

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

STEPHEN J. BYERS AND  
ERICH NIKOROWICZ,

Petitioners,

vs.

Case No. 18-1732

ANTIQUERS AERODROME, INC.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH") heard this case by video teleconference at locations in Tallahassee and West Palm Beach, Florida, on March 14, 2019.

APPEARANCES

For Petitioner Erich Nikorowicz:

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For Respondent: Keith F. Backer, Esquire  
Ryan D. Poliakoff, Esquire  
Backer Aboud Poliakoff & Foelster, LLP  
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Antiquers Aerodrome, Inc., followed the statutory process to revive its restricted covenants and properly submitted the revitalization package to Department of Economic Opportunity according to chapter 720, Part III, Florida Statutes.

PRELIMINARY STATEMENT

On December 11, 2017, Respondent, Antiquers Aerodrome, Inc., submitted proposed revised declarations of covenants and other governing documents to the Department of Economic Opportunity ("DEO") requesting revitalization approval. By letter dated February 2, 2018, DEO advised Respondent that it had determined that the submitted "documents revitalizing the covenants and restrictions comply with the requirements of chapter 720, part III, Florida Statutes" and DEO approved the revitalization.

On March 19, 2018, Petitioners Stephen J. Byers ("Byers") and Erich Nikorowicz ("Nikorowicz") filed a Petition for Administrative Proceedings with DEO challenging the validity of the revitalization of the restrictive covenants of Antiquers Aerodrome, Inc.

On June 13, 2018, Respondent Antiquers Aerodrome, Inc., filed Respondent's Antiquers Aerodrome, Inc.'s Motion for a More Definite Statement and Motion to Stay Discovery, which the

undersigned granted. Petitioners were ordered to file amended petitions by July 30, 2018. After an extension of the filing deadline, Petitioners filed timely amended petitions on September 6, 2018.

On October 1, 2018, Petitioner Nikorowicz made a motion for leave to file a second amended petition. On October 2, 2018, Petitioner Byers joined the motion for leave to file a second amended petition. On October 4, 2018, the undersigned granted the motions and this case proceeded to final hearing on the second amended petitions filed by Petitioners.

After several joint continuances for good cause, the final administrative hearing was scheduled to start on March 14, 2019, and the case proceeded as scheduled.

At hearing, Petitioners presented the testimony of four witnesses: Petitioners Nikorowicz and Byers; Daniel Riggin; and Michael Downs. Respondent presented the testimony of one witness: Michael Downs. Petitioners' Exhibits numbered 1 through 11 were admitted into evidence. Respondent's Exhibits numbered 1 through 6 were admitted into evidence.

A one-volume Transcript of the final hearing was filed with DOAH on April 15, 2019. The parties submitted timely proposed recommended orders on May 3, 2019, which have been carefully considered in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2017).

FINDINGS OF FACT

1. Respondent Antiquers Aerodrome, Inc. ("association") is a Florida for-profit corporation that serves as the governing body for the family residential community known as Antiquers Aerodrome ("community").

2. Petitioners own a combination of four lots in the community.

3. The Marketable Record Title Act caused a lapse in the governing documents for some or all of the lots in the community.

4. On June 19, 2017, during an association meeting, the association moved forward to revive the expired Restrictive Covenants and Reservations ("Declarations") and assembled an organizing committee ("committee"). Michael Downs ("Downs"), John Van Lennep, and Michael Helm were chosen by vote as the committee members.

5. The committee used the law firm of Backer, Aboud, Poliakoff, and Foelster, LLP ("firm"), to assist them through the revitalization process for the community.

6. Attorney Ryan Poliakoff oversaw Respondent's revitalization process and Attorney Danielle Riggin ("Riggin") worked to develop and manage the revitalization package, as well

as guide the committee through the process so that the revitalization package could be submitted to DEO for approval.

7. Riggin prepared the revitalization packages for the committee by collecting the statutorily required materials including a graphic depiction, printing out the materials, compiling the revitalization packages, laying out the individual packages on the firm's conference room table, taking her list of the parcel owners' mailing addresses, and preparing an address label and envelope containing a revitalization package for each and every lot owner from the community. The firm placed a mailing label for each community parcel owner from the mailing list on each envelope.

8. During the organization of the packages for mailing, Downs reviewed the list of parcel owners that would receive the package. The committee members also reviewed the package and determined it was correct.

9. Downs drafted a memo used as the cover letter for the revitalization package. The firm edited the letter and Downs signed off on the final edited version of the letter for distribution in the package.

10. Riggin included the memo in each of the community parcel owners' revitalization packages.

11. On behalf of the committee, Riggin sent the revitalization package by regular U.S. mail on August 2, 2017,

("August 2 Notice") to the parcel owners explaining the revitalization process and seeking approval from each community parcel owner by consent. The memo specifically requested each parcel owner to sign and return the consent. The memo stated:

It is critical that a majority of the lot owners execute the enclosed "Parcel Owner Consent." The law provides that the enclosed materials must be provided to the parcel owners not less than fourteen (14) days before the time that the consent of the parcel owners is sought by the Committee. Presumably, that portion of the law is intended to give the parcel owners time to consider the effect of agreeing to the revival of the Governing Documents. Consistent with the requirement, the Committee is not asking you to sign the enclosed "Parcel Owner Consent" until after the expiration of fourteen days from your receipt of these materials.

12. Petitioners did not receive the August 2 Notice.

### **Parcel Owner Consents**

13. Parcel owners were instructed to mail owner consents back to the firm. Riggin personally reviewed each of the original consents. Upon receipt, she compared the consents to the firm's list of parcel owners to keep up with the receipts.

14. The consent of Daniel Trunk, as trustee of the Daniel J. Trunk Trust Under Agreement, dated July 26, 2013, was signed and dated August 3, 2017.

15. Two consents of Mike Black, as Trustee of the Mike Black Revocable Trust Under Agreement, dated December 22, 1997, were both signed and dated August 5, 2017.

16. The consent of Amer Rustom, which was signed and dated August 8, 2017, was returned to the firm responding to the August 2 Notice.

17. Riggin discovered two errors in the August 2 Notice. The August 2 Notice was sent with a misspelled parcel owner's last name and the package failed to correctly indicate in the chart of lots that a portion of one of the properties had been conveyed.

18. Riggin corrected the misspelled last name and the chart of lots to reflect the conveyance of the portion of the property from one community neighbor to the other neighbor. Riggin drafted, signed, and sent a second letter dated August 8, 2017 ("August 8 Notice"), by U.S. mail to all the parcel owners with Exhibit 1.

19. The August 8 Notice letter stated in part:

The Organizing Committee previously sent you a Revival Documentation Package seeking your approval to revitalize the Association's governing documents. . . .

\* \* \*

Enclosed with this correspondence is a revised Exhibit "1" of the Revived Restrictive Covenants and Reservations and Other Governing Documents Relating to

Antiquers Aerodrome, Inc. ("Exhibit 1"). The enclosed Exhibit 1 corrects a scrivener's error in the chart of lots and Owners that was sent with the original package. Please replace the chart that was initially included as Exhibit "1" with the enclosed revised Exhibit.

Please be sure that each parcel owner signs the Parcel Owner Consent form that were previously mailed and returns it to the Revitalization Organizing Committee. . . . The Parcel Owner Consent is not being sought any sooner than fourteen (14) days from the date you receive this correspondence with the revised Exhibit 1.

20. The firm received nine more timely parcel owner consents within 14 days of the August 8 Notice.

21. The consent of Luiz Claudio Maia Ferreira as Trustee of the Elaine Lignelli Irrevocable Trust dated September 28, 2012, was signed and dated August 10, 2017.

22. The consent of Richard Preiser and Peggy Sue Preiser was signed and dated August 10, 2017.

23. The consent of William and Shireen Bower, as Trustees of the William and Shireen Bower Trust dated February 22, 2002, was signed and dated August 11, 2011.

24. The consent of Thomas Stout was signed and dated August 14, 2017.

25. The consent of Brumardi Investments, LLC, which was signed by Thomas Stout, was dated August 14, 2017.



26. The consent of Pamela and Robert Bakeris was signed and dated August 15, 2017.

27. The consent of Mayda Balboa, as Trustee and not individually or her Successors in Trust, and under the Daoud Family Irrevocable Trust, dated May 19, 2014, and any amendments or restatements thereto, was signed and dated August 15, 2017.

28. The consent of Michael Brito was signed August 21, 2017.

29. The consent of Patricia Mazzoni and William Mazzoni was signed and dated August 15, 2017.

30. The remainder of the consents returned to the firm were dated August 23, 2017; September 6, 2017; October 27 and 28, 2017; and November 15, 2017.

31. The last parcel consents received by the firm were all dated November 15, 2017.

32. Petitioners did not receive the August 8 Notice.

33. Riggin learned that some community parcel owners indicated that they still had not received the previously mailed August 2 Notice and August 8 Notice.

34. Downs reviewed the address mailing checklist of parcel owners to verify who had not returned their consents. He was concerned about what to do about the nonresponses and the persons that indicated they never received the prior notices.

35. To ensure all community parcel owners received the package, on November 25, 2017, Riggin resent revitalization packages by certified mail ("November 25 Notice") to the 18 parcel owners who had not returned a written consent.

36. Petitioners Nikorowicz and Byers were two of the parcel owners the firm sent the revitalization package to by certified mail.

37. At the date of the hearing, Petitioners still had not received the August 2 Notice, August 8 Notice, or November 25 Notice.

### **Graphical Depiction**

38. When preparing the revitalization packages, Riggin included approximately 22 documents with similar representations of the community property. Respondent's Exhibit AA010940, is the image representation Riggin used as the graphical depiction placed in the revitalization package to meet the statutory mandate that a graphical depiction be included. The graphical depiction adequately identified the property in the community that is subject to the recorded covenants.

39. The graphical depiction contained in the revitalization package and ultimately submitted to DEO for approval was identical to the one included with the original Declaration recorded in the public records of Palm Beach County at Book 1651, page 151 on April 21, 1968.

40. The graphical depiction included a recorder's memo that states, "Legibility of Writing, typing or printing unsatisfactory in this document when received."

41. The graphical depiction illustrates two roads, Sims and Hagen, not subject to the covenants and adjacent to the community. The current names of the roads are Lake Ida Road and Hagen Ranch Road.

42. The graphical depiction failed to delineate Oriole Road on the fourth side of the property outside the community.

43. The graphical depiction was not to scale and does not illustrate the shortening of the runway since origination in 1968.

44. The drawing also neither has a legend nor legal descriptions of the property lots in the community.

45. The graphical depiction fails to detail all the lot lines, borders, and roads, or identify single lots from the double lots. Additionally, the words are difficult to read on the drawing.

46. At the final hearing, Petitioner Byers made a vague reference that some of the land on the graphical depiction is no longer governed by the covenants because of an eminent domain taking, but no competent substantial evidence was provided to demonstrate such an allegation.

## **Affidavit**

47. Riggin was responsible for collecting all the documents needed for Respondent's submission to DEO.

48. During the process of collecting the materials for revitalization submission, Downs visited the firm several times to review consents and other documents. He also had telephonic meetings with the firm where the proposed revitalization submission status was updated by the lawyers working on the process.

49. The firm prepared the affidavit of verification and emailed it to Downs for review.

50. In Down's affidavit, he attests to the following: the requirements for reviving the Declaration have been satisfied; the articles of incorporation, bylaws and the amendments to the bylaws, and other documents are true and correct copies; written consents of parcel owners are true and correct copies; and the affidavit "is made with the intention of fulfilling the requirements set forth in Sections 720.405 and 720.406, Fla. Stat."

51. Downs read the affidavit, agreed with its content, and verified it with his signature. The affidavit was notarized and given back to the firm to submit with the association's revitalization package.

52. On December 11, 2017, the firm submitted the proposed revised declaration and other governing documents on behalf of the association to the DEO to review and determine approval or disapproval of the proposal.

53. On February 2, 2018, DEO's Bureau of Community Planning and Growth determined that the association had complied with the requirements of chapter 720, Part III, Florida Statutes and the revitalization of the homeowners' documents and covenants were approved.

54. Petitioners contest DEO's approval. Since neither Petitioner received any notice, they were not able to participate in a discussion of the proposed revitalization with other parcel owners before it was approved. Petitioners contend that the process is tainted and contrary to the statutory requirements for the Florida revitalization procedure.

#### CONCLUSIONS OF LAW

55. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

56. The burden of proof in this proceeding is on Petitioners to prove by the preponderance of the evidence their claim for relief in this matter. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

"Preponderance of the evidence" is evidence that more likely

than not tends to prove the proposition set forth by the proponent. Gross v. Lyons, 763 So. 2d 276 (Fla. 2000).

57. Petitioners have challenged generally two aspects of the proposed revitalization, the process and submission. The decision in this case ultimately turns on the proper application of sections 720.405 and 720.406.

58. Section 720.405(5) provides in pertinent part:

A copy of the complete text of the proposed revised declaration of covenants, the proposed new or existing articles of incorporation and bylaws of the association, and a graphic depiction of the property to be governed by the revived declaration shall be presented to all of the affected parcel owners by mail or hand delivery not less than 14 days before the time that the consent of the affected parcel owners to the proposed governing documents is sought by the organizing committee.

### **Presentment**

59. Petitioners maintain that section 720.405(5) requires receipt and Respondent failed to meet the presentment criteria because all the parcel owners, including Petitioners, did not receive the revitalization package information by mail. The undersigned rejects Petitioners' argument as an unreasonable interpretation because there is simply no language within the text of the statute which suggests mandatory receipt.

60. Even though "present" is not defined in section 720.405, the Legislature specifically provided that "the

revived declaration shall be presented to all the affected parcel owners by mail." When looking at the actual language of the statute and applying its plain meaning, the undersigned is without the authority to construe an unambiguous statute in a way which would extend or modify the terms of a statute. See Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Therefore, the record is clear that Respondent complied with section 720.405(5) by having its designee, the firm, mail the information to the approximate 37 parcel owners at least twice without a receipt, and a third time by certified mail to the 18 parcel owners who did not return the previously mailed consents.

**Fourteen-Day Requirement**

61. As stated above, section 720.405(5) also requires "delivery not less than 14 days before the time that consent . . . is sought by the organizing committee."

62. Petitioners contend in their Proposed Recommended Order that the August 8 Notice failed to conform to section 720.405(5) when the committee solicited and received 13 consents from the August 8 Notice within a 14-day period. Petitioners further contend that the 13 consents were untimely and should be removed from the 21 total consents that were sent to DEO. Without the 13 consents, Petitioners assert Respondent fails to have a majority of consents needed for approval of the proposed revitalization.

63. Even though section 720.405(5) is poorly worded, it provides that the committee has to give at least 14 days' notice before the committee's action. The statute does not prohibit acceptance within the 14 days. Therefore, parcel owners can sign and return their consents upon their decision being made within the 14-day period. The unrebutted evidence shows the 13 parcel owner consents were timely. Therefore, Respondent did not violate the 14-day statutory requirement of section 720.405(5).

**Graphical Depiction**

64. Petitioners raised a number of objections to the graphical depiction utilized in the revitalization package and submitted to DEO. Although the drawing is not to scale, does not have a legend, is hard to read, has an original recorded stamp "illegible," names roads that have since been renamed, fails to show details of the borders, identifies roads outside the community, and does not have an updated shortened runway, section 720.405(5) does not require any of those details to be in a graphical depiction.

65. The general rule is that where the legislature has not defined words or phrases used in a statute, they must be "construed in accordance with [their] common and ordinary meaning." Donato v. AT&T, 767 So. 2d 1146, 1154 (Fla. 2000). "[T]he plain and ordinary meaning of [a] word can be ascertained



by reference to a dictionary." Green v. State, 604 So. 2d 471, 473 (Fla. 1992). The dictionary defines the adjective "graphical" as "written or transmitted in a (specified) way." Merriam-Webster Dictionary, "graphical," <https://www.merriam-webster.com/dictionary/graphical> (last visited June 18, 2019). Additionally, "depiction" is defined as "a representation in words or images of someone or something." Merriam-Webster Dictionary, "depiction," <https://www.merriam-webster.com/dictionary/depiction> (last visited June 18, 2019). In this cause, Respondent provided representation of the community as an image that identified the property that is going to be subject to the recorded covenants. Accordingly, Respondent met the statutory guidelines by providing a drawing, although imperfect, of what the community looks like that is going to be governed by the revised Declarations.

**Affidavit**

66. Section 720.406(1) provides:

720.406 Department of Economic Opportunity;  
submission; review and determination.

(1) No later than 60 days after the date the proposed revived declaration and other governing documents are approved by the affected parcel owners, the organizing committee or its designee must submit the proposed revived governing documents and supporting materials to the Department of Economic Opportunity to review and determine whether to approve or disapprove of the proposal to preserve the residential

community. The submission to the department must include:

(a) The full text of the proposed revived declaration of covenants and articles of incorporation and bylaws of the homeowners' association;

(b) A verified copy of the previous declaration of covenants and other previous governing documents for the community, including any amendments thereto;

(c) The legal description of each parcel to be subject to the revived declaration and other governing documents and a plat or other graphic depiction of the affected properties in the community;

(d) A verified copy of the written consents of the requisite number of the affected parcel owners approving the revived declaration and other governing documents or, if approval was obtained by a vote at a meeting of affected parcel owners, verified copies of the notice of the meeting, attendance, and voting results;

(e) An affidavit by a current or former officer of the association or by a member of the organizing committee verifying that the requirements for the revived declaration set forth in s. 720.404 have been satisfied[.]

67. Petitioners further assert that Respondent's DEO submission failed to comply with the statutory requirements of section 720.406(1) because Downs lacked personal knowledge of the affidavit's contents and the submission was more than 60 days after consents were signed. Specifically, Petitioners contest that since Downs never possessed the consents and the

revitalization process was delegated to the firm, Downs lacked personal knowledge of the affidavit's content.

68. In this matter, the firm served as the committee's agent. An attorney is generally viewed as the agent of his client. An act done by an agent on behalf of the client within the scope of the agency is not the act of the attorney, but of the client by whose direction it is done. Johnson v. Estate of Fraedrich, 472 So. 2d 1266, 1985 (Fla. 1st DCA 1985).

69. In addition, the competent evidence taken as a whole demonstrates that the firm kept Downs abreast of the process. Downs made several visits to the office where he reviewed revitalization information and had multiple telephone meetings with the firm for updates. Downs even credibly testified during hearing that he was aware of what he verified in the affidavit. The affidavit tracks section 720.406(1). Accordingly, the affidavit complied with the verification mandate of section 720.406(1).

**Sixty-Day Prohibition**

70. As stated above, section 720.406(1) also requires a 60-day restriction.

71. Petitioners claim that Respondent submitted the revitalization package to DEO more than 60 days after the consents were signed, contrary to section 720.406(1), which requires the committee to submit the proposed revitalization

package to DEO no later than 60 days after the revitalization package is approved by the affected parcel owners. Petitioners focus on the three-and-a-half month period to which the consents were collected in this cause and contend that starting to collect consents in August and the submission taking place in December is well beyond the 60 days.

72. The undersigned is not persuaded by Petitioners' calculations and timeline. Section 720.406(1) specifically provides language establishing the date that triggers the time to start counting the 60 days. It is "upon approval." In this case, approval was by consent and the last consents that completed the majority approval process are dated November 15, 2017. Counting backwards 60 days from the December submission date, as required by the statute is October 12, 2017. The last consents were received by the firm dated November 15, 2017, a date between October 12, 2017, and December 11, 2017. Accordingly, the revitalization submission was well within the 60-day mandated deadline and Respondent complied with section 720.406(1).

73. In summary, based on the findings of fact herein, Petitioners have failed to meet their burden in this matter and DEO's determination is valid.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Economic Opportunity enter a final order dismissing Petitioners' second amended petitions and affirming the approval of Respondent's revival.

DONE AND ENTERED this 19th day of June, 2019, in Tallahassee, Leon County, Florida.



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JUNE C. MCKINNEY  
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Filed with the Clerk of the  
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.