RESOLUTION R-21-135

A RESOLUTION OF THE MANATEE COUNTY BOARD OF COUNTY COMMISSIONERS APPROVING THE TERMINATION OF A 1979 AGREEMENT AMENDED IN 1984, BY AND BETWEEN MANATEE COUNTY AND ASSIGNEE AND SUCCESSOR-IN-INTEREST, CHAMPION HOME COMMUNITIES, INC.; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, in 1979, Manatee County entered into a written agreement ("Agreement") with developers of the Rosedale community to provide up to 180,000 gallons per day of reclaimed water for the irrigation of the Rosedale golf course at the Rosedale Golf and Country Club; and

WHEREAS, pursuant to the Agreement, amended in 1984, the County would provide free reclaimed water if the developers agreed to store the reclaimed water in ponds on its property; and

WHEREAS, at that time, Manatee County had inadequate storage facilities for reclaimed water, including reclaimed water that would be produced by a newly constructed wastewater facility built to serve 950 homes in the Rosedale Community; and

WHEREAS, the Agreement appears to have been assigned by the original parties (Champion Home Communities, Inc.; Creekwood Investors, Ltd.; and Aristek/Champion Joint Venture No. 2) to Champion Home Communities, Inc., and

WHEREAS, Florida law provides that a party to a contract may terminate a contract at-will, with reasonable notice, if there is no termination date in the contract and no indication that the parties intended to create a perpetual contract; and

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WHEREAS, the Agreement is silent as to a termination date; and

WHEREAS, the 1984 amendment indicates that the primary obligations of the parties (to provide free reclaimed water or to store reclaimed water) would cease once the County established rates for reclaimed water, and once the County acquired adequate effluent storage capacity; and

WHEREAS, on or around 2014, Manatee County began storing reclaimed water, by injecting it into deep wells, and started selling reclaimed water to private entities at established rates; and

WHEREAS, the Manatee County Code and its bond covenants prohibit free service and require the County to sell reclaimed water to similarly situated customers at the same established rates; and

WHEREAS, the County is required to keep its utility system financially self-sufficient while maintaining a rate structure that operates in an equitable manner; and

WHEREAS, the Utilities Department has given Champion Home Communities reasonable written notice that it intends to terminate the Agreement.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Manatee County, Florida, that:

SECTION 1. Approval of Termination. The Agreement entered into in 1979 and amended in 1984, by and between Manatee County and assignee and successor in interest, Champion Home Communities, Inc., providing free reclaimed water for the Rosedale golf course in exchange for storage of reclaimed water, is hereby terminated by the Manatee County Board of County Commissioners, effective upon the date signed below. Champion Home Communities may seek to enter into a new agreement with the County for the purchase of reclaimed water at established rates, subject to availability.

SECTION 2. SEVERABILITY. Should any section, subsection, sentence, clause, or provision of this Resolution be determined to be unconstitutional, invalid, inoperative, void, or otherwise unenforceable by a court of competent jurisdiction, such finding shall not affect the remaining portions of this Resolution so long as the remaining portions can be given legal effect absent the invalid portions.

SECTION 3. EFFECTIVE DATE. This Resolution shall be effective upon adoption.

DULY ADOPTED with a quorum present and voting, on the 14th day of September, 2021.

BOARD OF COUNTY COMMISSIONERS
OF MANATEE COUNTY, FLORIDA

By: _____
Chairperson

ATTEST: ANGELINA M. COLONNESO
CLERK OF THE CIRCUIT COURT AND COMPTROLLER

By: _____
Deputy Clerk

Approved in Open Session 9/14/21
Manatee County
Board of County Commissioners

Board of County Commissioners
September 14, 2021 - Regular Meeting

SUBJECT
ADOPTION OF RESOLUTION R-21-135 APPROVING THE TERMINATION OF A 1979 CHAMPION HOME COMMUNITIES RECLAIMED WATER AGREEMENT

Category
CONSENT AGENDA

Briefings
All

Contact and/or Presenter Information
Jeff Goodwin, Deputy Director, Utilities Department, ext. 5235

Action Requested
Adoption of Resolution R-21-135.

Enabling/Regulating Authority
Chapter 125, Florida Statutes

Background Discussion
On March 22, 1979, the Board of County Commissioners entered into an agreement with Creekwood Investors, Ltd. for the purchase of property for the purpose of constructing a wastewater treatment facility. The agreement was subsequently amended on June 24, 1982.

One of the conditions of the agreement provided Creekwood (now Rosedale Country Club) with effluent (reclaimed) water for use within the development at no charge. Manatee County has been complying with this to date.

The agreement or subsequent amendment had no termination date or clause. All other similar agreements have been terminated and a fee for reclaimed is being assessed. This Resolution terminates the Agreement and treats the Rosedale Community as others according to the Manatee County Code of Ordinances, which requires there be no free service.

Attorney Review
Formal Written Review (Opinion memo must be attached)

Reviewing Attorney
Warren

Instructions to Board Records
Please return executed copy to jeff.goodwin@mymanatee.org and amy.pilson@mymanatee.org
Also to: L. Stephens & M. Dunnan, 9/17/21 RT
Cost and Funds Source Account Number and Name
N/A

Amount and Frequency of Recurring Costs
N/A

OFFICE OF THE COUNTY ATTORNEY

MITCHELL O. PALMER, COUNTY ATTORNEY*
William E. Clague, Chief Assistant County Attorney
Sarah A. Schenk, Assistant County Attorney**
Christopher M. De Carlo, Assistant County Attorney
Pamela J. D'Agostino, Assistant County Attorney
Anne M. Morris, Assistant County Attorney
Katharine M. Zamboni, Assistant County Attorney
Alexandria C. Nicodemi, Assistant County Attorney
Douglas E. Polk, Assistant County Attorney

MEMORANDUM

DATE: January 28, 2020

TO: Jeff Goodwin, Deputy Director, Utilities Department

THROUGH: Mitchell O. Palmer, County Attorney Approved by *M. Palmer 01-28-2020*

FROM: Katharine M. Zamboni, Assistant County Attorney Approved by *K. Zamboni*

RE: Creekwood Investors/Rosedale Wastewater and Effluent Agreement; CAO Matter 2020-0019

Issue Presented:

In this Request for Legal Services (RLS), you asked this Office to review an agreement between the County and a property developer (originally Creekwood Investors) to determine the duration of the agreement or circumstances under which it may be terminated.

Brief Answer:

I have reviewed the agreement and amendment provided with the RLS and am unable to determine a duration period for the parties' performance or a procedure for termination by one of the parties. Under Florida law, when a contract is silent as to the duration that the parties must perform an ongoing affirmative obligation, the law implies that the contract is terminable at will by either party upon reasonable notice, unless there is an indication of the parties' intent to make the contract perpetual.

Recommendation:

While the RLS states that the Department is not seeking to terminate the agreement at this time, I recommend that the Department plan on providing at least 90 days' written notice if it decides to terminate the agreement and that the termination notice be delivered via certified mail to the correct legal entity currently entitled to rights originally granted to Creekwood Investors.

Nothing herein is to be construed to mean that the County may terminate its wastewater collection and treatment service or reclaimed water service to any customer in a manner that would violate a County ordinance or applicable permit requirements.

Discussion:

A. Factual Background.

The original March 1979 agreement between Creekwood Investors ("Creekwood") and Manatee County (hereinafter the "1979 Creekwood Agreement") provided that Creekwood would sell a parcel of property to the County for $150,000.00 and that the County would be entitled to a credit against the purchase price for the value of a water main and sewer line installed to provide water and sewer service to other property owned by Creekwood (valued at $34,350.72). In addition, the 1979 Creekwood Agreement provided that Creekwood would design and construct a sewage treatment plant and a lift station in accordance with specifications approved by the County with a minimum capacity of 180,000 gallons per day (GPD). Upon completion of the sewage treatment plant and the lift station, Creekwood promised to donate the facilities to the County to own and maintain. In exchange, the County promised to provide Creekwood (or its transferee) any and all of the treated effluent discharge (i.e., reclaimed water) from the sewage treatment plant, which Creekwood would have a right to use on its proposed 18-hole golf course. The only charge the County would be permitted to impose on Creekwood (or its transferee) in connection with such treated effluent pursuant to the 1979 Creekwood Agreement was the electrical cost of pumping water to the golf course.

Subsequently, in 1984, the County, Creekwood and a third party, Champion Home Communities ("Champion"), agreed to amend the 1979 Creekwood Agreement to assign some of Creekwood's rights and obligations to Champion and to amend Creekwood's obligations regarding the sewage treatment plant (hereinafter the "1984 Amendment"). Pursuant to the 1984 Amendment, the County agreed to design and construct the wastewater treatment plant (known as the Southeast Regional Wastewater Treatment Plant) with a minimum capacity of 180,000 GPD, instead of Creekwood. Champion, in turn, agreed to pay the County $350,000 as payment in full for the Facility Investment Fee (FIF) applicable to Champion's development project. Champion also agreed to pay the County $38,000 in lieu of constructing a 6" force main and lift station as part of the delivery system Champion would have been obligated to construct. Champion also obtained the right and obligation to receive the same amount of effluent (i.e., reclaimed water) equal to the amount generated by its development project up to the maximum limit of 180,000 GPD. The 1984 Amendment further states that while Champion's obligation to pay an FIF would be deemed satisfied with its $350,000 payment, Champion would be obligated to pay all other applicable fees, charges and rates as legally established from time to time by the County.

B. Legal Analysis.

An examination of the 1979 Creekwood Agreement, as amended by the 1984 Amendment (collectively referred to herein as the "Amended Creekwood Agreement") reveals that it is silent as to the duration or term of the agreement during which the parties are obligated to provide and receive up to the maximum limit of 180,000 GPD of reclaimed

water. Nor does the Amended Creekwood Agreement provide for termination of the obligations.

It is not uncommon for an agreement to remain silent on the term or duration, particularly when the parties' obligations are discreet acts that would occur once, such as the purchase and sale of a single product or service. In those cases, once the parties have completed their respective obligations, the contract is considered performed and discharged. The contract remains in effect with respect to the parties accrued rights, but the parties have no future rights or obligations under the discharged contract. By way of contrast, the Amended Creekwood Agreement does not involve a discreet act that would occur only once or twice. Rather, it creates an affirmative obligation to provide, and a right to receive, up to 180,000 gallons ***per day*** of reclaimed water from the Southeast Regional Wastewater Treatment Plant.

Generally, when a contract has no predetermined duration or contract period, and does not contain a provision for termination, the contract is considered terminable at will by either party, provided reasonable notice is provided. Under Florida law, a contract with an indefinite period is not deemed to create a perpetual relationship, unless there is some indication that the parties intended the contractual obligations to be perpetual. "Instead, the law generally imposes a 'reasonableness' standard upon a contract for an indefinite period." Autonation, Inc v. Susi, 199 So. 3d 456, 459 (Fla. 4th DCA 2016) (citing Perri v. Byrd, 436 So. 2d 359, 361 (Fla. 1st DCA 1983) ("The general rule is that a contract which contains no express provision as to duration, or which is to remain in effect for an indefinite period of time, is not deemed to be perpetual . . . .")).

Florida courts tend to look unfavorably at interpreting a contract that is silent as to duration as creating a perpetual obligation because it would create an endless duty on the court to enforce the specific performance of such a contract. See, e.g., Collins v. Pic-Town Water Works, Inc., 166 So. 2d 760, 762 (Fla. 2nd DCA 1964).

However, a contract silent as to the duration will not always be interpreted to mean it is terminable at will by either party. A court will look at the circumstances of the agreement at issue to determine if by its inherent nature, the parties intended to create a perpetual obligation. In City of Homestead v. Beard, 600 So. 2d 450 (Fla. 1992), for example, the Supreme Court of Florida found an agreement that created a negative duty on the parties (i.e., to refrain from entering the service area of the other party) was not terminable at will, even though the agreement was silent as to the duration. Id. at 454-55. In that case, the ***absence of an affirmative duty*** to be performed in perpetuity was considered by the Court in trying to ascertain the parties' intent. There, the Court likened the contract at issue to a settlement agreement where the parties intend to permanently resolve their conflict. As a result, the Court concluded that the contract was not terminable at will by the parties. Id.

The Court contrasted the contract at issue in City of Homestead with other cases involving contracts that would have obligated parties to perform an act in perpetuity, or contracts in which there was a lack of mutuality of obligation or certainty of consideration. The Court

concluded that in those other cases, given the inherent nature of the contract, the parties had intended some kind of duration and therefore "were considered terminable at will in the absence of an express provision to the contrary." Id. at 453-54.

The Amended Creekwood Agreement at issue in the instant RLS is similar to a contract at issue in Gulf Cities Gas Corp. v. Tangelo Park Service Co., 253 So. 2d 744 (Fla. 4th DCA 1971). In Gulf Cities Gas, a contract gave one party the exclusive right to sell gas to residents of a subdivision and in return that party was to pay another party ten percent of all revenues from such sales. According to the Fourth District Court of Appeal, the contract contained no express contractual duty to sell gas to the residents of the subdivision for any specific duration. Because the contract was silent as to the duration of the party's obligation to provide gas to the subdivision, the court refused to impose contractual rights and duties that the parties omitted. Rather, "[i]n that circumstance, the normal rule is that the duty is terminable at will." Id. at 748 citing Florida-Georgia Chem. Co. v. National Labs. Inc., 153 So. 2d 752 (Fla. 1st DCA 1963); Southern Bell Tel. & Tel. Co. v. Florida E. Coast Ry. Co., 399 F.2d 854 (5th Cir. 1968); Collins v. Pic-Town Water Works, Inc., 166 So. 2d 760 (Fla. 2nd DCA 1964). Similarly, the Amended Creekwood Agreement is silent as the duration of the County's obligation to provide up to 180,000 GPD of reclaimed water to Champion (or its transferee).

Unlike the contract in City of Homestead, there is nothing about the inherent nature of the Amended Creekwood Agreement to indicate that the parties intended to create a perpetual duty. The inherent nature of the Amended Creekwood Agreement, which created an affirmative obligation on the parties to provide and receive reclaimed water, indicates that the parties intended some kind of duration, but simply omitted it from the contract. Based on the foregoing, under Florida contract law, the Amended Creekwood Agreement should be considered terminable at will by either party, provided reasonable notice is provided to the other party.

There is no single standard that dictates what is considered "reasonable notice," because reasonableness is determined based on the circumstances of the matter. In this case, I would recommend providing at least 90 days' notice, if the County wished to terminate its obligations under the Amended Creekwood Agreement. I further recommend that the notice be provided in writing via certified mail to the legal entity that is currently entitled to the benefits of the Amended Creekwood Agreement.

Conclusion:

I trust this response has adequately addressed your question. This concludes my response to this Request for Legal Services. Should you have any further questions or if I can be of further assistance, please do not hesitate to contact this office.

KMZ

Copies to: Cheri Coryea, County Administrator
John Osborne, Deputy County Administrator
Karen Stewart, Deputy County Administrator

Mike Gore, Director, Utilities Department
Mark Simpson, Deputy Director, Utilities Department
Amy Pilson, Strategic Affairs Manager, Utilities Department