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TOWN ATTORNEY REPORT

DATE: February 26, 2003

FROM: Monroe D. Kiar

RE: Litigation Update

1. **Sunrise Water Acquisition Negotiations:** The Town requested competitive proposals for providing engineering services to conduct a western area utilities study. The Bid Selection Committee ranked URS as its first choice. At the Town Council Meeting of October 3, 2001, a resolution was approved selecting URS to provide engineering services for the western area utilities study and authorizing the Town Administrator to negotiate an agreement with URS for such services. The Town Attorney's Office has in the past, spoken with Mr. Cohen, who indicated that negotiations with URS have been ongoing. Mr. Cohen indicated that URS was requested to provide the Town with a Memorandum of Services setting forth their anticipated costs for each service to be rendered to enable the Town to determine the precise cost of the project and to determine if there are funds available to allow URS to conduct such services. A response has been received by the Town. The Town Attorney's Office spoke with Heidi of Mr. Colabella's office on February 25, 2003. Heidi indicated that no agreement has been reached with URS as yet for conducting the engineering services for the western area utility study.
2. **Seventy-Five East, Inc. and Griffin-Orange North, Inc. v. Town of Davie:** A Final Order and Judgment Granting Petition for Common Law Certiorari was entered by Judge Patricia Cocalis in these two consolidated cases. Pursuant to the direction given to Mr. Burke by the Davie Town Council, an appeal of the Order entered by Judge Cocalis was filed with the 4th District Court of Appeal, but the 4th District Court of Appeal denied the Town's Petition for Writ of Certiorari on the Merits and Without Opinion, ordered that the matter be remanded back to the Town Council and required it to vote on the application based on the record as it existed prior to the filing of the Writ of Certiorari and in accordance with the Final Judgment entered by Judge Cocalis. The Petitioner requested the matter again be placed on the Town Council Agenda and the matter was again heard on October 2, 2002, by the Town Council. After a presentation by Mr. Burke, the applicant and Staff evidence was presented by those in attendance who spoke in favor and in opposition to the two Petitions, the Town Council voted 4 to 1 to deny each petition. A Petition for Supplemental Relief to Enforce Mandate, or in the Alternative, Supplemental Complaint for Writ of Mandamus and for Writ of Certiorari has

been filed by the Plaintiffs, Griffin-Orange North, Inc. and Seventy-Five East, Inc. with regard to the Quasi Judicial Hearing held before the Town of Davie on October 2, 2002. The Plaintiffs have filed these pleadings requesting that the Court order the Town of Davie to grant it the B-3 zoning and they are seeking a recovery of their attorneys' fees and court costs for their preparation and filing of this new Petition for Supplemental Relief to Enforce the Court's Mandate. Essentially, the pleadings request that the Circuit Court quash the Town Council's second denial of the Plaintiffs' zoning application and request that the Court compel approval of the B-3 zoning designation. The Plaintiffs have filed the pleadings with the same Court (Judge Cocalis) which previously entered a Final Judgment in favor of the Plaintiffs and have also filed an identical original action to cover all of their procedural basis. The Town Attorney's Office has reviewed the new pleadings filed by the Petitioner and has on several occasions, spoken with Mr. Burke, our special counsel, regarding their contents and litigation strategy. Mr. Burke previously indicated that the Petitioner filed a Motion to Consolidate the Petition for Supplemental Relief to Enforce Mandate as well as the second lawsuit it initiated, and requested that both lawsuits be heard before the original Judge in this case, Judge Cocalis, who is no longer in the Civil Trial Division, rather than Judge Robert Carney, who has taken over Judge Cocalis' prior case load. A hearing on the Petitioner's Motion to Consolidate the new Petition for Writ of Certiorari with its previously filed action was heard on December 17, 2002. Judge Carney granted the property owner's Motion to Consolidate, but denied the property owner's second Motion which was to transfer both actions back to Circuit Court Judge Patricia Cocalis. On January 30, 2003, there was an initial hearing and oral argument was presented by both sides before Judge Robert Carney relevant to the property owner's Motion to prohibit the Town of Davie Administrator from proceeding with administrative re-zoning of the property. At the January 30 hearing, Judge Carney stated he wanted to hear more argument on this matter and scheduled another hearing for February 14, 2003. As Councilmember Paul correctly advised the Town Council at the February 19, 2003 Meeting, on February 14, 2003, Mr. Burke attended the hearing on the property owner's Petition for Writ of Prohibition and Motion to Stay Further Proceedings concerning the Town Administrator's recent application to re-zone the subject properties to suburban commercial (SC) and community business (B-2). As Councilmember Paul further apprised the Council, Judge Carney denied the Writ of Prohibition and Motion to Stay and indicated that in his view, the Court did not have jurisdiction to prevent the Town of Davie from carrying out its municipal function of re-zoning property. Mr. Burke advises that the Court requested that both sides submit proposed Orders to the Court reflecting the ruling of the Court. His office indicates that he has been in contact with Mr. Spencer, the attorney for the property owner, in an effort to work out the wording of a proposed Order. No proposed Order has yet been submitted to the Court for its review. Mr. Burke has further confirmed Councilmember Paul's understanding that in light of the Court's February 14, 2003 decision, there are no impediments to the Town's moving forward with Planning & Zoning review and Town Council action on the Town Administrator's application to re-zone the two parcels to B-2 and SC. The Court has not yet addressed the property owner's second Petition for Writ of Certiorari, Petition for Mandamus and Request for Supplemental Relief, all of which seek the entry of a Court Order compelling the Town to re-zone the subject properties for B-3 use.

3. **MVP Properties, Inc.:** The Plaintiff previously filed a multi-count lawsuit in the United States District Court for the Southern District of Florida where a Final Summary Judgment in favor of the Town and against Plaintiff, MVP Properties, Inc. was granted by the Court. MVP Properties, Inc. appealed to the 11th Circuit Court of Appeals which later affirmed the decision

of the lower court in favor of the Town of Davie and against the Plaintiff, MVP Properties, Inc. The Town is currently pursuing collection of the Judgment for costs that has been obtained from MVP Properties, Inc. In the meantime, MVP Properties, Inc. has instituted a new lawsuit in which it has filed a Complaint for Inverse Condemnation against the Town of Davie. The Florida League of Cities declined to represent the Town in this latest lawsuit as actions for inverse condemnation are excluded from coverage by the League. Accordingly, the Town Attorney's Office has reviewed the Complaint for Inverse Condemnation filed by MVP Properties, Inc. against the Town of Davie and has timely filed a Motion to Dismiss the Plaintiff's Complaint. Said Motion to Dismiss had been scheduled for hearing for Tuesday, October 29, 2002, at 2:00 P.M. The Plaintiff however, requested that the hearing be continued to a later date and the hearing was subsequently scheduled to February 21, 2003. Oral argument on our Motion to Dismiss was heard on February 21, 2003 and argued before the Honorable Robert A. Rosenberg. The Town Attorney has previously provided to the Town Council a copy of Judge Rosenberg's Order granting the Defendant, Town of Davie's Motion to Dismiss and allowing the Plaintiff to amend its Complaint. As previously indicated in a recent Memorandum to the Town Council, should the Plaintiff fail to sufficiently amend its Complaint to meet the necessary statutory and legal requirements for an inverse condemnation action, then the Town Attorney's Office anticipates filing another Motion to Dismiss relevant to any such defects that may appear in the Amended Complaint, again seeking dismissal of the Plaintiff's lawsuit, or if appropriate, a Motion for Summary Judgment. The Town Attorney's Office is confident in the ultimate outcome of this litigation.

4. **Town of Davie v. Malka:** The Town Attorney's Office recently spoke with the Building Department and the Chief Building Official, Mr. Craig, confirmed that his staff is keeping a close eye on this particular property owner to ensure that the property owner is moving ahead with final completion of all additions of the structure as promised. During our last conversation, he indicated that there have been no recent complaints from the community.

5. **City of Pompano Beach, et al v. Florida Department of Agriculture and Consumer Services:** As indicated in prior Litigation Reports, on May 24, 2002, Judge Fleet issued a 19 page Order on the Motion for Temporary Injunction in which he concluded that the Amendments regarding the Citrus Canker litigation enacted by the Florida Legislature as codified in Florida Statutes Section 581.184, was an invalid invasion of the constitutional safeguard contained in both the United States Constitution and the Constitution of the State of Florida. The Judge ultimately entered a statewide Stay Order enjoining the Department of Agriculture from entering upon private property in the absence of a valid search warrant issued by an authorized judicial officer and executed by one authorized by law to do so. The Florida Department of Agriculture and Consumer Services filed its Notice of Appeal seeking review by the 4th District Court of Appeal. The Department of Agriculture also filed a Motion with the 4th District Court of Appeal seeking that the appellate procedures be expedited, and a motion in which there was a suggestion for "bypass" certification to the Supreme Court of Florida. The Department of Agriculture contended that in light of the gravity and emergency nature of the issues, the matter should be certified by the 4th District Court of Appeal directly to the Supreme Court for its adjudication since the Department of Agriculture anticipated that regardless as to how the 4th District Court of Appeal rules on the matter, it would in fact be appealed by either the Department of Agriculture or by the County and coalition of cities to the Supreme Court of Florida for final adjudication. The 4th District Court of Appeal in fact for only the fourth time in its history, did certify this matter directly to the Florida Supreme

Court for adjudication. The Florida Supreme Court however, refused to hear this matter at this stage and remanded it back to the 4th District Court of Appeal for further proceeding. Both the Florida Department of Agriculture and Consumer Services and the County and coalition of cities have filed their respective Appellate Briefs. The Florida Department of Agriculture filed a Reply Brief to the Brief filed by Broward County and the coalition of cities. The Town Attorney along with several other municipal attorneys, at the request of the Chief Appellate Attorney for Broward County, Andrew Meyers, attended the oral argument in these proceedings before a three judge panel at the 4th District Court of Appeal Courthouse in Palm Beach County, on December 4, 2002. On January 15, 2003, the 4th District Court of Appeal issued its opinion relevant to the appeal filed by the Florida Department of Agriculture and Consumer Services challenging the Order of Judge Fleet. The 4th District Court of Appeal found that Section 581.184 of the Florida Statutes (2002) requiring removal of Citrus trees within the 1900 feet of a tree infected with canker did not violate due process and therefore, was constitutional. The 4th District Court of Appeal also found Section 933.07(2) of the Florida Statutes allowing area wide search warrants unconstitutional and a violation of the 4th Amendment. The Court however, did rule that multiple properties to be searched may be included in a single search warrant and the issuance of such a warrant should be left to the discretion of the issuing magistrate. The 4th District Court of Appeal entered an Order quashing Judge Fleet's Order and in response, the County and coalition of cities, including the Town of Davie, have filed a Notice to Invoke Discretionary Jurisdiction of the Supreme Court to review the decision of the 4th District Court of Appeal dated January 15, 2003, and rendered February 17, 2003. The Notice to Invoke Discretionary Jurisdiction also requests a review by the Supreme Court of the 4th District Court of Appeal's December 10, 2002 Order Reimposing the Rule 9.310(b)(2) Automatic Stay of the Temporary Injunction.

6. **Christina MacKenzie Maranon v. Town of Davie:** The Town of Davie filed a Motion for Summary Final Judgment on behalf of the Town of Davie and Police Officer Quentin Taylor seeking to dismiss both parties as defendants in this lawsuit. In response, the Plaintiffs filed an Amended Complaint naming the Town of Davie only as a defendant. Officer Taylor was no longer named a party to these proceedings. The Florida League of Cities attorney assigned to this case has filed a Motion to Dismiss the Amended Complaint and has advised the Town Attorney's Office that if it is not granted, he will again file a Motion for Summary Judgment. The Town Attorney recently conferred with our special legal counsel, Rick McDuff, regarding the status of this case. Mr. McDuff has advised the Town Attorney that the status remains the same and the Court has still not yet ruled upon the Town's Motion to Dismiss the Amended Complaint. In the meantime, the Plaintiffs continue to do little to move their case forward and Mr. McDuff continues to remain confident that the case will ultimately be dismissed by the Court in its entirety.
7. **Spur Road Property:** As indicated by Mr. Willi to the Town Council at its meeting of January 2, 2003, Mr. Burke advised Mr. Willi that the 4th District Court of Appeal had affirmed the decision of the Florida Department of Transportation to accept the bid of Kevin Carmichael, Trustee, for the sale and purchase of the property which forms the subject matter of the State Road 84 Spur property litigation. At the last Town Council Meeting of February 5, 2003, Mr. Willi requested that the Town Council grant him authority to take whatever legal action was necessary to obtain the property in question. That authority was given to him by the Town Council.
8. **Peter Castagna v. Officers Brito and Williams:** Peter Castagna filed a lawsuit against Officers

Daniel Brito and Paul Williams alleging an action for damages pursuant to Title 42 U.S.C. 1983, for alleged false imprisonment, battery and alleged intentional infliction of emotional distress. The outside legal counsel assigned by the Florida League of Cities to defend the police officers at the League's expense, filed a Motion to Dismiss the lawsuit instituted by Mr. Castagna. Prior to the Motion being heard, the attorneys for Mr. Castagna filed an Amended Complaint and our special outside legal counsel has filed a Motion to Dismiss the Amended Complaint. The Town Attorney's Office recently spoke with Mr. McDuff and was advised that the Motion to Dismiss is still pending. In the meantime, the case is still scheduled for trial for May, 2003. Mr. McDuff has indicated that the parties are continuing to conduct further discovery and will continue to do so until the cutoff date in March. Recently, the deposition of Broward Sheriff Deputy Anthony Perez was conducted and according to Mr. McDuff's office, the testimony of Officer Perez was very beneficial to the defense of this case. Mr. McDuff has indicated that his office is in the process of preparing a Motion for Summary Judgment and expects to file same shortly. It is the continued belief of our Florida League of Cities attorney that it is very questionable that the police conduct on June 25, 1999 resulted in the problems which the Plaintiff contends he now has as a result of the incident of June 25, 1999, and that the evidence will show that there was no improper conduct by the two police officers in this matter.

9. **Pelican Coast Holdings, Inc. and William Cuthbertson v. Town of Davie:** A Petition for Certiorari was served upon the Town along with an Order to Show Cause signed by Judge Burnstein requiring the Town of Davie to show cause why the relief requested in the Petition for Certiorari should not be granted. On July 22, 2002, Appellee, Town of Davie, filed its response to the Petition for Writ of Certiorari and Pelican Coast Holdings, Inc. and William Cuthbertson have since filed their Reply Brief. Oral argument in this matter was held on October 3, 2002 and thereafter, both side submitted Memorandum of Law in support of their respective positions. On October 28, 2002, Judge Burnstein issued her Order in this case. The Court granted the Petition for Writ of Certiorari and quashed the condition imposed by the Town Council at its May 15, 2002 Meeting that the owner of the property obtained a "special permit" from the Council, if the owner seeks to serve alcoholic beverages at the site. The Court does however, make clear that the owners and users of the property are bound by the separation requirements for alcoholic establishments, but the Court proposes that the Town would be able to monitor the owner's compliance through its occupational licensing regulations. The Court has also ruled that the Petitioner is entitled to recover its attorney's fees in prosecuting the appeal. A copy of Judge Burnstein's Order of October 28, 2002 has been previously provided to the Mayor and Councilmembers. At the first meeting in November of the Davie Town Council, the Council authorized Mr. Burke's firm to file the necessary paperwork to challenge Judge Burnstein's Order of October 28, 2002. Pursuant to the Council's instructions, a Petition for Writ of Certiorari was filed on behalf of the Town of Davie with the 4th District Court of Appeal. The Petition was reviewed by a 3 judge panel of the 4th District Court of Appeal and the Town Attorney has been advised by Mr. Burke that the Court has denied the Town's Petition for Writ of Certiorari, but also denied the request of the property owner for an award of attorney's fees on the appellate level. The Town Attorney's Office has again spoken with Mr. Burke regarding this matter and the only remaining issue is what amount, if any, is to be awarded to the Petitioner with regard to attorney's fees on the Circuit Court level. To date, no hearing on this issue has been scheduled.

10. **DePaola v. Town of Davie:** Plaintiff DePaola filed a lawsuit against the Town of Davie and the Town filed a Motion to Dismiss. The Motion to Dismiss was heard by Judge Burnstein who requested that both sides file Memoranda of Law in support of their positions and she took the case under advisement. Both sides did file their Memoranda of Law in support of their positions on the Town's Motion to Dismiss, and on November 13, 2002, the Court entered an Order granting the Town's Motion to Dismiss and entered an Order of Dismissal. The Court found that Mr. DePaola had administrative remedies as a career service employee, either by pursuing a civil service appeal or by a grievance procedure established under a collective bargaining agreement, but he had failed to pursue his administrative remedies. A copy the Court's Order of November 13, 2002, has been previously provided to the Town Council for its review. The Plaintiff DePaola filed a motion with the Court for re-hearing of the Town's Motion to Dismiss, which motion was denied by the Trial Court. The attorneys for DePaola have since filed a Notice of Appeal of the Trial Court's decision to the 4th District Court of Appeal, but Mr. Burke advises that as of this date, February 26, 2003, his office has not yet received DePaola's Appellate Brief.

11. **Southern Homes of Davie, LLC v. Davie (Charleston Oaks Plat) Case No. 02-015674 (11):** The Town was served with a Summons and Complaint for Declaratory Judgment and Injunction and Petition for Writ of Mandamus with regard to Case Number 02-015674 (11) instituted by Southern Homes of Davie, LLC against the Town of Davie relevant to the "Charleston Oaks Plat". The Florida League of Cities has accepted responsibility for providing a defense to the Town of Davie relevant to this lawsuit and has assigned the case to Attorney Michael Burke. The Plaintiff is seeking both equitable relief and monetary damages against the Town. The Plaintiff is alleging that they have suffered injury as a result of the Town's refusal to process, review and/or approve its Site Plan Application while the Zoning in Progress has been in effect. They are seeking an Order declaring that the Plaintiff is entitled to approval of its Site Plan Application and that the Town be estopped to apply the "Zoning in Progress"; declaring that the Zoning in Progress does not exist and/or does not apply to Plaintiff's Site Plan Application and/or Plaintiff's property, and other relief. Since then, the Plaintiff has filed a second companion case also seeking a Declaratory Judgment and Injunction and Petition for Mandamus against the Town of Davie with regard to the "Flamingo Plat". This too, has been accepted for defense by the Florida League of Cities. Both cases have been since consolidated for discovery purposes and Mr. Burke's firm has filed its response to each Complaint filed in the two lawsuits. On this date, February 26, 2003, the Town Attorney again discussed this matter with our special outside counsel, Mr. Burke. Mr. Burke had previous discussions with the attorneys for the Plaintiff regarding the potential dismissal of both lawsuits in light of the Town Council's actions approving the Code changes pertaining to the Zoning in Progress. A written proposal from Attorney Spencer was received, and the proposed Stipulation was reviewed by both the Town Attorney's Office and Mr. Burke and Mr. Spencer has been advised that it is not acceptable in its current form. Attorney Spencer has requested that the Town submit its proposed revisions to the document and members of the Administration and Staff are currently working with Mr. Burke and the Town Attorney to formulate an appropriate response to be provided to the Plaintiff's attorney, Mr. Spencer.

12. **Asset Management Consultants of Virginia, Inc. v. Town of Davie:** The Town of Davie has been sued by Asset Management Consultants of Virginia, Inc., who are seeking a refund of a public service fee imposed on certain property owners by the Town pursuant to Ordinance

No. 99-35 of the Town Code. The Town filed a Motion to Dismiss the Complaint along with a Memorandum of Law in support of the Town's position. The Town's position is that at the time of the passage of Ordinance No. 99-35 of the Davie Town Code, it was properly initiated and therefore, the Plaintiff is not entitled to a refund of the public services fees which were subsequently declared unconstitutional and contrary to Section 192.042 of the Florida Statutes by the Florida Supreme Court in 1999. The Town of Davie's Motion to dismiss the lawsuit was heard on Friday, November 15, 2002, and after Judge Greene heard lengthy oral argument on both sides, the Court granted the Town of Davie's Motion to Dismiss Plaintiff's Complaint. The Judge granted our Motion to Dismiss with Prejudice as to Count II, which was a claim by the Plaintiff against the Town of Davie for unjust enrichment with regard to the Town of Davie's collection of the public service fee which was subsequently ruled unconstitutional. The Judge also granted the Town's Motion to Dismiss Counts I and III in which the Plaintiff sought a declaratory judgment and a refund of the public services fee that was collected relevant to the Plaintiffs. The Judge also struck with prejudice that portion of Count III which sought prejudgment interest against the Town if the Plaintiff is successful. The Judge did give the Plaintiff 20 days in which to amend Count I and the balance of Count III. A copy of the Court's Order of November 15, 2002, was previously forwarded to the Town for distribution to the Mayor and Councilmembers. The Plaintiffs filed a Motion for Extension of Time to submit their Amended Complaint and their request was granted. The Amended Complaint was ultimately filed by the Plaintiffs on January 3, 2003, and a Motion to Dismiss the Amended Complaint was filed by the Town. Oral argument on the Town's Motion to Dismiss the Amended Complaint is to be heard on February 26, 2003.

13. **Michael Biglen v. Town of Davie:** The Plaintiff has sued Florida Power & Light Company, the Town of Davie and several other defendants. The Plaintiff alleges that he made contact with an overhead power line owned by Florida Power & Light Company while he was on the premises of a private land owner. Nevertheless, he asserts claims for negligence against the Town claiming a duty owed by the Town to enforce compliance with one of its ordinances. The Town has filed a Motion to Dismiss the Plaintiff's Second Amended Complaint for failure to state a cause of action for premises liability against the Town of Davie, that the Plaintiff's claims are barred by sovereign immunity, and seeking an award from the Plaintiff of attorney's fees and costs pursuant to Florida Statutes §57.105. It is the Town's position that the Plaintiff has asserted claims against the Town without a good faith basis in doing so and that no facts or legal theories support the Plaintiff's claims and therefore, based on the circumstances, the Town is entitled to an award of its attorney's fees and costs. On January 16, 2003, the Court heard the Motion to Dismiss filed on behalf of the Town of Davie to dismiss the Plaintiff's Second Amended Complaint. After hearing argument of counsel and reviewing the case law provided, the Court reserved ruling. Mr. Johnson, our Florida League of Cities Attorney, has advised the Town Attorney that he is hopeful of receiving the Court's decision shortly.

14. **City of Cooper City v. Town of Davie:** The City of Cooper City has filed a lawsuit for Declaratory Judgment and Injunctive Relief and Alternative Petitions for Writ of Quo Warranto and Certiorari alleging that a recent ordinance and a recent resolution relevant to annexation are invalid. The Town Attorney's Office prepared an appropriate Motion to Dismiss and filed same as the Town's insurance carrier has refused to provide a legal defense to this action. This matter was originally noticed to be heard for oral argument on February 19, 2003, but the Court thereafter advised the Town Attorney's Office that the earliest time it will entertain oral argument is in March. The attorney for the City of Cooper City contacted

the Town Attorney's Office relevant to the scheduling of the hearing date on our Motion. The attorney for Cooper City had sought to have this matter postponed o May, 2003, and she was advised that this was not acceptable to the Town Attorney's Office. This matter is scheduled to be argued in March. The Town Attorney's Office is confident in a successful outcome of this litigation.