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Reply to: Bradenton

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Via Email (kfernandez@swflgovlaw.com)
and Regular U.S. Mail

City of Venice
c/o Kelly Fernandez, Esquire
Persson & Cohen, P.A.
6853 Energy Court
Lakewood Ranch, FL 34240

Re: Use Restrictions in Pre-Annexation Agreement signed by R. Gene Smith

Ladies and Gentlemen:

We act as counsel to 700 Gene Green, LLC, a Florida limited liability company ("**Owner**") which owns 700 Gene Green Road, Nokomis, FL 34275 (the "**Property**"). This opinion letter is furnished at the City of Venice's (the "**City**") request and with the consent of the Owner. More specifically, the City has asked for a legal opinion as to the inapplicability of the restrictions contained in section 6.B. of the Pre-annexation Agreement made as of June 8, 2004 by R. Gene Smith and the City of Venice (the "**Agreement**") to our client's Property.

We express no opinion with respect to the effect of any law other than the law of the State of Florida (the "**State**") and the Federal law of the United States (collectively, "**Applicable Law**"). Notwithstanding the foregoing, unless specifically identified in this letter, our opinions hereunder will not be deemed to cover any of the following types of laws: federal and state securities laws and regulations; federal and state laws and regulations governing financial institutions; pension and employee benefit laws and regulations such as ERISA; federal and state antitrust and unfair competition laws and regulations; federal and state regulations concerning filing requirements (such as Hart-Scot-Rodino), other than requirements applicable to filings related to articles of incorporation, articles of organization and the like; compliance with fiduciary duty requirements; federal and state environmental laws and regulations; federal and state land use laws and regulations; RICO and other criminal and civil forfeiture laws; federal and state laws concerning patents, trademarks and copyrights; federal and state labor laws and regulations, including OSHA; federal and state criminal laws; and federal and state tax laws and regulations. Moreover, this opinion is provided solely as a matter of convenience for the City of Venice and without prejudice to any rights or claims available to the Owner, all of which rights and claims are hereby expressly preserved.

Based on the foregoing, and subject to the qualifications and exceptions herein contained, we are of the opinion that, as a matter of Florida law, the Conditions set forth in Section 6B(i) of the Agreement cannot restrict the stockpiling and recycling of concrete, asphalt, and vegetative

landscaping material, irrespective of whether it is produced on the "Subject Property" or brought to the Owner's Property from another location.

Legal Standard

It is a long standing and well settled principle of Florida law that any "covenants restraining the free use of real property ... [are] not favored." *Moore v. Stevens*, 106 So.2d 901, 903 (Fla. 1925). As the Florida Supreme Court explains, "Such covenants are strictly construed in favor of the free and unrestricted use of real property." *Id.* at 903. Consequently, "ambiguity or doubt ***must be resolved against the person claiming the right to enforce the covenant***" (emphasis added). *Id.* at 904.

The Restriction

The specific restriction the City has asked us to review states, "The stockpiling and recycling on the ***subject parcel*** shall be limited to concrete, asphalt, vegetative landscaping material and other aggregate products produced on the ***Subject Property***" (the "Restriction") (emphasis added).

Legal Analysis, Opinion, and Conclusion

1. Use of the term "subject parcel" as opposed to "Subject Property" – The Restriction set forth above ***ONLY*** applies to stockpiling and recycling on the "***subject parcel***" as opposed to stockpiling and recycling on the "Subject Property." Notably, there is no definition of the term "subject parcel" anywhere in the Agreement, especially not within section 6B of the Agreement. In fact, the word "parcel" appears in only two other contexts in the Agreement. The word "parcel" first appears in the first recital of the Agreement which states, "the owner owns ***two parcels*** of land comprising approximately 648 acres (hereinafter referred to as the '***Subject Property***') located in Sarasota County, Florida" (emphasis added).

   It is unclear from the Petition for annexation and from the pre-annexation Agreement exactly what two parcels make up the Subject Property. More specifically, the Agreement contains only one metes and bounds legal description of all lands owned by R. Gene Smith with no distinction between the two parcels referred to in the Recitals. However, that issue can be resolved from a plain and simple reading of the remainder of the Pre-annexation Agreement. Notably, the Agreement makes no other reference to a "parcel" that could refer to the "subject parcel" identified in the Restriction except for the "10 acre ***parcel***" described in paragraph 10 of the Agreement. By contrast, the Agreement refers to this 10 acre parcel no less than ten (10) times in Section 10 of the Agreement and is the only individual "parcel" described anywhere in the Agreement. In light of this fact, the only logical reading of the Restriction is that any limitation on stockpiling and recycling on the "***subject parcel***" was intended to apply to stockpiling and recycling on the ten acre ***parcel*** and not the remaining 648 acre Subject Parcel.

The Agreement states that 5 acres of the 10 acre parcel will be conveyed to the City and "will be used by the City solely for water storage and related uses." In order to minimize the adverse impacts of the surrounding industrial and mining operations on the City's plans for water storage, the City attempted to impose additional restrictions on the entire 10 acre parcel to insure that adequate berms were in place to protect the water supply from stockpiles of materials in the ***immediate*** vicinity of the City's 5 acre water storage area (i.e. stockpiles on the 10 acre subject parcel surrounding the water storage area, but not stockpiles on the remaining 638 acres comprising the Subject Property as that would be an unreasonable use restriction). In the spirit of protecting the water stored on the 10 acre "subject parcel," the Agreement can and should be read as attempting to restrict what materials may be stockpiled ***immediately adjacent*** to the water source. Consequently, the Agreement attempts to limit stockpiles on the 10 acre "subject parcel" to aggregates removed from the entire 648 acre Subject Property as well as concrete, asphalt, and vegetative landscape materials brought from outside locations.

From a legal perspective, there is clearly and unequivocally an ambiguity as to the meaning of the term "subject parcel." However, it certainly cannot be interpreted to include the entire Subject Parcel. We know this because the term "Subject Property" appears no less than thirty-three (33) times throughout the Agreement and is even expressly used in the very same Restriction contained in section 6B(i) of the Agreement being addressed herein. That defined term is then abandoned in the Restriction in order to limit the stockpiling and recycling only on the "subject parcel" and not the "Subject Property." As a result, under Florida law it must be narrowly construed to apply only to the 10 acre "***parcel***" and not the remaining Subject Property. See *Moore* supra. Finally, in light of the fact that the 10 acre parcel does not touch or concern the Owner's Property, the restriction cannot be applied to the Owner's Property without violating Florida's longstanding and well settled case law.

2. Assuming, *arguendo*, that there was no ambiguity surrounding the term "subject parcel," it is our opinion that the Restriction could still not be construed to limit the stockpiling and recycling to concrete, asphalt, and vegetative landscaping materials on the Owner's Property to concrete, asphalt, and vegetative material "produced on the Subject Property."[1] The clause, "produced on the Subject Property," modifies only the phrase "other aggregate products." Therefore, the stockpiling and recycling of concrete and asphalt brought to the Property would be permitted under the Agreement. However, for purposes of rendering this opinion and in light of the City Planning Commission's prior interpretation at our client's hearing on a temporary use permit application, we have assumed for argument's sake that there is some ambiguity as to whether the phrase "produced on the Subject Property" applies to concrete and asphalt and not just aggregate products. Again, the Florida Supreme Court makes it clear that any such "ambiguity or doubt ***must be resolved against the person claiming the right to enforce the covenant***"

[1] Additionally, we again assert that the opinion asserted herein is based solely on the assumption that the Pre-annexation Agreement impacts the entire Subject Property and without waiving any of the Owner's rights with respect to the validity of the Pre-Annexation Agreement, all of which rights are hereby expressly reserved.

(emphasis added). *Id.* at 904. In other words, given the ambiguity, the City is under a legal obligation to resolve that doubt in favor of the Owner.

We have assumed, for the purpose of rendering this opinion only and without prejudice to any of the Owner's and/or its title insurers rights, the authenticity, proper execution, recording, and indexing of all documents reviewed. We have further assumed, with respect to all documents we have reviewed, the due authorization, execution and delivery thereof by parties other than Borrower and Guarantor.

This opinion shall not be relied upon by any party other than the City.

Very truly yours,

Grimes Goebel Grimes Hawkins
Gladfelter & Galvano, P.L.

By: _____
Derin Parks, Esquire

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