
> Or, alternatively,
>
> DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

The District Court also held that every settlement of an eminent domain case is a "purchase", and that every purchase by a school board is subject to:

> "section 235.054(1)(b), Florida Statutes, which requires: Prior to acquisition of the property, the board shall [if the purchase price exceeds $500,000] obtain at least two appraisals by appraisers approved pursuant to s. 253,025. If the agreed purchase price exceeds the average appraised value, the board is required to approve the purchase by an extraordinary vote."

The quoted language was created in 1995, after the trial court proceedings. The original statute was intended by the Legislature as an optional or alternative method of purchasing property. (Appendix - 14, 15).

ISSUES ON APPEAL

I.

DOES RESPONDENT HAVE STANDING IN THE ABSENCE OF SPECIAL INJURY?

A. SHOULD THIS COURT RECONSIDER ITS DECISION IN *FORNES?*

B. [CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,]* DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?

C. [ALTERNATIVE CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

II.

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IS A SETTLEMENT OF EMINENT DOMAIN PROCEEDINGS GOVERNED EXCLUSIVELY BY THE STANDARDS APPLICABLE TO VOLUNTARY PURCHASES OF LAND?

A. WAS FLA. STAT. 235.054 (1984 TO 1994) AN OPTIONAL METHOD OF PURCHASING LAND?

B. MAY A SCHOOL BOARD BE COMPELLED, IN MANDAMUS, TO OBEY A 1995 STATUTE AS TO A 1994 ACTION?

IV.

MAY MANDAMUS BE UTILIZED AS A MEANS OF COLLATERAL ATTACK ON AN UNAPPEALED CONDEMNATION JUDGMENT, WHERE THE CONDEMNEE IS NOT JOINED?

SUMMARY OF ARGUMENT

The argument is presented in the order necessary for adjudication. If Clayton is incorrect on any point, then his claim must fail entirely, irrespective of any following point.

Argument begins with the District Court's invitation to this Court to reconsider *Forms*. This Court should reaffirm the principles of *Fornes* as a sensible distinction between different species of "public rights". Where alleged violation of legal duty is nonconstitutional, public officers are charged with enforcing public rights. Citizens without special injury have no standing. If an activist judiciary is to adjudicate every species of "public right" at the instance of any uninjured citizen, the effect on governments and the courts of dealing with multiple, often conflicting, citizens' claims will be crippling.

The Court should also resist the attempts to distinguish *Forms* in the alternate certified questions. First, the suggested grant of standing to an uninjured citizen under "unique circumstances of the case" offers a standardless exception to *Fornes*.

The alternative question, apart from commentary, asks whether an act allegedly unauthorized by statute is *ipso facto* an alleged constitutional violation. The answer is that it is an alleged statutory violation.

On the merits, the District Court opinion does serious damage to the orderly mediation and settlement of condemnation cases. It expressly affects the constitutional class of school board members. The Court may address the merits in any event, but in this case it has an independent jurisdictional basis to do so apart from the certified questions.

On the merits, the District Court erred in three respects.

First, the court erred in holding that mediated condemnation settlements are always "purchases".

Second, the court erred in holding that Fla, Stat. 235.054 is the sole authority for school land purchases. If that were true, then school boards had no power to purchase property prior to 1985. In that year, Fla. Stat. 235.054 and its city and county counterparts were created by a single bill as exceptions to the Public Records Law. These exceptions allow governments the option to keep purchase documents confidential, if certain procedures are followed. The District Court construed the statute as mandatory for all purchases. That construction either violates the "single subject" rule for legislation, or depends on a text not yet adopted when the Board acted.

Finally, the District Court ignored the absence from these proceedings of the condemnee, and the finality of the Final Judgment in condemnation. Clayton misconceived the nature of mandamus when he attempted to use a writ against the Board as a means of collaterally attacking the condemnation proceedings. Where that judgment was unappealed, and more than a year has passed under Rule 1.540, there is no clear legal duty of the Board to "untake" Site "S" and unbuild the school.

ARGUMENT

I.

RESPONDENT HAS NO STANDING IN THE ABSENCE OF SPECIAL INJURY.

A. THIS COURT SHOULD REAFFIRM ITS DECISION IN *FORNES.*

The District Court in the opinion below "respectfully request[s] that [this Court] reconsider the Fornes decision."

In North *Broward Hospital District* v. *Fornes, 476* So.2d 154 (Fla. 1985), the Court reaffirmed the principle that a mere increase in taxes does not confer standing upon a taxpayer party to challenge a governmental expenditure, in the absence of some proof of special injury not suffered by taxpayers generally. This principle is sometimes known as the "Rickman Rule", after the decision in *Rickman v. Whitehurst, 73* Fla. 152, 74 So. 205 (1917).

Florida law on this point is parallel to Federal decisions holding standing to be an element of subject matter jurisdiction. In *U.S. v. Richardson,* 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed. 2d 678 (1974), a citizen attempted to compel disclosure of CIA expenditures which he alleged were being kept secret in violation of law. The Court rejected his claim even though it acknowledged [at 179] that "if respondent is not permitted to litigate this issue, no one can do so." *Cf.* the District Court's protest that "this restriction truly creates a standing rule that is an anomaly: if everyone is injured, no one can sue."

The *Court* in *Richardson* explained the reason for restricting citizen standing in the absence of special injury:

> Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

This Court has previously explained why it would be improper for an activist judiciary to hear citizens with no special injury, In *Department of Revenue v. Markham, 396* So.2d 1120 (Fla. 1981), the Court set forth the reasons behind the standing rules [at 1122, quoting with approval from *Paul v. Blake, 376* So.2d 256 (Fla. 3d D.C.A. 1979)]:

> "This rule is based on the sound policy ground that without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits filed by disgruntled taxpayers who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elective representatives. It is felt that absent some showing of special injury as thus defined, the taxpayer's remedy should be at the polls and not in the courts.
>
> "Moreover, it has long been recognized that in a representative democracy the public's representatives in government should ordinarily be relied on to institute the appropriate legal proceedings to prevent the unlawful exercise of the state or county's taxing and spending power."

There is a number of public representatives who have power to address the faults alleged by Clayton, The Governor is chief magistrate of the State of Florida, and is charged under Article IV, §1 of the Constitution to "take care that the laws be faithfully executed." As such, he has the power to enforce public rights.'

Under Article IV, §2 of the Constitution, the Governor is further given the express power to

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'In *State v. Crawford,* 28 Fla. 441, 10 So. 118 (1891), the Governor sued the Secretary of State in mandamus to compel the affixing of the state seal to a commission; this Court held that as chief magistrate of the state responsible for enforcement of its laws, he had standing to enforce a "public right".

> "initiate judicial proceedings in the name of the state against any . . . county or municipal officer to enforce compliance with any duty or to restrain any unauthorized act."

Completing the relevant list of the Governor's powers to address unauthorized acts is the power, under Article IV $7 of the Constitution, to suspend *my* county officer *inter alia* for malfeasance, misfeasance or neglect of duty.

The Attorney General is the chief legal officer of Florida under Article IV, $4 of the Constitution. As such, he has the exclusive power to bring, authorize, or refuse to authorize, quo warranto proceedings against public bodies corporate alleged to be acting without authority. In *State ex rel. Shevin v. City of Sanibel,* 3 18 So.2d 177 (Fla. 2d D.C.A. 1975), the court stated it thus in requiring that a challenge to municipal authority be dismissed where the Attorney General had withdrawn his earlier consent:

> at common law the overwhelming weight of authority was that the Attorney General has absolute control of such a quo warranto proceeding, the rationale being that the state, not the relator, is the real party in interest.

See *also Butterworth* v. *Espey, 523* So.2d 1278 (Fla. 2d.D.C.A. 1988), holding that where the Attorney General maintains control over a quo warranto action, there is no improper delegation of his power.

Under the provisions of Article III, §2 of the Constitution, the Legislature is required to appoint an auditor to audit public records. Under the provisions of Fla. Stat. §11.45(3)(a), the Auditor General is required to audit district school boards annually. Under subsection (3)(c), the Auditor General must make special mention of any violation of the laws, or any illegal or improper expenditures.

As the *Court* in *U.S. v. Richardson, supra,* noted in denying standing (418 US at 177):

> it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest. It is therefore open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen.

The only recognized exception to the rule requiring special injury for citizen standing is a situation where the act or expenditure is alleged to violate the constitution. *Department of Administration* v. *Horne*, 269 So.2d 659 (Fla.1972). A mere allegation of a statutory violation will not suffice.

Here again Florida law closely parallels Federal principles. *Frothingham v. Mellon, 262* U.S. 447 (1923) is the bedrock decision holding that a taxpayer may not sue merely because of the burden of taxation to support an unauthorized expenditure. But in *Flast v. Cohen, 392* US. 83 (1968) the Court distinguished *Frothingham* and held that a taxpayer had standing to sue if the expenditure directly violated the Establishment Clause of the Constitution.

As the Court explained in *U.S. v. Richardson, supra* (418 US at 179), the remedy of a citizen with neither constitutional complaint nor special injury is political:

> Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.

Judicial activism in the absence of a special injury risks intrusion on the coordinate branches of government, and on the prerogatives of other elected officers charged with protecting public rights. It assumes, wrongly, that the sovereign people through their elected representatives are unequal to the task.

In contrast, where the injury is constitutional, electoral power does not always avail, especially in cases involving minority rights where the political majority may be unmotivated to act. It is entirely proper for the judiciary, consistent with the principle of *Flast* and *Home,* to protect fundamental rights without showing of special injury. But Clayton has no standing under those principles. Accordingly, *Fornes* should be reaffirmed

B. [CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?

The District Court has discerned an exception to *Fornes* which it has labelled "uniqueness of the particular case", based on this Court's decision in *Clayton v. Board of Regents,* 635 So.2d 937 (Fla.1994).

In that case, this Court held that under "unique circumstances" not reported in the decision, Clayton had standing to challenge the appointment of a university president.

Clayton v. Board of Regents appears similar on its facts to *Ex parte Le vitt, 302* U.S. 633 (1937). In that case, Le vitt challenged the validity of the commission of a Supreme Court justice on the ground that, as a former senator, the justice had voted for an increase in the salary of justices. The allegations, if true, set forth a violation of Article I, §6 of the Federal Constitution; but the Court found that Le vitt had no special injury and hence, no standing.

Flast v. *Cohen* is consistent with *Le vitt.* In *Flast,* the Court expressed the need for a sufficiently adverse interest that would sharpen an ordinarily undifferentiated taxpayer's complaint into a particularized and justiciable controversy. The Court required not only an

"unauthorized" expenditure, but also an expenditure which expressly violated a prohibition in the Constitution, the Establishment clause, in which Flast had a specific protectable and personalized interest. Le vitt could not make such a showing when he asked to bar the appointment of a justice.

It appears, on the face of it, that *Clayton v. Board of Regents* is more like *Le vitt*. But if the District Court has correctly perceived an exception to *Forms* born of unique circumstances, then it necessarily follows that this Court is being called on, by the certified question, to develop and announce the guidelines for such an exception. It is here that the task becomes oxymoronic: If the circumstances of a case are unique, they are by definition incapable of repetition, and no precedent is capable of describing them.

The certified question invites the Court onto a slippery slope in which a standardless exception would swallow the *Fornes* rule whenever an activist court so chose. The invitation should be rejected.

> C. [ALTERNATIVE CERTIFIED QUESTION: IRRESPECTIVE OF *FORNES,*] DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

The phrasing of this question by the District Court begs a larger question: What is the source of authority for school boards?

School Boards are creatures of the Constitution, not the Legislature. Article IX, §4 prescribes elected school boards, and gives to each district school board the power to "operate, control and supervise all free public schools within the school district." The Legislature has declared in Fla, Stat. 230.03(2) that in accordance with the Constitution, district school boards

"may exercise any power except as expressly prohibited by the State Constitution or general law." *Cf.* Art. VIII, §§1(g) and 2(b) of the Constitution. Fla. Stat. 166.021(1) similarly provides that "as provided in [the Constitution], municipalities . . . may exercise any power for municipal purposes, except when expressly prohibited by law." In construing such legislative acknowledgments of Constitutionally-derived powers, this Court held in *City of Miami Beach* v. Forte *Towers,* 305 So.2d 764 (Fla. 1974) that such statutes are not a "mere delegation of the police power" but a recognition of the separate constitutional basis of such power. [2]

Nor is it apparent, as stated by the District Court, that the settlement of the condemnation action of Site "S" will increase taxes or waste public money. In the instant case, the record shows that the Board carefully considered the availability of an alternate site, the fact that it was less well located in terms of long-range planning and safety, the fact that the alternate site was encumbered by high-voltage transmission lines, and the fact that after factoring in the cost of utility extensions and the intangible costs and risks of delay, the alternate was more expensive (Appendix - 5, 6). The resolution of taking recites that the Board has made the necessary findings for a taking, and those findings are not challenged by Clayton

In *School Board of Broward* County v. *Viele*, 459 So.2d 354 (Fla. 4th D.C.A. 1984), the circuit court denied a requested taking because of its view that "necessity" was absent in that another reasonable site was available. The appellate court reversed. The record showed that the school board had properly considered alternate sites, costs, environmental factors, long-

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' School boards have been held to have inherent powers to discipline students irrespective of particular statutory grants. *Banks v. Board of Public Instruction of Dade County, 3* 14 So.2d 285 (S.D.Fla. 1970), *vacated onprocedural grounds* 401 U.S. 988 (1971) *aff'd 450* F.2d 1103 (5th Cir. 1971).

range planning, and safety considerations. Thereafter, the court could interfere only upon a demonstrable abuse of discretion.

II.

IS A SETTLEMENT OF EMINENT DOMAIN PROCEEDINGS GOVERNED EXCLUSIVELY BY THE STANDARDS APPLICABLE TO VOLUNTARY PURCHASES OF LAND?

Fla. Stat. $73.032 contemplates that eminent domain cases may be settled. It provides for offers of judgment, not less than 20 days prior to trial. Fla. Stat. §44.102(6) does not except eminent domain proceedings from court-ordered mediation. In cases of takings by the Department of Transportation, Fla. Stat. 5337.271 *requires* the Department to "negotiate in good faith", and provides for an "exchange" of appraisal reports and business damage reports prior to mediation.

In contrast, the District Court opinion holds:

> We believe the legislature has given the Board two, and only two, alternative methods for obtaining real property -- eminent domain and negotiated purchase. . . . However, the Board urges that, as with any litigation, it can "settle" even an eminent domain case by agreement. Certainly it can, but in doing so *the transaction becomes a negotiated purchase and not an eminent domain taking.* (Emphasis supplied).

The District Court cites no authority for the statement, and none has been discovered.

The District Court bolsters its statement by saying that the "property taken was not even described in the order of taking." This statement is mystifying; the one and only instrument vesting title to the property in the School Board is the Order of Taking and Final Judgment. Exhibit A to the Order of Taking and Final Judgment (Appendix - 8) fully describes the property taken.

In *Department of Transportation v. Burnette, 399* So.2d 5 1 (Fla. 1st D.C.A. 1981), the Court noted that a longstanding drainage problem had worked a taking of Burnette's property without compensation, The Department was thereupon ordered either to cease the offending drainage, or to engage in a "voluntary purchase" or to commence a formal taking, The case is significant in its assumption that a "voluntary purchase" may take place after an inverse condemnation has already occurred.

Fla. Stat. §235.054 was first created as a part of Chapter 84-298, Laws of Florida, which was "an act relating to governmental meetings and records." It created §§ 125.355 (for counties), 166.045 (for cities) and 235.054 (for school boards), in virtually identical language.

Nothing in Chapter 84-298 suggests that the "act relating to government meetings and records" is really a limitation on the power of cities, counties and school boards to settle eminent domain disputes. Even the District Court does not believe so. For example, in *Seminole County* v. *Delco Oil, Inc.,* 21 Fla.L.Weekly D254 (Fla. 5th D.C.A. January 26, 1996) (in which the majority of the instant panel also joined), that court noted that condemnation had been commenced and that "the parties' negotiations quickly led to a stipulation on the compensation due Delco." The remaining dispute was over the fees and costs to be paid Delco's counsel.

It appeared that the County's original estimate of value in its declaration of taking was $225,000, and that during settlement negotiations, the offer was increased to $495,000. The Court engaged in an extended analysis of the proper computation of fees and costs, but noted without comment that the matter was governed by Fla. Stat. $73.092, the eminent domain statute.

Similarly, in *Seminole* County v. Clayton, 665 So.2d 363 (Fla. 5th D.C.A. 1995), the District Court noted the settlement without trial by the County, in an amount which exceeded the average of the County's appraisals and also exceeded $500,000. Nevertheless the court never doubted for an instant that the case was governed by the eminent domain statutes, The court ignored Fla. Stat. §125.355(1)(b) (1995), which imposes on counties the same requirements that Fla. Stat. 5235.054 imposes on school boards, If the court were correct that every settlement by a county is subject to the requirements of §125.355(1)(b), then any citizen of Seminole County may now challenge and set aside that settlement, by writ of mandamus,

It is plain that Fla. Stat. §235.054 and the Board's parallel Policy 608 apply only to acquisitions *by purchase*. Acquisitions by eminent domain are authorized under a different law, Fla. Stat. §235.05. This section authorizes School Boards to exercise the power of eminent domain, under the methods set forth in Chapters 73 and 74 of the Florida Statutes.

When a Board authorizes institution of eminent domain proceedings, it has no way of knowing what the ultimate price fixed by a jury may be. It also has no way of knowing how much in severance damages, business damages, relocation expenses, attorneys' fees and costs may be claimed and proven by the defendant property owner. Control over the ultimate liability has, at that point, passed from the Board to the judicial branch.[3]

At the time the Resolution to commence eminent domain proceedings was adopted, it would have been impossible to predict whether the Board's ultimate exposure to judgment was below or above $500,000. Yet the opinion below suggests that the Board must make an

[3]Until an Order of Taking has been entered, the Board may voluntarily dismiss its complaint, but is liable for the costs and fees of the defendant owners, together with possible damages for a "temporary taking".

infallible prophecy of the judgment amount, and adopt the resolution by an extraordinary vote if the judgment amount is prophesied to exceed $500,000. In such a circumstance, does the $500,000 apply to the combined amount for the taking, the severance damages and the business damages, or merely the taking? Does it include or exclude the award of fees and costs?

Clayton has not argued that the commencement of eminent domain proceedings was in any way a subterfuge to avoid the requirements of Fla. Stat. $235.054. Further, the District Court acknowledged that it was not suggesting there was any such intention of the Board. Indeed, the Resolution itself was approved by a supermajority of the Board, prior to the election of two different members at the 1994 election. It would have been prescient indeed for the former Board or its counsel to have hatched such a plot. The trial court specifically found, against every argument and inference raised by Clayton, that the condemnation proceedings were lawful and free of any defect,

The District Court's holding that "the provisions of 235.054(b) apply to any purchase of real property by the Board that is not accomplished by a jury verdict" should be reversed.

III.

FLA. STAT. 235.054 (1995) IS NOT THE EXCLUSIVE AUTHORITY FOR SCHOOL BOARD PURCHASES OF LAND.

Section 235.054 says that when a School Board seeks to acquire *by purchase* any real property for educational purposes, its appraisals, offers a&counteroffers must be in writing and are exempt from the provisions of Fla. Stat. $119.07 (the Public Records Law) until the option is signed, or until 30 days after negotiations terminate. If an option or an unconditional contract is to be presented to the Board for approval, the public records exemption must be lifted 30 days prior to the Board's consideration.

A. WAS FLA. STAT. 235.054 (1984 TO 1994) AN OPTIONAL METHOD OF PURCHASING LAND?

From its initial adoption in 1984, until the 1995 legislative session (which *followed* the actions of which Clayton complained, and also following the final judgment in condemnation and the final judgment in this cause), Fla. Stat. 235.054 stated that *if this procedure is utilized,* the Board must obtain appraisals, and an extraordinary vote is required if a purchase of over $500,000 exceeds the average of two appraisals.

Fla. Stat. $235.054 was first created as a part of Chapter 84-298, Laws of Florida, which was "an act relating to governmental meetings and records." It created §§ 125.355 (for counties), 166.045 (for cities) and 235.054 (for school boards), in virtually identical language. Each of these bodies of local government was given authority to exempt its appraisals, offers and contracts from the public records law until agreement had been reached by the negotiators, subject to final government approval. Cities, counties and school boards were each, by that act, made subject to the requirement of an extraordinary vote *if this procedure was chosen* and a purchase price then exceeded the average of the appraisals.

In Chapter 88-3 15, Laws of Florida, the Legislature said that it was "clarifying the application of [§ 125.3551; providing that the purchase procedure specified therein is alternative to certain other purchase procedures". The staff and committee reports supporting Chapter 88-3 15 echo that intent (Appendix -14-15). The Chapter also amends Fla. Stat. § 166.045 to similar effect.

In Op. Atty. Gen. 90-53, the Attorney General noted the testimony of the Florida League of Cities that the statutes had been unclear as to their effect on other, home rule authority of cities. He opined that in view of the legislature's clarification, $166.045 was not

an exclusive method of acquisition ***by purchase,*** and need not be followed if a city had other statutes or ordinances authorizing a procedure for purchases, and opted not to invoke the public records law exemption authorized by §166.045.

Courts may consider subsequent legislation to determine the intended result of a previously enacted statute. *Ivey* ***v. Chicago*** Ins. Co., 410 So.2d 294 (Fla. 1982); ***Brown v.*** *MRS* ***Manufacturing*** Co., 617 So.2d 758 (Fla. 4th D.C.A. 1993). Chapter 88-3 15 clearly reveals what the legislature's intent was in adopting Chapter 84-298. The intent was, as Fla. Stat. $235.054 plainly puts it, that "*if* this procedure is utilized" ***and*** a city, county or school board seeks to "acquire by purchase" for more than $500,000, ***and*** the price exceeds the average amount of the confidential appraisals, an extraordinary vote may be required to approve an option contract or agreement.

The opinion below says that the Legislature has given to school boards two, and only two, methods of acquiring property: either a voluntary purchase, or a verdict of twelve jurors. The District Court then finds that Fla. Stat. 8235.054 sets forth the exclusive method for voluntary purchases.

Since $235.054 did not exist prior to 1984, then either there was some pre-existent source of authority for purchases, or else purchases were completely unauthorized prior to that date and may now be collaterally challenged by any citizen in mandamus proceedings.

Fla. Stat. §235.23(2)[1983] gives to school boards the power to control property, including the power to "manage and dispose of such property to the best interests of education; contract, sue, receive, ***purchase, acquire by the institution of condemnation proceedings*** *if necessary*". That authority continues without substantial change in the 1995 statutes, Prior to 1984, it was the sole statute which expressly authorized the purchase of school property.

The question thus arises: Did the Legislature intend, by adoption of Chapter 84-298, Laws of Florida, to amend or repeal the pre-existing authority of school boards to acquire property?

Article III, $6 of the Constitution says that "every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The title of Chapter 84-298 reflects only that it is an act relating to governmental meetings and records. Each and every section of that Chapter deals with some aspect of public records or public meetings. If that law is to be construed as also amending the substantive power of school boards to acquire property by purchase, then it violates Article III, §6. But it is unnecessary to give it an unconstitutional construction, as the District Court has inadvertently done. It is sufficient to construe it, as the legislative committees have reported and as the Attorney General has opined, as an optional and alternative method of purchasing under an exception to the public records laws.

B. MAY A SCHOOL BOARD BE COMPELLED, IN MANDAMUS, TO OBEY A 1995 STATUTE AS TO A 1994 ACTION?

The District Court has quoted and apparently relied upon the text of Fla. Stat. $235.054 as it existed after 1995 amendments to Chapter 235, It is plain that Clayton's challenge is to an allegedly void act of the Board occurring on December 13, 1994. The Final Judgment adverse to him was entered on February 15, 1995, before the adoption of the 1995 amendments to the statute. Whether or not the Legislature in 1995 intended substantive changes to the requirements for all voluntary purchases by school boards is beside the point here; the amendment cannot retroactively authorize a collateral attack on a 1994 acquisition.

As the statute existed in 1994, it began with the preface "*if this procedure is utilized*', thus demonstrating that it was optional. If the District Court had considered the statute in the form in which it existed in 1994, its decision may well have been different. It is sufficient to say here that the Board had no "clear legal duty" enforceable by mandamus, to abide by the statute as quoted by the District Court.

IV.

MAY MANDAMUS BE UTILIZED AS A MEANS OF COLLATERAL ATTACK ON AN UNAPPEALED CONDEMNATION JUDGMENT, WHERE THE CONDEMNEE IS NOT JOINED?

In *State ex rel. Lloyd v. City of Ft. Pierce,* 206 So.2d 51 (Fla. 4th D.C.A. 1968), a disgruntled taxpayer had sued for writ of mandamus to compel his city to de-authorize a contract for the employment of special counsel. In its return, the City showed that the contract had been fully performed, the sums due on the contract had been paid, and the litigation for which counsel had been engaged had been finally dismissed. The court held:

> Under these circumstances the following principle stated by the Supreme Court of Florida in County Commissioners of Duval County v. City of Jacksonville, 1895, 36 Fla. 196, 18 So. 339, 29 L.R.A. 416, is applicable: 'The writ of mandamus is a discretionary remedy and, while the courts will apply it in proper cases, they often refuse it when it would be attended by no beneficial results. * * * A peremptory writ of mandamus will not usually issue commanding an officer to do what is not within his power to do, and though, by putting it out of his power to perform a duty, he may become liable in damages, still, where he cannot perform the act, and this is clear to the court, mandamus will not be issued against him.

These circumstances are precisely applicable to the instant case. Here, by virtue of the stipulated order of taking and final judgment which Clayton sought to stop, all sums due the defendant in condemnation have been paid. That judgment is final and unappealable. Clayton

was not a party to it (though he attempted repeated ex parte correspondence with the trial judge), nor are any of the defendants in the condemnation action before this court in this proceeding.

DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957) is directly on point. There, this Court held that mandamus was not available as a means of collateral attack on an order judicial in nature. Similarly, in *Powell v. Civil Service Board of Escambia County,* 154 So.2d 915 (Fla. 1963), the court held that mandamus was not available as a means of untimely and collateral attack on a judicial or quasi-judicial order,

The school now being erected on Site S is one of three schools serving southwest Volusia county, scheduled for completion this summer. An areawide realignment of attendance zones for the new and existing schools has already been adopted, after the Board conducted extensive public hearings under Fla. Stat. $120.54. A contract has been awarded by the Board for the construction of the school on this site.

All of these other parties whose legal or other interests would be affected by Clayton's petition are not parties here. Some are indispensable to these proceedings. Every one of them has a greater claim to legal standing than Clayton does.

CONCLUSION

The certified questions should be answered in the negative. Clayton should be held to lack standing as a petitioner for mandamus, where he has no special injury. In addition, the Court should declare that the District Court erroneously construed the powers and authorities of school boards to settle eminent domain cases, and should reverse the decision of the District Court with instructions to reinstate the Final Judgment of dismissal.

Respectfully submitted,

COBB COLE & BELL

By: C. Allen Watts

C. Allen Watts
FLA. BAR. NO. 139759
150 Magnolia Avenue
Post Office Box 2491
Daytona Beach,FL 32115-2491
Telephone (904) 255-8171
ATTORNEYS FOR PETITIONER
SCHOOL BOARD OF VOLUSIA COUNTY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard S. Graham, Esquire, 543 South Ridgewood Avenue, Daytona Beach, FL 32114, this 18TH day of MARCH, 1996.

C. Allen Watts
Attorney

SUPPLEMENTAL INDEX TO APPENDIX

Appendix Part 1

INTEROFFICE MEMORANDUM

DATE: January 13, 1994

TO: Joan P. Kowal
Superintendent of Schools

FRO@!:..- Oat Drago, Interim Executive Director
Facilities Services

RE: Site for New Elementary School "S"

==========

Attached is information on the sites reviewed for potential location of new Elementary School "S", which is planned to relieve overcrowding at Orange City Elementary and Enterprise Elementary schools. Site acquisition, planning, and construction are funded through the 1991 Certificates of Participation Issue.

The site search was initiated in 1991, in the general geographic area of southwest Volusia, south of Blue Springs Avenue, North of Highbanks Road, west of **I-4 with the** student population coming primarily from the DeBary area. Within the search area transportation access and utility services are concerns.

Site #1: The Threadgill property has several constraints. In selecting a 20 acre portion of the 114 acre whole, we sought to Locate the farthest distance from Orange City Elementary along the southeast corner or in the center with frontage on Sparkman. Although maps show Sparkman as a road, most of the roads shown in that area currently exist as sandy ruts. Sparkman is no exception. It has the additional obstacle of a deep depression in the right of way. The city and the county discourage directing school traffic here. There were also environmental considerations that were encountered on this site and several others nearby.

Site #2: The Martin property *has the* same environmental limitarions as Site #1 and poor connection to 17-92 on the east. Until a new north-south corridor is constructed 17-92 will be the primary transportation route for most students.

Site #3: The Cleveland property is located in the same general area but does have east-west connections via Dogwood Avenue and Holly Drive direct to 17-92. This site abuts existing residential development. The sketch indicates an area larger than 100 acres. A 20 acre site could be parceled off.

Connection to central wastewater collection and potable water is available at all three of these sites by line extension to the 17-92 corridor. None of the five sites are served by pedestrian or bicycle facilities.

Site #4: The Root property on Miller Road has severe limitations on access. Miller Road is a dedicated right of way but with no secondary access. Utility connection would be to a line along 17-92 north of Miller Road.

Site #5: Is equidistant from Enterprise Elementary and Orange City Elementary which is ideal. However, it is located in an area of intense commercial development and high traffic. The completion of the Saxon interchange will only increase traffic in this area. It is not recommended as an elementary school location.

Site #6: This site is located in the DeBary Gulf and County Club on the north side of Highbanks Road with approximately 1,100 feet frontage. Secondary access would be provided by constructing a road to the north on the west boundary.

Several concerns would be addressed in planning a school on this site: distance from power transmission lines., connection to central wastewater, securing necessary water pressure.

The availability Of services is very limited within the entire search area. The need to improve services in this area of rapid growth is reflected on the county's capital improvement plan. For example, the installation of a 16" water line along Highbanks Road is scheduled for 1997. There are plansfor a major beltline parallel to ii-52 that will link DeBary and Orange City within 15 years. The County has a wastewater plant in the area with connection required for the undeveloped poreicn of DeBary Golf & County Club.

In selecting a site for a future elementary school two criteria are most critical. First, is its location in relation to current and future residential growth. Second, is the safety Of students whether arriving by vehicle, bicycle or foot. Site #6 best meets these two criteria.

To expedite site acquisition and school construction the site planning and determining the final configuration wi11 be done in close coordination with the architect, civil engineer and staff. Concurrent with this work, appraisals will be conducted to determine fair market value.

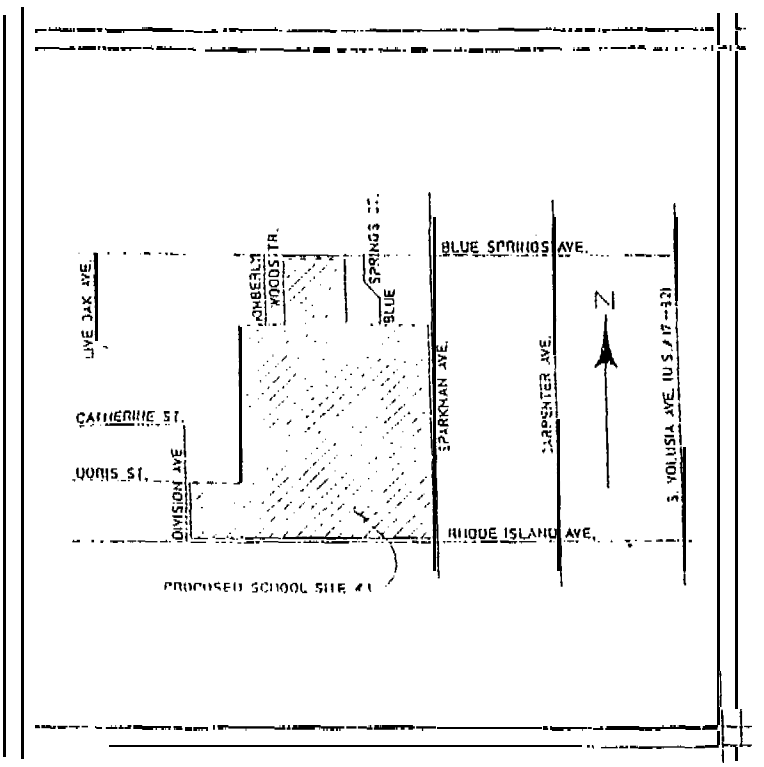
Recommendation: Select site #6 as the future site for New Elementary School "S" with agreement that final conficuration and an agreement for sale and purchase will be considered at a future board meeting.

PD/ls

Attachments

cc: School Board Members
Lee Britton
John Hossfield
Fred Miller
Tom Orloff
C. Allen Watts

EVALUATION OF SCHOOL SITE
SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
NEW ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE #1

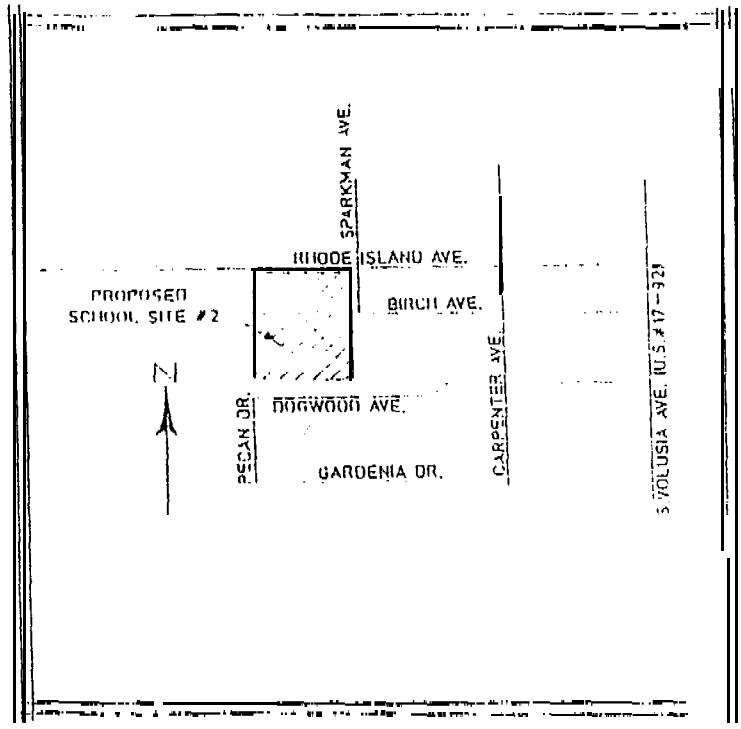


LOCATION :	West of Sparkman Road, north of W. Rhode Island lying south of Orange City.
ACREAGE :	114.5 acres total.
PARCEL NO.	8015-00-00-0020
LEGAL DESCRIPTION:	The Southwest quarter of Section 10, to be described more particularly later.
EASEMENTS:	Unknown at this time.
DEED RESTRICTIONS:	None.
TOPOGRAPHICAL:	Gently rolling, heavily wooded terrain. There are 15 to 20 changes in grade with 4 mean high elevation of 50 to 70 feet above sea level. The trees are typical of Florida scrub habitat with oaks and sand pines. No portion is in a flood prone area.
SOIL SURVEY:	This site consists predominately of Paola fine sand, an excessively drained deep sandy soil that occurs on-nearly level to moderately steep uplands. There are small areas of Orsino fine sand and Astatula fine sand which have similar properties. All soils have a high potential for development with limitations on landscaping due to extreme sandiness. A program of fertilizer and Lawn management will be required for playfields.
UTILITIES:	Central water and sewer service availability will need to be confirmed.

STREETS: This site fronts on an unpaved segment of Sparkman Avenue, a two way local street which runs north and south parallel to 17-92. Transportation corridors to the east or west are very limited or non-existent. unpaved at this point.

(Threadgill Property)

EVALUATION OF SCHOOL SITE
SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
NEW ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE #2

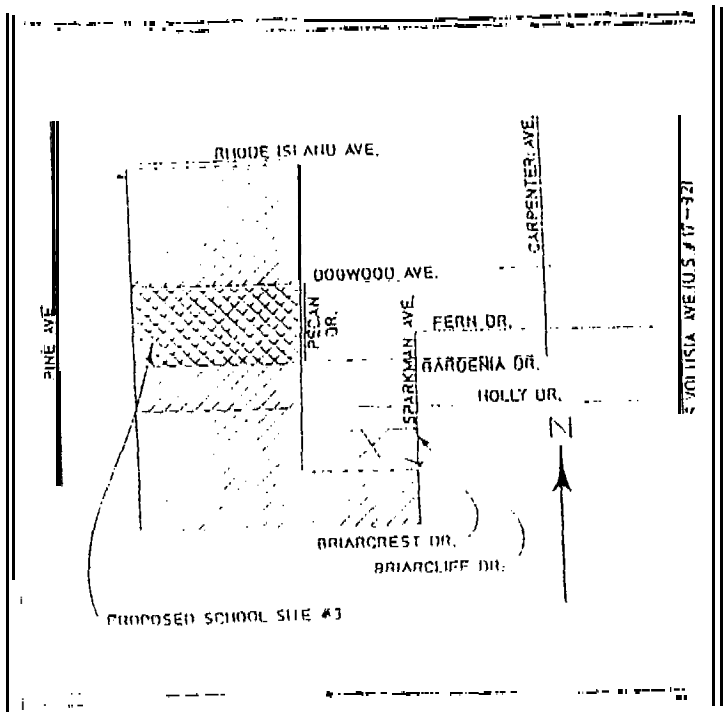


LOCATION:	West of Sparkman Ave. if constructed, south of W. Rhode Island and north of Dogwood Avenue, lying south of Orange City.
ACREAGE:	30 acres, can be sold in 10 acre parcels
PARCEL NO.:	8015-00-00-0200, 8015-00-00-0202, 8015-00-00-0201
LEGAL DESCRIPTION:	A portion of Section 15, to be described later.
EASEMENTS:	Unknown at this time
DEED RESTRICTIONS:	None
TOPOGRAPHICAL:	This heavily wooded site contains several sharp changes in grade from 10 to 35 feet. There are two mirror depressions and a major one affecting approximately one third of the site. Vegetation is typical of Florida sand scrub habitat heavily populated by pine and oak.
SOIL SURVEY:	This site consists almost totally of Astatula fine sand, an excessively drained, nearly level to steep soil with a high potential for development. Development of play fields and landscaping will require the application of top soil and a program of periodic maintenance due to the extremely sandy soil.
UTILITIES:	Central water and sewer availability

STREETS: Connection could be made with Sparkman Avenue and Pecan Drive, both are Local streets with limited access to major transportation corridors.

(Martin Property)

EVALUATION OF SCHOOL SITE
SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
NEW ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE #3



LOCATION: The property is found at the westerly termination of Dogwood Ave., West Fern Dr., Gardenia Dr., Holly Dr., and Briarcrest Drive, lying south of W . Rhode Island, if extended, in the city of Orange City.

ACREAGE: 160± acres, which can be subdivided for a 20 acre parcel.

PARCEL NO.: 801 j-00-00-0280, 8015-00-00-0 1.80

LEGAL DESCRIPTION: A portion of Section 15 to be more particularly described later.

EASEMENTS: None known at this time

DEED RESTRICTIONS: None

TOPOGRAPHICAL: This is a heavily wooded property with changes in elevation and four natural depressions. The deepest depression appears to be 15 feet above sea level with the highest elevation at 50 feet above sea level.
No portion of the site is in the flood plain. The vegetation is typical of Florida scrub consisting of oak and pine with a heavy understory.

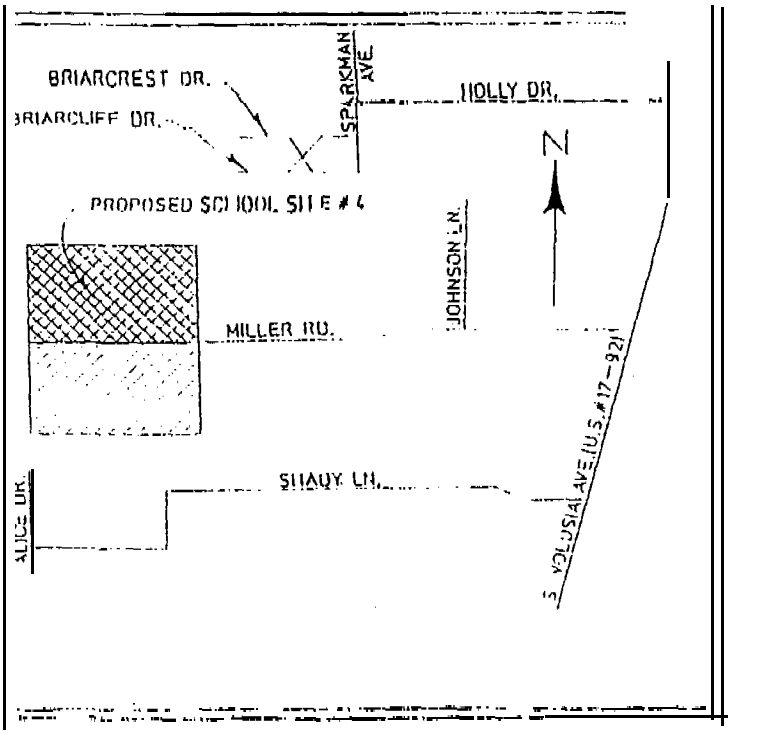
SOIL SURVEY: This site consists primarily of Paola fine sand, an excessively drained sandy soil occurring on level and nearly level steep uplands with a high potential for development. A small portion of the site contains Astatula fine sand with properties similar to Paola.
Application of top soil and a program of

UTILITIES: Central sewer and water availability will need to be determined.

STREETS: This site has connections to the five streets listed showing the location. All are paved local streets leading east that connect with corridors to the nor-th and south.

(Flack Cleveland property)

EVALUATION OF SCHOOL SITE
SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
NEW ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE #4



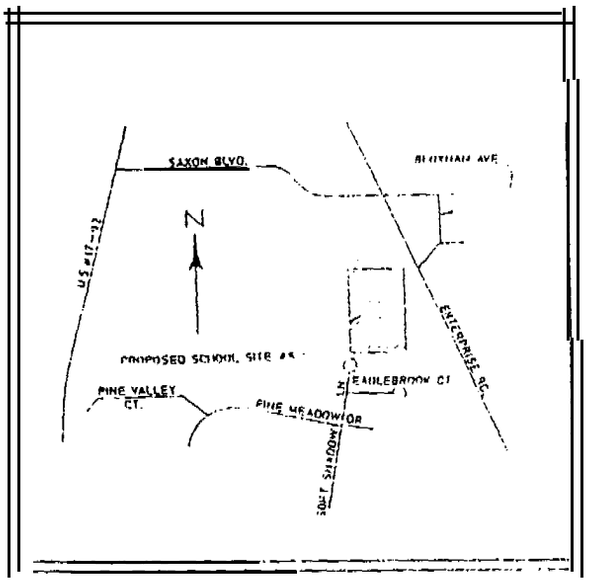
LOCATION:	At the western termination of Miller Road just south of the southwestern boundary of Orange City.
ACREAGE:	40± acres which my be divided into a 20 acre parcel.
PARCEL NO.:	8015-00-00-0191
LEGAL DESCRIPTION:	A portion of Section 15 to be more particularly described later.
EASEMENTS:	None known at this time
DEED RESTRICTIONS:	None
TOPOGRAPHICAL:	The northern portion is gently sloping while the southern one half gradually slopes to the east abutting a depressional area. The site is mostly wooded with vegetation typical of Florida scrub, oak and pine. The elevation is at a high of 50 feet on the north to a low of 30 feet in the southeast. No portion is in the flood plain.
SOIL SURVEY:	This site consists primarily of Paola fine sand, an excessively drained sandy soil that occurs on nearly level to moderately steep uplands. Paola sand has a high potential for development with an application of top soil and a program of regular maintenance required for play fields and landscaping. The southeast corner of this site contains Myakka fine sand indicative of the

UTILITIES: The availability of central water and wastewater treatment will have to be confirmed.

STREETS: This site has access on Miller Road a county maintained road with prescriptive rights only. Miller Road connects with S.R.17-92 south of the junction with Enterprise Road.

(Root Property)

EVALUATION OF SCHOOL SITE
SCHOOL DISTRICT OF VOLUSIA COUNTY, FLORIDA
NEW ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE # 5



LOCATION:	South of Glen Abbey Marketplace, east of S.R. 17-92, west of Enterprise Road.
ACREAGE:	20 acres, zoned residential
PARCEL NO:	Parent parcel number is 8023-00-00-0120
LEGAL DESCRIPTION:	The following lands in Section 23, Township 18 South, Range 30 East, Volusia County, Florida: The South 52 feet of the West 1/2 of the Northeast 1/4 of the Southwest 1/4 AND all of the West 1/2 of the Southeast 1/4 of the Southwest 1/4, excepting therefrom the North 300 feet of the South 1100 feet of the East 217.8 feet of the West 435.6 feet thereof, and excepting the North 100 feet of the South 300 feet of the East 217.8 feet of the West 653.4 feet thereof, and excepting the South 200 feet of the East 217.8 feet of the West 435.6 feet thereof, and excepting the North 100 feet of the South 1400 feet of the West 217.8 feet thereof, less and except the following: North 100 feet of the South 200 feet East 217.80 feet of the W653.4 feet of the West 1/2 of the East 1/2 of the Southwest 1/4 in Section 23, Township 18 South, Range 30 East.
EASEMENTS:	None known at this time
DEED RESTRICTIONS:	Several interior out parcels remaining to assemble piece. These would be acquired during option period.
TOPOGRAPHICAL:	This neatly level site has a mean high elevation of approximately 75 to 80 feet above sea level. This heavily wooded site is covered by typical Florida scrub vegetation, pine,

oak with an understory. No portion of this site is in the flood plain.

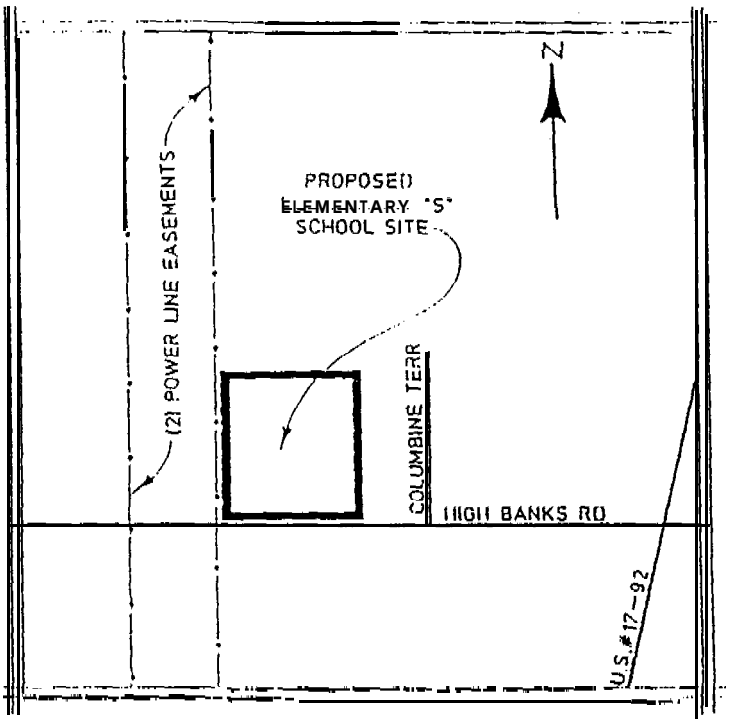
SOIL SURVEY: This site consists solely of Orsino fine sand, a deep, moderately well-drained sandy soil. on nearly level to gently sloping flat ridges with a high potential for development. This soil will require a regular program of management for play fields and Landscaped areas.

UTILITIES: Central water and wastewater treatment are available to this site.

STREETS: This site has access via soft Soft Shadow Lane into Glen Abbey and the possible extension of Commed Boulevard west from Enterprise. Road may provide second access point.

(Glen Abbey multi-family property)

EVALUATION OF SCHOOL SITE
SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA
N R W ELEMENTARY SCHOOL "S"
ORANGE CITY/DEBARY AREA
SITE #6



LOCATION:	This site lies on the north side of Highbanks Road, 8/10th of a mile west of Highway 17-92. In the town limits of DeBary.
ACREAGE:	15+/- acres
PARCEL NO.:	8028-00-00-0060
LEGAL DESCRIPTION:	Southwest corner of Section 28, Township 18, Range 30. To be described more particularly later.
EASEMENTS:	None known at this time.
DEED RESTRICTIONS:	This property is a part of DeBary Golf and Country Club Planned Unit Development.
TOPOGRAPHICAL:	This site has a gently rolling, heavily wooded terrain. The elevations range from a small depressed area of 65 feet above sea level to an area at 84 feet above sea level. This is typical Florida scrub habitat with oaks and sand pines dominating the area. No portion of this site lies in a flood prone area.
SOIL SURVEY:	This site consists of three (3) similar types of soils, Apopka fine sand, Orsino fine sand and Paola fine sand. All of these soils are well drained soils that occur in nearly level to steep slopes. These soils have a high to very high potential for development with limitations on landscaping areas due to the sandiness. A program of fertilizer and management will be needed for playfields.

UTILITIES: It will be necessary to install a lift station and approximately 6,000 ft. of force main to connect to central wastewater treatment. There is an 8" water line fed by a 6" line in front of the site. It will be necessary to determine adequate pressure for fire flows.

STREETS: The property fronts on West Highbanks Road, a paved two lane street. Highway 17-92 is the only north-south corridor, at this time.

Appendix Part 2

COBB COLE & BELL
Daytona Beach, Florida

June 23, 1994

MEMORANDUM

TO: **Members of the School** Board of Volusia County

FROM: C. Allen Watts

RE: Acquisition of Elementary site "S"

Ms. Drago, Ms. Morrissey and I have met with the owners of the recommended site for Elementary School S in DeBary and have presented the owners with an offer of purchase. No response has been received.

The Board has previously indicated its preference for that site. and has rejected one alternate site. The Board now has the power to proceed to authorize condemnation of the sire. and we have prepared a resolution to that end.

According to the decision *in School Board of Broward County v. Viele*, 459 So.2d 354 (Fla. 4th D.C.A. 1984), the Board should consider in its resolution the following:

1. Availability of an alternate site.

2. cost

3. Environmental factors

4. Long-range area planning

5. Safety considerations

It is our recommendation that the attached resoiurion be approved. With respect to alternate sites. the record will reflect -&at the board considered a number of alternates and in fact rejected the first recommended site for this school. With respect to costs. our appraisals indicate that the subject site should be n-eared as land suitable for development but not ye: platted. Ms. Drago's office has conducted preliminary environmental and soil tests with the consent of the owners. and the site is suitable for our purposes. It further meets our long-range planning for the DeBary community in that it provides a school with a substantial walk zone from existing neighborhoods west of U.S. 17-92. and is superior to other sites in that regard. It is located nearer the center of the likely popuiation growth in this community than the alternate sites. With respect to safety. it appears that the site is superior to the alternatives in that a larger percentage of the two-mile walk zone can reach this site without crossing a major thoroughfare.

Appendix Part 3

RESOLUTION NO, 94- 0 7

A RESOLUTION AUTHORIZING EXERCISE OF THE VOLUSIA COUNTY SCHOOL BOARD'S POWER OF EMINENT DOMAIN FOR THE PURPOSE OF ACQUIRING PROPERTY FOR THE CONSTRUCTION OF ELEMENTARY SCHOOL "S"

WHEREAS, pursuant to Fla. Stat. § 235.05, the Volusia County School Board has the power and authority to take private property for any public school purpose and use when, in the opinion of the school board, such property is needed for public purposes; and

WHEREAS, the Volusia County School Board, due to the fact that the Southwest portion of Volusia County has experienced and will continue to experience dramatic and sustained growth, has planned to construct a new elementary school in Southwest Volusia County; and

WHEREAS, the Volusia County School Board has considered and weighed the following: (1) availability of an alternative site; (2) costs; (3) environmental factors; (4) long-range area planning; and (5) safety considerations; and

WHEREAS, the acquisition of private land described on Exhibit **"A"** attached hereto, is necessary to have a site on which to build the new elementary school as referenced above; and

WHEREAS, the School Board has attempted unsuccessfully to negotiate the purchase of the proposed site and has rejected alternative sites; and

WHEREAS. at a regular meeting on June 28. 1994, the Volusia County School Board. determined that it is necessary to the public interest to acquire said lands and utilize the same

for the public purpose of the construction of a new elementary school, and found and determined that it was necessary for effective operation of the public school system in the Volusia County School District to acquire the properties herein described.

NOW, THEREFORE, BE IT RESOLVED BY THE SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA:

SECTION ONE. That the foregoing recitals are incorporated in the body of this resolution as if set forth verbatim; and, the Volusia County School Board finds that the acquisition of the property described on Exhibit "A" attached hereto, said exhibit being incorporated herein by reference as if set forth verbatim, is necessary to the construction of a new elementary school. The School Board further finds that the planned new school constitutes a valid public purpose, and that the taking of the said private property is necessary for the benefit of the citizens of the County of Volusia.

SECTION TWO. That the officers, employees, attorneys, and agents of the Volusia County School Board be and each of them are hereby authorized for and on behalf of the School Board to acquire by negotiation, contract, eminent domain proceedings, or otherwise, ownership of the property described on Exhibit "A" attached hereto, for the purposes hereinabove described.

SECTION THREE. The School Board directs that a certified copy of this Resolution be filed with the Clerk of the Circuit Court of Volusia County, Florida.

SECTION FOUR. That this Resolution shall take effect immediately upon its adoption.

APPROVED AND **AUTHENTICATED,** this 28th **day** of June, 1994.

SCHOOL BOARD OF VOLUSIX COUNTY

WITNESS

By: _____
JEFFREY D. TIMKO, CHAIRPERSON

DATED: June 28, 1994

Readopted August 30, 1994, to reflect revised legal description.

STEINMAN SURVEYING, INC.
professional land surveyors

REVISED LEGAL DESCRIPTION FOR ELEMENTARY SCHOOL "S" AND 100 FT. ROAD RIGHT OF WAY

SCHOOL SITE DESCRIPTION

THAT PART OF THE SOUTHEAST 1/4 OF SECTION 28, TOWNSHIP 18 SOUTH, RANGE 30 EAST, VOLUSIA COUNTY, FLORIDA, DESCRIBED AS FOLLOWS: COMMENCING AT THE SOUTHWEST CORNER OF THE SOUTHEAST 1/4 OF SAID SECTION 28, RUN THENCE N89°55'13"E ALONG THE SOUTH LINE THEREOF A DISTANCE OF 100 FEET; THENCE N00°24'12"W PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 42 FEET TO A POINT ON ME NORTH RIGHT OF WAY LINE OF HIGHBANKS ROAD, SAID POINT BEING THE **POINT OF BEGINNING;** THENCE CONTINUE N00°24'12"W PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE Of 969.52 FEET; THENCE N79°25'28"E A DISTANCE OF 233.58 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 253.63 FEET; THENCE N89°55'13"E PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 246.82 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION, 28, A DISTANCE OF 84.87 FEET; THENCE N89°55'13"E PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 185.22 FEET TO THE WEST LINE OF A GOLF COURSE EASEMENT DESCRIBED IN OFFICIAL RECORDS BOOK 3782, PAGE 2899, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA; THENCE S00°33'47"W ALONG SAID WEST LINE A DISTANCE OF 47.56 FEET TO ME SOUTH LINE OF SAID GOLF COURSE EASEMENT; THENCE S87°03'28"E ALONG SAID SOUTH LINE A DISTANCE OF 191.17 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 615.93 FEET TO THE NORTH RIGHT OF WAY LINE OF SAID HIGHBANKS ROAD; THENCE S89°55'13"W ALONG SAID RIGHT OF WAY LINE BEING PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 852.0 FEET TO THE POINT OF BEGINNING; SAID PARCEL CONTAINING 15.10 ACRES, MORE OR LESS.

ROAD RIGHT OF WAY DESCRIPTION

THE WEST 100 FEET OF THE NORTHEAST 1/4 AND THE WEST 100 FEET OF THE SOUTHEAST 1/4 OF SECTION 28, TOWNSHIP 18 SOUTH, RANGE 30 EAST, VOLUSIA COUNTY, FLORIDA.

delegation to propose a special act calling for a referendum. Mr. Watts advised the board that a charter amendment must be approved at a county general election. In order to avoid waiting until the nest scheduled general election in November 1996 or in an effort to avoid the additional costs in calling a general election sooner, it was decided to meet the deadline for the 1994 ballot. Following board discussion, Ms. McFall moved that the board authorize the board chairperson to submit a letter to the chairperson and members of the County Council requesting that the County Council adopt a resolution at their September 15, 1994, meeting placing the question of nonpartisan elections fcr school board members on the November 8, 1994, ballot. The following sentence would be added to Section 904, Nonpartisan Elections, of the Volusia County Charter, "School Board members elected after January 1, 1995, shall be elected on a nonpartisan basis in the manner provided in Section 901.13 of the Charter." Ms. Conte seconded the motion which carried unanimously.

Mr. Allen Watts, consulting board attorney, explained that the site for proposed Elementary "S" in DeBary, which was previously adopted in School Board Resolution 94-07, had been resurveyed and now will not encroach upon the DeBary Country Club. Mr. Ross moved that the board approve and adopt the revised Resolution 94-07 for the purpose of amending the legal description of proposed Elementary "S," DeBary. Ms. McFall seconded ehe motion which carried unanimously.

Ms. Conte moved that the board approve the following consent agenda:

Department for Program Development Services

1. Approved submitting to the Department of Education a grant application requesting PECO funds for Full Service Schools for the 1994-95 school year in the total amount of $265,000.00.

2. Approved entering into an agreement between the School Board of Volusia County and the Florida Department of Education providing for the participation of district migrant students in the national Portable Assisted Study Sequence (PASS) services for the 1994-95 school year, as presented and to be recorded as number 1343 in the Supplemental Minute Book for Agreements.

Curriculum and School Improvement Services

Approved a field study request for 15 participating varsity cheerleaders from Seabreeze High School to cheer and perform in the Sugar Bowl half-time show in New Orleans, Louisiana, from December 29, 1994 to January 2, 1995.

Department for Personnel

Approved the listed instructional, support and managerial/non-unit personnel appointments, transfers, leaves of absence, resignations, and reappointments, as presented and to be recorded in the Supplemental Minute Bock for Personnel. All vacant positions outside of the classroom and not directly related to student health and safety are subject to intensive review prior to being filled.

Appendix Part 4

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO.
DIVISION

SCHOOL BOARD OF VOLUSIA COUNTY,

Petitioner,

v.

DEBARY ESTATES ASSOCIATES, LTD., a Florida Limited Partnership MAGNOLIA SERVICE CORPORATION, DEBARY COUNTRY CLUB REALTY, INC., COUNTY OF VOLUSIA, CITY OF DEBARY, and FLORIDA POWER CORPORATION,

Respondents.

PETITION IN EMINENT DOMAIN

Petitioner, SCHOOL BOARD OF VOLUSIA COUNTY ("SCHOOL BOARD"), sues Defendant, DEBARY ESTATES ASSOCIATES, LTD. ("DEBARY ESTATES"), MAGNOLIA SERVICE CORPORATION, DEBARY COUNTRY CLUB REALTY, INC., COUNTY OF VOLUSIA, CITY OF DEBARY, and FLORIDA POWER CORPORATION and alleges:

1. This is an action in eminent domain to condemn certain property located in Volusia County, Florida.

2. SCHOOL BOARD is the duly constituted district school board for Volusia County, Florida, pursuant to Chapter 230 of the Florida Statutes.

3. SCHOOL BOARD is exercising its right to eminent domain by virtue of the authority granted to it by Fla. Stat. $235.05, as amended.

4. SCHOOL BOARD, pursuant to Fla. Stat. $73.0511, has notified the fee owner defendants of their rights under Fla. Stat. $73.091, concerning payment of costs and fees. SCHOOL BOARD has also notified the Department of Environmental Protection, pursuant to Fla. Stat. §373.023(3).

5. The property is being acquired for construction and use as a public school and is necessary for that use.

6. The SCHOOL BOARD has made a diligent search and inquiry to discover the names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, lienholders, persons in possession and all persons having or claiming any interest in said property. These parties are as follows:

DEBARY ESTATES ASSOCIATES, LTD.
7241 SW 168 Street
Miami, FL 33157

MAGNOLIA SERVICE CORPORATION
245 Peachtree Center Avenue
Suite 1100
Atlanta, GA 30303

DEBARY COUNTRY CLUB REALTY, INC.
100 DeBary Plantation Boulevard
DeBary, FL 32713

COUNTY OF VOLUSIA
c/o Daniel D. Eckert, County Attorney
123 West Indiana Avenue
DeLand, FL 32720-46 13

dropped

CITY OF DEBARY
c/o C. Allen Watts, City Attorney
Post Office Box 2491
Daytona Beach, FL 32115-249 1

dropped

FLORIDA POWER CORPORATION
3201 34th Street, South
St. Petersburg, FL 33711

All other persons and parties having or claiming to have any right, title or interest in the property described in these proceedings, and the legal disabilities of any such parties, if any, are unknown to petitioner.

7. There are no mobile homes located on the property sought to be acquired in these proceedings.

8. The SCHOOL BOARD has surveyed and located its line or area of construction and intends, in good faith, to construct this elementary school on or over the property described in Exhibit A.

9. The interest or estate sought to be condemned by these proceedings is fee simple title, as more specifically described in Exhibit A.

10. The SCHOOL BOARD has passed an appropriate resolution determining the necessity to exercise the power of eminent domain to condemn the property interests described in Exhibit A for the public purpose of constructing a new elementary school to accommodate the growth of the population in Southwest Volusia County. This resolution recognizes the public purpose of alleviating the demands placed on the existing schools by constructing a new school in Southwest Volusia County, and authorizes the condemnation of the necessary property. A copy of the resolution is attached to this petition as Exhibit B. By action at its regular meeting of August 30, 1994, petitioner re-adopted Resolution 94-07 to revise the legal description of the parcel to be taken to that as shown in Exhibit A. A copy of the minutes of the August 30 meeting is attached to this petition as Exhibit C.

11. Defendant, MAGNOLIA SERVICE CORPORATION, may claim some interest in the property described in Exhibit A by reason of that certain mortgage recorded in OR 3782, page 2920 of the Public Records of Volusia County, Florida, an Assignment of Rents, Leases and Profits recorded in OR 3782, page 2964, of the Public Records of Volusia County, Florida,

and a Financing Statement recorded in OR 3782, page 2981, of the Public Records of Volusia County, Florida.

12. DEBARY COUNTRY CLUB REALTY, INC., a Florida corporation, may claim some interest in the property described in Exhibit A by reason of that certain Exclusive Right of Sale Listing Agreement recorded in OR 3873, page 2228 of the Public Records of Volusia County, Florida.

13. The COUNTY OF VOLUSIA may assert some interest in the parcel described in Exhibit A by reason of the reservation of a 100' right of way on the PUD map for DEBARY ESTATES, being that portion of the parcel described as "Right of Way Description" on Exhibit A. Further, there may exist outstanding real property taxes or other liens in favor of the County as to the subject property.

14. CITY OF DEBARY may assert some interest in the parcel described in Exhibit A by reason of the reservation of a 100' right of way on the PUD map, being that portion of the parcel described as "Right of Way Description" on Exhibit A. Further, there may exist outstanding real property taxes or other liens in favor of the City as to the subject property.

15. FLORIDA POWER CORPORATION may assert some interest in the parcel described in Exhibit A by reason of a 100' power line easement as recorded in Deed Book 532, page 445, and by reason of an ingress and egress easement recorded in OR 1558, page 20, of the Public Records of Volusia County, Florida,

16. The SCHOOL BOARD has performed all conditions precedent to the filing of this action.

WHEREFORE, the SCHOOL BOARD demands that:

A. The property described in this petition be condemned and taken by the SCHOOL BOARD for the uses and purposes set forth in this petition, and that the interest sought by the

SCHOOL BOARD in this property be vested in the SCHOOL BOARD OF VOLUSIA COUNTY.

B. A jury be empaneled to assess what compensation shall be made to DEBARY ESTATES for the properties sought to be appropriated.

COBB COLE & BELL

By: _____

J. LESTER KANEY
FLA. BAR NO. 156553
150 Magnolia Avenue
Post Office Box 2491
Daytona Beach, FL 32115-2491
(904) 255-8171
ATTORNEYS FOR SCHOOL BOARD

DATED: Sept 13, 1994

**REVISED LEGAL DESCRIPTION FOR ELEMENTARY SCHOOL "S"
AND 100 FT. ROAD RIGHT OF WAY**

SCHOOL SITE DESCRIPTION

THAT PART OF THE SOUTHEAST 1/4 OF SECTION 28, TOWNSHIP 18 SOUTH, RANGE 30 EAST, VOLUSIA COUNTY, FLORIDA, DESCRIBED AS FOLLOWS: COMMENCING AT THE SOUTHWEST CORNER OF THE SOUTHEAST 1/4 OF SAID SECTION 28, RUN THENCE N89°55'13"E ALONG THE SOUTH LINE THEREOF A DISTANCE OF 100 FEET; THENCE N00°24'12"W PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 42 FEET TO A POINT ON THE NORTH RIGHT OF WAY LINE OF HIGHBANKS ROAD, SAID POINT BEING THE POINT OF BEGINNING; THENCE CONTINUE N00°24'12"W PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 969.52 FEET; THENCE N79°25'28"E A DISTANCE OF 233.58 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 253.63 FEET; THENCE N89°55'13"E PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 246.82 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 84.87 FEET; THENCE N89°55'13"E PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 185.22 FEET TO THE WEST LINE OF A GOLF COURSE EASEMENT DESCRIBED IN OFFICIAL RECORDS BOOK 3782, PAGE 2899, PUBLIC RECORDS OF VOLUSIA COUNTY, FLORIDA; THENCE S00°33'47"W ALONG SAID WEST LINE ADISTANCE OF 47.56 FEET TO THE SOUTH LINE OF SAID GOLF COURSE EASEMENT; THENCE S87°03'28"E ALONG SAID SOUTH LINE A DISTANCE OF 191.17 FEET; THENCE S00°24'12"E PARALLEL WITH THE WEST LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 615.93 FEET TO THE NORTH RIGHT OF WAY LINE OF SAID HIGHBANKS ROAD; THENCE S89°55'13"W ALONG SAID RIGHT OF WAY LINE BEING PARALLEL WITH THE SOUTH LINE OF THE SOUTHEAST 1/4 OF SAID SECTION 28, A DISTANCE OF 852.0 FEET TO THE POINT OF BEGINNING; SAID PARCEL CONTAINING 15.10 ACRES, MORE OR LESS.

ROAD RIGHT OF WAY DESCRIPTION

THE WEST.100 FEET OF THE NORTHEAST 1/4 AND THE WEST 100 FEET OF THE SOUTHEAST 1/4 OF SECTION 28, TOWNSHIP 18 SOUTH, RANGE 30 EAST, VOLUSIA COUNTY, FLORIDA.

EXHIBIT A

RESOLUTION NO. 94-07

A **RESOLUTION AUTHORIZING** EXERCISE OF THE **VOLUSIA** COUNTY SCHOOL BOARD'S POWER OF EMINENT DOMAIN FOR THE PURPOSE OF **ACQUIRING** PROPERTY FOR THE CONSTRUCTION OF ELEMENTARY SCHOOL **"S"**

WHEREAS, pursuant to Fla. Stat. § 235.05, the Volusia County School Board has the power and authority to take private property for any public school purpose and use when, in the opinion of the school board, such property is needed for public purposes; and

WHEREAS, the Volusia County School Board, due to the fact that the Southwest portion of Volusia County has experienced and will continue to experience dramatic and sustained growth, has planned to construct a new elementary school in Southwest Volusia County; and

WHEREAS, the Volusia County School. Board has considered and weighed the following: (1) availability of an alternative site; (2) costs; (3) environmental factors; (4) long-range area planning; and (5) safety considerations; and

WHEREAS, the acquisition of private land described on Exhibit "A" attached hereto, is necessary to have a site on which to build the *new* elementary school as referenced above; and

WHEREAS, the School Board has attempted unsuccessfully to negotiate the purchase of the proposed site and has rejected alternative sites; and

WHEREAS, at a regular meeting on June 28, 1994, the Volusia County School Board, determined that it is necessary to the public interest to acquire said lands and utilize the same

EXHIBIT B

for the public purpose of the construction Of a new elementary school, and found and determined that it was necessary for effective operation of the public school system in the Volusia County School District to acquire the properties herein described.

NOW, THEREFORE, BE IT RESOLVED BY THE SCHOOL BOARD **OF VOLUSIA** COUNTY, **FLORIDA:**

SECTION ONE. That the foregoing recitals are incorporated in the body of this resolution as if set forth verbatim; and, the Volusia County School Board finds that the acquisition of the property described on Exhibit "A" attached hereto, said exhibit being incorporated herein by reference as if set forth verbatim, is necessary to the construction of a new elementary school. The School Board further finds that the planned new school constitutes a valid public purpose, and that the taking of the said private property is necessary for the benefit of the citizens of the County of Volusia.

SECTION TWO. That the officers, employees, attorneys, and agents of the Volusia County School Board be and each of them are hereby authorized for and on behalf of the 'School Board to acquire by negotiation, contract, eminent domain proceedings, or otherwise, ownership of the property described on Exhibit "A" attached hereto, for the purposes hereinabove described.

SECTION THREE. The School Board directs that a certified copy of this Resolution be filed with the Clerk of the Circuit Court of Volusia County, Florida.

SECTION FOUR. That this Resolution shall take effect immediately upon its adoption.

APPROVED AND AUTHENTICATED, this 28th day of June, 1994.

SCHOOL BOARD OF VOLUSIA COUNTY

By: _____
JEFFREY L. TIMKO, CHAIRPERSON

DATED: June 28, 1994

MINUTES

THE SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA

REGULAR SESSION

August 30, 1994

The School Board of Volusia County, Florida, met in regular session on Tuesday, August 30, 1994, in the DeLand Administrative Complex, 200 North Clara Avenue, DeLand, Florida, with Dr. Joan P. Kowal, superintendent; Mr. Tom Hart, consulting board attorney, (Mr. C. Allen Watts substituting at approximately 11:30 p-m.); and the following school board members present:

Dr. Jeff Timko, Chairperson
Ms. Ann E. McFall, Vice Chairperson
Mr. William L. Ross, Jr.
Ms. Judy Conte
Mr. Earl C. McCrary.

The meeting was called to order at 9:00 a.m. and opened with the Pledge of Allegiance to the Flag, followed by comments from Mr. Ross regarding the district Vision Statement.

Ms. McFall moved that the board approve the minutes of the following sessions with the corrections listed below:

Executive Session	August 16, 1994
Regular Session	August 16, 1994

To page 9 of the minutes of the Regular School Board Meeting of August 16, 1994, add the following to the consent agenda portion: "Approval of an agreement for Smartstream Decision Support Software, as presented and to be recorded as number 1841 in the Supplemental Minute Book for Agreements." This item was inadvertently omitted from the minutes.

Ms. McFall seconded the motion to approve the minutes, as amended, which carried unanimously.

At the recommendation of the superintendent, Mr. McCrary moved that the board approve the printed agenda with the following changes:

1. Delete item number 10. "Expulsions-~ This item was deleted because there are no expulsions for this meeting. The chairperson found this item to be deleted for good cause.

EXHIBIT C

2. Move item 6, "Discussion of a Charter Amendment for nonpartisan School Board elections," to item 10.

3. Add as an emergency item 10.a. "Approval of readoption of Resolution 94-07 for purposes of amending the legal description for proposed Elementary "S," in DeBary.

4. Add as an emergency item, new item 6, "Discussion of adjusted schedule for Trimester I at Pine Ridge High School." This item was added to announce the schedule for students to the community in a timely manner.

The chairperson finds these two items to be added for good cause. MS. McFall seconded the motion to approve the agenda, as amended, which carried unanimously.

During the time reserved for the superintendent's comments, the following notes were made:

1. 'Working collaboratively with the Supervisor of Elections, two Volusia County Schools, Sunrise and Indian River elementaries, have been designated as polling sites for the 1994 general elections, which begin with the primary on September 8th.

2. The first day student membership for 1994 was 51,723 students, which is an increase of 1,872 students over the first day last year and is equivalent to an additional high school or a large middle school or 2 1/2 elementary schools. The projected 20 day count for 1994 is 55,849 students.

During the time reserved for members of the public to address items requiring action on the agenda for the August 30, 1994, meeting, the following notes were made:

1. Mr. Hank Wenz, Deltona, spoke in favor of nonpartisan school board elections and urged the board to proceed with seeking a charter amendment.

2. Mr. Larry Bowen, DeLand, spoke in favor of nonpartisan school board elections and at-large school board districts for all five members.

3. Ms. Peggy Farmer, Ormond Beach, stated that nonpartisan school board elections should be a legislative issue rather than a charter issue.

4. **Ms.** Vicki Bumpus, Deltona, supported expansion of the District Advisory council and urged the board board to proceed on the issue of nonpartisan school board elections.

5. Ms. Suzy Smith, president of the Volusia Teachers Organization (VTO), stated that the VTO vote was 1,970 in favor of ratification and 175 against.

When no one else chose to address the board, the chairperson closed the first public input portion of the meeting.

Ms. Pat Drago, interim executive director of facilities services, presented highlights of the elementary, middle, and high school facilities lists for the Volusia County School District. The planning outlines for school facilities will allow flexibility, efficiency of operation, and supports the instructional program of the Volusia County School District. Ms. Conte moved that the board approve the School Facilities List for the Volusia County School District.

Mr. Richard Kizma, chief counsel for labor relations, contract services and policy development, presented information about the items in the reopened portions of the 1993-1996 Volusia Teachers Organization contract, including the new issue of tuition reimbursement for teachers. Following discussion, Mr. McCrary moved that the board approve and adopt the recommended settlement for this reopener of the VTO contract, as presented and to be recorded as number 1842 in the Supplemental Minute Book for Agreements. Mr. Ross seconded the motion which carried unanimously.

Ms. Nana Hilsenbeck, coordinator for high school services, presented the adjusted schedule for Trimester I at new Pine Ridge High school, Deltona. The first trimester has been adjusted to allow the school to provide at least 120 hours of instruction despite the delay in the opening date for the new school. Mr. Ross moved that the board approve the adjusted schedule for only Trimester I at Pine Ridge High School. Mr. McCrary seconded the motion which carried unanimously.

Ms. Cynthia Pino, assistant superintendent for curriculum and school improvement services, and Ms. Muffi Chanfrau, chairperson of the District Advisory Committee (DAC), presented the committee's purpose and guidelines and reviewed the current and proposed organizational structure of the DAC. Mr. Ross moved that the board approve the purpose and guidelines, expanded DAC membership, school board member representation on a rotating basis at DAC meetings with the member as designated by the board chairperson, and quarterly reports at school board meetings on an as needed basis, all for the 1994-95 school year. Ms. Conte seconded the motion which carried unanimously.

Dr. Kowal introduced the topic of avenues for public input on budget development. Board discussion ensued with consensus reached for staff to plan workshops for board information with opportunities for public input earlier in the budget process to be held in rotating quadrants of the district, to update the 1990 Staff Utilization Study by sections, and to better communicate to various advisory groups that their input is welcomed by the board and staff.

At 12:08, the chairperson invited members of the public to address the board. During that time, the following notes were made:

1. Mr. Al Ensell, Ormond Beach, requested permanent school bus service (due to traffic conditions along State Road 40) for Tomoka Elementary School students living in the Tomoka View and Tanglewood subdivisions.

2. Ms. Reatha Valera, Ormond Beach, requested permanent school bus service (due to traffic conditions along State Road 40) for Tomoka Elementary School students living in the Tomoka View and Tanglewood subdivisions.

3. Mr. Dennis and daughter Lauren Valera, Onnond Beach, requested permanent school bus service (due to traffic conditions along State Road 40) for students living in the Tomoka View and Tanglewood subdivisions.

4. Ms. Jean Fox, Ormond Beach, requested permanent school bus service (due to traffic conditions along State Road 40) for students living in the Tomoka View and Tanglewood subdivisions.

5. Ms. Bonnie Adams, Ormond Beach, requested permanent school bus service (due to traffic conditions along State Road 40) for students living in the Tomoka View and Tanglewood subdivisions.

Mr. Fred Miller, chief officer for student and school support services, responded that conditions along State Road 40 are continually monitored. The school had been notified on May 23, 1994, that transportation would no longer be provided as of August 22, 1994. Information was received late Monday, August 30, 1994, from the State of Florida Department of Transportation that the road would not be completed by the original deadline, This necessitated an immediate re-evaluation of the hazardous condition and reinstatement of transportation ***services.***

6. Ms. Deborah Denys, New Smyrna Beach, requested more public input opportunities regarding modified calendar schools, and that voters should decide if the modified calendar is to be utilized in Volusia County Schools.

7. Ms. Vicki Burrrpus, Deltona, stated that she was pleased with earlier public input for the budget and with increased membership in the District Advisory Committee. Ms. Bumpus stated opposition to single-member districts for school board members.

When no one else chose to address the board, the chairperson closed the public input portion of the meeting and called a recess at 12:40 p-m. At 12:50 p.m., Chairperson Timko called the meeting back to order and continued the regular order of business.

Mr. Allen Watts, consulting board attorney, presented the issues for the consideration of a charter amendment for nonpartisan school board elections. Mr. Watts stated that it would be possible to establish a nonpartisan school board by an amendment to the charter, but that a more conservative method would be to ask the legislative

delegation to propose a special act calling for a referendum. Mr. Watts advised the board that a charter amendment must be approved at a county general election. In order to avoid waiting until the next scheduled general election in November 1996 or in an effort to avoid the additional costs in calling a general election sooner, it was decided to meet the deadline for the J.994 ballot. Following board discussion, Ms. McFall moved that the board authorize the board chairperson to submit a letter to the chairperson and members of the County Council requesting that the County Council adopt a resolution at their September 15, 1994, meeting placing the question of nonpartisan elections for school board members on the November 8, 1994, ballot. The following sentence would be added to Section 904, Nonpartisan Elections, of the Volusia County Charter, "School Board members elected after January 1, 1995, shall be elected on a nonpartisan basis in the manner provided in Section 901.13 of the Charter." Ms. Conte seconded the motion which carried unanimously.

Mr. Allen Watts, consulting board attorney, explained that the site for proposed Elementary "S" in DeBary, which was previously adopted in School Board Resolution 94-07, had been resurveyed and now will not encroach upon the DeBary Country Club. Mr. Ross moved that the board approve and adopt the revised Resolution 94-07 for the purpose of amending the legal description of proposed Elementary "S," DeBary. Ms. McFall seconded the motion which carried unanimously.

Ms. Conte moved that the board approve the following consent agenda:

Department for Program Development Services

1. Approved submitting to the Department of Education a grant application requesting PECO funds for Full Service Schools for the 1994-95 school year in the total amount of $265,000.00.

2. Approved entering into an agreement between the School Board of Volusia County and the Florida Department of Education providing for the participation of district migrant students in the national Portable Assisted Study Sequence (PASS) services for the 1994-95 school year, as presented and to be recorded as number 1843 in the Supplemental Minute Book for Agreements.

Curriculum and School Improvement Services

Approved a field study request for 15 participating varsity cheerleaders from Seabreeze High School to cheer and perform in the Sugar Bowl half-time show in New Orleans, Louisiana, from December 29, 1994 to January 2, 1995.

Department for Personnel

Approved the listed instructional, support and managerial/non-unit personnel appointments, transfers, leaves of absence, resignations, and reappointments, as presented and to be recorded in the Supplemental Minute Book for Personnel. All vacant positions outside of the classroom and not directly related to student health and safety are subject to intensive review prior to being filled.

Department of Finance

1. Approved the Annual Financial report for the fiscal year ended June 30, 1994, as presented and to be recorded as number 1844 in the Supplemental Minute Book for Agreements.

2. Approved the following final 1993-94 Budget Amendments as presented and to be recorded as number 1845 in the Supplemental Minute Book for Agreements:

   No. 1 - General Fund
   No. 2 - Debt Service
   No. 3 - Capital Outlay Funds
   No. 4 - School Food Service Fund
   No. 5 - Special Revenue-Other Fund
   No. 6 - Self Insurance Funds

3. Approved establishment of Barnett Banks Trust Company as a third party custodian for repurchase agreement collateral, as presented and to be recorded as number 1846 in the Supplemental Minute Book for Agreemen-ts.

Department of Facilities

1. Approved rescinding the Mobile Home Agreement between the School Board of Volusia County, Florida, and Mr. William Hightower, for the George W. Marks Elementary School site.

2. Approved a Mobile Home Agreement between the School Board of Volusia County, Florida, and Mr. Billie R. Beach, Jr. for the George W. Marks Elementary School site, as presented and to be recorded as number 1847 in the Supplemental Minute Book for Agreements.

Department of Facilities Planning and Construction

1. Approved electrical service line and transformer easements between the School Board of Volusia County, DeLand, Florida, and Florida Power and Light Company, Port Orange, Florida, at Pine Ridge High School, Deltona, Florida, as presented and to be recorded as number 1848 in the Supplemental Minute Book for Agreements.

2. Approved a Certificate of Qualification, in accordance with the Consultants' Competitive Negotiations Act for Harper Partners, Inc., Coral Gables, Florida, to provide architectural services.

3. Approved renewing the following Certificates of Qualification, in accordance with the Consultants' Competitive Negotiations Act:

   a. ESE Environmental Science & Engineering, Inc., Orlando, Florida, to provide engineering services,

b. Junck & Walker Architects/Planners, Inc., Jacksonville, Florida, to provide architectural services,

c. Overstreet Consultants, Inc., Altamonte Springs, Florida, to provide engineering services,

d. Pappas Associates, Architects. Inc., Jacksonville, Florida, to provide architectural services.

4. Approved a Certificate of Prequalification, in accordance with Administrative Services Policy No. 604 for Continental Electric Company of Florida, Inc., Orlando, Florida, for electrical projects.

5. Approved renewing the following Certificates of Prequalification, in accordance with Administrative Services Policy No. 604:

a. Centex-Great Southwest Corporation, Orlando, Florida, for general construction projects,

b. Jensco, Inc., Atlantic Beach, Florida, for asbestos abatement projects,

c. Williams Floorcenter, Inc., Orange City, Florida, for floor and wall covering projects.

6. Authorized the negotiation of construction contracts between the School Board of Volusia county and prequalified contractors, in accordance with School Board Policy No. 602(3) for the following construction projects:

a. Electrical installation for seven (7) student built portables at seven (7) various schools, districtwide, (PECO),

b. Mechanical installation fox seven (7) student built portables at seven (7) various schools, districtwide, (PECO).

7. Approved the following Change Orders:

a. Change Order Number 1 to the construction contract for technology lab at Mainland High School, Daytona Beach, Florida, (Matern Professional Engineering, P-A.), (PECO),

b. Change Order Number 1 to the construction contract for eight classroom addition at L.S. McInnis Elementary School, DeLeon Springs, Florida, (Strollo Architects, Inc.), (1986 BOND).

8. Acknowledged the presentation for information of the following Change Orders, which have been previously administratively approved, in accordance with School Board Policy No.602(11):

a. Change Order Number 2 to the construction contract for toilet room addition and renovations at Deltona Middle School, Deltona, Florida, (Ray Johnson and Associates, P.A.), (PECO), which was administratively approved August 4, 1994,

b. Change Order **Number** 1 to the construction contract for ceiling and Lighting renovation at Holly Hill Middle School, Holly Hill, Florida, (Matern Professional Engineering, P.A.), (PECO), which was administratively approved August 12, 1994,

c. Change Order Number 3 to the construction contract for elevator addition at New Smyrna Beach High School, New Smyrna Beach, Florida, (Ray Johnson and Associates, P.R.), (PECO), which was administratively approved August 12, 1994,

a. Change Order Number 1 to the construction contract for outside air at Ormond Beach Elementary School, Ormond Beach, Florida, (PECO), which was administratively approved August 4, 1994,

e. Change Order Number 1 to the construction contract for fire alarm renovation and site lighting at Ormond Beach Middle School, Ormond Beach, Florida, (Matern Professional Engineering, P.A.), (PECO), which was administratively approved August 4, 1994,

f. Change Order Number 1 to the construction contract for windows and doors renovation-at Riverview Learning Center, Daytona Beach, Florida, (Facilities Architectural Services), (PECO), which was administratively approved August 4, 1994,

g. Change Order Number 3 to the construction contract for media building chiller renovation at Seabreeze High School, Daytona Beach, Florida, (PECO), which was administratively approved August 4, 1994,

h. Change Order Number 2 to the construction contract for ceiling and lighting renovation at Seabreeze High School, Daytona Beach, Florida, (Matern Professional Engineering, P.R.), (PECO), which was administratively approved August 4, 1994,

i. Change Order Number 1 to the construction contract for walk-in cooler/freezer at South Daytona Elementary School, South Daytona, Florida, (PECO), which was administratively approved August 4, 1994,

j. Change Order Number 1 to the construction contract for window renovation at South Ridgewood Center, South Daytona, Florida, (Facilities Architectural Services), (PECO), which was administratively approved August 12, 1994,

k. Change Order Number 1 to the construction contract for intercom and lighting renovation at Southwestern Middle School, DeLand, Florida, (Matern Professional Engineering, P.A.), (PECO), which was administratively approved August 4, 1994,

l. Change Order Number 5 to the construction contract for replacement of heating, ventilation and air conditioning systems at Ortona Elementary School, Daytona Beach, Florida, and Holly Hill Middle School, Holly Hill, Florida, (H.C. Yu and Associates), (PECO), which was administratively approved August 4, 1994,

m. Change Order Number 4 to the construction contract for elevator additions at DeLand High School and Southwestern Middle School, DeLand, Florida, and T.D. Taylor Middle-High School, Pierson, Florida, (Ray Johnson and Associates, P.A.), (PECO), wh-ich was administratively approved August 9, 1994.

9. Approved Certificates of Substantial **Completion** for the following construction projects:

a. Ceiling and lighting renovation at Holly Hill Middle School, Holly Hill, Florida, (Matern Professional Engineering, P.A.), (PECO),

b. Interior of buildings number 1, 2, 3, 4 and 5 at Pine Ridge High School ("CCC" High School), Deltona, Florida, (Ray Johnson and Associates, P.A.), (1986 BOND),

c. Ceiling and lighting renovation at Seabreeze High School, Daytona Beach, Florida, (Matern Professional Engineering, P-A.), (PECO).

Department of Purchasing

Approved the following bids as presented and to be recorded in the Supplemental Minute Book for Bids:

1. Bid Request No. MTS-508, wire, Facilities Operations.

2. Bid Request **No.** TR-502, purchase of uniforms, Transportation Department.

3. Bid Request No. TR-503, tire recapping, Transportation Department.

4. Bid Request No. TYP-517, cabling, Management Information Services.

Office of the Superintendent

Approved the following donations to the Volusia County School System:

1. Boston Avenue School

Two thousand dollars ($2,000.00) by the Boston Avenue PTO for a pavilion.

2. Coronado Beach Elementary School

Miscellaneous supplies valued at one hundred eighty-five dollars ($185.00) by Rocco and Connie Sorice, New Smyrna Beach, Florida, to enhance first grade programs.

3. Deltona Middle School

One hundred dollars ($100.00) by the VFW Ladies Auxiliary Post No. 8093, DeBary, Florida, for field studies.

4. Discovery Elementary School

Three hundred fifty-two dollars and sixty-seven cents ($352.67) by the Discovery PTA for student incentives-

5. Hillcrest School

Five hundred fifty-one dollars ($551.00) by the Knights of Columbus, Florida State Council, Ormond Beach, Florida, for the general fund.

6. Mainland High School

a. Two hundred dollars ($200.00) by Mr. Robert L. Brown, South Daytona, Florida, for the boys basketball program-

b. One hundred dollars ($100.00) by Bankhead Barber & Beauty Shop, Atlanta, Georgia, for the varsity cheerleaders program.

c. One hundred dollars ($100.00) by Halifax Plumbing, Inc., Port Orange, Florida, for the varsity cheerleaders program.

d. One hundred dollars ($100.00) by Blue Water Pool Supplies & Service, South Daytona, Florida, for the varsity cheerleaders program.

e. One (1) stereo receiver valued at one hundred dollars ($100.00) by Mr. William Bennett, Ormond Beach, Florida, for the media center.

7. Pine Ridge High School

Four hundred dollars ($400.00) by First Union National Bank of Florida, Deltona, Florida, for the general fund.

Ms. McFall seconded the motion to approve the consent agenda which carried unanimously.

During the time reserved for the school board members, the superintendent or the board attorney to present miscellaneous items, the following notes were made and actions taken:

Mr. Ross

Reported that he had attended a productive Spruce Creek High School Advisory Board meeting. He also visited several schools on opening day and noted that administrative directions were handled smoothly and expeditiously and students were on-task in subject matter areas quickly.

Mr. McCrary

Requested information for possible School Board use of General Electric property. Ms. Saralee Morrissey, real properties planner, responded that a vacant building is being considered as a possible replacement facility for the Maintenance and Transportation Department and that the cost difference between buying an extant building vs. undeveloped land was being investigated.

Dr. Timko

Urged board members to become FUTURES, Inc, Dean's Club members and to work on expanding the membership.

Mr. McCrary

Inquired about the new unit of Headstart at T.T. Small Elementary School. Dr. Kowal replied that she would provide information at a later date.

Adjourned.

_____
Chairperson

_____
Secretary

1. CASE STYLE

SCHOOL BOARD OF VOLUSIA COUNTY,

Petitioner,

v.

DEBARY ESTATES ASSOCIATES, LTD., a Florida Limited Partnership MAGNOLIA SERVICE CORPORATION, DEBARY COUNTRY CLUB REALTY, INC., COUNTY OF VOLUSIA, CITY OF DEBARY, and FLORIDA POWER CORPORATION,

Respondents.

II. TYPE OF CASE (Place an x in one box only. If the case fits more than one type of case, select the most definitive.)

Domestic Relations	Torts	Other Civil
___ Simplified Dissolution	___ Professional	___ Contracts
___ Dissolution	Malpractice	Condominium
___ Support-IVD	___ Products	___ Real Property/
___ Support-Non IV-D	Liability	Mortgage foreclosure
URESA-IV-D	___ Auto negligence	✓ Eminent domain
___ URESA-Non-IV-D	___ Other negligence	Other
___ Domestic violence		
___ Other domestic relations		

III. Is Jury Trial Demanded in Complaint?

✓ Yes

___ No

DATE 9-14 94

COBB COLE & BELL

BY _____
for

J. LESTER KANEY
FLA. BAR NO. 156553
Post Office Box 2491
150 Magnolia Avenue
Daytona Beach, FL 32115-2491
(904) 255-8171
ATTORNEYS FOR PETITIONER

LKA\DGR\MISC\139580.1

Appendix Part 5

INTEROFFICE MEMORANDUM

DATE: DECEMBER 7, 1994

TO: JOAN P. KOWAL
SUPERINTENDENT OF SCHOOLS

FROM: PATRICIA DRAGO. INTERIM EXECUTIVE DIRECTOR
FACILITIES SERVICES

RE: AGREEMENT FOR SITE FOR NEW ELEMENTARY SCHOOL "S", DEBARY

Within this packer you will find the following items:

1. Memorandum with site recommendation.
2. Site plan.
3. Excerpts from the January. 18, 1994, presentation recommending the Highbanks site.
4. Site evaluations of the six sites considered prior to recommendation.
5. Memorandum and Resolution 94-07 authorizing the board to exercise its power of eminent domain for the Highbanks site.
6. Report of student populations in specific areas.
7. Map showing two mile radius around existing schools and proposed site. These are not actual waik zones, only an overlay for discussion purposes.

PD/bk

Enclosures

Volusia County Schools

INTEROFFICE MEMORANDUM

DATE: DECEMBER 7, 1994

TO: JOAN P. KOWAL
SUPERINTENDENT OF SCHOOLS

FROM: PATRICIA DRAGO, INTERIM EXECUTIVE DIRECTOR
FACILITIES SERVICES

RE: AGREEMENT FOR SITE FOR NEW ELEMENTARY "S", DEBARY

The site search for Elementary "S" was initiated in early 1991. Elementary "S" was planned to relieve overcrowding at Orange City Elementary and Enterprise Elementary. The current student population of Orange City Elementary is 999 with a permanent capacity of 598 and 23 portables. Orange City is on a traditional calendar. Enterprise Elementary has student population of 1145 with a permanent capacity of 594. Enterprise is on a modified multi-track calendar and has 16 portables. Construction of Elementary "S" is funded by the 1991 Certificates of Participation Issue.

Early in the search interest was focused on the area southwest of Orange City and later expanded south into DeBary. When DeBary incorporated into a city in 1993, the location of an elementary school became a point of civic pride as well as an educational concern.

When the subject site was recommended to the board, the property owner offered several other parcels as alternatives to this location. Those sites were along the southern part of DeBary and more westerly along Highbanks Road. For reasons which are explained herein none of the alternate sites were recommended and on June 28, 1994, the board adopted Resolution 94-07 authorizing exercise of the board's power of eminent domain to acquire the subject site. Let us review why this step was taken and why the subject site is superior to others proposed and considered.

In locating any school, but most especially an elementary school, safety of student pedestrian and bicycle access is a primary concern. Second, is the compatibility of the surrounding land USES and the potential for the school to function as a community center in a residential area. Last,

but not least, is the cost of acquisition coupled with the cost to develop and provide essential services, such as water and wastewater.

When researching sites in the southwest Orange City area as explained in the January 13, 1994, site information which is attached, the sites were found to be inferior to the subject site for location of an elementary school. First, the existing roadway network serving the area is quite limited, in many areas only rutted dirt roads. Pedestrian and bicycle access was almost non-existent. Land costs were low but development costs were high. The surrounding neighborhoods were sparsely developed and further residential development might take place in the future but little is planned for the area in the immediate future, In addition, comparatively few students resided within the two mile walk zones and most students transferred to Elementary "s" to relieve Enterprise Elementary would need to be transported.

At first glance the area along Highbanks Road westerly from the subject site offers promise. However, a closer look reveals several limitations for a future elementary school site. Immediately west of the subject site are three rights of way for power lines over one thousand feet apart. There is a concern about locating-a school close to power lines and Florida Administrative Code 6A-2 recommended a distance of 500 feet from power lines. If one were to go west of the most westerly power line by 500 feet, one would encounter wetlands and environmentally sensitive lands, not recommended for development of an elementary school.

The other area that was thoroughly researched was the undeveloped land along Shell Road and Dirksen Drive on the south side of DeBary. This area was not recommended for several reasons. The student population surrounding this area is dense, however, with the exception of some proposed residential development potential for the future is limited and it is on the southern most part of Volusia County. The area on the west side of Shell Road near Benson Junction is industrial and south of Dirksen Drive development will be limited by environmental concerns. Additionally, services to the area are limited for both water/wastewater. The main transportation corridor is 19-92 which is scheduled to be four-lanecl from Highbanks to Plantation with construction to begin in 1995. The portion south of Plantation to Seminole County is in design but not funded for construction. When going both west and south of DeBary there is little developable land between DeBary and the adjoining counties of Lake and Seminole.

It should be clear from the above discussion that the selection of an 18 +- acre site on the north side of Highbanks Road in the undeveloped southwest corner of DeBary Golf and Country Club is the best location for new Elementary "S." In selecting the final site configuration the architect, Larry Derryberry of Daimwood, Derryberry and Pavelchek, and the civil engineer, Jim Hunter of Conklin, Porter and Holmes, worked closely with the developer to accommodate a school and minimize impact on the development and golf course. For example, this is the first two story school built in Volusia County in over twenty years. This is being done to minimize site impacts.

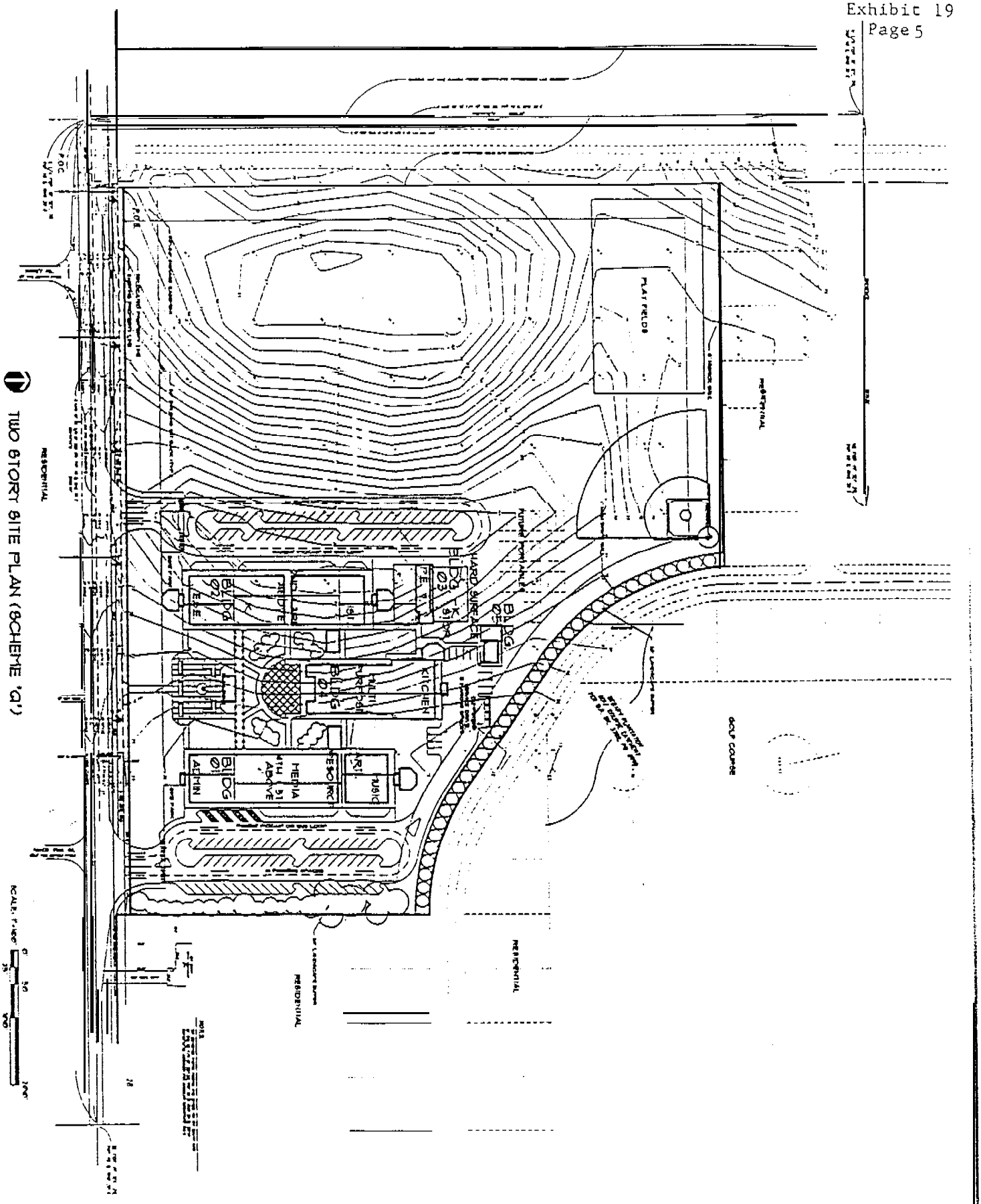
Although student attendance boundaries have not been drawn, today we can identify more than 600 students who reside within a two mile walk zone of the subject site. As DeBary Golf and Country Club develops there will be many more walk-in students to the north. The challenge will be in drawing student attendance boundaries for new elementary "S" and "P" (on Doyle Road) and still maintain a viable student base for Enterprise Elementary.

Many sites have been reviewed for new Elementary "S", but based on the information contained above it is the administration's recommendation that the Highbanks site best meets the three criteria:

1. Safest for student pedestrian and bicycle **access.**
2. Most compatible with surrounding land uses with the potential to be at the center of a residential community.
3. Most cost effective of sites that meet criteria 1 and 2 for acquisition and development.

In summary, it is the administration's consistent recommendation that new Elementary School "S." be located on the site proposed and that the proposed Memorandum of Settlement Agreement Between The School Board of Volusia County DeBary Estates Associates Limited and DeBary Golf Associates Limited To The Extent of Its Interest be approved. With this formal action we can proceed to final documents, regulatory permitting and still plan to open the summer of 1996. The students at both Orange City and Enterprise will benefit from this decision.

PD/vr
Attachments
cc: School Board Members
Lee Britton
Bill Hall
John Hossfield
Fred Miller
C. Allen Watts



TWO STORY SITE PLAN (SCHEME 'Q')

SCALE: 1"=60'

TWO STORY ELEMENTARY SCHOOL "S"
THE SCHOOL BOARD OF VOLUSIA COUNTY

DAMWOOD DERRYBERRY PAVELCHAK ARCHITECTS, P.A.

TWO STORY SITE PLAN SCHEME 'Q'

01

Appendix Part 6

LAW OFFICES
COBB COLE & BELL
150 MAGNOLIA AVENUE
POST OFFICE BOX 2491
DAYTONA BEACH, FLORIDA 321152491
TELEPHONE (904) 255-8171
DELAND (904) 736-7700

TELECOPIER (904) 238-7003

December 7, 1994

Honorable Judith G. Conte, Chairman
Volusia County School Board
40 Nicholas Court
Ormond Beach, FL 32176

Dear Ms. Conte:

I report to the Board that as a result of two mediation sessions between Ms. Drago and myself representing the Board, and the owners and counsel of DeBary Estates Associates Ltd., we have reached a tentative agreement in the condemnation proceedings for a site for Elementary School "S". The agreement is, of course, subject to ratification by the Board, and we recommend that ratification at your regular meeting of December 13.

By separate memorandum, Ms. Drago will review for you the reasons why the preferred site for this school was chosen, and the limitations imposed by the locations and development costs of alternate sites. I concur with her recommendation that, considering the 50-year life cycle of the school, and the location of this site in proximity to utilities, transportation and the attendance zones of Orange City and Enterprise Elementary Schools, this site is superior to others and justifies the legal condemnation of the site,

Insofar as the condemnation proceedings are concerned, I will recall for the benefit of the new Board members the direction given to counsel last June. Florida Statutes allow condemnation of school sites by either of two methods, commonly called a "quick taking" and a "slow taking".

In the case of a "quick taking", the Board asks the Court to go ahead and enter an order transferring the land to the School District, and pays a good faith amount to the former owners which can be immediately withdrawn by the former owners. If the owners are dissatisfied with that payment, they can insist on a jury trial, and the actual trial of the amount of damages due to the former owners can come many months later. In addition to the cost of the land, owners are entitled to their attorneys' fees and the fees of their appraisers and other consultants. Interest accrues on any unpaid amount at 12% per year.

Exhibit 3

In the case of a "slow taking", the Court is not asked to enter a judgment until the jury determines the amount to which the owners are entitled. If the School District is unwilling to pay that amount, it can dismiss the proceedings and be liable only for the costs and fees of both sides in the litigation up to that point.

At its final meeting in June, the Board entered a resolution authorizing a "slow taking" of the site for Elementary School S. After we received a new survey showing the exact location of the DeBary Country Club golf course parcel, the Board amended the legal description so that no part of the golf course parcel would be taken.

It was our expectation that. by late fall, we would have enough informatioa to resolve this case, or to bring it back to the Board for consideration of its conversion to .a "quick taking" in order to meet the timetable for construction of this school and the relief of its overcrowded neighbors.

We have now met our schedule expectation. After careful consideration by both sides of their appraisals, the costs of further litigation and the risks of exposure to other damages for injury to the real estate development plan and the golf course, we have reached an agreed price- of $550,000 for approximately 18 acres of land, and an amount of $65,000 for the fees and expenses of the owner in the litigation to date. We have also reached an agreement to develop the school site as "good neighbors", by installing a brick wall and landscaping along the common border which will match the brick walls already in use by the developer elsewhere in the project.

As a part of the effort to reach a settlement, we have reconfigured the site to lessen its intrusion into the interior of the development, and increase its frontage on Highbanks Road. Our topographical survey disclosed the existence of a large natural depression at the intersection of Highbanks Road and the future road west of this site, and it has thus been desirable to make the driveways for both bus and parent access intersect directly with Highbanks Road. As a result, the School District will not need to construct approximately 1000 feet of the north-south road on the west side of the site, as shown on a previous conceptual plan. This should save more than $100,000 in road construction. If and when the developer or the County or City constructs this road, we have agreed that the excess stormwater capacity in our natural retention area can be shared with the roadway drainage system.

During the construction of this school, it will be necessary to extend County sewer lines from its plant on the west side of the Country Club development, south to the school. Water lines large enough for fire protection will need to be extended west along Highbanks Road to the school, We had considered during the negotiation the possibility of providing these lines to the development as an "in kind" part payment, but the developer was more interested in cash. We have therefore reserved the right to negotiate with the County a utility agreement that will provide future reimbursement from County utility customers, when they connect to the lines that will be oversized for school purposes.

We initially appraised a smaller quantity of land, about 15 acres, at a price of $237,500. The appraisal was based on the value of developable but unplatted land in this area of the County. The owners responded that their land was already included in an approved golf course development, and that the value of the land was substantially higher. They also contended that the school's location would disrupt a "beltway" road planned along the golf course, would destroy several golf course lots, and would perhaps require shutdown and partial reconstruction of the golf course. Their initial calculations at the mediation claimed combined damages substantially in excess of $1 million.

After long negotiations and the able assistance of mediator David Strawn, we arrived at a price of $550,000 for the land, which includes any and every possible injury to the balance of the owners' development. For purposes of comparison, in the case of Sweetwater Elementary, the Board authorized $540,000 and assumed the duty to build a road for the developer at an additional cost in excess of $100,000.

If the Board accepts this recommendation, our land costs will be fixed and we will proceed toward the anticipated groundbreaking in three or four months.

If the Board rejects this recommendation, you will have the following alternatives:

1. Continue the litigation. Our assessment is that the costs of litigation for both sides, which are certain, and the risks of liability for additional damages to the developer, which are possible, make this alternative more expensive in the long run than the proposed settlement.

2. Abandon this site and search for a new site. This alternative has the following advantages and disadvantages:

a. There may be a possibility of purchasing a site at a lower price. One landowner has offered a site in the south end of DeBary at a tentative price of $400,000. On its face, this is an attractive price in comparison to the settlement price on the present site. However, there is an AT&T fiber optic cable easement running through the center of the alternate site. We understand that there is significant liability for damaging such lines because of the huge amounts of data that would be disrupted. The cable itself is buried only 3 or 4 feet deep, and because of its likely damage during construction and the inevitability of a building being placed over its present location, the cable would have to be relocated, with uncertain legal and financial costs. We are endeavoring to get some harder estimates of those costs prior to the Board meeting.

b. If the present suit is discontinued, the District will be liable nonetheless for the fees and expenses of the owners to date, which we estimate will be not less than the presently agreed $65,000.

c. If a new site is sought, the site planning design expenses incurred to date for the present site, not reusable at a new site, are estimated at $65,000,

d. If a new site is sought, you should assess the effect of a delay of at least one year in the completion of Elementary School S. It is, of course, impossible to place a money value on the effect of another year in crowded conditions for the children at Enterprise and Orange City Elementary Schools, or to speculate on what might or might not happen to construction costs during a year's delay, The state's average experience in the inflation of construction costs is in excess of 3%, and if the budget for this school were $6 million, we could assume an annual increase in construction costs of perhaps $200,000. It is, of course, possible that the national economy could falter and that costs would fall during a delay.

e. If the suggested alternate site north of Dirksen Drive and east of US 17-92 is considered, you should assess both the temporary and longterm aspects of transportation into this site. Over the next several years, US 17-92 in DeBary will be under construction, first from Plantation Boulevard north to Highbanks, and then from Plantation south to the Lake Monroe Bridge. If the second phase of this road construction, now unfunded, takes place after opening of this school, we expect that substantial safety-related offsite roadway improvements will be required at the expense of the District. These

will consist primarily of turn lanes at a school entrance drive off US 17-92, and intersection improvements at US 17-92 and Dirksen Drive. Turn lanes will also be required on Dirksen, but these are comparable to what would be required on Highbanks at the site now proposed, so that cost is a neutral factor. The internal drives in this particular alternate site can be expected to be more expensive because of the necessity of traversing the high-voltage power line north of Dirksen and reaching a building complex at least 500 feet from the power line.

e. The County's preliminary estimates for utility extension to the selected Highbanks site are in the range of $300,000, some part of which may be recaptured from future development served by the same lines.

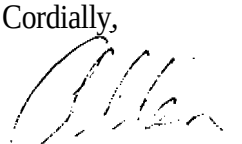
f. If a new site is selected in the US 17-92 corridor, utilities will be upgraded in that corridor as far south as Plantation Boulevard by 1997, at County expense, during the widening of US 17-92. The further extension of main County lines to the Dirksen Drive area will not take place until the second phase of widening of US 17-92, from Plantation Boulevard to the Lake Monroe Bridge. This project is being designed, but its construction is not funded during the current five-year budget. There are three proposed private developments in the vicinity which have discussed interim extensions with the County Utilities Department via Shell Road, but these developments are far from the point at which the expense of these extensions would be secured by a developer's bond for construction purposes. In no case would there be adequate fire flow for school purposes as a result of these interim improvements; it would be necessary to extend water mains from the future County terminus (1997) at US 17-92 and Plantation Boulevard, I received from the County Utilities Engineer a very rough estimate of utility extension costs, suitable for an elementary school in the Dirksen corridor, at about a half-million dollars. I have asked the County Utilities Engineer to be available for our meeting of December 13. The owner of the alternate site has tentatively suggested a cost-sharing arrangement, in which the expense of extending utilities to the school might be less than half that amount, but still substantial. The only way to reduce that cost further would be to share it with other private developers whose plans and schedules are uncertain, or wait for the second phase of the US 17-92 widening, not now budgeted either by DOT or by County Utilities.

g. The Board has tentatively planned to commence the attendance rezoning for the DeBary school site "S" and its effect on Orange City Elementary, Enterprise Elementary and any other existing schools, in 1995. One of the strong reasons for the Board's selection of the Highbanks site now proposed was the ability to create a conceptual walk zone that was centered on the developing areas of DeBary and did not conflict with the walk zones of either Orange City or Enterprise. You should consider whether placement of School "S" closer to Enterprise Elementary, taken in conjunction with the site already purchased for proposed School "P", will make the job of attendance rezoning of these schools easier or more disruptive on the existing communities in these schools, As legal counsel I would remind you of our duty in such rezonings to maintain some level of socioeconomic integration in all of our schools. I encourage your consideration of whether that duty becomes easier or harder depending on your decision as to the proper siting of School "S".

On balance, I recommend your ratification of the settlement agreement on the Highbanks site. I will be happy to answer any remaining questions of individual Board members, or to help find those answers, in advance of your consideration of the settlement on December 13. Although the settlement memorandum becomes a public record by virtue of its attachment to this letter, such memoranda in the case of private parties would ordinarily remain sealed, and the owners have requested that we not voluntarily broadcast its specific terms in advance of the Board meeting. Naturally any member of the public who requests it is entitled to it.

Please contact me if you have any concerns or questions.

Cordially,



C. Allen Watts

CAW:pas

cc: Board Members
Dr. Joan Kowal
Richard A. Kizma, Esq.
Ms. Patricia Drago

MEMORANDUM OF SETTLEMENT AGREEMENT
BETWEEN
THE SCIHOOL BOARD OF VOLUSIA COUNTY
DEBARY ESTATES ASSOCIATES LIMITED
AND
DEBARY GOLF ASSOCIATES LIMITED
TO THE EXTENT OF ITS INTEREST

Being mindful of the uncertainty of litigation the parties have reached a mediated settlement as follows:

1. The School Board will acquire the property depicted on site plan dated 11/18/94 at a price of $550,000;

2. The School Board will pay Brigham Moore, et. al $65,000 for its fees and costs;

3. In lieu of severance damages, the School Board will cause to be constructed during the construction of an elementary school on the site a brickwall on the northern property line of the school of single wide Norwegian brick, 6 feet high with columns every 20 feet and will landscape the 20 feet beyond the wall with live oaks of 4 inch dbh size and 5 foot wax myrtle shrubs. The School Board will guaranty one year survivability of the landscaping. Oaks will be placed at one per 30 feet. The sellers will be granted a maintenance easement to maintain the landscaping;

4. The School Board will construct a fence and gate across the future right-of-way along the western edge of the site;

5. The School Board will grant an easement for a brickwall and integrated sign at the southwest corner of the property adjacent to High Banks Road;

6. The construction on the site will be limited to two stories in height unless otherwise agreed by the parties;

7. The School Board will provide an easement for stormwater retention in the depressional area at the southwest corner of the site, to the extent that the capacity of the depression exceeds the needs of the school construction. The dedication of the drainange retention area and the adjoining road right-of-way will be documented in such a way as to secure to the sellers the maximum road impact fee credit available;

8. During school construction the School Board will cause a 12 inch waterline to be extended along the easterly perimeter to the northeasterly corner of the school site;

9. Excess fill dirt, if any, resulting from the grading of the school site will be made available to the sellers at no cost;

10. During the construction of the school the School Board will cause water and sewer lines to be extended to the school site at no cost to the Developer. The School Board may negotiate a developer agreement with the County of Volusia which provides future reimbursement of hydraulic share at the expense of the ultimate consumer other than the seller;

This agreement is subject to approval by the School Board of Volusia County in lawful session. The undersigned representatives of the School Board agree to expedite the consideration of this agreement by the School Board. If this agreement is approved, closing will occur as soon as possible in calendar year 1995.

DEBARY ESTATES ASSOCIATES LIMITED
DEBARY GOLF ASSOCIATES LIMITED

By _____
Bill Vernon
General P...

J. Wiley Hicks, ...

SCHOOL BOARD OF VOLUSIA COUNTY

By _____
Patricia Drago
Interim Facilities Director

C. Allen Watts, Counsel

DATE: 11/21/94

Appendix

IN THE CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.

CASE NO. 94-10866 CIDL

SCHOOL BOARD OF VOLUSIA COUNTY,

Petitioner,

vs.

DEBARY ESTATES ASSOCIATES, LTD., et al.,

Respondents.
_____/

JOINT STIPULATION

Plaintiff, SCHOOL BOARD OF VOLUSIA COUNTY, and Defendant, DEBARY ESTATES ASSOCIATES, LTD., jointly stipulate as follows:

1. That this case has been amicably resolved at mediation upon the terms and conditions of the Agreement attached hereto.

2. That in consideration of the Agreement, Defendant's Motion to Disqualify is withdrawn as moot, without prejudice.

3. The parties jointly move the Court to vacate the Stipulated Order for Withdrawal of Cobb, Cole & Bell as counsel for Plaintiff.

4. The parties shall, within ten (10) days hereafter, or at such other time as may be mutually agreed, submit a Stipulated Final Judgment in accordance with the Agreement.

DATED this 6th day of January, 1995.

BRIGHAM, MOORE, GAYLORD, SCHUSTER & MERLIN
203 S.W. 13th Street
Miami, Florida 33 130
Telephone: (305) 858-2400
Attorney for Defendant

By: _____
J. Wiley Hicks
Fla. Bar # 516155

COBB COLE & BELL
150 Magnolia Avenue
P.O. Box 2491
Daytona Beach, Fl. 32115-2491
Telephone: (904) 255-8171
Attorney for Petitioner

By: _____
J. Lester Kaney
Fla. Bar # 156553

ORDER

ORDERED and ADJUDGED that foregoing Joint Stipulation is approved and the court's Stipulated Order for withdrawal of counsel, entered December 6, 1994, is hereby vacated this 6 day of January, 1995.

/s/ _____
JOHN W. WATSON III
CIRCUIT COURT JUDGE

cc: All counsel of record.

MEMORANDUM OF SETTLEMENT AGREEMENT
BETWEEN
THE SCHOOL BOARD OF VOLUSIA COUNTY
DEBARY ESTATES ASSOCIATES LIMITED
AND
DEBARY GOLF ASSOCIATES LIMITED
TO THE EXTENT OF ITS INTEREST

Being mindful of the uncertainty of litigation the parties have reached a mediated settlement as follows:

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3. In lieu of severance damages, the School Board will cause to be constructed during the construction of an elementary school on the site a brickwall on the northern property line of the school of single wide Norwegian brick, 6 feet high with columns every 20 feet and will landscape the 20 feet beyond the wall with live oaks of 4 inch dbh size and 5 foot wax myrtle shrubs. The School Board will guaranty one year survivability of the landscaping. Oaks will be placed at one per 30 feet. The sellers will be granted a maintenance easement to maintain the landscaping;

4. The School Board will construct a fence and gate across the future right-of-way along the western edge of the site;

5. The School Board will grant an easement for a brickwall and integrated sign at the Southwest corner of the property adjacent to High Banks Road;

6. The construction on the site will be limited to two stories in height unless otherwise agreed by the parties;

7. The School Board will provide an easement for stormwater retention in the depressional area at the southwest corner of the site, to the extent that the capacity of the depression exceeds the needs of the school construction. The dedication of the drainange retention area and the adjoining road right-of-way will be documented in such a way as to secure to the sellers the maximum road impact fee credit available;

8. During school construction the School Board will cause a 12 inch waterline to be extended along the easterly perimeter to the northeasterly corner of the school site;

9. Excess fill dirt, if any, resulting from the grading of the school site will be made available to the sellers at no cost;

10. During the construction of the school the School Board will cause water and sewer lines to be extended to the school site at no cost to the Developer. The School Board may negotiate a developer agreement with the County of Volusia which provides future reimbursement of hydraulic share at the expense of the ultimate consumer other than the seller;

This agreement is subject to approval by the School Board of Volusia County in lawful session. The undersigned representatives of the School Board agree to expedite the consideration of this agreement by the School Board. If this agreement is approved, closing will occur as soon as possible in calendar year 1995.

DEBARY ESTATES ASSOCIATES LIMITED
DEBARY GOLF ASSOCIATES LIMITED

By _____
Bill Vernon
General Partner

_____
J. Wiley-Hicks, Counsel

SCHOOL BOARD OF VOLUSIA COUNTY

B _____
Patricia Drago
Interim Facilities Director

_____
C. Allen Watts, Counsel

DATE: 11/21/94

Appendix

IN THE CIRCUIT COURT OF **THE** 7TH **JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA.**

SCHOOL BOARD OF VOLUSIA COUNTY,

Petitioner,

vs.

DEBARY ESTATES ASSOCIATES, LTD., et al.,

Respondents.

/

CASE NO. 94-10866 CIDL

STIPULATED ORDER OF **TAKING AND FINAL JUDGEMENT AND ORDER AWARDING ATTORNEY'S FEES AND** COSTS

THIS MATTER came before the Court upon the joint motion of Petitioner and Defendant, DeBary Estates Associates, Ltd., for entry of this Stipulated Order of Taking and Final Judgment and Order Awarding Attorney's Fees and Costs, and the Court having reviewed the motion, fmding that proper notice was given to all defendants and to all persons having or claiming any equity, lien, title or other interest in or to the real property described in the Petition, being advised that there is agreement of counsel, and being otherwise fully advised in **the premises,** it is

ORDERED and ADJUDGED as follows:

1. The Court has jurisdiction of the subject matter and parties to this cause.

2. The pleadings in this cause are sufficient and the Petitioner is properly exercising its delegated authority.

3. The Estimate of Value filed in this cause by the Petitioner was made in good faith and was based upon a valid appraisal.

4. Subject to the provisions of paragraph 5 below, upon payment of the Final Judgment hereinafter specified into the Registry of this Court, the right, title and interest

specified in the Petition shall vest in the Petitioner. The legal description and the quantity of the estate taken by this final judgment is different from and larger than what was sought by Petitioner in the Petition. As a result, the Petition is hereby deemed amended to reflect the accurate legal description and quantity of estate taken by Petitioner as described on Exhibit A to this final judgment.

5. The award of full compensation and all obligations and benefits conferred by this final judgment are set forth as follows:

a) Defendant shall recover from Petitioner the sum of $550,000.00, representing full compensation for the taking of Defendant's property described in Exhibit A to this 'final judgment, including full payment for the property taken, for any damages to the remainder and for all other damages of any nature, including but not limited to all counterclaims and statutory interest;

b) Petitioner shall construct an elementary school on the subject site and during the construction of the school shall construct a single wide Norwegian brick wall adjacent to the northern property line of the school site. The brick wall shall be six (6) feet tall and shall have columns every 20 feet;

c) Petitioner shall landscape a 20 foot wide area north of the brick wall between the wall and the northern boundary of the subject site with live oaks of 4 inch diameter breast height every 30 feet, interspersed with five (5) foot wax myrtle shrubs, Petitioner guarantees one year survivability for all such landscaping. Defendant shall have a maintenance easement on this landscaped area of Petitioner's property in order to maintain, supplement and/or replace the landscaping within the landscape buffer area;

d) Petitioner shall construct and maintain a fence and gate across the future right of way along the western edge of the school site within thirty days of a written request by the Defendant, If such a request is made by Defendant, Petitioner shall only be responsible for installation and maintenance of the fence at the specific site where it is initially installed. Should Defendant be required or desire to relocate the fence and gate for any reason, Defendant shall be responsible for all costs associated with any such relocation:

e) Petitioner shall grant an easement for a brick wall and integrated sign at the southwest corner of the subject school site adjacent to High Banks Road;

f) Petitioner shall not allow construction of any structure on the subject site that is greater than forty-five (45) feet above finished floor in height without the written consent of Defendants;

g) Petitioner shall provide-an easement for stormwater retention in the depressional area at the southwest corner of the subject site, to the extent that the capacity of the depression exceeds the needs of the school construction. The dedication of the drainage retention area and the adjoining road right of way will be documented and consummated in a manner that will assure the Defendant the maximum road impact fee credit available;

h) Petitioner shall construct a 12 inch waterline to be extended along the easterly perimeter to the northeasterly comer of the school site for future connection by Defendant, if needed;

i) Petitioner shall deliver all excess fill dirt, if any, resulting from the grading of the school site to Defendant at no cost to Defendant; and

j) Petitioner shall cause sewer lines to be extended to the school site at

no cost to the Defendant. Petitioner may, however, negotiate a developer agreement with the County of Volusia that provides for future reimbursement of hydraulic share at the expense of ultimate consumers other than the Defendant.

6. Pursuant to Fla. Stat. §§ 73.091 and 73.092, Defendant shall recover from the Petitioner the total sum of $65,000.00, representing all reasonable costs of the proceedings in the circuit court including, but not limited to attorney's fees and all other costs for the representation of Defendant in this cause.

7. Petitioner shall deposit the total sum of $615,000.00 in the Registry of this Court within 30 days of entry of this judgment, and upon such deposit Petitioner shall be entitled to possession of the property described in Exhibit A without further order of this Court.

DONE and ORDERED in Chambers at the Volusia County Courthouse, Volusia County, Deland, Florida, this 15 day of Feb, 1995.

s/

JOHN W. WATSON III
CIRCUIT COURT JUDGE

cc: All counsel of record

REVISED LEGAL DESCRIPTION FOR ELEMENTARY SCHOOL "S"
AND 100 FT. ROAD RIGHT-OF-WAY
December 21, 1994

School Site Description

That part of the Southeast 1/4 of Section 28, Township 18 South, Range 30 East, Volusia County, Florida, described as follows: Commencing at the Southwest corner of the Southeast 114 of said Section 28, run thence N 89°55' 13" E along the South line thereof a distance of 100 feet; thence N 00°24'12" W parallel with the West line of the Southeast 1/4 of said Section 28, a distance of 42 feet to a point on the North right-of-way line of Highbanks Road, said point being the Point of Beginning; thence continue N 00°24'12" W parallel with the West line of the Southeast 1/4 of said Section 28, a distance of 867.01 feet; thence N 89°20'01" E, a distance of 579.59 feet to a point on a curve concave Northeasterly, having a central angle of 51°24'22" and a radius of 337.00 feet; thence from a radial bearing of N 86°13'53" E run Southeasterly along the arc of said curve a distance of 302.36 feet to the point of tangency thereof; thence S 55°10'29" E, a distance of 211.78 feet to the point of curvature of a curve concave Northeasterly, having a central angle of 34°09'51" and a radius of 337.00 feet; thence run Southeasterly along the arc of said curve a distance of 200.95 feet to a point on a line that is the Northerly extension of the Westerly line of DeBary Plantation, as recorded in Map Book 35, Page 3, Public Records of Volusia County, Florida; thence from a radial bearing of N 00°39'40" E run S 00°22'27" E along said line a distance of 436.47 feet to the North right-of-way line of said Highbanks Road; thence S 89°55' 13" W along said right-of-way line being parallel with the South line of the Southeast 1/4 of said Section 28, a distance of 1082.54 feet to the Point of Beginning; said Parcel containing 18.04 acres, more or less.

Road Right-of-Way Description

The West 100 feet of the Northeast 1/4 and the West 100 feet of the Southeast 1/4 of Section 28, Township 18 South, Range 30 East, Volusia County, Florida.

EXHIBIT "A"

Appendix

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

JAMES B. CLAYTON,
Plaintiff,

vs.

CASENO.: 95-10044-CIDL
DIVISION: 0 1

SCHOOL BOARD OF VOLUSIA
COUNTY, FLORIDA,
Defendant.
_____/

AMENDED PETITION FOR WRIT OF MANDAMUS

COMES NOW the Plaintiff, JAMES B. CLAYTON, and files this his Amended Petition for a Writ of Mandamus against the Defendant, SCHOOL BOARD OF VOLUSIA COUNTY, and as grounds therefore would state:

JURISDICTION OF THE CIRCUIT COURT

1. This Petition is filed pursuant to Article V, Section 5(b), of the Constitution of the State of Florida, and is not brought to enforce a private right.

2. The Plaintiff has no other remedy than this Petition for Writ of Mandamus. The Plaintiff has no administrative remedy.

3. Mandamus lies to enforce a ministerial act. City of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950). In the case of State ex. Rel.

Zuckerman-Vernon v. City of Miami, 306 So. 2d 173 (Fla. 4th D.C.A., 1974) the District Court said at page 175:

> Mandamus applies to legal duties of a specific imperative character as distinguished from those that are permissive or discretionary. The distinction between ministerial and judicial duties is that the duty is ministerial when the law prescribes and defines it with such precision and certainty as to leave nothing to the exercise of discretion or judgment. Where the act to be done does involve the exercise of discretion or judgment, it is a judicial or discretionary duty. Fasenmyer v. Wainwright, 230 So.2d 129 (Fla. 1969); Green v. Walter, 161 So.2d 830 (Fla. 1964); State ex rel Glynn v. McNayr, 133 So.2d 312 (Fla. 1961); Coral Gables v. State, 44 So, 2d 298 (Fla. 1950); Somlyo v. Schott, 45 So.2d 502 (Fla. 1950).

There is no doubt that the required rescission by the School Board is a ministerial act necessary to correct and stop an illegal purchase of Site "S" in violation of Florida Statutes 235.054 and School Board Policy 608 I.C.1.; 608 I.C.2; and 608 I.D. The requested order of this Court requiring rescission will not allow the School Board an exercise of discretion, but will direct it to carry out its duty as required by the said Statute and Policy. The ministerial duty is to simply rescind an act of exercising an option by a 3 to 2 vote while the Statute requires an extraordinary vote in this case. The ministerial duty is also to rescind that act of exercising the option because Policy 608 has not been followed and the act is therefore prohibited for the reasons set forth hereinafter in Paragraphs 7,

8, 9 and 10. The School Board is a constitutional body and its members are constitutional officers.

4. The School Board had not been properly informed by its attorneys that a vote to exercise the option to purchase Site "S" for $550,000.00 (when the average of the two appraisals was $229,750.00) required at least a 4 to 1 vote. Florida Statutes 235.054 requires that, "If the agreed purchase price exceeds the average appraisal prices of the two appraisals, the board is required to approve the purchase by an extraordinary vote." The School Board of Volusia County is composed of five members and members Earl C. McCrary and Susan A. Whit-taker voted on December 13, 1994 against exercising the option. to purchase.

5. The School Board adopted Policy 608 and it became legally effective on August 8, 1989 after a public hearing. The portions of Policy 608 controlling the prohibited action of the School Board are set forth in Paragraphs 6, 7 and 8 following.

6. School Board Policy No. 608 I.C.1. provides:

> "C. Public Announcement and Procedures to Purchase. 1. Real property shall be purchased by written contract or an option contract which shall allow 30 days public notice before final approval of purchase by the School Board at a public meeting."

Thirty days' public notice was not given before the School Board's 3 to 2 vote.

7. School Board Policy No. 608 I.C.2. provides that :

> "2. All agreements for the sale and purchase of real property shall specify that said agreement is subject to approval by the school board and the Department of Education, and to satisfactory results as to all geotechnological tests, property line, flood plain requirements and boundary surveys."

While the Memorandum of Agreement (attached to Defendant's Motion to Quash as part of Exhibit 3 and hereto as Plaintiff's Exhibit A) did require School Board approval, it was silent as to approval by the Department of Education.

8. School Board Policy No. 608 I.D. in part provides:

> ". . . For each purchase in excess of $500,000.00 the Facilities Property Management Department shall obtain at least two written appraisals. The school board may, by majority vote, exempt a purchase in an amount of $100,000.00 or less from the requirement for an appraisal."

The School Board has not in open or closed session been provided a legal description of the property covered by the Memorandum of Agreement (which is claimed by Cobb, Cole and Bell to be different than the property described in its Resolution No. 94-07 and in its Petition in Eminent Domain) and no appraisals have been done for the new parcel. Cobb, Cole and Bell has stated in written form through one of its lawyers, Jonathan D. Kaney, III, that the two appraisals "do not apply to the parcel that the

School Board condemned."

9. That on June 28, 1994 the School Board adopted Resolution No.94-07 authorizing eminent domain on a 15.33 acre parcel in DeBary, Florida. Then on August 30, 1994, the School Board attempted to adopt Resolution No. 94-07 after changing the legal description from 15.33 acres in the June 28 Resolution to 15.10 acres in the August 30 attempt (This is the description in Notice of Lis Pendens.). Neither of those legal descriptions in the Resolutions were included in the Minute Book of the School Board as required by Florida Statute 230.23(2). The June 28, 1994 Resolution (not the August 30, 1994 Resolution) was attached to the School Board's eminent domain petition (94-10866) as Exhibit B therein.

10. That Exhibit B referred to its own Exhibit A for the legal description of the property which was intended to be the subject of eminent domain. There was no Exhibit A attached to that Exhibit B. Cobb, Cole and Bell now claims that there are 18 acres in School Board's eminent domain suit (94-10866). In each of the three legal descriptions noted above (15.33 acres, 15.10 acres and 18.04 acres) there is also included (a 100' wide by one mile long) "Road Right of Way Description: The West 100 feet of the Northeast 1/4 and the West 100 feet of the Southeast 1/4 of Section 28, Township 18 South, Range 30 East, Volusia

County, Florida." The School Board erroneously relies on its 94-10866 eminent domain suit as a way to avoid the legal requirements of Florida Statute 235.054 and its Policy 608.

11. The Plaintiff has advised the School Board and Cobb that to proceed with the said purchase and closing on the option is illegal, but the School Board has instructed its employees to proceed to close under the said illegal action of December 13, 1994.

12. The Plaintiff's contention is simply that the School Board has given credence to the passage of a motion which is void and this Petition for Writ of Mandamus is sought to rescind that void action.

PLAINTIFF'S STANDING

13. The Plaintiff is a citizen of Volusia County, Florida, represents all persons in his situation as a voter and taxpayer, and has standing to bring this Petition For Writ of Mandamus against this School Board.

The Court in North Palm Beach v. Cochran, 112 So. 2d. 1 (Fla. 1959), at page 5, said:

> Where the object is the enforcement of a public right the people are regarded as the real party, and the Plaintiff need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the duty in question enforced.' 14 Amer. &

> Eng.Enc.Law, **218 and authorities there cited. The** above has been adopted by this court as being the correct rule in McConihe v. State, 17 Fla. 238, and in State v. Crawford, 28 Fla. 441, 10 So. 118 (14 L.R.A. 253).

The Amended Petition seeks settlement of a statute of statewide public interest and a policy of local public interest.

14. Intervention or leave of the Attorney General is not required to bring an action in his name in this suit by the Plaintiff.

15. The Plaintiff is not here questioning the ethics of the School Board, individually or collectively. No allegation is here made of any criminality. The Petition is simply saying that the School Board made a void motion and then acted thereon and that this Petition for Writ of Mandamus seeks to have the Circuit Court coerce the Board to rescind it. In the case of Citv of Coral Gables v. State, 44 So. 2d 298 (Fla. 1950), at page 300, concerning mandamus, the Court said:

> It may issue to coerce the performance of official duties where officials charged by law with the performance of a duty refuse or fail to perform the same.

WHEREFORE, the Plaintiff requests the Court retain jurisdiction and issue an Alternative Writ of Mandamus to require that the School Board respond to the amended allegations concerning School Board Policy 608 violations and Florida Statutes 235.054 and that the Court will direct the

School Board to rescind, as void, its action taken December 13, 1994 exercising the option to purchase Site "S" or to show cause why the Court should not make the Alternative Writ a final and absolute order.

Respectfully submitted,
JAMES B. CLAYTON
Attorney at Law

James B. Clayton
Post Office Box 39
DeLeon Springs, FL 32130
Florida Bar No.: 013997
(904) 9854077

STATE OF FLORIDA
COUNTY OF VOLUSIA

BEFORE ME, the undersigned authority, personally appeared JAMES B. CLAYTON, personally known by me, did affirm, depose and state that he has read the foregoing Petition and he affirmed that the facts and matters stated therein are true and correct.

AFFIRMED AND SUBSCRIBED before me this 1st day of February, 1995 in DeLand, Volusia County, Florida.

Marcelle Horwath
NOTARY PUBLIC
State of Florida
MARCELLE HORWATH
Printed Name
My commission expires:

OFFICIAL SEAL
MARCELLE HORWATH
My Commission Expires
Sept. 9. 1995
Comm. No. CC 142006

MEMORANDUM OF SETTLEMENT AGREEMENT
BETWEEN
THE SCHOOL BOARD OF VOLUSIA COUNTY
DEBARY ESTATES ASSOCIATES LIMITED
AND
DEBARY GOLF ASSOCIATES LIMITED
TO THE EXTENT OF ITS INTEREST

Being mindful of the uncertainty of litigation the parties have reached a mediated settlement as follows:

1. The School Board will acquire the property depicted on site plan dated 1 1/1 8/94 at a price of $550,000;

2. The School Board will pay Brigham Moore, et al $65,000 for its fees and costs;

3. In lieu of severance damages, the School Board will cause to be constructed during the construction of an elementary school on the site a brickwall on the northern property line of the school of single wide Norwegian brick, 6 feet high with columns every 20 feet and will landscape the 20 feet beyond the wall with live oaks of 4 inch dbh size and 5 foot wax myrtle shrubs, The School Board will guaranty one year survivability of the landscaping. Oaks will be placed at one per 30 feet. The sellers will be granted a maintenance easement to maintain the landscaping;

4. The School Board will construct a fence and gate across the future right-of-way along the western edge of the site;

5. The School Board will grant an easement for a brickwall and integrated sign at the southwest corner of the property adjacent to High Banks Road;

6. The construction on the site will be limited to two stories in height unless otherwise agreed by the parties;

7. The School Board will provide an easement for stormwater retention in the depressional area at the southwest corner of the site. to the extent that the capacity of the depression exceeds the needs of the school construction. The dedication of the drainange retention area and the adjoining road right-of-way will be documented in such a way as to secure to the sellers the maximum road impact fee credit available;

8. During school construction the School Board will cause a 12 inch waterline to be extended along the easterly perimeter to the northeasterly corner of the school site;

Exhibit A

9. Excess fill dirt, if any, resulting from the grading of the school site will be made available to the sellers at no cost;

10. During the construction of the school the School Board will cause water and sewer lines to be extended to the school site at no cost to the Developer. The School Board may negotiate a developer agreement with the County of Volusia which provides future reimbursement of hydraulic share at the expense of the ultimate consumer other than the seller;

This agreement is subject to approval by the School Board of Volusia County in lawful session. The undersigned representatives of the School Board agree to expedite the consideration of this agreement by the School Board. If this agreement is approved, closing will occur as soon as possible in calendar year 1995.

DEBARY ESTATES ASSOCIATES LIMITED
DEBARY GOLF ASSOCIATES LIMITED

By _____
Bill Vernon
General Partner

_____
J. Wiley Hicks, Counsel

SCHOOL BOARD OF VOLUSIA COUNTY

By _____
Patricia Drago
Interim Facilities Director

_____
C. Allen Watts, Counsel

DATE: 11/21/94

Appendix

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO. 9510044 CIDL
DIVISION 0 1

THE STATE OF FLORIDA
ON THE PETITION OF
JAMES B. CLAYTON,

Relator,

v.

SCHOOL BOARD OF VOLUSIA
COUNTY, FLORIDA,

Respondent.

MOTION TO QUASH ALTERNATIVE WRIT OF MANDAMUS

This action came before the Court on the filing of a petition for writ of mandamus by the plaintiff,[1] JAMES B. CLAYTON. On January 19, 1995, this Court issued an Alternative Writ of Mandamus requiring SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA ("SCHOOL BOARD"), to respond in writing to the allegations contained in plaintiffs complaint by either:

1. rescinding as void the alleged December 13, 1994 action of approving the exercise of an option to purchase site "B"; or by

2. showing cause why you have not done so; or by

---

[1] Although the plaintiff uses the terms "relator" and "respondent" in identifying the parties, these terms are no longer properly used in Florida. Fla.R.Civ.P. 1.630(a) & (e) requires that the parties to this type of proceeding be referred to as "plaintiff' and "defendant." It is also improper to bring the action on the relation of the State of Florida.

3. showing cause why Relator's Petition should be dismissed; or by

4. showing why this alternative writ should be quashed.

In accordance with the Court's Order, SCHOOL BOARD moves the Court to dismiss plaintiffs complaint, or in the alternative, to quash the January 19, 1995, Alternative Writ of Mandamus, and shows:

I. LACK OF STANDING

The plaintiff is not a proper party to bring this action. Plaintiff bases his claim for standing on North Palm Beach v. Cochran, 112 So. 2d 1 (Fla. 1959). Plaintiff alleges that he is enforcing a public right pursuant to the rule set forth in Cochran.

The rule in Cochran ignored the longstanding rule enunciated in Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205 (1917). From this case emerged what has been called the Rickman Rule. The case involved a suit to enjoin the county commissioners' and bond trustees' use of day labor (as opposed to contracting to the lowest bidder) to construct a bridge in violation of a legislative enactment. In concluding that the 'plaintiffs suit was properly dismissed for lack of standing the Supreme Court stated:

> The principle is universally recognized that to entitle a party to relief in equity he must bring his case under some acknowledged head of equity jurisdiction. In a case where a public official is about to commit an unlawful act, the public by its authorized public officers must institute the proceeding to prevent the wrongful act, **unless a private person is threatened with or suffers some public or special damage to his individual interests, distinct from that of every other inhabitant,** in which case he may maintain his bill.

73 Fla. at 158, 74 So. at 207. (Emphasis supplied)

The Rickman Rule, then, requires plaintiff to allege and prove, that he "suffers some public or special damage to his individual interests, distinct from that of every other

inhabitant." Plaintiff apparently interprets Cochran to read out the Rickman Rule special injury requirement as applied to public damage. Whether **Cochran** indeed does so, however, is immaterial because in 1981 the Supreme Court reiterated the Rickman Rule in the case of Department of Revenue v. Markham, 396 So, 2d 1120 (Fla, 1981). In holding that a citizen and taxpayer does not have standing to seek a determination of whether household goods of nonresidents were subject to taxation, the court reasoned:

> The complaint for declaratory relief contained no allegation of any special injury, and it did not attack the constitutionality of the taxing statutes in question. It has long been the rule in Florida that, in the absence of a constitutional challenge, a taxpayer may bring suit only upon a **showing of special injury which is distinct from that suffered by other taxpayers in the district.**

396 So. 2d at 1121. (Emphasis supplied)

Plaintiff has made no allegation that he suffers any special injury nor has he attacked the constitutionality of SCHOOL BOARD's alleged action. Therefore, plaintiff lacks standing to bring this suit.

II. LACK OF MINISTERIAL DUTY

Plaintiffs complaint fails to state a cause of action in that the duty plaintiff proposes that this Court force SCHOOL BOARD to perform is not a ministerial duty.

Plaintiffs "Petition for Writ of Mandamus is sought to rescind that **void** action," of approving "an option (to purchase real property) by a 3 to 2 vote while the Statute requires an extraordinary vote." (CP #6 & #3) (Emphasis supplied) Plaintiff alleges that it is a ministerial duty of SCHOOL BOARD to rescind the void vote. (CP #3)

BLACK'S LAW DICTIONARY (6th Ed.) defines "ministerial duty" as "[o]ne regarding which nothing is left to discretion--a simple and definite duty, **imposed by law,** and arising

under conditions admitted or proved to exist." (Emphasis supplied) **BLACK'S LAW DICTIONARY** defines "void" as "[n]ull; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended."

Plaintiff has not cited nor even referred to any duty "imposed by law" to rescind a "void" action. For this reason alone, plaintiff has failed to state a cause of action. However, a careful analysis of what plaintiff prays that this Court force SCHOOL BOARD to do is warranted,

Plaintiff claims that the disputed action (the vote) was null, ineffectual, nugatory, having no legal force or binding effect, etc . . . Plaintiff then, in a gross display of logical inconsistency, prays that this Court require SCHOOL BOARD to rescind that action. What plaintiff is asking this Court to do is essentially to require SCHOOL BOARD to undo something that was, according to plaintiffs complaint, never done. That is, if plaintiff is correct that the vote was void, as he alleges, then there is nothing to rescind--the action would be null and of no legal effect, Therefore, if the -vote were indeed void, as plaintiff alleges, then there is no duty, ministerial or not, to rescind it, because there would simply be nothing to rescind.

III. ABSENCE OF CLEAR LEGAL DUTY

Plaintiffs complaint fails to state a cause of action in that the complaint fails to allege facts showing a clear legal duty of SCHOOL BOARD to perform the act that the Alternative Writ of Mandamus would require SCHOOL BOARD to perform.

A. SCHOOL BOARD Has Not Exercised An "Option to Purchase"

Plaintiff alleges that SCHOOL BOARD exercised an option to purchase real property for greater than $500,000 by a 3 to 2 vote. Plaintiff alleges that the statute governing proposed real property purchases, FLA. STAT. $235.054, requires an extraordinary vote.

Plaintiffs allegation is wrong. In the first place, SCHOOL BOARD did not "exercise an option" to purchase real property. Rather, SCHOOL BOARD, on the recommendation of its attorney, ratified the settlement of an action in eminent domain, styled School Board of Volusia County v. Debar-v Estates Associates, Ltd., pending in this Court as Case No: 94-10866-CIDL-01. SCHOOL BOARD requests that this Court take judicial notice of civil action No: 94-10866-CIDL-01 now pending in this Court. Attached hereto as Exhibits 1 through 4, respectively, are certified copies of the agenda and minutes of the school board meeting in question, and the recommendations of its counsel and staff supporting the agenda item in question. These documents demonstrate that: (1) the questioned action was taken to settle a pending action in eminent domain; (2) the settlement included the compromise of business and severance damage claims exceeding $1 million; and (3) the settlement involved a different and larger parcel than the parcel to which the appraisals quoted in plaintiffs complaint pertain.

B. FLA. STAT. §235.054 is a Public Records Law Exemption

In that the December 13, 1994 vote in question ratified the settlement of an action in eminent domain, and not, as plaintiff erroneously alleges, a vote approving the exercise of an option to purchase real property, FLA. STAT. $235.054 is entirely irrelevant. That is, a plain reading of FLA. STAT. $235.054 reveals that it only governs certain types of real property purchases "if this procedure is utilized"; hence the title: "Proposed purchase of real property by a board; confidentiality of records; procedure."

SCHOOL BOARD has the inherent constitutional and statutory right to purchase real property. See FLA. CONST. Art. IX, sec. 4(b) and FLA. STAT. §230.03(2). FLA. STAT. $235.054 is not a limitation on SCHOOL BOARD's constitutional and statutory right to purchase real property. Rather, it is a public records law exemption that provides SCHOOL BOARD a procedure whereby SCHOOL BOARD can keep confidential, for a limited period of time, the appraisals received on the property sought to be purchased.

The procedures outlined in FLA. STAT. $235.054 are not mandatory. The statute says, "[i]f this procedure is utilized . . ." This language indicates that the procedures contained in the statute do not apply to all situations wherein a school board seeks to purchase real property. Rather, the heightened procedural requirements contained therein, including the requirement for an extraordinary vote, are the Legislature's trade-out for the right to keep the appraisals secret. SCHOOL BOARD has attached as Exhibit 5 a copy of House Bill No. 1266 which creates FLA. STAT. $235.054, as further evidence, beyond the plain meaning of the statute, that this statute is merely a public records law exemption.

Therefore, even if SCHOOL BOARD did exercise an option to purchase by the challenged 3 to 2 vote (which it did not), plaintiff would still have to show that SCHOOL BOARD "utilized" the procedures contained in the statute. Plaintiff, however, has not alleged that SCHOOL BOARD "utilized" the public records exemption provided by FLA. STAT. $235.054 and, therefore, would have failed to state a cause of action even if SCHOOL BOARD had indeed exercised an option to purchase real property.

C. FLA. STAT. §235.05 Governs Actions in Eminent Domain

The statute which governs the right of eminent domain possessed by school boards is FLA. STAT. $235.05. Not surprisingly, this statute is entitled: "Right of eminent domain."

FLA. STAT. $235.05 does not require an "extraordinary" vote by a school board when settling an action in eminent domain. Indeed, FLA. STAT. §235.05 does not require an extraordinary vote by a school board during any stage of an action in eminent domain, nor has plaintiff so alleged.

IV. CONCLUSION

SCHOOL BOARD is unable to rescind "as void the alleged December 13, 1994 action of approving the exercise of an option to purchase site 'B'," because there was no vote approving the exercise of an option to purchase site "B". In fact, there is not, nor was there ever, an option contract, written or oral, in existence between any parties for the purchase of site "B". Indeed, plaintiff does not even specifically discuss the alleged contract. Rather, plaintiff merely makes vague references to an option to purchase contract which is in fact fictional.

Therefore, SCHOOL BOARD's ordinary vote was proper and as such SCHOOL BOARD has no duty, legal or otherwise, to rescind it.

WHEREFORE, SCHOOL BOARD respectfully requests that this Court enter an order dismissing this action with prejudice or, in the alternative, enter an order quashing the Alternative Writ of Mandamus. SCHOOL BOARD further prays that the Court enter an order, pursuant to FLA. STAT. $57.105, awarding SCHOOL BOARD its attorneys' fees and costs associated with this frivolous action.

COBB COLE & BELL

By: _____

J. LESTER KANEY
FLA. BAR. NO. 156553
150 Magnolia Avenue
Post Office Box 2491
Daytona Beach, FL 32115-2491
(904) 255-8171
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to James B. Clayton, Post Office Box 39, DeLeon Springs, Florida 32130 this 24 day of _____, 1995.

_____
Attorney

JAK\JAK\MISC\150207.1

Appendix

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 95-10044
DIVISION CI-DL-01

THE STATE OF FLORIDA,
ON THE PETITION OF
JAMES B. CLAYTON,

Relator,

v.

SCHOOL BOARD OF VOLUSIA COUNTY, FLORIDA,

Respondent.

ORDER QUASHING ALTERNATIVE WRIT OF MANDAMUS AND DISMISSING CAUSE WITH PREJUDICE

The court, after reviewing the petition, issued an alternative writ of mandamus directing a response. The defendant School Board filed its motion to quash the alternative writ, or in the alternative to dismiss the petition. Plaintiff filed an amended petition, by stipulation, and the defendant School Board's motions stood over against the petition as amended.

I.

As to the Volusia County School Board's first ground, it argued that plaintiff was without standing, and the court agrees. The court finds that under current standards of the Supreme Court of Florida, plaintiff Clayton lacks standing to seek relief.

Florida has a checkered history for the requirements of standing to brind a suit such as was brought here. Plaintiff argues that he has standing under the authority of *Rickman v. Whitehurst, et* al., 73 Fla. 152, 74 So. 205 (Fla. 1917).

The *Rickman* rule states that:

> "[w]here a public officer threatens an unlawful act, the public by its representatives must institute the proceedings to prevent it, unless a private person can show a damage peculiar to his individual interests in which case equity will grant him succor."

In the pre-1985 Florida court decisions after *Rickman* cited by plaintiff Clayton, there was support for the proposition that a plaintiff had standing to sue to rescind an action of a public body which, if not rescinded, would act to increase the tax burden of himself and others.

Plaintiff never specifically alleged in the petition as amended that he would suffer an increased tax burden if the court failed to grant the relief requested. Plaintiff did argue such at the hearing in support of his standing claim. In spite of the failure of plaintiff to allege such an injury, the court will address the issue based upon what was pled as well as what was argued at the hearing.

Valid public policy considerations support the interpretation of *Rickman* as set forth by the plaintiff to support his standing. Allowing a taxpayer to have standing to sue a body for alleged unlawful conduct which would increase his burden gives the taxpayer power to insure that the laws are being upheld and that tax money is not being unlawfully spent. Furthermore, a contrary interpretation of *Rickman* could potentially insulate governmental bodies from lawsuits instituted by a taxpayer interested in insuring that governmental bodies uphold the law.

Nevertheless in 1985 the Florida Supreme Court established a rule which eliminated any arguable standing that plaintiff might have previously had. In *North Broward Hospital District*

v. Fornes, 476 So.2d 154, at 155 (Fla. 1985), the Court held that absent a constitutional challenge, a taxpayer must allege a special injury distinct from other taxpayers in the taxing district to challenge alleged illegal government expenditures. See *also Godheim v. City of Tampa, 426* So.2d 1084 (Fla. 2d DCA 1983) .

In *Fornes*, the Florida Supreme Court recognized that these standing rules are based upon highly debatable public policy choices, but found that the overriding public policy was guaranteeing that public bodies exercise their taxing and spending authority without unduly hampering the normal operations of a representative democratic government. *Id* at 156.

Without a special injury standing requirement, the courts would in all likelihood be faced with a great number of frivolous lawsuits filed by disgruntled taxpayers who, along with much of the taxpaying public these days, are not entirely pleased with certain of the taxing and spending decisions of their elective representatives. *Godheim,* 426 So. 2d at 1087, citing *Paul v. Blake,* 376 So.2d 256 (Fla. 3d D.C.A. 1979). Absent some showing of special injury as thus defined, the taxpayer's remedy should 'be at the polls and not in the courts. After all, in a representative democracy the public representatives should ordinarily be relied upon to institute the appropriate legal proceedings to prevent the unlawful exercise of the state's or county's taxing and spending power. *Id.*

In the instant case, plaintiff has not made any allegation of special injury, nor has he attacked the constitutionality of the defendant School Board's action. Accordingly, under current Florida law, plaintiff does not have standing to bring this action calling into question the legality or propriety of the actions of the School Board in relation to Florida Statute

$235.054. Nor does plaintiff have standing to question the legality or propriety of the actions of the School Board in relation to the eminent domain proceedings.

II.

In seeking to quash the writ and dismiss the petition as amended, the defendant School Board also argues that the requirements of $235.054 do not have to be met by the School Board in this scenario. The court agrees. Even had the court found that plaintiff did have standing, any arguments regarding defendant's alleged failure to perform legal duties required by Florida Statute $235.054 and its Rule 608 promulgated in furtherance of that statute are not well taken. The court finds that, as argued by the defendant School Board, defendant proceeded to acquire the land in question pursuant to its right of eminent domain as set forth in Florida Statute $235.05. The rights and duties of the defendant School Board under that section are distinct from the requirements of $235.054, a statute dealing with the purchase of land by a school board.

Since the defendant sought to acquire the land in question pursuant to condemnation proceedings rather than pursuant to an option or purchase contract, defendant is not required to meet the requirements of $235.054. Accordingly, plaintiff has failed to state a cause of action because he failed to allege facts demonstrating a clear legal duty to comply with the requirements of Florida Statute $235.054,

III.

Likewise aside from plaintiff's lack of standing, the court has considered the arguments of plaintiff regarding claimed defects in the eminent domain proceedings in Case No. ~~104966~~ 94-10866 Juwit including suggestions of fraud perpetrated on the court by counsel for the defendant School Board and/or for DeBary Estates Associates, Ltd., *et al.* The court finds these contentions to be unsubstantiated and not supported by the record.

For the foregoing reasons, the Alternative Writ of Mandamus is quashed, and the Amended Petition is dismissed with prejudice. The Court takes under advisement the claim of defendant School Board for attorneys' fees and costs, and retains jurisdiction to determine any such claims, pending further hearing.

DONE AND ORDERED in chambers at DeLand, Volusia County, Florida this 15 day of February, 1995.

/s/ JOHN W. WATSON, III
Circuit Judge

copies to:
James B. Clayton
C. Allen Watts

Appendix

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

5DCA CASE NO.: 95-00643
VOLUSIA
L.T. CASE NO.: 95-10044-CIDL

JAMES B. CLAYTON,

Appellant,

-vs-

SCHOOL BOARD OF VOLUSIA COUNTY,

Appellee.

RESPONSE TO MOTION FOR STAY OF APPEAL AND CROSS-MOTION TO DISMISS APPEAL AND AWARD ATTORNEYS' FEES

Appellee School Board of Volusia County responds to the Motion to Stay served by Appellant. on May 23, 1995, by cross-moving to dismiss the appeal herein as moot or frivolous or lacking an indispensable party, and shows:

1. The Final Judgment appealed from is attached hereto as Exhibit A. In the lower court, Appellant as a taxpayer had petitioned for a Writ of Mandamus ordering the appellee School Board not to enter a stipulated Final Judgment in a pending eminent domain action.

2. Mandamus was denied by the lower court, both because Appellant lacked standing and because there was no merit in his petition.

3. Final judgment in the eminent domain proceeding (7th Circuit-Volusia No; 94-10866) was thereafter entered, and the appeal period has expired, A copy of that judgment is attached as Exhibit B. Appellant was not a party to that action, and this Court cannot now entertain any appeal therefrom.

4. The School Board has fully complied with that judgment, as evidenced by its Notice of Deposit of the condemnation award (attached as Exhibit C) and is now the owner of the school site in question.

5. In substance, Appellant proposes by this Appeal to ask this Court to nullify, by mandamus, an unappealed final judgment in another case in which this Appellant was never a party and never sought intervention.

6. The condemnee in Case 94-10866 is not a party in this case, and would be indispensable to any appeal which asks this Court to nullify its condemnation award and seize its proceeds.

7. Appellant argues for stay (or properly, abatement) of this appeal on the ground that by virtue of some speculative future agreements or postdecretal orders in Case 94-10866; this appeal might become moot. The School Board responds that this appeal is now moot, and is in any event frivolous for the reasons and upon the authorities cited in the judgment here appealed (Exhibit A).

8. The supposed grounds for stay of this appeal arise out of a Rule 1.540 motion pending in Case 94-10866 in the lower court, to which Appellant is not a party. At its meeting of May 22, prior to the service of the motion for stay herein, the School Board authorized a stipulated joint motion which makes the argued ground for stay moot. A copy of the agenda item and recommendations approved by the Board is attached as Exhibit D.

9. The School Board has engaged architects who have drawn plans for the construction of an elementary school on the condemned property, and has had its plans approved by the Department of Education, and its site plan approved by the City of DeBary,

and has invited bids for the construction of an elementary school, which are returnable on May 31, 1995.

10. The School Board intends to finance the construction with proceeds of its 1991 Certificates of Participation in a lease-purchase program. The governing resolutions authorizing said Certificates require the issuance of a Title Insurance policy in favor of the lessor of the facilities, and the School Board intends to issue such policy on or about June 13, 1995. Granting of any stay in this matter would require disclosure of such a stay in the Title Insurance policy as an exception, and cast doubt upon the financing of the school.

11. The School District has conducted public hearings and has thereupon already fixed the 1996 attendance zones for the new school, and proposes to construct the school with lease-purchase revenues at an estimated cost exceeding $6 million, and to open the school for attendance in approximately one year.

12. If for any reason. this appeal is not dismissed or is stayed in such a manner as to place in doubt the funds expended in the unappealed eminent domain proceeding, or to delay the timely construction and opening of the school, Appellant should be required to post a supersedeas bond in an amount not less than $6,615,000, subject to adjustment upon determination of the amount of the successful construction bid.

13. The lower court has expressly reserved jurisdiction to consider and award attorneys' fees under Fla. Stat. S. 57.105 in favor of Appellee, and a motion therefor is pending in the lower court, awaiting the return of jurisdiction to that court. Appellee further moves for the award of appellate fees in this court (in which its legal services have thus far been substantially limited to the filing of this Response and Motion), to be determined along with the fees in the trial court.

WHEREFORE, Appellee School Board prays that the Motion for Stay be denied and that this Appeal be summarily dismissed as moot, or frivolous, or lacking an indispensable party, and that its costs and counsel fees of defense be awarded.

COBB COLE & BELL

By: C Allen Watts

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ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Todd J. Sanders, Esquire, 432 South Beach Street, Daytona Beach, Florida 32114, Co-Counsel for Appellant, this 26 day of May, 1995.

C Allen Watts

Attorney

Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1996

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

JAMES B. CLAYTON,

Appellant,

v.

CASE NO. 95-643

SCHOOL BOARD OF VOLUSIA COUNTY,

Appellee.

Opinion filed February 9, 1996

Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge.

Daniel R. Vaughen of Daniel R. Vaughen, P.A., and Philip L. Partridge, Deland, and Richard S. Graham, of Landis, Graham, French, Husfetd, Sherman & Ford, P.A., Daytona Beach, and Todd J. Sanders, Daytona Beach, for Appellant..

C. Allen Watts of Cobb, Cole & Bell, Daytona Beach, for Appellee.

HARRIS, J.

This case requires that we review the holding in *North Broward Hospital District v. Fornes*, 476 So. 2d 1564 (Fla. 1985), which substantially limited taxpayer standing in most litigation, to determine if James B. Clayton has standing to bring this action.

The undisputed facts are these: The School Board of Volusia County (Board) adopted a resolution authorizing an eminent domain action to acquire certain property in

DeBary, Florida, owned by DeBary Estate Associates, inc. Pursuant to this resolution and the authority granted by it, the Board filed its petition for eminent domain.

During the course of the action, however, it was decided to substantially change the description of the property to be acquired. And instead of permitting the issue of value to go to the jury, the value of the new parcel was determined by negotiated agreement. Even though the purchase price agreed to was in excess of $500,000, over twice the amount of the appraisals in the record, the Board voted to approve the purchase but only by a bare majority vote.

Clayton contends that the Board acted without lawful authority in that it failed to comply with section 235.054(1)(b), Florida Statutes, which requires:

> Prior to acquisition of the property, the board shall [if the purchase price exceeds $500,000] obtain at least two appraisals by appraisers approved pursuant to s. 253.025. If the agreed purchase price exceeds the average appraised value, the board is required to approve the purchase by an extraordinary vote.

Although the Board asserts that this transaction is not subject to section 235.054(1)(b) because the purchase took place as part of an eminent domain action, we must consider the allegations of Clayton's complaint in order to determine standing. Only If we find standing should we proceed to the merits of the controversy.

The question before us, then, is whether a taxpayer who believes that a public board is wasting public money to the detriment of all the taxpayers by acting beyond its authority must sit back and watch the unauthorized action go forward or whether he, as one of the aggrieved taxpayers, may enforce the Board's adherence to its lawful authority through the courts via mandamus. In other words, did James B. Clayton have standing to

challenge the action of the School Board of Volusia County when it proposed to settle an eminent domain action by agreeing to purchase property not described in the Order of Taking for more than the appraised value and in excess of $500,000 even though such action lacked the extraordinary vote required by the legislature?

Our first inquiry is whether *Forms* precludes standing since Clayton admittedly is not economically impacted differently from any other taxpayer. This restriction truly creates a standing rule that is an anomaly: if everyone is injured, no one can sue. In announcing this rule as it applies to taxpayer actions, the majority in *Fornes* stated:

> Since this court's decision in Henry L. *Doherty &* Co. *v. Joachin*, 146 Fla. 50, 200 So. 238 (1941), we have consistently held that a mere increase in taxes does not confer standing upon a taxpayer to challenge a governmental expenditure. In that case we stated:
>
> > Both parties seem to recognize the rule announced in *Rickman v. Whitehurst, et al.*, 73 Fla. 152, 74 So. 205, that in the event an official threatens an unlawful act, the public by its representatives must institute the proceedings to prevent it, unless a private person can show a damage peculiar to his individual interests in which case equity will grant him succor.

In a strong dissent, Justice Ehrlich asserted that the *Fornes'* majority simply misread the precedent when it held that an illegal public action that raises the taxpayer obligation or wastes public money cannot constitute the necessary "injury" which authorizes a taxpayer suit. A careful reading of *Chamberlain v. City* of *Tampa,* 40 Fla. 74, 23 So. 572 (1898), *Rickman* and *Joachin* lends support to Justice Ehrlich's contention, and we respectfully request that the present court reconsider the *Fornes* decision.[1]

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[1]Our analysis is not a criticism of the 1985 supreme court. We recognize the authority of the supreme court and our obligation to apply the law as directed by its decisions. We do not believe It inappropriate, however, after a reasonable period of time and after observing the effect of a

In *Chamberlain,* the court was considering a challenge by a taxpayer that the City had acted improperly when it applied to the general fund surplus monies from an account committed to the reduction of bonds. In response to a challenge to the taxpayer's standing, the court held:

> Courts of equity have jurisdiction to restrain municipal corporations and their officers from making unauthorized appropriations, or otherwise illegally and wrongfully disposing of the corporate funds, to the injury of property holders and taxpayers in the corporation, and a bill for this purpose is properly brought by an individual taxpayer on behalf of himself and other taxpayers in the municipality.

Chamberlain, 23 So. at 574. This principle was recognized in *Rickman:*

> In the first place the complainant has the right to maintain the bill if the acts complained of were unauthorized and not within the powers of the board of county commissioners, and tended to produce a resulting injury to the complainant by increasing the burden of his taxes. The right of a citizen and taxpayer to maintain a suit to prevent the unlawful expenditure by public officials of public monies . . . is generally recognized.

Rickman, *74 So.* at 206.

In *Rickman,* the taxpayer challenged that the county had improperly acted to use public funds to construct roads and bridges by hiring day labor instead of contracting with the lowest and best bidder. But, as the court stated:

> There is no allegation of special injury to the complainant, nor that the cost of constructing the roads and bridges by the method proposed will entail a greater cost than the method prescribed by the general act, nor that the money is being wasted or improvidently expended . . . . If [the taxpayer in *Rickman* could maintain the action], then any citizen of the county, whether taxpayer or not, whether he resides in the special road district or beyond its limits, may maintain the action.

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particular decision on the litigants that come before us, to request that the supreme court review a decision that is so often challenged before our court. It is up to the supreme court to determine whether the request deserves consideration.

Although *Rickman* requires a "special injury," it held that an allegation of an illegal expenditure of public funds which would either increase the tax burden or waste public money, would meet that requirement. What constitutes an actionable injury is made even clearer by *Rickman's* further comment:

> [The taxpayer's] position is not contradistinguished from that of all other taxpayers, or citizens who are not taxpayers, and therefore cannot invoke the aid of equity merely to prevent an unlawful corporate act however much the act may shame his sense of pride in the faithful observance by public officials of the obligations of their public duties.

We believe that this language stands for the proposition that if a citizen/taxpayer cannot show that his or her tax burden will increase because of illegal action, he or she has no standing to sue public officials merely to force them to obey the law. For example, if a county commissioner routinely runs a stop sign or exceeds the speed limit, a taxpayer suffers no "injury" that would justify individual action. If the taxpayer wants to stop this type of illegal activity, he or she should contact law enforcement. However, if the county is required to pay the commissioner's fines out of the public treasury, an individual action would be appropriate.[2]

Joachin followed up on this theme. In *Joachin*, the taxpayer sued because the City voted to close a public walkway that ran along the shore between the Breakers and the ocean. The complainant urged that although the entire public was "injured," his injury was greater because the complainant, "their guests and tenants had but 600 feet to walk for

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[2]The Board argues here that the protection of the public interest even in cases such as this is adequately left in the exclusive hands of the Attorney General and the State Attorney. This argument is refuted by the obvious fact that only Clayton has stepped forth to protect the public interest in this case.

a swim before the act of the council in closing the pathway" but because of the City's improper action, such journey was now increased to "one-third of a mile and required passage through a congested traffic area."

The court found that although the complainant was injured, his injury did not differ in kind from that of "others in the same community, the neighbor next door or the man across the street."[3] But *Joachin* did not involve the illegal expenditure of public funds or the wasting of public money which would bring the case within the "general rule" recognized by *Rickman.*

Admittedly, however, the *Fornes* majority read *Rickman* to require some special injury other than increased taxes suffered by all taxpayers. The court adopted the following language from *Department* of *Administration* v. Home, 269 So. 2d. 659, 663 (Fla. 1972):

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[3]We confess some confusion by this holding, The *Joachin* court seems to acknowledge that the value of property in a coastal area depends on its "accessibility" to the beach. Indeed, the court recognized the disappointment of property owners "who having bought within easy walking distance to the sea awake suddenly to find that if they are to be lulled by the waves lapping the sands; charmed by the sunlight dancing upon the water; fascinated by myriads of minnows fleeing for their lives before the ruthless charge of a cavilla; or interested by a stately liner sailing for Miami, close in to avoid the Gulf Stream, they must go three times as far through a business district in a most roundabout way. . . that there has been an injury we have no doubt; that it is greater in degree than that of many others in the community we believe; that it is different in kind we cannot agree." In recognizing that the value of an owner's property would be affected by the challenged government action, we have to wonder why the constitutional right to seek redress was not implicated. If *Joachin* considered the issue at ail, the court must have believed that the injury suffered by the complainants by having to go a greater distance to the beach caused by the unauthorized acts of public officials did not come within the protection of the constitutional provision then in effect: "All courts of the state shall be open so that every person for any injury done him in his lands, goods, person or reputation shall have remedy." Section 4, Declaration of Rights, Constitution of the State of Florida (1885). However, now (and at the time of *Fornes*) a different standard applies: 'The courts shall be open to every person for the redress of any injury." (Emphasis added). Article 1, Section 21, Constitution of the State of Florida (1968). By its terms at least, the constitution does not distinguish between direct and indirect, small and large, or special and universal injuries.

> Thus we find that where there is an attack upon constitutional grounds based directly upon the Legislature's taxina and spending power, there is standing to sue without the *Rickman* requirement of special injury, which will still obtain in other cases.

Therefore, if the supreme court elects not to reconsider the Fornes decision, then Clayton's standing depends on whether his claim comes within an exception to Fornes.

We believe that standing in this case meets a recognized exception to the Fornes' rule. *Fornes* itself recognized a "constitutional argument" exception. Certainly, the question of whether a public board can take an official action requiring the expenditure of public funds on less than its required vote has constitutional implications since it challenges the very heart of representative government -- whether the servant must operate within his delegated authority.

In addition, the supreme court in *Clayton* v. Board of *Regents, 635* So.2d 937 (Fla. 1994), engrafted an additional exception -- a "unique circumstances of the case" exception. We acknowledge and agree with the statement in the dissent that it is not clear exactly what the specific circumstances were in *Regents* that authorized standing. However, this is an issue that almost daily faces the trial court and regularly faces us. Since we assume that the new "unique circumstances of the case" rule on standing applies to all courts when dealing with a mandamus petition, it is our obligation to help shape the limits and better define such rule subject to supreme court review and correction. Therefore, based on an analysis of *Regents,* we should determine and explain the standard for this new exception. This is essential if we are to assist the trial court in determining the scope of the new rule.

The issue in Regents, insofar as we can tell from the Regents opinion, was whether a public body overseeing the state university system exceeded its authority when it appointed one of its own as president of one of the universities under its control. The challenge to this authority was not based on a constitutional argument but rather on a common law principle that a governmental body may not appoint one of its own members to a position over which it has the power of appointment.

It appears, therefore, that the "unique circumstances" doctrine may apply when one challenges the very authority of the public board to take the contested action or, as in our case, contends that no action was lawfully taken by the board because it failed to obtain the necessary vote yet proceeded as though it had officially acted. Or it may well be that the supreme court was merely recognizing a position similar to the one announced by the New Mexico Supreme Court in *State ex rel Clark v. Johnson, 904* P. 2d 11, 18 (N.M. 1995):

> In the present proceedings, two of the Petitioners are state legislators, and all three are voters and taxpayers. However, as in *Sego*,[4] we need not consider whether those factors independently confer standing to bring this action because, as in Sego, the issues presented are of "great public interest and importance." *Id.* Petitioners assert in the present proceeding that the governor has exercised the state legislature's authority. Their assertion presents issues of constitutional and fundamental importance; in resolving those issues, we will contribute to this state's definition of itself as sovereign. "We simply elect to confer standing on the basis of the importance of the public issues involved." *Id.* More limited notions of standing are not acceptable.

We believe that the issue of whether a public board can take official action with less than the requisite vote is of sufficient public importance to warrant standing under the "unique circumstances" standard or under the constitutional question exception. But we

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[4] *State* ex *rel* Sego *v.* Kirkpatrick, 524 P. 2d 975 (N.M. 1974).

certify the following **questions** to the supreme court as having great public importance:

> DOES THE "UNIQUENESS OF THE PARTICULAR CASE" STANDARD PERMIT A TAXPAYER CHALLENGE TO THE ACTION OF A PUBLIC BOARD WHICH IS ALLEGED TO BE ACTING IN EXCESS OF ITS STATUTORY AUTHORITY AND WHICH ACTION EITHER INCREASES THE TAX BURDEN OR WASTES PUBLIC MONEY?

And in the alternative:

> DOES THE ACTION OF A PUBLIC BOARD WHICH EITHER INCREASES TAXES OR WASTES PUBLIC MONEY RISE TO THE LEVEL OF A CONSTITUTIONAL ISSUE WHEN IT IS ASSERTED THAT THE PUBLIC BOARD EXCEEDED ITS AUTHORITY GRANTED BY THE LEGISLATURE?

Having determined that Clayton has standing, we now proceed to the issue on the merits. The Board contends that section 235.054 is simply inapplicable to this case since the purchase was a part of the process of eminent domain.

We agree that the extraordinary vote required by section 235.054 does not apply if the Board acquires property under the power of eminent domain. We disagree, however, that the Board can avoid the provisions of this section merely by filing an eminent domain action, after which it then proceeds to negotiate the purchase of the property. We are not suggesting that this was the intent of the Board when the eminent domain action was filed, merely that the filing of an eminent domain action alone does not change the Board's responsibilities in negotiated purchases.

We believe the legislature has given the Board two, and only two, alternative methods for obtaining real property -- eminent domain and negotiated purchase. If the eminent domain method is used, the value is established by twelve citizens. In this event, the Board's only action is the initial vote to proceed to eminent domain. The amount is totally in the hands of an impartial jury. However, the Board urges that, as with any

litigation, it can "settle" even an-eminent domain case by agreement. Certainly it can, but in doing so, the transaction becomes a negotiated purchase and not an eminent domain taking. That is particularly true in this case because the property taken was not even described in the order of taking. If the value is established by agreement, we believe the proceedings fall under the requirements of section 235.054. This section provides that the Board can settle based on a bare majority vote if the agreed price does not exceed the average appraised value. If the purchase price does exceed the average appraisal, however, then an extraordinary vote is required. It was required in this case.

Nor do we accept the Board's position that it can "opt out" of section 235.054 simply by not invoking the exemptions from disclosure provided by section 235.054(a). We believe that the provision of 235.054(b) apply to any purchase of real property by the Board that is not accomplished by a jury verdict in an eminent domain action.

The court's order quashing the alternative writ of mandamus is reversed and the cause is remanded for further action consistent with this opinion.

REVERSED and REMANDED.

COBB, J., concurs.
ANTOON, J., dissents, with opinion.

ANTOON, J., dissenting with opinion.

While I respect the views expressed by the majority, I dissent.

James Clayton appeals the trial court's order denying his petition for writ of mandamus. The petition requested the trial court to issue an order directing the School Board of Volusia County (School Board) to rescind its vote to acquire real property described as "Site S," alleging that the vote was void because it was not made in accordance with the provisions of section 235.054, Florida Statutes (1993)[1]. The petition alleged that Clayton had standing to seek mandamus relief in the circuit court as a citizen of Volusia County "representing all persons in his situation as a voter and taxpayer." The trial court denied the petition, citing to North Broward Hospital District v. Fornes, 476 So.2d 154 (Fla. 1985), ruling that Clayton lacked standing to obtain mandamus relief because his petition failed to allege either a constitutional challenge or a special injury. I conclude that the trial court was correct in so ruling, and therefore, I would affirm.

The holding in Fornes is clear -- "[a]bsent a constitutional challenge, a taxpayer must allege a special injury distinct from other taxpayers in the taxing district to bring suit." Fornes, 476 So. 2d at 154. As I read Fornes, an allegation of either unconstitutionality or special injury is essential in a taxpayer suit, and without such an allegation a taxpayer lacks standing to institute a suit challenging allegedly illegal expenditures made by the government. Here, Clayton's petition for mandamus failed to assert either a constitutional challenge or an allegation that Clayton suffered a special injury. Accordingly, the trial court properly concluded that application of Fornes mandated denial of Clayton's petition. In agreeing with the trial court's conclusion, I reject Clayton's contention that the decision in

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1 Section 235.054 of the Florida Statutes (1993) provides, among other things, that when a school board seeks to acquire by purchase any real property for educational purposes and the agreed purchase price exceeds the average appraised price of two appraisals, the school board must approve the purchase by an extraordinary vote.

Fornes is factually distinguishable and therefore not controlling.

In this regard, Clayton maintains that the ruling in Fornes does not apply to the instant case because, unlike the petitioner in Fornes who sought injunctive relief, in this case Clayton petitioned the trial court seeking mandamus relief. Clayton cites ,to Clayton v. Board of Regents, 635 So. 2d 937 (Fla. 1994) to support this argument. In Board of Reaents, Clayton filed a petition for writ of mandamus challenging the authority of the Board of Regents to appoint Betty Castor as president of the University of South Florida. With regard to the question of whether Clayton had standing to institute the mandamus action, the supreme court simply stated that "under the unique circumstance? of this case, we do find that Clayton has standing to bring the petition . . ."

While it is unclear what the "unique circumstances" were in that case, I reject the majority's conclusion that the terse reference was intended to create an exception to the holdinginFornes. I do this because the supreme court did not cite to Fornes and did not explain what was meant by the reference. Although the majority elevates this phrase to the status of a rule of law, in my view, it is at best obscure dictum. However, even if this language were intended to create such an exception to the law of standing, it would not apply in the instant case because there is nothing "unique" in either Clayton's status as a taxpayer or in Clayton's choice of mandamus as his vehicle for relief. Furthermore, I conclude that it is unlikely that, in so ruling, the supreme court intended to make the distinction Clayton urges us to make here; that is, that standing to challenge government action exists when a challenger seeks mandamus relief but not when injunctive relief is sought. If such a distinction were intended, the supreme court would have clearly said so.

In any event, the decision in Board of Regents is certainly distinguishable inasmuch as that case did not pertain to a taxpayer challenge concerning the expenditure of public money, but instead, involved a citizen's challenge to the appointment of a university

president, and as a result, the Regents court did not even cite to or mention the ruling in Fornes in its discussion of the standing issue.

However, in an abundance of caution, I suggest that the following question be certified to the supreme court as one of great public importance:

> DOES A VOTER OR TAXPAYER HAVE STANDING TO PURSUE MANDAMUS RELIEF WHEN CHALLENGING THE LEGALITY OF THE GOVERNMENTS EXPENDITURE OF FUNDS?

In closing, I note that the policy considerations expressed by the court in Fornes apply to the facts of the instant case:

> We recognize that all these standing rules are based on highly debatable policy choices, but they represent, in our view, a reasonable effort to guarantee that the state and counties lawfully exercise their taxing and spending authority without unduly hampering the normal operations of a representative democratic government. We adhere to these rules today because they are based on long-established precedent and seem both reasonable and fair.

Fornes, 476 So. 2d at 155 (quoting Paul v. Blake, 376 So. 2d 256 (Fla. 3d DCA 1979)). It is obvious from the persuasive dissent authored by Justice Ehrlich that the majority opinion in Fornes was controversial in the respect that the court's decision to limit public access to our courts affects not only those citizens who institute suit in an effort to frustrate the legitimate functions of state government but also to those citizens who are presumably well-intentioned. Nevertheless, Fornes is the controlling law in Florida and I maintain that the trial court was correct in enforcing it. While review of the instant record certainly raises concerns with regard to the legality of events leading up to the School Board's acquisition of the Site S property, I conclude that disposition of this appeal must turn on the fact that Clayton lacked standing to pursue the underlying action for mandamus.

Appendix

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Bradley DB	Buck DB	1. ECCA	FAV/2 amends.
2.			2.	
3.			3.	
4.			4.	

SUBJECT :

Municipalities

BILL NO. AND SPONSOR:

HB 183 by
House Committee on Governmental Operations

I. SUMMARY :

A. Present Situation:

Paragraph 166.045(1)(a), Florida Statutes, relating to the proposed purchase of real property by municipalities, provides an exemption from the open records requirements of chapter 119, Florida Statutes, for appraisals, offers, and counteroffers associated with the purchase of real property for a municipal purpose. The exemption is time-limited and is effective Only until an option contract has been executed or, if no option contract is executed, until 30 days before a contract or agreement for purchase is considered for approval by the governing body of the municipality. In the event that a contract or agreement for purchase is not submitted to the governing body, the exemption from the open records law expires 30 days after the termination of negotiations.

Custodians of these confidential records include city administrators, clerks, attorneys, or department heads responsible for real property acquisitions. Some local governments maintain the documents in a locked file or safe, while others keep appraisals, offers, and counteroffers in their regular files but under the direct control of the responsible staff person. The alternative source for obtaining confidential appraisal reports would be the appraiser who had prepared the document. Municipalities utilizing the public records exemption must select appraisers who are members of appraisal organizations listed in s. 253.025(7)(b), F.S. Florida law requires appraisers to be licensed under ch. 475, F.S., as real estate salesmen or brokers. Their fiduciary responsibility not to divulge client information safeguards appraisal documents in their possession.

Paragraph 166.045(1)(b), F.S., requires appraisals of real property that is to be purchased by a municipality if the public records exemption is being used. Governing bodies must obtain at least one appraisal for each purchase of not more than $500,000 and two appraisals for each purchase over that amount. Purchases in an amount of $100,000 or less may be exempted by ordinary vote of the governing body from the requirement for an appraisal. If the agreed purchase price exceeds the average of the appraised values contained in the two appraisals, the governing body must approve the purchase by an extraordinary vote.

The exemption provisions of s. 166.045, F.S., are scheduled for repeal on October 1, 1988, pursuant to the Open Government Sunset Review Act. In addition, the same repeal date was established for the section as a whole at the time of its enactment.

B. Effect of Proposed Changes:

Section 166.045, F.S., is revived and readopted and is amended, in accordance with s. 119.14(4)(e), F.S., to include uniform language subjecting the section to the Open Government Sunset Review Act.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Maintaining the time-limited exemption to the open government requirements allows municipalities to negotiate effectively to purchase property at the lowest possible price, thereby saving taxpayers' money.

B. Government:

Continuing the time-limited exemption from the open records law for appraisals, offers, and counter-offers related to purchases of real property places municipalities on an equal footing with property owners in negotiations. This enables municipalities to continue to negotiate effectively to acquire properties at the lowest possible price.

III. COMMENTS:

None.

IV. AMENDMENTS:

#1 by ECCA:

Amends sections 125.355 and 166.045, F.S., to clarify that the decision to use the public records exemption may be made by a local government on a case-by-case basis and that compliance with the other provisions of each section is only required when the exemption is being used. Revives and readopts section 166.045, F.S., and includes uniform language subjecting the section to the Open Government Sunset Review Act.

#2 by ECCA:

corresponding title amendment.

Appendix

AS PASSED BY THE LEGISLATURE

COPY

STORAGE NAME: h183-f.go
Date: June 14, 1988

HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENTAL OPERATIONS
FINAL STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT

BILL #: HB 183 (Passed)

RELATING TO: Purchase of real property by counties and municipalities

SPONSOR(S): Governmental Operations and Hodges

EFFECTIVE DATE: October 1, 1988

DATE BECAME LAW: May 30, 1988

CHAPTER #: 88- Laws of Florida

COMPANION BILL(S): SB 373, CS/HB 379

OTHER COMMITTEES OF REFERENCE: (1)

(2)

****

I. SUMMARY :

A. PRESENT SITUATION:

Sections 125.355, and 166.045, F.S., relate to the proposed purchase of real property by counties and municipalities respectively. These sections are identical in scope. Provisions for the proposed purchase. of real property by counties are found in s. 125.355, F.S., and for municipalities in s. 166.045.

The statutes provide that when such entities seek to **acquire** real property, every appraisal, offer, or counteroffer must be in writing and is exempt from the provision of chapter 119 until an option contract is executed, or if not option contract is executed until 30 days before a contract or agreement for purchase is considered for approval by the governing body. If a contract or agreement is not submitted to the governing body for approval, the appraisal, offer or counteroffer becomes public information 30 days after negotiations cease. The governing body must obtain complete and accurate records of all appraisals, offers, and counteroffers. An option contract for purposes of these sections, is defined as an agreement by the governing body to purchase a piece of property subject to the approval of the governing body at a public meeting after 30 days notice.

The governing body is not under an obligation to exercise the option unless the contract is approved by such body in a public

public meeting. If this procedure is utilized, such entities are required to obtain at least one appraisal by an appraiser who is-a member of an appraisal organization listed in s. 253.025(7)(b) for each purchase in an amount of not more than $500,000. For purchases in excess of $500,000 such entities are required to obtain at least two appraisals. If the agreed purchase price exceeds the average appraised price of the two appraisals, the entity is required to approve the purchase by an extraordinary vote. Additionally, the entity may, by ordinary vote, exempt purchases in an amount of $100,000 or less for the requirement of an appraisal.

B. EFFECT OF PROPOSED CHANGES:

This "bill clarifies that the public records exemptions for the proposed purchase of real property by counties and municipalities may be utilized at the option of the local government. If a local government chooses not to use the public records exemption currently authorized in the statutes, the local government may adopt its own procedures for the purchase of real property provided that such procedure is authorized in the local governments charter or established by ordinance and provided that the procedure is not in conflict with the provisions of chapter 119, F.S.

-The bill also revives and readopts the public records exemption in section 166.045, F.S.

C. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends section 125.355, F.S. relating to proposed purchase of real property by counties and clarifies that any counties who do not choose to utilize the exemption from chapter 119, F.S. for the purchase or real property may follow any procedure not in conflict with chapter 119, F.S. if such procedure is authorized in the counties' charter or adopted by ordinance.

Section 2: Reenacts the public records exemption found in section 166.045;F.S., relating to proposed purchase of real property by municipalities.

Clarifies that any municipalities who do not choose to utilize the exemption from chapter 119, F.S., for the purchase OK real property may follow any procedure not in conflict with chapter 119, F.S., if such procedure is authorized in the municipalities' charter or adopted by ordinance.

Section 3: Provides an effective date of October 1, 1988.

II. **FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:**

A. FISCAL **IMPACT ON STATE AGENCIES/STATE FUNDS:**

Appendix

1990 Fla. Op. Atty. Gen. 164
Fla. AGO 90-53, 1990 WL 509066 (Fla.A.G.)

Office of the Attorney General
State of Florida

AGO 90-53
July 13, 1990

Mr. Alan B. Koslow Acting City Attorney City of Hollywood Post Office Box 229045 Hollywood, Florida 33022-9045

Dear Mr. Koslow:

You ask substantially the following questions: 1. Does s. 166.045(1)(a), F.S., require that every appraisal, offer, and counteroffer regarding the purchase of real property by a municipality be in writing? 2. Where the purchase price of the real property to be acquired is in excess of $500,000, is the municipality required to obtain two appraisals in accordance with s. 166.045(1)(b)? 3. Are the procedures in s. 166.045(1)(a) and (b), F.S., mandatory if the municipality has no charter or ordinance procedures setting forth its own procedures for the acquisition of real property, regardless of whether the municipality seeks to utilize the limited exemption from Ch. 119, F.S., contained therein?

In sum, I am of the opinion: 1. Section 166.045(1)(a), F.S., requires that appraisals, offers or counteroffers be in writing when a municipality is utilizing the provisions of this section to acquire property. 2. When the real -property to be acquired by purchase by a municipality is in excess of $500,000, the municipality is required to obtain two appraisals in accordance with s. 166.045(1)(b), F.S., if it seeks to utilize the exemption contained in s. 166.045, F.S. 3, A municipality which does not have any charter or ordinance provision setting forth the procedures for the acquisition of real property would be required to comply with the provisions of s. 166.045, F.S.

Question One

Section 166.045(1)(a), F.S., provides in pertinent part: In any case in which a municipality, pursuant to the provisions of this section, seeks to acquire by purchase any real property for a municipal purpose, every appraisal, offer, or counteroffer must be in writing.... (e.s.)

Thus, s. 166.045(1)(a), F.S., requires that all appraisals, offers or counteroffers be in writing when a municipality is utilizing the provisions of this section to acquire property. The statute by its own terms does not apply to those instances in which the municipality is not purchasing property pursuant to the provisions of s. 166.045, F.S.

Question Two

Section 166.045(1)(b), F.S., provides: If the exemptions provided in this section are utilized, the governing body shall obtain at least one appraisal by an appraiser who is a member of an appraisal organization listed in s. 253.025(7)(b) for each purchase in an amount of not more than $500,000. For each purchase in an amount in excess of $500,000, the governing body shall obtain at least two appraisals by appraisers who are members of appraisal organizations listed in s. 253.025(7)(b).... (e.s.)

The appraisal requirements contained in s. 166.045(1)(b), F.S., thus apply when a municipality seeks to utilize the exemption from the mandatory disclosure requirements contained in s. 166.045, F.S. Paragraph (l)(a) of s. 166.045, F.S., states that written appraisals, offers or counteroffers are not available for public inspection or disclosure until an option contract is executed or, if no option contract is executed, until 30 days before a contract or agreement for purchase is considered for approval by the governing body of the municipality. If the contract or agreement is not submitted to the governing body, the exemption expires 30 days after the termination of negotiations.

Thus, in those instances where a municipality seeks to rely on the time limited exemption provided in s. 166.045, F.S., and the property to be acquired is in excess of $500,000, a municipality is required to obtain two appraisals in accordance with the provisions of s. 166.045(1)(b), F.S.

Question Three

Prior to its amendment in 1988, s. 166.045(1)(a), F.S., required that in any case in which a municipality, pursuant to the provisions of Ch. 166, F.S., sought to acquire any real property by purchase, all appraisals, offers or counteroffers must be in writing. [FN1] During the sunset review of s. 166.045, F.S., by the 1988 Legislature pursuant to s. 119.14, F.S., the Florida League of Cities testified that the statute was unclear as to whether municipalities were required to follow the provisions of s. 166.045, F.S., or whether municipalities could exercise their home rule powers to follow an alternative procedure. [FN2]

The language of s. 166.045(1)(a), F.S., was amended to require that appraisals, offers and counteroffers be in writing when a municipality sought to acquire property by purchase pursuant to that section. Subparagraph (l)(c) was added to provide: Notwithstanding the provisions of this section, any municipality that does not choose with respect to any specific purchase to utilize the exemption from chapter 119 provided in this section may follow any procedure not in conflict with the provisions of chapter 119 for the purchase of real property which is authorized in its charter or established by ordinance. (e.s.)

The staff analysis for the bill adding the above language states that the bill "[c]larifies that any municipalities who do not choose to utilize the exemption from chapter 119, F.S., for the purchase or [sic] real property may follow any procedure not in conflict with chapter 119, F.S., if such procedure is authorized in the municipalities' charter or adopted by ordinance." [FN3] (e.s.)

Clearly, if a municipality wishes to exempt the appraisals, offers and counteroffers it receives relating to the purchase of real property from the disclosure requirements of Ch. 119, F.S., it must comply with the requirements of s. 166.045, F.S. If a municipality does not wish to utilize the exemption provisions of s. 166.045, F.S., the statute specifically recognizes that the municipality may do so provided that such alternative procedure is not in conflict with Ch. 119, F.S., and the procedure is authorized in its charter or established by ordinance.

A municipality which does not have a procedure for the purchase of real property in its charter or ordinance would not appear to satisfy the second criterion of s. 166.045(1)(c), F.S. Accordingly, I am of the opinion, until legislatively or judicially determined otherwise, that a municipality which does not have any charter or ordinance setting forth the procedure for the acquisition of real property would be required to comply with the provisions of s. 166.045, F.S.

Sincerely,

Robert A. Butterworth
Attorney General

FN1. See, s. 166.045(1)(a), F.S.1987.

FN2. See, Staff Report on Open Government Sunset Review Act Real Property Acquisition by Municipalities and School Boards, Florida House of Representatives, Committee on Governmental Operations, December 1987, p. 42; Tape, Florida House of Representatives, Governmental Operations Committee, January 5, 1988.

FN3 Staff Analysis, HB 183, House of Representatives, Committee on Governmental Operations, June 14, 1988: This bill clarifies that the public records exemptions for the proposed purchase of real property by ... municipalities may be utilized at the option of the local government. If a local government chooses not to use the public records exemption currently authorized in the statutes, the local government may adopt its own procedures for the purchase of real property provided that such procedure is authorized in the local governments charter or established by ordinance and provided that the procedure is not in conflict with the provisions of chapter 119, F.S. (e.s.) Compare, Staff Analysis, HB 183, May 4, 1988, stating that the statute was amended "to clarify that the decision to use the public records exemption may be made by a local government on a case-by-case basis and that compliance with the other provisions of each section is only required when the exemption is being used."

1990 Fla. Op. Atty. Gen. 164, Fla. AGO 90-53, 1990 WL 509066 (Fla.A.G.)
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