IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

SONS OF THE BEACH, INC., a Florida Not-for-profit corporation
Plaintiff,

v.

COUNTY OF VOLUSIA,
Defendant.
_____/

CASE NO.: 2015-11142-CIDL
DIVISION: 01

MOTION TO DISMISS

Defendant, COUNTY OF VOLUSIA (Volusia), pursuant to Rule 1.140(b), Florida Rules of Civil Procedure, moves to dismiss the complaint filed herein by Sons of the Beach, Inc. (SOB) for failure to state a cause of action, and says:

1. Three Volusia ordinances attached to the complaint either establish policy to prohibit beach vehicular traffic or effect that policy in specific locations. SOB seeks a judgment declaring that those ordinances are invalid and enjoining enforcement because they also provide an inducement to redevelop upland property. SOB contends that the ordinances violate the Volusia home rule charter and the constitutional public trust doctrine.

2. SOB lacks standing to challenge the ordinances. It alleges no property right in the beach or in vehicular access to the beach; no injury differing in kind from injury to the general public; no violation of the constitutional taxing and spending power; and no claim authorized by statute.

3. Section 161.58, Florida Statutes, controls beach vehicular traffic. The statute since 1985 has prohibited vehicular traffic on Florida beaches, except as provided therein. It once allowed local governments to authorize an exception. It now allows those local governments to forbid vehicular traffic on all or a portion of the beaches under their jurisdiction. SOB tellingly makes no reference to the statute and effectively alleges no legal impediment to Volusia's exercise of delegated statutory authority. Inducement of economic development and promotion of tourism are public purposes which lawfully may accompany the exercise of statutory authority to prohibit beach vehicular traffic.

4. SOB alleges no ultimate facts which would establish any violation of Volusia charter section 205.1. SOB makes no claim that the ordinances fail to assure replacement parking reasonably accessible to the portions of the beach on which vehicular traffic has been forbidden. Even if there were such an allegation, the requirement for replacement parking is a charter companion to the prohibition of beach vehicular traffic, not a legal basis to preclude the exercise of statutory authority.

5. SOB alleges no ultimate facts which would establish any violation of Volusia charter section 202.2(2). SOB conflates the grantor and grantee of the easements required by the ordinances. The easements are granted by the owners of the two properties to Volusia, not vice versa as stated in paragraphs 8(a) and (b) of the complaint. SOB otherwise alleges no use of public land for private benefit and no use of the taxing power or credit of the county.

6. SOB alleges no ultimate facts which would show any violation of the constitutional public trust doctrine. SOB shows no action taken by Volusia pertaining to the land owned by the state between mean high and mean low water lines other than a prohibition of beach vehicular traffic specifically authorized by statute.

MEMORANDUM OF LAW

Charter background

The 1968 Florida Constitution enabled any Florida county to adopt a charter. Art. VIII, section 1(c), ("pursuant to general or special law, a county government may be established by charter...."). Volusia was the first to exercise the new constitutional prerogative and became a charter county in 1971. Chapter 70-966, Laws of Florida (Sp. Acts), as amended. Counties operating under charters have all powers local self-government not inconsistent with general law, Art. VIII, section 1(g), Fla. Const. The county governing body may enact ordinances not inconsistent with general law. Id. The charter may provide whether those ordinances prevail over a conflicting municipal ordinance. Id.

The Volusia charter was amended in 1986 to add what now are sections 205.1-6 to provide for unified countywide beach regulation. The county council in November 1987 by ordinance 87-36 adopted a Unified Beach Code that is now chapter 20 of the county's code of ordinances. The code authorized vehicular beach access pursuant to

charter directive.[1] The challenged ordinances amend section 20-173 which regulates vehicular access.

The Ordinances

Economic development has been a Volusia policy goal for beach management since 1987 code adoption. Sec. 20-4, Code of Ordinances, County of Volusia. Ordinance 2015-06 is a more specific statement of policy. It states that to encourage economic development, the county council will consider two traffic-free zones, between the University and Seabreeze Boulevard approaches; and between the International Speedway Boulevard and Silver Beach Avenue approaches, upon compliance with certain conditions.

The beachfront property owner must redevelop or construct an internationally recognized brand resort franchise hotel with an international centralized booking system and global and divisional brand support. Prior to hotel opening, the property owner at its sole expense must provide replacement off-beach motor vehicle parking, including paving, landscaping, and stormwater. The replacement parking calculation is one space per 15 linear feet of beach, if the parking is adjacent to the beach; and one space per 10 linear feet, if the parking is adjacent to the western side of A1A. Parking adjacent to the beach must include a dune walkover or other direct means of access to the beach.

[1] Section 205.1, Volusia County Home Rule Charter ("The public has a right of access to the beaches and a right to use the beaches for recreation and other customary purposes. This right of access and use is a public trust, which the council shall by ordinance define, protect, and enforce. Because prohibiting motor vehicle access to the beaches would deny beach use to many, the council shall authorize, as permitted by law, vehicular access to any part of the beach not reasonably accessible from public parking facilities").

Replacement parking across SR A1A also must have safe and convenient access as determined by the county council.

The traffic-free zone must not obstruct motor vehicle access to any other portion of the beach unless replacement parking also is provided for that area. The off-beach replacement parking site is to be conveyed to the county by fee simple or an exclusive, perpetual, non-revocable easement, to be under the sole control of the county, and not to be used as overflow parking for the resort development. The upland private property owner, i.e., the fee simple owner landward of the mean-high water line, must grant to the public a perpetual and non-revocable easement to the beach for the traffic-free zone. In sum, the policy is to induce international resort hotels; to create a traffic-free zone dedicated to the public; and to provide replacement parking with convenient access to the beach.

Ordinances 2015-07 and 2015-08 implement the policy of ordinance 2015-06 for certain beach segments in the designated zones. Ordinance 2015-07 pertains to the beach seaward of the former Desert Inn hotel, found to be blighted and in need of repair; and provides inducement for renovation to a Westin Hotel and Resort. The ordinance removes vehicular traffic from the beach for 410 linear feet, if certain conditions are met prior to May 7, 2017. Those include a guarantee of performance, essentially franchise brand verification, that standards have been met for opening; the construction of 27 parking spaces on a specified parcel adjacent to the beach; and dedication to the public of the beach that is to become traffic-free.

Ordinance 2015-08 provides inducement for a Hard Rock Hotel on vacant property. The ordinance removes vehicular traffic from the beach for 906 feet, if certain conditions are met by December 31, 2018. Those are the performance guarantee, the construction of 60 parking spaces on a specified parcel adjacent to the beach, and dedication to the public of the beach for the 906 feet that is to become traffic-free.

General law

Section 161.58, Florida Statutes, Vehicular traffic on coastal beaches, is part of the Coastal Zone Protection Act of 1985. Since adoption, the statute has prohibited vehicular traffic on the beach in Florida, with certain exceptions. One allows Volusia to maintain the authorization given for vehicular traffic by its unified beach code at a time when the statute allowed local governments to do so within their jurisdiction. Section 161.58(2)(b), Fla. Stat. (2013).[2] However, the statute provides that a local government which under its terms authorized beach vehicular traffic later may prohibit such traffic on all or a portion of the beaches under its jurisdiction.

The statute is preemptive.[3] The county exercised state delegated authority when in 1987 it authorized beach vehicular traffic. It operates within the statutory framework

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[2] Chapter 85-55, section 36, Laws of Florida, adopted section 161.58, Florida Statutes. Chapter 88-106, section 2, amended the statute to prohibit further authorization of beach vehicular traffic; and to authorize prohibition of vehicular traffic where it had been authorized. The 1988 amendment also required a finding of insufficiency of off beach parking according to a rule to be adopted in order for vehicular traffic to remain where it had been authorized. Chapter 89-249, section 2, allowed an authorization by code adopted pursuant to county charter to substitute for a local government finding under the rule.

[3] See City of Daytona Beach Shores v. State, 483 So. 2d 405, 408-09 (Fla. 1986) (Boyd, C.J., dissenting) (recognizing that authority to authorize vehicular traffic was one

when in 2015 it prohibited vehicular traffic on portions of the beach.[4] The 1986 Volusia charter amendment could not establish a home rule right to vehicular access to the beach to conflict with general law, nor did it purport to do so. The charter assurance is access from reasonably accessible public parking facilities.[5]

SOB claims

SOB's general premise is that Volusia may not exercise statutory authority to prohibit beach vehicular traffic because such action also provides an incentive for the construction of first class hotels to attract tourists. SOB's exhortation that the Court declare the ordinances invalid lacks citation of authority and clarity of reason to do so. Perhaps the claim is that the ordinance lacks public purpose to sustain it. If that is the case, SOB is mistaken.

Regulation of vehicular traffic on the beach is an exercise of the police power. Police power use needs only to have a rational basis, subject to specific constitutional

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delegated by the legislature in statute; arguing that the exception to the general prohibition was an unreasonable classification); City of New Smyrna Beach v. Board of Trustees of Internal Imp. Trust Fund, 543 So. 2d 824, 829 (Fla. 5th DCA 1989) (home rule power to impose vehicular access fees existed [only] until 1985 statutory adoption).

[4] Cf. City of Daytona Beach v. Tona Rama, 294 So. 2d 73, 78 (Fla. 1974) (recognizing customary use doctrine in Florida; stating that right of customary use subject to appropriate governmental regulation).

[5] See Town of Ponce Inlet v. County of Volusia, No. 96-10202-CIDL (Fla. 7th Cir. Ct. Apr. 25, 1996) (order denying temporary injunction against county to prohibit application for federal incidental take permit which upon issuance would remove vehicular traffic from a portion of the beach in town; finding no right to drive a motor vehicle on county beaches; stating that if charter section 205.1 were violated, the Court could fashion remedy through mandatory injunction to provide reasonable access).

limitations. The legislative determination entitled to deference.[6] Restriction of dangerous instrumentalities from the beach for public safety[7] and for environmental protection[8] are such public purposes. Promotion of economic development, enhanced property values,

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[6] Hawaii Housing Authority v. Minkoff, 467 U.S. 229, 239 (1984) (approving land reform act which provided condemnation plan to take property from lessors and transfer to lessees; stating that police power is essentially a product of legislative determinations addressed to the purpose of government...Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation), quoting Berman v. Parker, 348 U.S. 26, 31 (1954); Eccles v. Stone, 134 Fla. 113, 183 So. 628, 630 (1938) (("The police power of the state inheres in its sovereignty, and is subject only to applicable provisions of the federal and state Constitutions designed to protect private rights from arbitrary and oppressive governmental action."), quoting Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 87 So. 68 (1921)).

[7] See White v. Hughes, 139 Fla. 54, 190 So. 446, 449 (1939) (opining that municipal "authorization for highway uses must be subject to reasonable uses of the beach or shore for its primary and long established public purposes, for which the State holds it in trust, and subject to lawful governmental regulations."; holding that "the right of the public to use the beach and recreational purposes is superior to that of the motorists driving thereon."); Town of Atlantic Beach v. Oosterhoudt, 127 Fla. 159, 172 So. 687, 689 (1937) (regulation by municipality of vehicular traffic on beach which had been declared public highway is part of police power; automobile is dangerous instrumentality and that use may be regulated even to exclusion, in the interest of the public); Sallas v. State, 98 Fla. 464, 124 So. 27 (1929) (sustaining manslaughter conviction for driver who killed pedestrian at 40 miles per hour along populated Atlantic Beach).

[8] Art. II, sec. 7(a), Fla. Const. ("It shall be the policy of the state to protect its natural resources and scenic beauty. Adequate provision shall be made by law ... for the conservation and protection of natural resources."); Art. X, sec. 11, Fla. Const. ("The title to lands under navigable waters, ..., including beaches below mean high water lines is held by the state, by virtue of its sovereignty, in trust for all the people."). Sec. 161.53, Fla. Stat. (Coastal Zone Protection Act legislative intent (recognizing importance of coastal zones in protection of ecology and public health, safety, and welfare of citizens).

tourism, and recreation also are public purposes.[9] Legislative action is not limited to a single public purpose at one time.[10]

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[9] Kelo v. City of New London, 545 U.S. 469, 484 (2005) ("Promoting economic development is a traditional and long-accepted function of government."); Poe v. Hillsborough County, 695 So. 2d 672 (Fla. 1997) (approving finding that construction of stadium to be paramount public purpose; disapproving trial court order invalidating bonds because of lease provision that gave the first $2 million of stadium revenue to professional football team from events not involving it); State v. Daytona Beach Racing & Recreational Facilities District, 89 So. 2d 34, 35 (Fla. 1956) (approving issuance of special district bonds to construct race track; finding tourism to be predominant public purpose and private benefit and gain to be incidental); Cf. Section 20.60(3) (e) (department of economic opportunity to coordinate activities to promote tourism); 125.0104 (tourism development tax; 163.335 (prevention of slum or blight a public purpose for which public funds may be expended; preservation of tax base implicit in purposes for which a taxing authority is organized; coastal resort and tourist areas or portions thereof that are deteriorating due to inadequate parking facilities could be revitalized and redeveloped in a manner to vastly improve community economic and social conditions); 187.201(23)(b) (state comprehensive plan) (policy to promote tourism statewide and to manage public lands to offer visitors and residents increased outdoor experiences); 212.0305 (convention development tax); 288.1226 (Florida Tourism Marketing Corporation organized for promotion and marketing of tourism).

[10] Town of Medley v. State, 162 So. 2d 257, 259 (Fla. 1964); (validating sale of bonds pledging non-ad valorem taxes and fees to finance construction of public improvements; stating that primary motivation of attracting industry by such construction would not be unlawful; observing that no showing that facilities will be used for the sole benefit of any such industry or that town inhabitants will not have full benefits of proposed improvements). Cf. Boschen v. City of Clearwater, 777 So. 2d 958 (Fla. 2001) (validating sales tax bonds for roadway leading to beach area, including roundabout and fountain; recognizing that economic development and health and safety both were goals); Lloyd Enterprises, Inc. v. Department of Revenue, 651 So.2d 735, 738 (Fla. 5th DCA 1995) (describing multiple purposes served by concession provisions of Volusia unified beach code, including the image that activities on the beach project to visitors and enhancement of public's enjoyment of the beach); State v. Sunrise Lakes Phase II Special Recreation District, 383 So. 2d 631 (Fla. 1980) (finding public purpose of bonds where condominium recreational facilities to be purchased from condominium association, but still to operated by it, since public would have use).

The ordinances are police power measures and do not exercise Volusia's taxing and credit powers. However, "special benefits that flow to certain properties because of the nature of the property do not diminish the predominantly public character," required if such powers had been used. Donovan v. Okaloosa County, 82 So.3d 801, 811 (Fla. 2012) (validating bonds for beach renourishment and restoration secured tourist development tax and by special assessments). In Donovan, the supreme court held that the benefit received by an upland property owner of a renourished beach was incidental to the public policy of beach renourishmment provided by the Beach and Shore Preservation Act, Sec. 161.011-.045, Florida Statutes.

The ordinances are specifically authorized by statute. They do no more than alter the means of access to a portion of the beach.[11] The inducement for hotel development is to be located upland from a vehicular traffic-free beach that guests may use as members of the public. If this outcome is uncommon in Florida, it is only because there often is no easement that guarantees that the public cannot be excluded from the sandy beach. The benefit to upland property owners is indirect and incidental to broad public policy. The more stringent paramount public purpose test thus would be satisfied, if it were applicable.

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[11] Cf. Sec. 161.55(5), Fla. Stat. (declaring that development or construction shall not interfere with public access that has been established unless comparable alternative accessway has been provided; establishing policy that developer has right to improve, consolidate, or relocate public accessways if accessways provided by developer are of substantially similar quality and convenience to public and approved by the local government).

SOB's assertion seems implicitly to be that there is no rational basis to utilize an economic development incentive to remove vehicular traffic from the beach, maintain public beach access, receive replacement parking, and promote tourism and economic development. SOB's position essentially is its policy preference. It unnecessarily would hobble state policy, hamper tax base growth, and harness the public to all replacement parking cost. SOB's general premise has no citation to authority because it has no support in law.

SOB incorrectly asserts that the challenged ordinances violate charter sections 205.1 and 202.2(2) and the constitutional public trust. Section 205.1 declares a right of beach access and use to be a public trust and requires essentially two county council actions: adoption of an ordinance to define, protect, and enforce that right; and either assurance of reasonably accessible off-beach parking or authorization for on-beach vehicular access as permitted by law. Volusia adopted that ordinance in 1987 and fulfilled the first mandate. Ordinances 2015-07 and 2015-08 assure replacement parking adjacent to the beach and satisfy the second obligation for these restrictions of vehicular access. There is no allegation to the contrary and thus no stated violation of section 205.1.

Charter section 202.2(2) requires that the county prevent the use of taxing power or public property for the benefit of private parties, in violation of article VII, section 10 of the constitution or of Florida law.[12] SOB does not allege any use of the taxing power;

[12] Article VII, section 10 prohibits the use of county taxing power or credit to aid any corporation, association, partnership or person, with certain exceptions, but contains no reference to use of public land.

nor could it do so, given the terms of the ordinances. The intent is to induce upland private investment, not to tax for public improvements. Property owners are required to furnish public replacement parking at their own expense.

SOB does not allege any facts which if proven would show that public property is to be used to benefit private parties, contrary to Florida law. It avers only that the beach has been regulated to prevent the use of vehicles. There is no allegation that public property has been converted to a use for the benefit of private parties contrary to Florida law. The ordinances do not eliminate or diminish the public's right to use the beach seaward of the two hotels; they secure by easement the public use of the non-state owned, dry sand beach, an enhancement of non-property right of customary use. See City of Daytona Beach v. Tona-Roma, 294 So.2d at 78 ("This right of customary use of the dry sand area of the beach does not create any interest in the land itself").

SOB invokes the constitutional public trust doctrine, but alleges no facts to show its violation. Article X, section 11 of the constitution embodies the common law public trust doctrine. Trepanier v. County of Volusia, 965 So. 2d 276, 284 (Fla. 5th DCA 2007). "Under both the Florida Constitution and the common law, the State holds the lands seaward of the [mean high water line], including the beaches between the mean high and low waterlines, in trust for the public for the purposes of bathing, fishing, and navigation. *See* Art. X §11, Fla. Const." Walton County v. Stop the Beach Renourishment, Inc., 998 So.2d 1102, 1109 (Fla. 2008).

Other than to prohibit vehicular traffic on portions of state lands seaward of hotels, as authorized by section 161.58, the ordinances have no relationship to the

constitutional public trust. If somehow the state were to consider the public trust violated, it could proceed on its own behalf for enforcement. See, e.g., City of Daytona Beach Shores, 483 So.2d at 408; City of New Smyrna Beach. 543 So.2d at 825-827.

SOB lacks standing

SOB claims associational or representational standing as a representative for those residents who support historical access to Volusia beaches to challenge ordinances prohibiting beach vehicular traffic. An association has standing to sue only when its members have standing to sue in their own right. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977), Warth v. Seldin, 422 U.S. 490, 511 (1975), State v. Florida Workers' Advocates, No. 3D-14-2062, 2015 WL 3875442, at*5 (Fla. 3d DCA June 24, 2015); See also Hillsborough County v. Florida Restaurant Association, 603 So.2d 587, 589 (Fla. 2d DCA 1992). No SOB member has standing for the challenge it seeks to make.

"[T]he Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens, or unless the claim is based on the violation of the provision of the Constitution that governs the taxing and spending powers." Solares v. City of Miami, No. 3D14-2237, 2015 WL 3390107 (Fla. 3d DCA May 27, 2015) (collecting and citing cases; holding no standing to challenge lease of property by city for charter violation). The special injury rule traces back almost a century to Rickman v. Whitehurst, 73 Fla. 152, 74 So. 205, 207 (1917), and thus sometimes is called the "Rickman Rule." The rationale is that the public by its

authorized officers must institute a proceeding to prevent a public official from committing a wrongful act "unless a private person suffers damage distinct from that of every other inhabitant." Rickman, 74 So. at 208.

The supreme court recognized an exception in Department of Administration v. Horne, 269 So.2d 659 (Fla. 1972) for cases in which a violation of the constitutional taxing and spending power is alleged. There must be a specific constitutional violation, not merely a violation of law that causes an increase in taxes. School Board of Volusia County v. Clayton, 691 So.2d 1066 (Fla. 1997), North Broward Hospital District v. Fornes, 476 So.2d 154 (Fla. 1985). Further, "[a] city charter does not rise to the level of the Florida Constitution for purposes of standing. Unlike the taxing and spending provisions of the Constitution, a city charter cannot expand or contract the principle of standing which ultimately sounds in the express separation of powers provision of Article II, Section 3 of the Florida Constitution." Kneapler v. City of Miami, Nos. 3D-14-2500; 3D14-2500, 3D14-16, 2015 WL 3397037, at *2 (Fla. 3d DCA May 27, 2015) (rejecting argument that standing should be granted to a challenge lease by city for charter violation since no one else would have standing).

The legislature may create statutory causes of action and confer enforcement rights on citizens. Compare, Florida Wildlife Federation v. State Department of Environmental Regulation, 390 So.2d 64 (Fla. 1980), (holding that section 403.412, Florida Statutes, created new cause of action for protection of environment allowing private citizens to sue without showing of special injury) with Citizens Growth Management Coalition v. City of West Palm Beach, 450 So.2d 204 (Fla. 1984) (applying

former comprehensive planning statute; denying standing to city residents to challenge a consistency of zoning ordinances) and City of Sarasota v. Windom, 736 So.2d 741 (Fla. 2d DCA 1999) (denying standing to challenge expenditure for speed bumps on city streets not in conformity with the state uniform system of traffic control devices). However, such is not the claim or circumstance here. Section 161.58, Florida Statutes, controls the allowance or disallowance of beach vehicular traffic; specifies that local government may prohibit vehicular traffic on portions of the beach where it previously had been authorized; and provides no direct right of action availing to SOB to contest the decision of the county council to do so.

Thus, SOB is similar to the unincorporated association denied standing in United States Steel Corporation v. Save Sand Key, Inc., 303 So.2d 9 (Fla. 1974) (quashing district court decision, reinstating circuit court dismissal of complaint with prejudice), which complained that a private corporation was interfering with rights of the public generally, including its members, to use the soft sand area of the beach. The association did not allege any special injury different in kind from the general public because it did not claim any right or title in the beach. Neither does SOB.

SOB is comparable to the unincorporated association and an individual citizen lacking standing in Sarasota County Anglers Club v. Burns, 193 So. 2d 691 (Fla.1st DCA) (affirming dismissal of fourth amended complaint), cert denied 200 So.2d 178 (1967) (approving and adopting district court opinion). The club sought a declaration that submerged lands that had been sold by the state were impressed with a public easement for boating, bathing, navigation, fishing, and other public uses precluding

issuance of a dredge and fill permit. However, the club and citizen had no right to sue because they failed to allege either in what manner they had been damaged as private citizens differing in kind from the general public or that their claim is authorized by statute. SOB's complaint is just so.

SOB is akin to the individual owner of property located near the beach who had no standing in Henry L. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238 (1941) (ordering complaint to be dismissed). There the property owner maintained that the Town of Palm Beach illegally had vacated a path dedicated to the public which traversed the Breakers Hotel property because it extended the required travel distance to the beach and benefited private interests by the resulting reversion. However, the nearby property owners alleged no injury different in kind from others in the same community. SOB alleges nothing more.

SOB alleges no special injury and has no standing. The Court should dismiss its complaint. "For a court of law operating as one of the three branches of government under the doctrine of separation of powers, standing is a threshold question which must be resolved before reaching the merits of a case." Solares, 2015 WL 3390107. SOB alleges no ultimate facts entitling it to relief, even if it had standing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Volusia's Motion to Dismiss has been served via the e-portal system to **Dennis Bayer, Esq.**, Denbayer@aol.com; and David A. Vukelja, Esq., DAVukelja@Vukeljalaw.com on this 30th day of July, 2015.

Respectfully Submitted,

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