IN THE SUPREME COURT OF FLORIDA

CASE NOS. 89,093 & 89,094

PROVIDENT MANAGEMENT CORPORATION and
LAURENCE N. BELAIR,

Petitioners,

vs.

CITY OF TREASURE ISLAND,

Respondent.

ON REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL
LAKELAND FLORIDA

PETITIONER PROVIDENT MANAGEMENT CORPORATION'S REPLY BRIEF ON THE MERITS

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Treasure Island's shotgun approach only underscores the weakness of its position. There is no legal basis to absolve the City from the consequences of its intentional and successful but wrongful crusade to shut down Provident's lawful business activities at Land's End, particularly when Treasure Island obtained the injunction with the understanding that it would be liable to Provident if the injunction proved wrongful. Moreover, the trial court's calculation of the amount of Provident's damages was supported by competent, substantial evidence and its award of attorneys' fees and interest was consistent with applicable law. The Second District Court of Appeal's decision should be reversed and Provident's damage award reinstated in full.

I. THE ABSENCE OF A BOND DOES NOT BAR PROVIDENT'S RECOVERY.

Treasure Island overstates the significance of the bond and the role of section 60.07, Florida Statutes. A court's jurisdiction to award damages for wrongful injunction depends neither upon the existence of a surety bond nor the existence of a statute. Rather, as is discussed in Provident's initial brief, the right of wrongful injunction damages extends from a court's inherent equitable powers to set the terms and conditions upon which an injunction will be entered. See Provident's Initial Brief ("Provident Br. ") at 23-24. Thus, although this right may be confirmed by statute or rule, such statutes are not the source nor are they a limitation of the court's inherent equitable powers,

The language of section 60.07 itself demonstrates this principle.[1] Contrary to the City's argument, section 60.07 does not create a cause of action for wrongful injunction.

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[1] Section 60.07 reads, "In injunction actions, on dissolution, the court may hear evidence and assess damages to which a defendant may be entitled under any injunction bond, eliminating the necessity for action on the injunction bond if no party has requested a jury trial on damages. "

Nor does it require a surety bond as a prerequisite to recovery. Rather, it simply suggests that the wrongfully enjoined party need not file a separate action for wrongful injunction but may bring the claim in the original case. The statute is drafted under the correct assumption that an action for wrongful injunction already exists (Provident Br. at 11-12).

The cases are in accord. See *City of St. Petersburg v. Wall, 475* So. 2d 662 (Fla. 1985); *Leibowitz v. City of Miami Beach,* 683 So. 2d 204 (Fla. 3d DCA 1996), *rev. denied,* No. 89,606 (Fla. Mar. *26,* 1997); *SeaEscape Ltd., Inc. v. Maximum Marketing Exposure,* Inc., 568 So. 2d 952 (Fla. 3d DCA 1990). In *Wall,* this Court awarded the equivalent of wrongful injunction damages against the City of St. Petersburg in the absence of a bond. In *Liebowitz* and *SeaEscape, the* court confirmed that a nominal bond could not limit the enjoined parties' right to recover for damages. If the bond were somehow jurisdictional, these courts would not have had the power to rule as they did. These cases serve as proof of a court's equitable powers to protect the enjoined party by ensuring that the terms and conditions of the injunction are fair.

It is perhaps the *Wall* case that is most telling because of this Court's explicit recognition that St. Petersburg's right to proceed without a bond did not insulate it from damages, Treasure Island dismisses *Wall* because it concerns a supersedeas bond. However, for all intents and purposes, St. Petersburg had obtained an injunction in *Wall* because the supersedeas prevented the defendant from disposing or encumbering his property. The defendant then sued for the equivalent of wrongful injunction damages. This Court ruled that the absence of a bond was no bar to recovery. *Wall* demonstrates that the right to recover in such circumstances depends upon the court's power to do equity (Provident Br. at 14-15).

Treasure Island's cases are off point. The best it can do is cite to cases between private parties where a bond was required by statute or rule. Provident has never disputed that recovery generally is limited to the amount of the bond in such cases. But Treasure Island cites only one case addressing the particular issue before this Court: whether the government's right to obtain an injunction without a bond immunizes it from wrongful injunction damages. The best Treasure Island can do is a 1910 Idaho case that stands in sharp contrast to the other cases around the country confirming that the government remains liable even if it is not required to post a bond (Provident Br. at 16-17) .[2]

Contrary to Treasure Island's suggestion, the federal courts support Provident's position. For example, in ***Marine Constr. & Dredging, Inc. v. United States Army Corps of Eng'rs*, *No. 88-3963,*** 1989 WL 150651 (9th Cir. Dec. 13, **1989),** the Army Corps of Engineers obtained an injunction preventing the defendant's development of its property. The injunction proved wrongful. The Corps argued that it was not liable for wrongful injunction damages because it had posted no bond. The court disagreed, stating:

> We find that the United States is not automatically exempt from liability merely because it was not required to post a bond.

1989 WL 150651, at *3; ***see also Diginet, Inc. v. Western Union ATS, Inc., 958*** **F.2d** 1388, 1394 (7th Cir. 1992) (suggesting, but not deciding, that the city may have waived the general

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[2] Treasure Island's citation to ***Hathcock v. Hathcock, 533 So.*** 2d 802 (Fla. 1st DCA 1988) provides little assistance to the Court. First, ***Hathcock*** did not hold that the defendant had no right to recover damages, only that the defendant had no right to recover damages in the main suit. Moreover, ***Hathcock*** concerns the very narrow circumstance of an injunction entered to protect against spousal abuse. While public policy may favor immunizing battered spouses from wrongful injunction damages, no similar policy should protect Treasure Island's intentional use of an injunction to cause economic injury.

rule that the bond serves as a limit on recovery when it sought waiver of its obligation to post a bond).[3]

In sum, the City's right to an injunction without a bond did not deprive the court of its power to do equity.

II. TREASURE ISLAND, NOT PROVIDENT, SHOULD HAVE APPEALED THE TRIAL COURT'S ORDER.

Treasure Island repeats ad nauseam its circular argument that Provident should have appealed the trial court's refusal to require a bond. To the contrary, it is Treasure Island that should have appealed if it wished its potential liability to be made certain. Provident was not aggrieved by the order below unless this Court determines that a trial court's decision not to require a municipality to post a bond is the equivalent of a decision to immunize the municipality from liability. Provident certainly had no reason to think itself aggrieved. The trial court made clear when it entered its injunction that the City would remain liable for damages. Treasure Island offered no objection to the trial court's holding and explicitly confirmed its liability shortly thereafter to the federal court (Provident Br. at 5-6).

To rule that Provident was required to appeal the absence of a bond would put trial courts in the "Catch 22" that Provident described in its initial brief. If the absence of a bond immunizes the government, the trial court will be forced to choose between granting the injunction without bond at the risk of great harm to the enjoined party or requiring a bond,

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[3] The only federal case to the contrary cited by Treasure Island is *S.E. C. v. Unifund SAL,,* 910 F.2d 1028, 1039-40 (2d Cir. 1990). However, *Unifund's* suggestion that the United States may be relieved from wrongful injunction damages is dicta and is accompanied by no discussion or case citation.

No reasonable court is likely to enter an injunction of this nature without the assurance that the enjoined party will be protected. As a result, courts will either require the government to post a bond in all cases, thereby depriving the government of the very benefit Rule 1.610(b) was designed to confer, or the injunction will be denied. This very concern caused the Florida Association of County Attorneys to file an amicus brief supporting Provident's position.

If, as Provident suggests, the trial court's decision to absolve the municipality of its obligation to post a bond did not immunize the city from damages, Treasure Island was the only party arguably aggrieved by the order. The trial court confirmed that Treasure Island would be liable; yet, Treasure Island neither objected nor appealed. The trial court could have set a limit to the City's exposure; yet, the City never asked for such a limit nor appealed the court's failure to set a limit. Thus, when Treasure Island complains that it was deprived of advance notice of the limit of its liability, it has only itself to blame.

III. THERE IS NO SOVEREIGN IMMUNITY FOR WRONGFUL INJUNCTION DAMAGES.

Treasure Island has not cited a single case from any jurisdiction holding that the government has sovereign immunity from wrongful injunction damages.[4] By contrast, there are decisions holding that municipalities are liable for wrongful injunction damages without any hint that these municipalities were immune. ***State v. William,*** *472* P.2d 109 (Ariz. Ct. App. 1970); ***Cone v. City of Lubbock,*** 431 S.W.2d 639 (Tx. Ct. App. 1968); ***Marine Constr.***

[4] The closest Treasure Island comes is dicta in *Unifund*. ***See infra*** at 4 n.3.

& Dredging, Inc., 1989 WL 150651. See ***Wall,*** 475 So. 2d at 652 (awarding damages based on wrongful stay).

Treasure Island's ponderous discussion of sovereign immunity for tort liability is completely irrelevant. Provident does not sue in tort. As is discussed above, Treasure Island's liability stems from the equitable power of the court to set the terms and conditions upon which an injunction will issue. If the government seeks the benefit of an injunction, it necessarily consents to the consequences that flow from a finding that the injunction is wrongful. This is entirely consistent with the many cases discussed in Provident's initial brief suggesting that Treasure Island's affirmative use of the court system prevents its retreat behind the "shield" of sovereign immunity (Provident Br. at 25-26).

Of more relevance than the City's tort cases are cases describing the government's liability in contract. Many courts describe wrongful injunction actions as the equivalent of a contract claim. ***Marine Constr. & Dredging, Inc.,*** 1989 WL 150651, at *3 ("almost all states classify a wrongful injunction action as an action in contract, not tort"). Even Treasure Island concedes that there is no sovereign immunity for contract actions.

To treat a claim for wrongful injunction like a contract action makes sense. Just as the legislature's authorization for the government to enter into a contract carries with it the right to be sued in contract, the right to seek an injunction carries with it the responsibility to be bound by the terms and conditions of the injunction. ***See Pan-Am Tobacco Corp. v. Dept. of Corrections,*** 471 So. 2d 4, 5 (Fla. 1984) (describing the basis for the State's liability in contract). If Treasure Island wanted to avoid liability for the damages it caused, it could have chosen not to seek an injunction and simply allowed the litigation to run its course,

Instead, when the trial court ruled that Treasure Island could be sued for wrongful injunction damages, Treasure Island offered no objection and indicated its assent to liability before both the state and federal courts. By seeking the injunction and accepting the conditions set by the court, Treasure Island waived any right to claim the protection of sovereign immunity.

Treasure Island misstates the holdings of ***Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757*** F.2d 1047 (9th Cir. 1984), ***rev'd on other grounds, 474*** U.S. 9 (1985), and ***Squaxin Island Tribe v. State of Wash.,*** 781 F.2d 715 (9th Cir. 1986). ***Chemehuevi*** does nothing more than recite the black letter rule that filing a lawsuit does not waive sovereign immunity for any counterclaim that may be brought. Because the indian tribe was immune from suit for cigarette taxes, the tribe did not waive that immunity by seeking a declaration that it had no liability to pay cigarette ***taxes.*** ***Chemehuevi*** says nothing about wrongful injunction damages.

Treasure Island's citation to ***Squaxin*** is even more curious. Like ***Chemehuevi,*** ***Squaxin*** holds that the tiling of a declaratory judgment action regarding the tribe's obligation to pay liquor taxes does not waive the tribe's sovereign immunity protecting it against the payment of such taxes. However, ***Squaxin goes*** on to discuss whether sovereign immunity would bar a wrongful injunction cause of action against the tribe. The court held that sovereign immunity does not apply. According to the court:

> We hold that when tribes obtain a preliminary injunction to which they were not entitled, sovereign immunity does not bar the defendant from collecting the security posted, without resort to a separate action.

Squaxin, 781 F.2d at 724.

Treasure Island is not protected by sovereign immunity. Like any other citizen that attempts to invoke the court's extraordinary powers to grant an injunction prior to a full hearing, Treasure Island is liable for the consequences of its actions when the injunction proves wrongful.

IV. PROVIDENT'S DAMAGE, FEE, AND INTEREST AWARDS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE AND APPLICABLE LAW.

Damages

Treasure Island also contends that the trial court erred in its valuation of Provident's destroyed business. Provident does not dispute that the proper measure of damages in this case is the fair market value of Provident's destroyed business. What Provident and its experts rejected is Treasure Island's argument that fair market value should be defined narrowly to encompass only the "comparable sales" or "market" approach in determining value.

A court may determine fair market value using any number of different valuation methods. The selection of a particular method is for the trial court to decide depending on the facts and circumstances of a given case. ***See Department of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc.,*** 570 So. 2d 892, 896 (Fla. 1990); ***Dade County v. General Waterworks Corp.,*** 267 So. 2d 633, 639 (Fla. 1972). For example, a method used to determine the fair market value of residential real estate is probably not the appropriate

method for determining the value of livestock, an on-going business, an orange grove, or any one of innumerable items of property the value of which courts determine routinely.'

Provident's Land's End operation was a service business. Thus, its value was its ability to generate income rather than its fixed assets. The method suggested by Provident's expert focused on determining the present value of the income streams generated by the business. Simply stated, Provident's method determines value as a function of its income producing capability. The record is replete with evidence supporting the propriety of the income method given the particular facts of this case as well as the propriety of the specific number generated by that valuation method. Treasure Island has done nothing in this appeal to demonstrate any error in either the method or computation of damages in this case.[6]

Treasure Island contended that the only reasonable method for determining fair market value in this case was an examination of comparable sales transactions. Contrary to its contention, however, Treasure Island was unable to present the trial court with any factually comparable sales transactions. For example, Treasure Island's principal expert witness, John Curry, based his valuation on telephone calls to personal acquaintances in the

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[5] ***Compare Mid-Florida*** Growers, 570 So. 2d at 892 (adopting "prospective net revenue" approach for valuing growing crops); ***Fiske v. Moczik,*** 329 So. 2d 35 (Fla. 2d DCA 1976) (using replacement cost as proper method of valuing destroyed ***trees); Matthews v. Division of Admin.,*** 324 So. 2d 664 (Fla. 4th DCA 1975) (considering value of destroyed business' goodwill in addition to lost profits).

[6] Provident's damage expert testified that he arrived at the value of Provident's business "by projecting an available cash flow stream into the future and discounting it for the time value of money and the risk inherent in the business" (R. 2965 at pp. 24-28). In simple terms, Provident's valuation method determines what an investor would pay for Provident's business at a particular point in time in light of the present value of Provident's future income streams. (R. 4088, 4100). The higher the potential income stream, the higher the value of the business.

"industry" (R. 4189-90). Curry admitted that there was no way to verify or contest such undocumented information.[7] *Id.* While he attempted to rely on a comparable sales approach, Curry also conceded that his method was but one of many available to the court (R. 4235-37). Ironically, he found no fault with the method selected by Provident's expert, Michael Mard (R. 4105, 4216-17).

Treasure Island engages in semantics by arguing that Provident's expert did not determine fair market value.' As discussed above, Mard's income approach is well-supported and is, as even Treasure Island's expert was forced to concede, a commonly utilized method of determining the fair market value of a business (R. 4105, 4216-17). But Treasure Island's most blatant mischaracterization of Mard's testimony is its suggestion that Mard somehow accepted Provident's own subjective determination of the value of its business. Treasure Island suggests that investment value really means the subjective value of the operation to a particular investor, in this case the majority shareholder of Provident. To the contrary, investment value means nothing more than utilizing the income approach to arrive at the value of a particular investor's holdings -- in this case, the value of Provident's

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[7] Even Curry was somewhat confused about exactly whom he had spoken to by telephone and whom he merely attempted to reach (R. 4158-61).

[8] Treasure Island's argument is based on a statement Mard made during cross-examination, During cross, counsel for Treasure Island was attempting to make the point that a "market" approach utilizing comparable sales is often the most accurate method of valuing a business (ignoring the fact that there were no comparables in this case). It is clear from this context that when Mard stated that "fair market value" was not the same as "investment value" he was distinguishing between the market approach utilized by Treasure Island and his income approach. His testimony in no way suggests that the income approach is not a proper way to value a business for the purpose of determining fair market value in the sense used by the courts (R. 3385-96). Instead, his testimony is a rejection of Treasure Island's very narrow definition of fair market value to include only the market approach.

business (R. 4088, 4100). There is no support in the record for Treasure Island's contention that the method used by Provident somehow reflects a subjective valuation of Provident by its owner.

Semantics aside, Treasure Island's damage calculations defy common sense. Throughout the injunction phase of this litigation, Treasure Island trumpeted that Provident's operation at Land's End was a commercial enterprise grossing millions of dollars per year (R. 2956, 3289-91). It is undisputed that Provident's net profits were close to $200,000 annually. Id. Treasure Island then suggests that a business earning $200,000 a year in net profits would sell for as little as $275,000. Having presented such a skewed interpretation of "fair market value, " Treasure Island should not be surprised that the trial court rejected its experts' approach in favor of Mard's presentation.

Attornevs' Fees

Treasure Island contends that the trial court erred in awarding Provident attorneys' fees as part of its wrongful injunction damages. However, the case law in Florida is clear that attorneys' fees incurred in efforts to secure dissolution of an injunction are appropriate damages for wrongful injunction. ***See, e.g., Luke Worth Broadcasting Corp. v. Hispanic Broadcasting, Inc.,*** 495 So. 2d 1234, 1234 (Fla. 3d DCA 1986); ***Roger Dean Chevrolet, Inc. v. Painters, Decorators & Paperhangers of Am., Local No, 452, 155 So.*** 2d 422, 424 (Fla. 2d DCA 1963); ***United Bonding Ins. Co. v. Presidential Ins.*** Co., 155 So. 2d 635, 636 (Fla. 2d DCA 1963).[9]

[9] Treasure Island also argues that attorneys' fees cannot be awarded in a wrongful injunction case unless a bond has been posted. This argument is nothing more than a reiteration of Treasure Island's primary point that Provident is precluded from recovering damages in this case

The trial court's order likewise reflects the required fmdings under ***Florida Patient's Compensation Fund*** v. ***Rowe, 472*** So. 2d 1145 (Fla. 1985). The judgment contains specific findings that the number of hours expended by Provident's counsel and the rate charged were both reasonable. There was no issue of an enhancement factor in this case. The only conceivable omission from the order is a reference to the specific number of hours and rate. Those numbers, however, are readily apparent in the record. (R. 2962, 3556-59). The trial court clearly considered the evidence and made the findings required by ***Rowe.*** If this Court is concerned that the attorney fee award is technically deficient, it should simply remand for entry of a corrected order. As courts have recognized, a trial court may correct such an omission without the necessity of a new hearing on fees. See ***Abdalla v. Southwind, Inc.,*** 561 So. 2d 468 (Fla. 2d DCA 1990); De ***Loach*** v. *Westman,* 506 So. 2d 1142 (Fla. 2d DCA 1987).

Prejudgment and Post-judgment Interest

Treasure Island has shown no error in the trial court's award of prejudgment interest. Florida law awards prejudgment interest as one element of an award of pecuniary damages whenever a court's order "liquidates" damages. See ***Argonaut Ins. Co. v. May Plumbing*** Co., 474 So. 2d 212, 214 (Fla. 1985); ***Lee County*** v. ***Sager, 595 So.*** 2d 177 (Fla. 2d DCA 1992) (prejudgment interest is part of full compensation in eminent domain proceeding), rev. ***denied,*** 606 So. 2d 1165 (Fla. 1992). For purposes of assessing prejudgment interest, a claim is liquidated when the court's order fixes an amount of damages and a date certain by

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because Treasure Island was excused from posting a bond. Attorneys' fees are merely one element of damages awarded for wrongful injunction. If Provident is entitled to damages in this case, it is likewise entitled to its attorneys' fees incurred in overturning the injunction,

which time the losses had occurred. See ***Argonaut, 474 So.*** 2d at 214. Once the court has liquidated damages as of a date certain, computation of prejudgment interest is nothing more than a ministerial procedure. ***See Argonaut, 474 So.*** 2d at 215.

Treasure Island does not dispute this well-settled law but argues that the trial judge chose the wrong date from which to calculate interest. Treasure Island's argument is based on either an obvious error or a blatant mischaracterization of the judge's order. For some reason, Treasure Island argued before the Second District and continues to argue here that the trial court liquidated damages as of May 31, 1990. To the contrary, the trial court's order plainly states that the date of the destruction of Provident's business was June 3, 1991.[10] The trial court's selection of June 3, 1991 was supported by competent substantial evidence because it was the date of Provident's last rental at Land's End. From that point forward, Provident's business at Land's End was over, having been completely shut down by the injunction.

Treasure Island also argues for the first time before this Court that the trial court improperly assessed prejudgment interest on the award of attorney's fees. Treasure Island did not make this argument below and cannot raise it for the first time at this late stage in the proceedings. ***See Commission on Ethics v. Barker,*** 677 So. 2d 254, 256 (Fla. 1996). In any event, this Court has already confirmed that prejudgment interest is available on an award of attorney fees. ***Quality Engineered Installation, Inc. v. Higley South, Inc., 670 So.*** 2d 929, 930 (Fla. 1996).

[10] In fact Treasure Island cites that very portion of the order on page 42 of its brief.

Treasure Island's claim that sovereign immunity bars the award of prejudgment interest in this case is also erroneous. If sovereign immunity does not apply to Provident's main claim, it can hardly bar prejudgment interest flowing from that claim. As this Court has stated, the state's immunity from interest can be waived. "The law is not absolute and a judicial determination regarding interest may depend on equitable considerations and whether the nature of the claim warrants a prejudgment interest award." ***State v. Family Bank of Hallandale,*** 623 So. 2d 474, 479 (Fla. 1993).

Treasure Island also challenges the trial court's award of post-judgment interest. Treasure Island contends that interest should accrue at the new rate established by the 1994 amendment to section 55.03, Florida Statutes rather than at the old annual rate of 12%. The plain language of section 55.03 indicates that the amendment applies only to judgments obtained on or after January 1, 1995. The judgment in this case was entered before January 1, 1995. Thus, the newly-prescribed rates do not apply to this judgment. ***Beverly Enterprises--Florida, Inc. v. Spilman, 689 So*** 2d 1230 (Fla. 5th DCA 1997).

Finally, although the trial court awarded post-judgment interest on Provident's damages, it refused to apply post-judgment interest to the prejudgment interest amount. The trial court followed the then-current law in the Second District. S ***& E Contractors, Inc. v. City of Tampa,*** 629 So. 2d 883, 883 (Fla. 2d DCA 1993). Since the date of the trial court's order, this Court has ruled that post-judgment interest accrues on all components of the final judgment, including prejudgment interest. ***Quality Engineered Installation, 670 So.*** 2d at 931. Thus, this Court should rule that post-judgment interest applies to the entire amount of the judgment.

CONCLUSION

This "Catch 22" created by the decision below is entirely avoidable. By ruling that a trial court does not immunize the government from damages when it exercises its discretion not to require a bond, the enjoined parties' right to be made whole is affirmed. If the government desires a limit of its potential liability, it may seek it. What it may not do is acknowledge its liability and then seek to avoid the consequences of its actions. For all the foregoing reasons, the decision of the Second District Court of Appeal should be reversed and the trial court's judgment in favor of Provident should be reinstated. The final judgment should be modified to include post-judgment interest on the entire amount of the award, including prejudgment interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished via U.S. Mail on this 13th day of May 1997 to: **Brian P. Battaglia, Esquire,** Battaglia, Ross, **Dicus** & Wein, P.A. P.O. Box 41100, St. Petersburg, FL 33743, Counsel for Petitioner Laurence **Belair;** and to **James Denhardt, Esquire,** 2700 First Avenue North, St. Petersburg, Florida 33713, **Edward Foreman, Esquire,** 100 Second Avenue North, Suite 300, St. Petersburg, Florida 33701, and **W. Douglas Berry, Esquire, Bayport** Plaza, Suite 1100, 6200 Courtney Campbell Causeway, Tampa, Florida 33607-1458 Counsel for Respondent City of Treasure Island.

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