

#001066

Submitted 5/18/01  
for Phil Boyles

# HISTORY OF YELVINGTON SITE DEVELOPMENT

- 1997 ● CITY COMMISSION VOTES TO DENY MORATORIUM ON INDUSTRIAL USES, AND APPROVES 3-2 THE WHITE CONSTRUCTION ASPHALT MIXING PLANT.
- NOVEMBER, 1998 ● INITIAL MEETING WITH CITY STAFF REGARDING REQUEST TO REZONE TO I-2.
- DECEMBER, 1998 ● CITY OF GAINESVILLE PLAN BOARD APPROVES PETITIONS TO AMEND LAND USE TO "INDUSTRIAL" AND ZONING TO "I-2".  
YELVINGTON AND AGENT MEET WITH STAFF AND NEIGHBORHOOD REPRESENTATIVES (HIDDEN LAKE/BUCK BAY) DURING REZONING PROCESS AND AGREE NOT TO REZONE/CHANGE LAND USE ON EASTERN 400 FEET OF PROPERTY TO PROVIDE BUFFERING AND PREVENT DRIVEWAY ACCESS TO STATE ROAD 121.
- FEBRUARY, 1999 ● CITY COMMISSION APPROVES LAND USE PETITION FOR TRANSMITTAL TO DCA.
- JUNE 28, 1999 ● CITY COMMISSION ADOPTS "INDUSTRIAL" LAND USE AND APPROVES REZONING TO "I-2".
- NOVEMBER, 1999 ● CITY DEVELOPMENT REVIEW BOARD CONDUCTS CONCEPTUAL REVIEW OF SITE PLAN AT PUBLIC MEETING.
- APRIL, 2000 ● DRB APPROVES PRELIMINARY SITE PLAN FOR YELVINGTON TRACT.
- SUMMER 2000 ● CITY STAFF MEETS WITH RALPH ENG (ENGINEER FOR WATSON) TO DISCUSS SITE PLAN AMENDMENT TO CONSTRUCT ASPHALT MIX AND CONCRETE BATCH PLANTS. STAFF ASSURES THAT A MORATORIUM IS NOT PLANNED OR PENDING. ENG ELECTS FOR OPTIONAL CONCEPT REVIEW BY DRB.
- OCTOBER 23, 2000 ● MANDATORY "FIRST STEP" MEETING WITH CITY STAFF CONCERNING WATSON ASPHALT AND CONCRETE PLANTS.
- OCTOBER 24, 2000 ● COUNTY ADOPTS EXPANDED WELLFIELD PROTECTION ZONE BY ORDINANCE, SUBJECTING EASTERN 1/3 OF YELVINGTON PROPERTY TO WELLFIELD ORDINANCE (SUP NOW REQUIRED).
- OCTOBER 25, 2000 ● FOLLOW-UP MEETING WITH CITY STAFF, WHO AGAIN ASSURED A MORATORIUM ON I-2 ZONING WAS NOT PLANNED OR PENDING.
- NOVEMBER 30, 2000 ● WATSON FILES CONCEPT REVIEW APPLICATION; REDESIGNS SITE PLAN TO MOVE PLANTS OUT OF WELLFIELD ZONE.
- DECEMBER 22, 2000 ● WATSON PARTICIPATES IN A DEVELOPMENT PLAN REVIEW WITH CITY STAFF REGARDING THE PROPOSED SITE PLAN AMENDMENT.
- JANUARY 18, 2001 ● CONCEPT REVIEW BEFORE CITY PLAN BOARD AT PUBLIC MEETING.
- FEBRUARY 3, 2001 ● PRIVATE MEETING OF OPPONENTS TO WATSON ASPHALT PLANT. PLAN FORMULATED TO REQUEST MORATORIUM ON INDUSTRIAL USES IN CITY.
- FEBRUARY 12, 2001 ● REGULAR CITY COMMISSION MEETING: COMMISSION HEARS REQUEST DURING "CITIZEN COMMENT" PORTION OF AGENDA FROM ASPHALT PLANT OPPONENTS TO ENACT MORATORIUM ON INDUSTRIAL USES IN THE CITY. COMMISSION REFERS ITEM TO THE COMMUNITY DEV'T COMMITTEE, AND PROVISIONALLY AUTHORIZED CITY ATTORNEY TO DRAFT MORATORIUM ORDINANCE BASED ON COMMITTEE'S RECOMMENDATION. WATSON ATTORNEY IN AUDIENCE ON ANOTHER MATTER, OBJECTS ON BEHALF OF WATSON.
- FEBRUARY 15, 2001 ● PRELIMINARY SITE PLAN AMENDMENT SUBMITTED FOR WATSON ASPHALT PLANT - AT THAT TIME IT WAS APPLICANT'S INTERPRETATION THAT A WELLFIELD SUP WAS NOT REQUIRED.
- FEBRUARY 28, 2001 ● WELLFIELD SUP APPLICATION SUBMITTED UNDER PROTEST.
- MARCH 5, 2001 ● COMMUNITY DEV'T COMMITTEE MEETING: COMMITTEE [COMMISSIONERS NIELSON AND BARROW] RECOMMENDS THAT THE CITY COMMISSION FURTHER DISCUSS AND CONSIDER A MORATORIUM ON CERTAIN INDUSTRIAL USES. DR. ZEGEL, CITY'S CONSULTANT, PRESENTS GENERALIZED RANKING OF INDUSTRIAL USES (ASPHALT PLANT IS #3).
- MARCH 8, 2001 ● BASED ON STAFF REVIEW, SITE MAY QUALIFY FOR A WELLFIELD SUP EXEMPTION. AN EXEMPTION WAS REQUESTED.
- MARCH 9, 2001 ● WATSON CONSULTANTS SUBMIT ALTERNATIVE RANKINGS, DISPUTE ZEGEL METHODOLOGY.
- MARCH 12, 2001 ● REGULAR CITY COMMISSION MEETING: DR. ZEGEL, CITY'S CONSULTANT, PRESENTS REVISED RANKINGS (ASPHALT PLANT IS NOW #13); METHODOLOGY AGAIN DISPUTED BY WATSON'S CONSULTANTS. MORATORIUM DISCUSSION CONTINUED TO SPECIAL COMMISSION MEETING, MARCH 29, 2001.
- MARCH 21, 2001 ● WELLFIELD SUP EXEMPTION DENIED.
- MARCH 27, 2001 ● TECHNICAL REVIEW COMMITTEE (CITY STAFF) DISCUSSES PROPOSED ASPHALT/CONCRETE PLANTS WITH WATSON'S REPRESENTATIVES, WHO HEAR COMMENTS FROM STAFF ON APPLICATION FOR PRELIMINARY SITE PLAN REVIEW.
- MARCH 29, 2001 ● SPECIAL COMMISSION MEETING: DR. ZEGEL PRESENTS REVISED DATA; WATSON'S REPRESENTATIVES AGAIN DISPUTE METHODOLOGY (ASPHALT PLANTS DROP TO #33); PUBLIC COMMENTS HEARD. COMMISSION VOTES TO IMPOSE MORATORIUM ON PARTICULAR USED IN INDUSTRIAL ZONING.

Excerpts from the Transcript of the Hearing on a  
Motion for Temporary Injunction had in the matter of  
Watson Construction Company v. City of Gainesville on May 2, 2001

**Transcript, Page 8; Lines 6-19:**

THE COURT: And when you say in the pipeline, you mean according to the City's own procedures and guidelines and what have you, it being in process, then the moratorium would not have been effected, according to the City's own interpretation?

MS. BOYES: Correct. Because we had completed an application, there is a lot of quibbling about what is required, but we had completed application, and we already had our first hearing, before the Plan Board, as Mr. Eng will explain to you.

THE COURT: It sounds like it was already in the pipeline.

**Transcript, Page 14; Lines 14-17:**

THE COURT: The only thing you are seeking today is a moratorium, which the big problem with it seems to be that when they passed it, they made it retroactive to catch Watson Construction.

**Transcript, Page 32; Lines 22-25; and Page 33, Lines 1-7:**

THE COURT: [To MR. RADSON] I would assume that if I deny the motion, at the second reading, you certainly would advise the City as to all of the problems that may occur. It appears that this particular moratorium, especially when they attempt to make it retroactive to cover the only person who's got something in the pipeline, you would point out all of these legal problems to them, which apparently was not known to them.

MR. RADSON: It was known, your Honor.

THE COURT: And they did it anyway?

**Transcript, Page 35; Lines 1-10:**

THE COURT: [To MR. RADSON] Somebody I would think would tell them, look, you go back to February 14 or whatever it was, what was magic about that date. We need to go back to that date because that's when Mr. Watson

applied, and if we don't go back to that particular date, he will sneak through.

And somebody needs to tell the City Commission that, because they didn't pull it out of the sky, they went back to that date for a particular reason.

**Transcript Page 48; Lines 9-13, and 18-24; Page 49, Lines 1-2:**

THE COURT:

[To MS. BOYES] I think a lot of your argument is certainly valid. And certainly a lot of it – I haven't really heard that much from the other side, but there certainly could be grounds for equitable estoppel.

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And I would urge the City to carefully consider all of this. I know there is always a political motivation behind what they do, but there's legal ramifications. And I think it's very important for the City's attorney to sometimes tell people what they don't want to hear . . . I think it is important to look at the overall picture.

IN THE CIRCUIT COURT OF THE EIGHTH  
JUDICIAL CIRCUIT, IN AND FOR  
ALACHUA COUNTY, FLORIDA

CASE NO.: 2001-CA-1356

WATSON CONSTRUCTION COMPANY,

Plaintiff,

vs.

CITY OF GAINESVILLE,

Defendant.

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TRANSCRIPT OF PROCEEDINGS had in the

above-entitled matter on the 2nd of May, A.D. 2001,  
at 1:30 p.m.

BEFORE: HONORABLE NATH C. DOUGHTIE  
Alachua County Courthouse  
Courtroom 3-B

REPORTED BY: CANDICE ARENS, IL CSR  
JOHNS, STEPHENSON & DUNNE/  
ADVANTAGE COURT REPORTERS  
515 North Main Street, Suite 300-B  
Gainesville, FL 32601  
(352) 373-7778

PRESENT:

BOYES & ASSOCIATES,  
(P.O. Box 1424,  
Gainesville, FL 32602), by:  
MS. PATRICE BOYES,  
appeared on behalf of the Watson  
Construction;

LAW OFFICES OF MARION RADSON,  
(P.O. Box 1110,  
Gainesville, FL 32602), by:  
MR. MARION RADSON,  
appeared on behalf of the City of  
Gainesville.

OPENING PROCEEDINGS PAGE NO.

OPENING STATEMENT FOR PLAINTIFF 3

OPENING STATEMENT FOR DEFENDANT 22

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1 (WHEREUPON, the following proceedings  
2 were had in open court:)

3 THE COURT: Watson versus City, the plaintiff  
4 has a motion.

5 OPENING STATEMENT ON BEHALF OF THE PLAINTIFF  
6 MS. BOYES: Yes, your Honor. Patrice Boyes,  
7 representing Watson Construction Company. I would  
8 like to mention also with me is Larry Watson,  
9 president of the company, and Mr. Ernie Windsor,  
10 the senior official. We will also be calling  
11 Mr. Ralph Eng, who is the project engineer for the  
12 subject project today.

13 We have before the Court a motion for  
14 temporary injunction to either stop the City from  
15 enacting a moratorium thus targeted directly at  
16 our project, or if they do pass the moratorium,  
17 that moratorium not be applied to our project.

18 Let me back up and give you a brief  
19 synopsis of the case to date. We filed an  
20 affidavit with the Court on April 11, along with  
21 our complaint for declaratory judgment and  
22 injunctive relief that laid out the basic facts of  
23 our case, which we feel, in the words of our  
24 Supreme Court, is pregnant with equity.

25 Mr. Watson has an option to purchase an

1 industrial-zoned track within the City of  
2 Gainesville. He seeks to build an asphalt mixing  
3 batch plant and a concrete batch plant. Both of  
4 those uses are permitted by right in the  
5 industrial district; thus, no rezoning or land use  
6 change is necessary before the City Commission.

7 At this point, all Mr. Watson would  
8 need to build the project is site plan review and  
9 approval by the appropriate appointed board. In  
10 this case, the City is also requiring him to  
11 obtain a special use permit, which we have taken  
12 issue with in our main case, but is not before you  
13 today. Both of those matters are scheduled,  
14 ironically, for final hearing on May 4 before the  
15 City Commission, which we did not know at the time  
16 we filed this complaint.

17 Mr. Eng will testify for you in great  
18 depth about the chronology that will show the land  
19 was zoned for industrial use in 1998 and the land  
20 use was redesignated in 1999, and that the current  
21 seller, Mr. Yelvington, received site plan  
22 approval from the City for a raw material  
23 aggregate distribution facility, essentially  
24 bringing gravel and raw materials in for use in  
25 mixing asphalt for paving and concrete for

1 batching.

2 THE COURT: Mr. Yelvington owns it now and he  
3 has approval for raw material aggregating?

4 MS. BOYES: Right. Brings it in by rail and  
5 distributes it. The idea here is Mr. Watson's  
6 facility would be co-located on the same property,  
7 reducing truck trips and impact to the surrounding  
8 community.

9 Mr. Yelvington at this point is the  
10 seller, Mr. Watson is the buyer, he does have  
11 equitable right under property law, which will  
12 expire May 30, absent some intervention by the  
13 Court or reversal of political forces before the  
14 City Commission.

15 Mr. Watson began to diligently pursue  
16 the permits and approval in the summer of the year  
17 2000 in full view, nothing was hidden, everyone  
18 knew exactly what was planned, he relied on the  
19 existing zoning and land use designation, invested  
20 a tremendous amount of money, as the testimony  
21 will show today, in engineering and design work,  
22 where he is approaching close to \$300,000. The  
23 critical point in the project was reached on  
24 January 18th of this year, in which we  
25 participated as a project team in a full blown



1 public review by the City Plan Board after the  
2 conceptual site plan for the project.

3 Technically speaking, we are amending  
4 Mr. Yelvington's site plan to accommodate this new  
5 project. That meeting was televised, there was  
6 little opposition voiced. We know now from  
7 e-mails that were provided to the City Commission  
8 that on February 3 there was a private meeting of  
9 activists and citizen opponents who decided to ask  
10 the City Commission for a moratorium on all  
11 industrial uses as a way to stop this particular  
12 project. They plan to do it during the --

13 THE COURT: Now, just so I will understand,  
14 because I did read your materials, and the City, I  
15 thought, voted 5 to 0 to do something, but that  
16 wasn't the moratorium.

17 MS. BOYES: In 1997 or currently? There was  
18 a 5-to-0 vote in 1997, there were three votes in  
19 1997; one to deny a moratorium on industrial uses,  
20 the same citizens were opposing an asphalt plant  
21 at the time, which was ultimately approved. And  
22 at the same time, the City Commission voted 5 to 0  
23 to instruct staff to look at industrial uses;  
24 three and a half years went by, nothing happened,  
25 except for an amendment to the welfare ordinance.

1 THE COURT: So now the City hasn't past the  
2 moratorium, but did schedule it for a vote?

3 MS. BOYES: They passed it on first reading,  
4 your Honor, and that occurred on April 23,  
5 subsequent to our filing of the complaint.

6 THE COURT: So the City did pass the first  
7 reading of the moratorium?

8 MS. BOYES: Yes.

9 THE COURT: And now?

10 MS. BOYES: Second reading is scheduled for  
11 May 14th, the same night as our hearing.

12 THE COURT: And the moratorium, does it have  
13 any limits? What's the substance of the  
14 moratorium? It says there wouldn't be any permits  
15 issued where, anywhere?

16 MS. BOYES: In industrial one and industrial  
17 two districts of the city for specified grouping  
18 of uses in manufacturing.

19 THE COURT: For how long is the moratorium?

20 MS. BOYES: The proposed ordinance says six  
21 months. The problem we are having is the  
22 effective date was rolled back to February 12.

23 THE COURT: The effective date would go back  
24 to February 12?

25 MS. BOYES: Yes, your Honor. If the

1 effective date were March 29, which is the night  
2 the City Commission voted to authorize adoption,  
3 drafting an adoption of the ordinance, we wouldn't  
4 have a problem because our project was well in the  
5 pipeline.

6 THE COURT: And when you say in the pipeline,  
7 you mean according to the City's own procedures  
8 and guidelines and what have you, it being in  
9 process, then the moratorium would not have been  
10 effected, according to the City's own  
11 interpretation?

12 MS. BOYES: Correct. Because we had  
13 completed an application, there is a lot of  
14 quibbling about what is required, but we had  
15 completed application, and we already had our  
16 first hearing, conceptual review hearing, before  
17 the Plan Board, as Mr. Eng will explain to you.

18 THE COURT: It sounds like it was already in  
19 the pipeline.

20 MS. BOYES: That's our contention, your  
21 Honor.

22 THE COURT: So what they did was they  
23 retroactively, according to what you are alleging,  
24 they retroactively made the moratorium go back  
25 prior to?

1 MS. BOYES: To February 12, which would catch  
2 our formal application, although we had been in  
3 the process of meetings and hearings and review  
4 for a year. But the formal application doesn't  
5 come out of the box overnight, it takes many  
6 months of review, engineering and design to come  
7 up with a final plan, which we submitted on or  
8 about February 15.

9 So by setting it on the 12th, it would  
10 arguably catch this project unfairly, after we  
11 relied on existing zoning. The night of February  
12 12 is very important. I don't know if you have  
13 had an opportunity to review the transcripts, we  
14 didn't have a transcript of the 12th, but the  
15 subsequent hearing, without any agenda items, no  
16 notice to my client, no advertisement, nothing.  
17 And during citizen comments, the opponents got up  
18 requesting a moratorium, as we now know they plan  
19 to do, and with no discussion, no evidence from  
20 consultants and no study, nothing, three city  
21 commissioners who were present voted 3 to 0 to  
22 refer it to the subcommittee of the City  
23 Commission for consideration and recommendation of  
24 adopting a moratorium.

25 I happen to be in the audience, your

1 Honor, on a different matter, and did get up and  
2 speak in opposition, but my client was unaware  
3 this matter would be discussed. If we fast  
4 forward to the evening of March 29, actually April  
5 23, which is the evening the moratorium ordinance  
6 passed on first reading, it was discovered under  
7 questioning from Marion Radson, the city attorney  
8 for the head planner, that our project is the only  
9 one in the pipeline that could possibly be  
10 effected by the moratorium.

11 We think there's a very strong  
12 inference from that and other facts that we can  
13 lay before the Court that this moratorium is  
14 specifically targeted at my client's project. We  
15 did engage a number of consultants to dispute the  
16 consultant's report that the City brought in after  
17 the fact. And I am sure you are aware that  
18 there's a case Ocean's Edge vs. Town of Juno  
19 Beach, a 4th DCA case from 1983, which says,  
20 "Government cannot bring evidence on after the  
21 fact to fill in the cracks of legislative intent."  
22 And that's exactly what happened here.

23 February 12, we have no notice, the  
24 wheels begin to turn; we come back to a special  
25 meeting on March 5, suddenly there's a

1 consultant's report, we engage consultants to  
2 rebut that. The asphalt plan is listed as the  
3 third worst thing to have in the community, after  
4 we challenge that report, consultants revisit the  
5 study, the asphalt plant drops to number 13, we  
6 challenge it again, and at the final hearing, it  
7 dropped to, I believe, number 33.

8 We didn't come here today to prepare to  
9 get into the merits of this case, I believe that's  
10 not proper for a motion for temporary injunction,  
11 but rather we wanted to inform you of what has  
12 happened since we filed. The city staff issued a  
13 report recommending approval of the asphalt batch  
14 plant special use permit, that was done in  
15 anticipation of the Plan Board hearing on April  
16 19th. The Plan Board on April 19th voted 3 to 2  
17 to recommend denial to the City Commission. We  
18 have filed a transcript of those proceedings.

19 THE COURT: Denial of what?

20 MS. BOYES: Denial of special use permit for  
21 the asphalt plant. We did fill a transcript with  
22 the Court, your Honor, and we would direct your  
23 attention to the latter portion of the transcript,  
24 in which the three members who voted to recommend  
25 denial opined that, well, we met the standard, but

1 they could not support the project, we should be  
2 required to exceed minimum standards. And a third  
3 member said, I paraphrase, well, we don't make  
4 decisions based on objective matters here, if you  
5 have prior experience or a motion, you should vote  
6 accordingly.

7 That recommendation has now been  
8 forwarded to the City Commission, which has  
9 scheduled, we now know, May 14 for the final  
10 hearing for a special use permit and development  
11 plan approval. Ironically, and it makes it the  
12 Court's job here today more exquisitely painful,  
13 the second reading of the moratorium ordinance is  
14 also scheduled for that same evening.

15 There was no discussion April 23 as to  
16 which would be considered first, but in fact, the  
17 moratorium would knock us off the agenda. Now, as  
18 the Court is aware, to be entitled to a temporary  
19 injunction, we have to show likelihood of  
20 irreparable harm without a legal remedy,  
21 substantial likelihood of success on the merits  
22 and we have to consider the public interest. We  
23 would direct the Court's attention to the  
24 affidavit of Mr. Larry Watson.

25 THE COURT: Let me interrupt, you are going

1 very fast, and you are so familiar with it and I  
2 am trying to track it. May 14 is the second  
3 reading of the moratorium?

4 MS. BOYES: Correct.

5 THE COURT: And also at that same time you  
6 have scheduled the application for the special use  
7 permit?

8 MS. BOYES: Correct.

9 THE COURT: So the only thing that you're  
10 seeking the Court to do has to do with the  
11 moratorium?

12 MS. BOYES: Correct.

13 THE COURT: I mean the special use permit,  
14 that's something you would have to face anyway.

15 MS. BOYES: Correct, arguably.

16 THE COURT: So you sink or swim, that is just  
17 part of the process.

18 MS. BOYES: We would like an opportunity to  
19 go forward with that hearing and be heard on the  
20 merit, which has yet to happen in this whole  
21 process. And if we are denied, we will take up  
22 our appeal accordingly.

23 THE COURT: So Mr. Watson was aware of that,  
24 he knew he would have to go through the special  
25 use.



1 MS. BOYES: We knew we would have to amend  
2 the site plan and get a site plan approval.

3 THE COURT: And they could deny that.

4 MS. BOYES: That's correct, Your Honor, and  
5 we would be pursuing our remedies accordingly, we  
6 have no problem with that. There was discussion  
7 and arguing back and forth between the city staff  
8 and us as to whether we needed a wellfield special  
9 use permit. You will notice from our pleadings,  
10 that's part of the dec action, we don't feel  
11 that's applicable. I suppose we could take that  
12 up in a separate hearing depending on what happens  
13 today.

14 THE COURT: The only thing you are seeking  
15 today is a moratorium, which the big problem with  
16 it seems to be that when they passed it, they made  
17 it retroactive to catch Watson Construction.

18 MS. BOYES: And you will see in the  
19 transcript of proceedings a lengthy discussion  
20 between the commissioners and the City attorney  
21 and the mayor as to what date to pick, a lot of  
22 opining that nobody wants to target a particular  
23 project, yet nobody would step forward and amend  
24 the motion or do what was necessary, despite  
25 counsel's request repeatedly, to ensure my client

1 would not be caught up and he could proceed with  
2 the project.

3 In fact, on April 23, when the draft  
4 moratorium was adopted, we had no idea -- excuse  
5 me, I am sorry, I correct that, on March 29, when  
6 we knew we would be back for another hearing for  
7 first reading of the moratorium, we didn't know  
8 what the effective date was going to be that  
9 night. We had no idea. We did not know until the  
10 ordinance came out the day before the hearing. So  
11 that's the nut of the problem.

12 My client wishes to go forward with the  
13 usual hearings and the City process, if he's  
14 denied, then he'll pursue his remedies  
15 accordingly. But to use the legislative median  
16 such as a moratorium to target what's really a  
17 quasi judicial permit seems unfair. It's very  
18 hard for us to get our hands on the inequity of  
19 it. That's what we are asking the Court to see  
20 through and allow us to proceed unfettered by that  
21 politically motivated attempt to stop the project,  
22 which is the use by right in the industrial zone.

23 If this moratorium is allowed to stand,  
24 and our project is targeted, the zoning code  
25 becomes unreliable, we destabilize the real estate

1 market in Gainesville, we destabilize the lending  
2 institutions who will not extend funds in the  
3 permitting phase of a project for fear the zoning  
4 will be ripped out from under them. There's a  
5 greater public interest at stake rather than just  
6 whether my clients project will go forward.

7 I know I am jumping ahead, but we do  
8 have to consider the public interest in the course  
9 of proving to you we are entitled to a temporary  
10 injunction. Back on the irreparable harm, if we  
11 look at the affidavit of Mr. Watson, two things  
12 come to light: (1) he loses the equitable right to  
13 purchase the property as of May 30, and any delay  
14 caused by having to go through the hardship  
15 provision of the moratorium, for example, or  
16 litigating that moratorium, if it is applied to  
17 us, is death to this project. Because the  
18 contract deadline is stayed.

19 He also loses the ability to timely  
20 acquire permits, which, as the Court is aware, is  
21 often a condition for us on a closing for any  
22 piece of real estate like this. There is no legal  
23 remedy for not being able to get a site plan or  
24 development approval. There is no monetary  
25 judgment that would remedy my client's harm; thus,

1 it is irreparable harm.

2 On the substantial likelihood of  
3 success on the merit, we think if we go to trial  
4 on our main complaint, there are three theories we  
5 will prevail on: (1) equitable estoppel; (2) the  
6 fact a moratorium cannot target a project such as  
7 ours, and we have had the discussion with how that  
8 is working; and (3) that a government can't divest  
9 uses by right under the cloak of police powers,  
10 particularly in this case, when they are so  
11 vaguely defined.

12 We really have no concept of what the  
13 imminent threat is to the public health and  
14 safety, it's never been articulated.

15 THE COURT: Let me interrupt there for a  
16 second. I am certain we are going to want to know  
17 by what authority the Court could act in this.  
18 But if the Court were to grant the temporary  
19 injunction and rule that, at least on a temporary  
20 basis, the moratorium does not apply to this  
21 project because it was actually in the pipeline  
22 before this was passed, and we then go to a full  
23 trial on that issue, and that's still just a  
24 moratorium, not the permit, right?

25 MS. BOYES: Right.

1 THE COURT: And so the full trial with a full  
2 hearing and witnesses and everything else, the  
3 Court determines that the City was right and they  
4 did have the full legal authority to pass the  
5 moratorium, then Mr. Watson would have gone ahead  
6 and closed on this property, he would now own it,  
7 and it looks like to me he might be in worse shape  
8 now than when he had not bought it. Because I  
9 assume the contract that he has to buy must be  
10 contingent on him being able to use it for the  
11 purposes.

12 MS. BOYES: He loses the opportunity and thus  
13 his \$300,000 investment.

14 THE COURT: A \$300,000 investment, that could  
15 still be applied to something else, I would  
16 assume.

17 MS. BOYES: He has purchased a portable  
18 asphalt plant in a warehouse.

19 THE COURT: Right now, if the moratorium is  
20 legal and he buys the property, then he owns the  
21 asphalt plant and then he owns the property and is  
22 further in the hole than when he started.

23 MS. BOYES: Likely he would not close on the  
24 property for fear he would not have a place to put  
25 the asphalt plant, which is sitting in a warehouse

1 by the way.

2 THE COURT: You say likely he would not close  
3 on the property if what?

4 MS. BOYES: If the moratorium is held to be  
5 valid, the asphalt plant would not be allowed in  
6 the industrial zones in the City of Gainesville.  
7 He would have a portable asphalt plant sitting in  
8 a warehouse with no place to put it.

9 THE COURT: Right. But that's if the  
10 moratorium was held valid.

11 MS. BOYES: Right.

12 THE COURT: If that's the case, he would  
13 still not be on the property.

14 MS. BOYES: I am speculating, I don't know  
15 what he would do in that event.

16 THE COURT: What I am looking for is the  
17 irreparable injury part of it because of the  
18 injunction. In other words, if the Court grants a  
19 temporary injunction and then he used that to go  
20 ahead and buy the property, then if the Court  
21 rules after a full hearing that the moratorium was  
22 legal, then he would have already closed on the  
23 property.

24 MS. BOYES: I think it could be incumbent  
25 upon him to mitigate his damages; however, I would

1 suggest that if the Court holds that the  
2 moratorium should be held in abeyance for a  
3 temporary period, we go through the special use  
4 permit process, then he makes his business  
5 decision based on that permit hearing, which is  
6 going to occur before his contract deadline comes  
7 up.

8 THE COURT: I see what you are saying. Go  
9 ahead.

10 MS. BOYES: I think I was on the substantial  
11 likelihood of success on the merits from equitable  
12 estoppel targeting issue, and they can't divest  
13 uses by right under the cloak of police powers.  
14 As we stated, Mr. Watson relied in good faith on  
15 the rezoning of this very property in 1998 and  
16 1999, after a failed attempt at a moratorium on  
17 industrial uses in '97.

18 He looked at that and said, well, the  
19 City Commission approved a competitor's asphalt  
20 plant, they told staff to study industrial uses in  
21 1997, they must have looked at something and  
22 decided all they needed to do was fix up the  
23 welfare ordinance because they went ahead a year  
24 later and rezoned more property for industrial  
25 use. So there's an affirmative action by the City

1 after '97 to rezone this property for industrial  
2 use.

3 He diligently pursued his permits for  
4 nearly a year, he purchased an asphalt plant,  
5 disassembled it, carted it across the state, it's  
6 sitting in a warehouse, he has a clear legal right  
7 to an injunction.

8 At this point, I would like to bring  
9 Mr. Eng to the stand, your Honor, to do some  
10 testimony from him for the record since it's  
11 incumbent on me to lay a foundation for the Court.

12 THE COURT: You need to do that, but I was  
13 thinking it might expedite things if I could hear  
14 from the City because many of these things  
15 probably are not contested. In other words, there  
16 could be an agreement as to exactly what happened  
17 on many of these things.

18 MS. BOYES: We have some cases to argue to  
19 the Court. In fact, two of them are from the City  
20 of Gainesville, I could argue that now or wait.

21 THE COURT: Let me hear from the City by way  
22 of opening statements, and then we'll come back  
23 and let you call whoever you want to by way of  
24 witnesses.

25



## 1 OPENING STATEMENT ON BEHALF OF THE DEFENDANT

2 MR. RADSON: Thank you, Your Honor. I am  
3 Marion Radson, representing the City as the City  
4 Attorney for the City of Gainesville. And I would  
5 like to present to the Court, and I have already  
6 provided the Court with a copy of documents, the  
7 cases I would like to address to the Court.

8 Your Honor, I think that we could  
9 dispose of the need for any evidentiary hearing  
10 after you hear my opening comments. And I would  
11 like to keep proceeding, but I will stop at the  
12 point where the Court would like me to stop.

13 Preliminary injunction, the law is  
14 clear, invokes equitable powers of the Court, it's  
15 to be used sparingly, as an extraordinary remedy.  
16 And the burden always lies with the plaintiff to  
17 show a clear legal right.

18 This motion was filed by the plaintiff,  
19 it asks for two things: (1) City should be  
20 prevented from adopting a moratorium ordinance;  
21 (2) in the alternative, the ordinance should be  
22 written in such a way or enjoined by the Court so  
23 it doesn't apply to the plaintiff's asphalt  
24 property.

25 On its face, this motion should be

1 denied. Why? Because it's premature. There is  
2 no law, there is no policy, ordinance or decision  
3 yet finalized that takes away any of the  
4 plaintiff's rights.

5 The second reading, and this it at tab  
6 one, your Honor, of the book I just gave you, the  
7 second reading of the ordinance is scheduled for  
8 May 14th as shown in the affidavit. Under the  
9 laws of the State of Florida, Chapter 166,  
10 ordinances such as moratorium ordinances are  
11 considered zoning ordinances, they require two  
12 readings. And the form of the ordinance shows  
13 there are two readings, the first one shows it was  
14 adopted, on page 8, on first reading on April 23,  
15 and the second reading has yet to take place.

16 So there's no law and no ordinance to  
17 enjoin. The City Commission may not adopt this  
18 ordinance. If they adopt this ordinance, they may  
19 adopt it with changes. They themselves may decide  
20 the effective date should be changed or who it  
21 catches in the net of the moratorium should be  
22 changed. Or maybe the uses should be changed,  
23 which are an exhibit to the ordinance, there is a  
24 list of uses that are being temporarily placed  
25 under moratorium. And as the Court did ask, what

1 are these, there is 48 uses, but the City allows  
2 hundreds and hundreds of uses in its industrial  
3 two zone. They are selecting out 48 of these uses  
4 because of the testimony and evidence that they  
5 received by an expert in the area of  
6 environmental.

7 THE COURT: The moratorium just applies to 48  
8 of the uses?

9 MR. RADSON: 48 of the uses and 47 of which  
10 are in the industrial two zone, and one is in the  
11 industrial one zone. Those are the only items  
12 being imposed for moratorium.

13 This is not yet the law. The City  
14 Commission has yet to go through the second  
15 hearing and the process required by the  
16 legislature to go through that process and decide  
17 if they want to do this. What Ms. Boyes would  
18 have this Court to do is supersede the City of  
19 Gainesville City Commission, step in it's place  
20 and tell the City what it should do in this  
21 situation and don't allow the legislature, the  
22 City Commission, to do its job as zoning board  
23 given those powers by the Constitution and by the  
24 state.

25 The Court is actually without authority

1 to enjoin this ordinance because it's not an  
2 ordinance, and there's legions of cases on this,  
3 and I am going to go through several of these with  
4 the Court.

5 THE COURT: There is no ordinance, and  
6 without an ordinance, there can be no enforcement  
7 of an ordinance; and if there's no enforcement of  
8 an ordinance, nobody can be harmed by it. Because  
9 it would be like the Court jumping in to say that  
10 the Florida Senate passed one thing and the House  
11 passed something else, and the Court jumping in  
12 and saying, wait a minute, I don't like either one  
13 of those and you don't even have a bill yet.

14 MR. RADSON: That's correct. That happened  
15 just recently when the Supreme Court reversed an  
16 injunction issued by a trial court enjoining  
17 legislature from holding hearings on labor  
18 matters. The Supreme Court reversed that on the  
19 separation of powers. And that's essentially the  
20 principle right here before the Court, and that's  
21 all this Court is being asked to do is enjoin an  
22 act that hasn't yet taken place.

23 They are not harmed yet. As a matter  
24 of fact, I am glad My. Boyes pointed out that on  
25 the agenda for the same meeting as the second

1 reading of the ordinance is their application for  
2 special use permit. And I have the advertisement  
3 with proof of publication in the booklet here  
4 showing that this is being posed for consideration  
5 by the City Commission.

6 If the City Commission decides not to  
7 adopt the moratorium ordinance, which is in their  
8 legislative prerogative, absent the abuse of  
9 discretion or acting outside of their powers, and  
10 there's none that have been alleged, then they  
11 should be able to, as the City Commission, the  
12 governing body of the zoning of the City of  
13 Gainesville, decide what applies and what doesn't  
14 apply. And then, if they harm the plaintiff, then  
15 the plaintiff may come back and ask for an  
16 injunction. But I submit that they don't meet the  
17 elements even then, and I would like to argue  
18 those.

19 But let me run through a couple of  
20 cases right on point, your Honor. From the United  
21 States Supreme Court, over 100 years ago, in tab  
22 two, New Orleans Water Works vs. City of New  
23 Orleans, the Water Works Company attempted to  
24 enjoin the City of New Orleans from adopting  
25 ordinances that would interfere with the rights of

1 the Water Works Company and to enjoin the City  
2 from enforcing ordinances currently in place.

3 The United States Supreme Court held it  
4 was improper to enjoin those ordinances that had  
5 not yet been adopted because to do so, would be to  
6 interfere with a legislative act which a court of  
7 equity cannot do under the law. The United States  
8 Supreme Court said we will pass the line that  
9 separates the judicial authority from the  
10 legislative authority, if the Court assumes to  
11 control the discretion of municipal assemblies  
12 when deliberating the adoption or objection of  
13 ordinances. If an ordinance is then passed, the  
14 Court said, and is invalid, the jurisdiction of  
15 the Court may then be invoked for the protecting  
16 of private rights.

17 That same issue was raised here in  
18 Florida in the case cited at tab three, Hernandez  
19 vs. Board of County Commissioners of Hillsboro  
20 County, where the County Commission threatened to  
21 redistrict a justice of the peace's election.  
22 They threatened, and the Supreme Court in that  
23 decision, 1934, said no injunction should issue.  
24 They established the fundamental principle without  
25 citing New Orleans United States Supreme Court

1 case but establishing the principle here in  
2 Florida that mere allegations that a commission is  
3 threatening to pass a resolution, which if passed  
4 will be unlawful, are no grounds for injunctive  
5 relief and interfering with the legislative  
6 functioning of the board. The powers of the  
7 board, the Court said, Florida Supreme Court, are  
8 to be tested by actions that actually pass.

9 As of this time, your Honor, there is  
10 no action. The City Commission hasn't yet  
11 exercised its legislative powers. And that is  
12 clearly stated in the motion before the Court  
13 because it says in the motion that the plaintiffs  
14 don't know when the moratorium ordinance will be  
15 heard, they hear it's in late April, in fact, it  
16 did take place, the first reading, on April 23.

17 And now they know and they knew on April 23 that  
18 the second reading was scheduled for May 14.  
19 And they can make those arguments  
20 before the City Commission; and the City  
21 Commission, after hearing those arguments, may  
22 well decide that the moratorium is ill-founded or  
23 that it shouldn't apply or should be treated  
24 differently or have different uses or apply to  
25 different zones, that is within their legislative

1 authority.

2 In the case of tab 4, in a similar case  
3 to the one that's before this Court, in Charlotte  
4 County vs. Venture Out in America, (1971) 2d, the  
5 developer attempted to enjoin the City from  
6 rezoning his property. The complaint pled all the  
7 allegations of estoppel, and yet the Court said  
8 this is not appropriate for injunctive relief.

9 I am going to read from the second full  
10 column, the second full paragraph from that: "It  
11 is well settled that the exercise of the zoning  
12 authority is a legislative function involving much  
13 discretion. The holding of public hearings  
14 designed to inform the legislative body which way  
15 to exercise its direction is an integral part of  
16 the legislative process and should not be  
17 interfered with by the Court.

18 "The property in question has not yet  
19 been rezoned and the exact manner of the  
20 threatened rezoning is not yet apparent even if we  
21 assume it is inevitable. If and when the rezoning  
22 takes place," the Court further said, "the  
23 appellee may challenge the decision by appropriate  
24 means and may even seek injunctive relief against  
25 enforcement thereof if appellee feels it invalid.



1           Until that time, the suit is premature."

2           Moratorium ordinances are well accepted  
3 zoning tools recognized by the courts as proper  
4 tools to prevent the rush on permits during a time  
5 when a legislative body believes there is a threat  
6 and danger or need for a change in the zoning in  
7 its community.

8           At tab 5, I cite a case that came out  
9 of Gainesville, actually, back in 1982, City of  
10 Gainesville vs. GNB Investments, and I cite that  
11 for the proposition that the Court, back in 1982,  
12 recognized the moratorium tool as a proper tool.  
13 This particular moratorium was struck down because  
14 the manner, the procedure in which the court --  
15 excuse me -- the City Commission attempted to  
16 enact that moratorium was invalid. Rather than  
17 adopting it by ordinance, as the Court has seen in  
18 tab one, the City Commission then passed a motion  
19 to change the zoning on somebody's property. And  
20 then later when they realized that a motion may  
21 not be good enough, they came back and tried to do  
22 it by resolution.

23           And the first district said, "A  
24 moratorium ordinance is akin and should be treated  
25 like a zoning ordinance, it has to go through the

1 same formalities as a zoning ordinance, hence, two  
2 readings advertised as a zoning ordinance."  
3 That's what the City has done in the case before  
4 the Court today. And the process continues and  
5 will continue on May 14 as it is advertised to do.

6 No branch of the government should  
7 encroach upon the powers of the other. The  
8 Supreme Court held in that Florida Senate case, in  
9 the Florida Senate case versus Florida Public  
10 Employee's Counsel, the one I mentioned earlier,  
11 that's not in the booklet, but I can provide it to  
12 the Court, the Supreme Court said, "Where the  
13 legislature is concerned, it is only the final  
14 product of the legislative process that is subject  
15 to judicial review."

16 Citing an earlier 1945 Supreme Court  
17 decision, the Court said, "The legislature has  
18 power to enact measures, the judiciary is  
19 redirected to the construction and interpretation  
20 thereof."

21 In this case, your Honor, the lawsuit  
22 is simply premature, the motion is premature,  
23 nothing has happened. The argument belongs before  
24 the City Commission, not this Court. This Court  
25 is not a legislative body, it shouldn't sit as a

1 super zoning board for this City, it shouldn't  
2 enjoin something that hasn't yet happened, the  
3 Court is without authority to do so. Injunctive  
4 relief may not be used to simply eliminate a  
5 possibility, however inevitable the plaintiffs  
6 think it may be, of a remote injury or a future  
7 invasion of rights.

8 As one appellate court in Indiana said,  
9 no harm can come until the board's decision is  
10 final. If it is unlawful, then it may be  
11 reviewed. Until such time, however, seeking  
12 review of the board's preliminary approval is  
13 somewhat like crying wolf when the devour of the  
14 sheep is only rumored to be in the neighborhood.  
15 And that's what we have here, Your Honor. I hate  
16 to liken my commission to wolves, but they haven't  
17 yet acted.

18 They may act, plaintiff may think it's  
19 inevitable, but I can tell you as the City  
20 attorney for many years, no acts of a legislative  
21 body are inevitable or predictable.

22 THE COURT: I would assume that if I deny the  
23 motion, at the second reading, you certainly would  
24 advise the City as to all of the problems that may  
25 occur. It appears that this particular

1 moratorium, especially when they attempt to make  
2 it retroactive to cover the only person who's got  
3 something in the pipeline, you would point out all  
4 of these legal problems to them, which apparently  
5 was not known to them.

6 MR. RADSON: It was known, Your Honor.

7 THE COURT: And they did it anyway?

8 MR. RADSON: They heard at the first reading  
9 that there was one application that would fit  
10 this. They only heard that for the first time at  
11 the first reading of the ordinance. I don't  
12 believe they knew that at that time, but the point  
13 of the matter is the City Commission looked at the  
14 matter from a very professional viewpoint, if you  
15 will, by hiring a consultant and having a  
16 consultant list out those uses that are in our  
17 industrial two zone that appear to be incompatible  
18 and inappropriate from an environmental standpoint  
19 for our community.

20 It was then that the City Commission  
21 decided what those uses ought to be and whether  
22 they ought to go forward with a hearing to adopt  
23 the moratorium ordinance. They didn't just  
24 willy-nilly the attack on this developer or any  
25 other particular developer as you have heard, they

1 didn't know that he was the only developer in the  
2 pipeline.

3 Yet there is other developments in  
4 industrial two zones, just not for these  
5 particular types of uses. Had the commission  
6 expanded that list, they could be catching more  
7 people. And they still might change that.

8 THE COURT: They went back to this particular  
9 date to be sure they caught this one; right?

10 MS. BOYES: Yes.

11 MR. RADSON: No, your Honor, that's not true.  
12 And there's no evidence to that effect.

13 THE COURT: Okay.

14 MR. RADSON: The evidence is, and I may have  
15 to be a witness in this case essentially, they did  
16 not select a date, they asked the City attorney to  
17 determine what the date ought to be from a legal  
18 position, from the standpoint of caselaw, research  
19 and caselaw. The date that appears in this  
20 ordinance, which let's look at what this is, we  
21 are talking about section 4.

22 THE COURT: This wasn't applied so much to  
23 your argument here, but all of these things could  
24 be thoroughly flushed out in the second reading.

25 MR. RADSON: Absolutely.

1 THE COURT: Somebody I would think would tell  
2 them, look, you go back to February 14 or whatever  
3 it was, what was magic about that date. We need  
4 to go back to that date because that's when  
5 Mr. Watson applied, and if we don't go back to  
6 that particular date, he will sneak through.

7 And somebody needs to tell the City  
8 Commission that, because they didn't pull it out  
9 of the sky, they went back to that date for a  
10 particular reason.

11 MR. RADSON: Yes, because the City attorney,  
12 after researching caselaw, advised them that in  
13 his opinion that is a date under the zoning in  
14 progress doctrine, the red flag doctrine, that  
15 caselaw supports when a moratorium can start  
16 catching applications.

17 What you will hear, if we get an  
18 evidentiary hearing on that date of February 12,  
19 is an application had not been filed by the  
20 developer for development approval. They went  
21 through optional concept approval, but an actual  
22 application had not yet been filed as of February  
23 12.

24 One other thing, Your Honor, if the  
25 Court will look at section 5 of the ordinance, at

1 tab one, there's an administrative remedy  
2 available to anyone who believes that they are  
3 improperly harmed by this ordinance. And anyone  
4 who is caught by the ordinance and believes the  
5 moratorium -- believes they are suffering a  
6 hardship can apply to the City Commission under  
7 section 5 for an alleviation of that hardship.

8 They have to go through the filing of  
9 an application, they have to file a fee and they  
10 have to present evidence before the City  
11 Commission. If they do that, the City Commission  
12 may find that on the basis of hardship, equity,  
13 that they should be allowed to proceed forward in  
14 spite of the ordinance. That is written in here  
15 intentionally to allow the City to review hardship  
16 cases and resolve them on an equitable basis. If  
17 that decision is unfair, of course that decision  
18 is able to be addressed by the Court.

19 THE COURT: Let me give the plaintiff a  
20 chance to respond, because your argument is very  
21 persuasive, not as to the facts and hardship and  
22 all of that, but just the basic legal issue that  
23 they haven't passed an ordinance yet and if I jump  
24 in and say you can't pass an ordinance, then I  
25 should be over there and they should be over here.

1 MS. BOYES: Right. Your Honor, I think we  
2 are parsing language here. We have a resolution  
3 and we have a vote, we had a formal action by the  
4 City Commission.

5 THE COURT: Half an action.

6 MS. BOYES: Voting 5 to 0 to set the wheels  
7 in motion. I can ask you to enjoin that action,  
8 it doesn't have to be an ordinance, I can ask you  
9 to enjoin an official action of the City  
10 Commission.

11 THE COURT: Wait a minute, I don't think you  
12 can do that, that's what they tried to do in  
13 Tallahassee, Mr. Ralph Smith tried to do that in  
14 the legislature, he said you can't meet. And they  
15 said, well, wait a minute, we determine when we  
16 can meet. And the Florida Supreme Court said  
17 that's right, they get to determine when they  
18 meet.

19 And they were in that process of  
20 passing something, but it hadn't past yet, and I  
21 don't think I can tell them they cannot meet or  
22 they can't take the second vote.

23 MS. BOYES: I think that's a different  
24 circumstance, where property rights are involved  
25 here. You look at the totality of the



1 circumstance as the vehicle chosen particularly to  
2 stop this project, which I assure you, your Honor,  
3 we made the City Commission aware at every hearing  
4 and every juncture we were the only one effected.

5 We are being told, I am glad the City  
6 attorney mentioned it to you, I was going to point  
7 it out in the transcript, where he gave a rather  
8 lengthy lecture to the City Commission about the  
9 zoning in progress law. And that was being used  
10 as a weapon that evening to tell us you are on  
11 notice, your rights are locked out as of that  
12 date. We are now being whipsawed and being told  
13 there is nothing you can attack, you are precluded  
14 from relief in court and you are precluded from  
15 relief over here.

16 So on second reading of the ordinance,  
17 I would lay money, I have never seen the City  
18 Commission reverse themselves on second reading.  
19 Moreover, your Honor, the transcript is replete  
20 with argument from counsel that this was  
21 politically motivated by the mayor's race.

22 THE COURT: No doubt, that's all that they do  
23 in politics. They are politicians, what did you  
24 expect them to do?

25 MS. BOYES: The mayor's race in particular,

1 your Honor, the candidate who won spearheaded this  
2 issue and thus the decision was made in reaction  
3 to that. Now we have an election, the official  
4 mind of the Commission likely will change, because  
5 of the platform he campaigned on, this is patently  
6 unfair, we are being whipsawed.

7 THE COURT: This is like there was an  
8 alligator on the witness stand and he says, "Of  
9 course I killed him in cold blood, I'm a reptile."

10 MS. BOYES: So we are on notice that we are  
11 under color of the zoning in progress doctrine to  
12 justify the February 12 cutoff deadline, when I  
13 just explained to the Court we didn't have any  
14 notice. Now we are being told that no official  
15 action took place. If no official action took  
16 place, how can we have zoning in progress.

17 THE COURT: No final official action took  
18 place. That's kind of like me saying I had a  
19 trial but I haven't issued a ruling and you want  
20 to appeal the ruling and say that I can't rule.  
21 And I guess under some circumstances there can be  
22 a petition for writ of mandamus, if, for example,  
23 you felt that I should have been disqualified from  
24 hearing the case, and sometimes you can get a  
25 mandamus to prevent a particular move of the

1 judge. But I just don't think they have passed  
2 anything, they had the first reading, but until  
3 they pass it.

4 MS. BOYES: If we look at the obverse, the  
5 doctrine of equitable estoppel, based on  
6 preliminary approval or preliminary work, you  
7 don't have to have a final decision of the City  
8 Commission for irreparable estoppel to apply.

9 This is somewhat analogous in that the  
10 government was on notice that we were pursuing  
11 these activities. We have made repeated  
12 arguments, Your Honor, in the legislative forum.  
13 A resolution was passed 5 to 0 to authorize the  
14 City attorney to draft the ordinance to pass it.  
15 They have made plans in the records to work with  
16 the county. This is set in stone. There is no  
17 turning back.

18 THE COURT: If they were trying to do  
19 something like they did with the center case that  
20 you cited, but even though you don't like what  
21 they are doing or the way they are doing it, they  
22 do have the right to pass moratoriums if they do  
23 them correctly.

24 MS. BOYES: Right. I guess the problem we  
25 are having in this case is they come in under the

1 cloak of legislative action and so we hear the  
2 separation of powers argument. Although this has  
3 a quasi judicial effect on my client's project,  
4 it's patently obvious what's in the record and  
5 before the Court.

6 So I would really urge the Court to  
7 look at the totality of the circumstances from a  
8 quasi judicial standpoint and stop it and let us  
9 go forward with our special use permit. On the  
10 merits, our project has been condemned and  
11 prejudged without a hearing and stands to be  
12 precluded by virtue of the time clock, and that is  
13 the danger of legislative process being misused.

14 We have diligently pursued permits not  
15 knowing whether we would get relief from the Court  
16 or a timely hearing before the contract expires.  
17 We didn't know, and in fact there's discussion at  
18 the end of the transcript in the last City  
19 hearing, about whether moratorium will be taken up  
20 first.

21 The choice of date is critical in this  
22 case. The City Commissioners one by one deferred  
23 to the City attorney to choose the date. The City  
24 attorney's record will bear out they lobbied for  
25 that date. There was very little discussion.

1 THE COURT: What date was that?

2 MS. BOYES: February 12. That was the  
3 advocacy date, February 12. There is no full and  
4 fair discussion of the equities we are having here  
5 before your Honor today. With that admonishment  
6 from the Court, I think perhaps we might see  
7 something different in the second reading, but I  
8 would hate to stake my client's success on that.  
9 I think there does need to be some instruction. I  
10 do think we will prevail on the merits if we have  
11 to come back, given the facts we laid out  
12 previously today.

13 Let me go on to rebut the other  
14 comments that counsel made. In the Town of Largo  
15 vs. Imperial Homes Corporation, 309, So.2d 571,  
16 (1975), that's a Second DCA case, the town was  
17 enjoined from prohibiting a developer from  
18 building a high-rise in a very similar  
19 circumstance. There was a perspective reach by  
20 the Court to keep the City from doing something to  
21 a particular developer.

22 The case that the City attorney cited  
23 is 100 years old, the law has moved forward  
24 considerably since then. And I didn't bring a  
25 room of authority with me, but there are other

1 cases when the facts are such as they are here, we  
2 are past first reading and we have had a wealth of  
3 testimony indicating that this train is not going  
4 to stop, where the Court has stepped in to save  
5 the contract right to prevent irreparable harm.

6 When Mr. Hilliard, who is the planning  
7 manager, was questioned by the City attorney at  
8 the last hearing, he was the one who testified we  
9 were the only project in the pipeline. There were  
10 two other petitions to subdivide properties in an  
11 industrial zone, but he testified nobody knew what  
12 the uses would be, so thus, we were really the  
13 only use on the moratorium that was to be  
14 effected. I wanted to correct the record on that.

15 The administrative remedy that the City  
16 attorney refers to, if we follow his logic, does  
17 not exist today. We cannot avail ourselves of it  
18 if the ordinance has not been passed. So if we  
19 wanted to mitigate our damages and try to make our  
20 May 30th contract deadline, we can't even apply  
21 for a hardship today, your Honor, we have to wait  
22 until the second reading of the moratorium  
23 ordinance, passage, enrolling by the Secretary of  
24 State. There are various administrative things  
25 that have to happen.

1                   Likely, with the application in  
2 process, being what it is, we will not meet our  
3 real estate contract deadline of the 30th. So I  
4 think it is a sure miracle to rely on this  
5 potential hardship provision, which the City  
6 Commission could decide to take out of the  
7 ordinance on second reading. We cannot rely on  
8 that to deny us injunctive relief.

9                   I did want to talk a little bit about  
10 the two Gainesville cases, your Honor, just to let  
11 you know the City has been down this path before  
12 unsuccessfully, the City of Gainesville vs. GNB  
13 Investments, 413 So. 2d 777, that was a First DCA  
14 case from 1982. The City Plan Board in this case  
15 denied a site plan for a skating center that was  
16 to be located on property zoned shopping center.  
17 And the site plan, it was found, met all of the  
18 technical requirements, but it was denied, similar  
19 to what happened to us last week. The denial was  
20 found to be arbitrary.

21                   Meanwhile, the City Commission adopted  
22 a moratorium on all construction in shopping  
23 center zones, analogous completely to what we are  
24 facing. There was no notice, the case fell on the  
25 fact there was no notice the moratorium would be

1 enacted. Similarly here, we had no notice on  
2 February 12, which was the day the City put things  
3 forward, the drop dead date, we had no notice of a  
4 moratorium being enacted then. It does effect our  
5 substantial interest, we had no opportunity to  
6 argue the merits of our project, and like I said  
7 in my opening statement, this case is progress  
8 with equity.

9 The other case I wanted to draw the  
10 Court's attention to is the City of Gainesville  
11 vs. Bishop. This is a real interesting case. The  
12 City Commission amended zoning to allow  
13 construction of a gas station on land near the law  
14 school at UF. They also reduced the spacing  
15 requirements ordinance from 250 to 200 feet, where  
16 you couldn't have a gas station closer than that.  
17 This became a campaign issue, people became  
18 enraged. Two new commissioners were elected on  
19 the platform of restoring the prohibition near the  
20 law school, you are quite familiar with the case.

21 Meanwhile, four days before the  
22 election, Mr. Bishop applied for and got his  
23 building permit. Five days later he applied for a  
24 demolition permit on an adjacent property that he  
25 had an option to buy, and he received a letter



1 from the City that he couldn't rely on the  
2 building permit because there was an election in  
3 the air and things might change.

4 Well, in fact, the City Commission five  
5 days later passed a moratorium on all construction  
6 near UF and some other ancillary zones. Then they  
7 proceeded to rezone Mr. Bishop's property to  
8 outlaw gas stations in effect. And, of course,  
9 Mr. Bishop prevailed on appeal on the equitable  
10 estoppel theory.

11 The parallels here are creepy, I must  
12 say. That case relies on several Florida Supreme  
13 Court cases, one being Texas Company vs. Town of  
14 Miami Springs, (1950) 44 So. 2d 808. During the  
15 due diligence period, the land owner was told by  
16 the City there was no ordinance prohibiting its  
17 intended use, similar to what happened with my  
18 client. Counsel then has the emergency ordinance  
19 which had the effect of banning the gas station at  
20 this particular location.

21 The Supreme Court, of course, estopped  
22 the City, they found there was no parol to common  
23 welfare where the permits were issued, you know,  
24 suddenly why is there an emergency now. These  
25 cases go to our prong that we would, by the way,

1 prevail ultimately at trial should we go.

2 In addition, the Sakolsky vs. City of  
3 Coral Gables case again involves political  
4 controversy erupting over post high-rise building  
5 in the City. The building permit was rescinded,  
6 the City was ultimately estopped, even though the  
7 Court found the land owner might have reason to  
8 believe the election would change the official  
9 minds of the City Commission.

10 Our case, of course, is not about a  
11 building permit being rescinded or blocked, but we  
12 would prevail under an equitable estoppel theory  
13 under the Town of Largo's case, to keep the City  
14 from changing the zoning permitted use list  
15 otherwise outlawing what currently is the use by  
16 right.

17 The Reid Crete vs. DER, 486 So. 2d  
18 642, First DCA case (1986), if you detrimentally  
19 rely on preliminary okay, as we have done here,  
20 with our meetings with technical staff, our  
21 hearings before the Plan Board, estoppel will lie.

22 Likewise, similarly there's a Fifth DCA  
23 case on the same point, Florida Companies Vs.  
24 Orange County. 411 So. 2d 1008 (1982).

25 Mr. Watson, in this situation, has received

1 repeated assurances by the way that he was  
2 initiating his approval applications that a  
3 moratorium was not in the offing. And I can bring  
4 Mr. Eng up here to testify to that fact. They  
5 inquired specifically based on what happened in  
6 1997, and it was based on that assurance they went  
7 forward and expended money in detrimental  
8 reliance.

9 THE COURT: I think a lot of your argument is  
10 certainly valid. And certainly a lot of it -- I  
11 haven't really heard that much of argument from  
12 the other side, but there certainly could be  
13 grounds for equitable estoppel.

14 Until the City acts though, there is no  
15 moratorium. I think it would be speculative to  
16 determine there would be, so I am going to deny  
17 the motion for the temporary injunction.

18 And I would urge the City to carefully  
19 consider all of this. I know there is always a  
20 political motivation behind what they do, but  
21 there's also legal ramifications. And I think  
22 it's very important for the City's attorney to  
23 sometimes tell people what they don't want to  
24 hear. And I am not making prejudgment on this  
25 because I really haven't heard the other side of

1 it, but I think that it is important to look at  
2 the overall picture.

3 At this point, though, the Court would  
4 determine an injunction would be premature because  
5 there is no moratorium. And maybe if there is a  
6 change, the date might change or something,  
7 probably not. Thank you.

8 MS. BOYES: Thank you, Your Honor.

9 MR. RADSON: Thank you, Your Honor.

10 (WHEREUPON, there were no further  
11 proceedings had on this date.)  
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CERTIFICATE OF OATH

STATE OF FLORIDA  
COUNTY OF ALACHUA

I, the undersigned authority, certify that  
the above proceedings were stenographically  
reported by me.

WITNESS my hand and official seal this 9th  
day of May, 2001.



CANDICE ARENS



Candice L. Arens

MY COMMISSION # CC982086 EXPIRES

NOVEMBER 15, 2004

BONDED THRU TROY FARM INSURANCE, INC.

COURT REPORTER

JOHNS, STEPHENSON & DUNNE/  
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I, Candice Arens, Court Reporter, certify  
that I was authorized to and did report  
stenographically the above proceedings and that  
the transcript is a true and complete record of my  
stenography notes.

I further certify that I am not a relative,  
employee, attorney or counsel of any of the  
parties, nor am I counsel connected with the  
action, nor am I financially interested in the  
action.

Dated this 9th day of May, 2001.



CANDICE ARENS

COURT REPORTER

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8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

# Index



**Assemblies**  
[1] 27:11  
**ASSOCIATES**  
[1] 2:2  
**Assume**  
[4] 18:9 18:16 29:21 32:22  
**Assumes**  
[1] 27:10  
[1] 48:6  
**Assurance**  
[1] 48:1  
**Assurances**  
[1] 48:1  
**Assure**  
[1] 38:2  
**Attack**  
[2] 33:24 38:13  
**Attempt**  
[3] 15:21 20:16 33:1  
**Attempted**  
[3] 26:23 29:5 30:15  
**Attention**  
[3] 11:23 12:23 45:10  
**Attorney**  
[14] 10:7 14:20 22:4 32:20 34:16  
35:11 38:6 40:14 41:23 42:22 43:7  
43:16 48:22 50:15  
**Attorney's**  
[1] 41:24  
**Audience**  
[1] 9:25  
**Authority**  
[10] 17:17 18:4 24:25 27:9 27:10  
29:1 29:12 32:3 42:25 50:3  
**Authorize**  
[2] 8:2 40:13  
**Authorized**  
[1] 50:13  
**Avail**  
[1] 43:17  
**Available**  
[1] 36:2  
**Aware**  
[5] 10:17 12:18 13:23 16:20 38:3

## B

**Banning**  
[1] 46:19  
**Based**  
[5] 12:4 20:5 40:5 48:5 48:6  
**Basic**  
[2] 3:22 36:22  
**Basis**  
[3] 17:20 36:12 36:16  
**Batch**  
[1] 4:3 4:3 11:13  
**Batching**  
[1] 5:1  
**Beach**  
[1] 10:19  
**Bear**  
[1] 41:24  
**Became**  
[2] 45:17 45:17  
**Becomes**  
[1] 15:25  
**Began**  
[1] 5:15  
**Begin**  
[1] 10:24  
**Behalf**  
[6] 2:4 2:7 3:5 22:1  
**Behind**  
[1] 48:20  
**Believes**  
[4] 30:5 36:2 36:4 36:5  
**Belongs**  
[1] 31:23  
**Between**  
[2] 14:7 14:20  
**Big**  
[1] 14:15  
**Bill**  
[1] 25:13  
**Bishop**  
[2] 45:11 45:22 46:9  
**Bishop's**  
[1] 46:7  
**Bit**  
[1] 44:9  
**Blocked**  
[1] 47:11  
**Blood**  
[1] 39:9

**Blown**  
[1] 5:25  
**Board**  
[12] 4:9 6:1 8:17 11:15 11:16 24:  
27 27:19 28:6 28:7 32:11 44:14 47:  
21  
**Board's**  
[2] 32:19 32:11  
**Body**  
[5] 26:12 29:14 30:5 31:25 32:21  
**Book**  
[1] 23:6  
**Booklet**  
[2] 26:3 31:11  
**Bought**  
[1] 18:8  
**Box**  
[3] 2:2 2:6 9:5  
**Boyes**  
[46] 2:2 2:3 3:6 3:6 5:4 6:17 7:3  
7:8 7:10 7:16 7:20 7:25 8:12 8:20  
9:1 11:20 13:4 13:8 13:12 13:15  
13:18 14:1 14:4 14:18 17:25 18:12  
18:17 18:23 19:4 19:11 19:14 19:  
24 20:10 21:18 24:17 25:24 34:10  
37:1 37:6 37:23 38:25 39:10 40:4  
40:24 42:2 49:8  
**Branch**  
[1] 31:6  
**Brief**  
[1] 3:18  
**Bring**  
[6] 10:20 21:8 42:24 48:3  
**Bringing**  
[1] 4:24  
**Brings**  
[1] 5:4  
**Brought**  
[1] 10:16  
**Build**  
[2] 4:2 4:8  
**Building**  
[6] 42:18 45:23 46:2 47:4 47:5 47:  
11  
**Burden**  
[1] 22:16  
**Business**  
[1] 20:4  
**Buy**  
[3] 18:9 19:20 45:25  
**Buyer**  
[1] 5:10  
**Buys**  
[1] 18:20

## C

**Campaign**  
[1] 45:17  
**Campaigned**  
[1] 39:5  
**Candice**  
[4] 1:22 50:7 50:12 50:19  
**Candidate**  
[1] 39:1  
**Cannot**  
[6] 10:20 17:6 27:7 37:21 43:17  
44:7  
**Carefully**  
[1] 48:18  
**Carted**  
[1] 21:5  
**Case**  
[39] 3:3 3:19 3:23 4:10 4:12 10:  
18 10:19 11:9 17:10 19:12 27:18  
28:1 28:2 29:2 30:8 31:3 31:8 31:  
9 31:23 34:15 39:24 40:19 40:25  
41:22 42:16 42:22 44:14 44:14 44:  
24 45:7 45:9 45:11 45:20 46:12 47:  
3 47:10 47:13 47:18 47:23  
**Caselaw**  
[4] 34:18 34:19 35:12 35:15  
**Cases**  
[9] 21:18 22:7 25:2 26:20 36:16  
43:1 44:10 46:13 46:25  
**Catch**  
[3] 9:1 9:10 14:17  
**Catches**  
[1] 23:21  
**Catching**  
[2] 34:6 35:16  
**Caught**  
[3] 15:1 34:9 36:4  
**Caused**  
[1] 16:14  
**Center**  
[4] 40:19 44:15 44:16 44:23  
**Certain**

[1] 17:16  
**Certainly**  
[4] 32:23 48:10 48:10 48:12  
**CERTIFICATE**  
[1] 39:9  
**Color**  
[1] 39:11  
**Column**  
[1] 29:10  
**Comments**  
[3] 9:17 22:10 42:14  
**Commission**  
[46] 4:6 4:15 5:14 6:7 6:10 6:22  
9:2 9:23 11:17 12:8 20:19 23:17  
24:14 24:19 24:22 26:5 26:6 26:11  
27:20 28:2 28:10 28:20 28:21 30:  
15 30:18 31:24 32:16 33:13 33:20  
34:5 35:8 36:6 36:11 36:11 37:4  
37:10 38:3 38:8 38:18 39:4 40:8  
44:6 44:21 45:12 46:4 47:9  
**Commissioners**  
[5] 9:21 14:20 27:19 41:22 45:18  
**Common**  
[1] 46:22  
**Community**  
[4] 5:8 11:3 30:7 33:19  
**Companies**  
[1] 47:23  
**Company**  
[6] 1:5 3:7 3:9 26:23 27:1 46:13  
**Competitor's**  
[1] 20:19  
**Complaint**  
[5] 3:21 4:16 7:5 17:4 29:6  
**Complete**  
[1] 50:14  
**Completed**  
[2] 8:13 8:15  
**Completely**  
[1] 44:23  
**Concept**  
[2] 17:12 35:21  
**Conceptual**  
[2] 6:2 8:16  
**Concerned**  
[1] 31:13  
**Concrete**  
[2] 4:3 4:25  
**Condemned**  
[1] 41:10  
**Condition**  
[1] 16:21  
**Connected**  
[1] 50:16  
**Consider**  
[3] 12:12 16:8 48:19  
**Considerably**  
[1] 42:24  
**Consideration**  
[2] 9:23 26:4  
**Considered**  
[1] 12:16 23:11  
**Constitution**  
[1] 24:23  
**Construction**  
[8] 1:5 2:4 3:7 14:17 31:19 44:22  
45:13 46:5  
**Consultant**  
[2] 33:15 33:16  
**Consultant's**  
[2] 10:16 11:1  
**Consultants**  
[4] 9:20 10:15 11:1 11:4  
**Contention**  
[1] 8:20  
**Contested**  
[1] 21:15  
**Contingent**  
[1] 18:10  
**Continue**  
[1] 31:5  
**Continues**  
[1] 31:4  
**Contract**  
[7] 16:18 18:9 20:6 41:16 43:5 43:  
20 44:3  
**Control**  
[1] 27:11  
**Controversy**  
[1] 47:4  
**Copy**  
[1] 22:6  
**Coral**  
[1] 47:3  
**Corporation**  
[1] 42:15  
**Correct**

[1] 15:24

**Cold**

[1] 39:9

**Color**

[1] 39:11

**Column**

[1] 29:10

**Comments**

[3] 9:17 22:10 42:14

**Commission**

[46] 4:6 4:15 5:14 6:7 6:10 6:22

9:2 9:23 11:17 12:8 20:19 23:17

24:14 24:19 24:22 26:5 26:6 26:11

27:20 28:2 28:10 28:20 28:21 30:

15 30:18 31:24 32:16 33:13 33:20

34:5 35:8 36:6 36:11 36:11 37:4

37:10 38:3 38:8 38:18 39:4 40:8

44:6 44:21 45:12 46:4 47:9

**Commissioners**

[5] 9:21 14:20 27:19 41:22 45:18

**Common**

[1] 46:22

**Community**

[4] 5:8 11:3 30:7 33:19

**Companies**

[1] 47:23

**Company**

[6] 1:5 3:7 3:9 26:23 27:1 46:13

**Competitor's**

[1] 20:19

**Complaint**

[5] 3:21 4:16 7:5 17:4 29:6

**Complete**

[1] 50:14

**Completed**

[2] 8:13 8:15

**Completely**

[1] 44:23

**Concept**

[2] 17:12 35:21

**Conceptual**

[2] 6:2 8:16

**Concerned**

[1] 31:13

**Concrete**

[2] 4:3 4:25

**Condemned**

[1] 41:10

**Condition**

[1] 16:21

**Connected**

[1] 50:16

**Consider**

[3] 12:12 16:8 48:19

**Considerably**

[1] 42:24

**Consideration**

[2] 9:23 26:4

**Considered**

[1] 12:16 23:11

**Constitution**

[1] 24:23

**Construction**

[8] 1:5 2:4 3:7 14:17 31:19 44:22

45:13 46:5

**Consultant**

[2] 33:15 33:16

**Consultant's**

[2] 10:16 11:1

**Consultants**

[4] 9:20 10:15 11:1 11:4

**Contention**

[1] 8:20

**Contested**

[1] 21:15

**Contingent**

[1] 18:10

**Continue**

[1] 31:5

**Continues**

[1] 31:4

**Contract**

[7] 16:18 18:9 20:6 41:16 43:5 43:  
20 44:3

**Control**

[1] 27:11

**Controversy**

[1] 47:4

**Copy**

[1] 22:6

**Coral**

[1] 47:3

**Corporation**

[1] 42:15

**Correct**



[9] 8:12 13:4 13:8 13:12 13:15 14:  
4 15:5 25:14 43:14  
**Correctly**  
(1) 40:23  
**Counsel**  
[6] 3:10 38:20 42:14 45:18 50:15  
50:16  
**Counsel's**  
[1] 14:25  
**County**  
[9] 1:2 1:18 27:19 27:20 27:20 29:  
4 40:16 47:24 50:2  
**Couple**  
(1) 26:19  
**Course**  
[6] 16:8 36:17 39:9 46:8 46:21 47:  
10  
**Court**  
[156] 1:1 1:23 3:2 3:3 3:13 3:20  
3:24 5:2 5:13 6:13 7:1 7:6 7:9 7:  
12 7:18 7:23 8:6 8:18 8:22 10:13  
11:18 11:22 12:38 12:25 13:15 13:9  
13:18 13:15 13:16 13:23 14:3 14:  
14 15:12 16:20 17:15 17:17 17:18  
18:1 18:3 18:24 18:19 19:2 19:9  
19:12 19:16 19:18 19:20 20:1 20:8  
21:1 21:12 21:19 21:21 22:15 22:6  
22:7 22:12 22:14 22:22 23:25 24:7  
24:18 24:25 25:4 25:5 25:9 25:11  
25:15 25:16 25:18 25:20 25:21 26:  
21 27:3 27:16 27:18 27:10 27:14 27:  
15 27:22 27:25 28:7 28:7 28:12 29:  
3 29:7 29:17 29:22 30:11 30:14 30:  
17 31:4 31:8 31:12 31:12 31:16 31:  
17 31:24 31:24 32:3 32:8 32:22 33:  
7 34:8 34:13 34:22 35:1 35:25 36:  
18 36:19 37:5 37:11 37:16 38:14  
38:22 39:7 39:13 39:17 40:18 41:5  
41:6 41:15 42:1 42:16 42:20 43:4  
46:13 46:21 47:7 48:9 48:3 50:8  
50:9 50:12 50:20 50:21  
**Court's**  
[3] 12:12 12:23 45:10  
**Courthouse**  
(1) 1:18  
**Courtroom**  
(1) 1:18  
**Courts**  
(1) 30:3  
**Cover**  
(1) 33:2  
**Cracks**  
(1) 10:21  
**Creepy**  
[1] 46:11  
**Crete**  
(1) 47:17  
**Critical**  
[2] 5:23 41:21  
**Crying**  
(1) 32:13  
**CSR**  
(1) 1:22  
**Current**  
(1) 4:20  
**Cutoff**  
(1) 39:12

**D**

**Damages**  
[2] 19:25 43:19  
**Danger**  
[2] 30:16 41:13  
**Date**  
[26] 3:19 7:22 7:23 8:1 14:21 15:  
8 23:20 34:9 34:16 34:17 34:19 35:  
3 35:4 35:6 35:9 35:13 35:18 38:4  
32 41:21 41:23 41:25 42:1 42:3 45:  
3 49:6 49:11  
**Dated**  
(1) 50:17  
**Days**  
[3] 45:21 45:23 46:5  
**DCA**  
[5] 10:19 42:16 44:13 47:18 47:22  
**Dead**  
(1) 45:3  
**Deadline**  
[5] 16:18 20:6 39:12 43:20 44:3  
**Death**  
(1) 16:17  
**Dec**  
(1) 14:10  
**Decide**  
[5] 23:19 24:16 26:13 28:22 44:6  
**Decided**  
[3] 6:9 20:22 33:21  
**Decides**  
(1) 26:6  
**Decision**

[10] 20:5 23:2 27:23 29:23 31:17  
32:9 36:17 36:17 39:12 40:7  
**Decisions**  
(1) 12:4  
**Declaratory**  
(1) 3:21  
**Defendant**  
[3] 1:9 2:11 32:1  
**Deferred**  
(1) 41:22  
**Defined**  
(1) 17:11  
**Delay**  
(1) 16:13  
**Deliberating**  
(1) 27:12  
**Demolition**  
(1) 45:24  
**Denial**  
[5] 11:17 11:19 11:20 11:25 44:19  
**Denied**  
[5] 13:21 15:14 23:1 44:15 44:18  
**Deny**  
[5] 6:19 14:3 32:22 44:8 48:16  
**DEPOSITION**  
(1) 50:11  
**Depth**  
(1) 4:18  
**DER**  
(1) 47:17  
**Design**  
[2] 5:21 9:6  
**Designation**  
(1) 5:19  
**Designed**  
(1) 29:14  
**Despite**  
(1) 14:24  
**Destabilize**  
(2) 15:25 16:1  
**Determine**  
[5] 34:17 37:15 37:17 48:16 49:4  
**Determines**  
(1) 18:3  
**Detrimental**  
(1) 48:7  
**Detrimentally**  
(1) 47:18  
**Developer**  
[7] 29:5 33:24 33:25 34:1 35:20  
42:17 42:21  
**Development**  
[3] 12:10 16:24 35:20  
**Developments**  
(1) 34:3  
**Devour**  
(1) 32:13  
**Different**  
[5] 10:1 28:24 28:25 37:23 42:7  
**Differently**  
(1) 28:24  
**Diligence**  
(1) 46:15  
**Diligently**  
[3] 5:15 21:3 41:14  
**Direct**  
[2] 11:22 12:23  
**Direction**  
(1) 29:15  
**Directly**  
(1) 3:15  
**Disassembled**  
(1) 21:5  
**Discovered**  
(1) 10:6  
**Discretion**  
[3] 26:9 27:11 29:13  
**Discussed**  
(1) 10:3  
**Discussion**  
[8] 9:19 12:15 14:6 14:19 17:7 41:  
17 41:25 42:4  
**Dispose**  
(1) 22:9  
**Dispute**  
(1) 10:15  
**Disqualified**  
(1) 39:23  
**Distributes**  
(1) 5:5  
**Distribution**  
(1) 4:23  
**District**

[2] 4:5 30:23  
**Districts**  
(1) 7:17  
**Divest**  
[2] 17:8 20:12  
**Doctrine**  
[4] 35:14 35:14 39:11 40:5  
**Documents**  
(1) 22:6  
**Done**  
[3] 11:14 31:3 47:29  
**Doubt**  
(1) 38:22  
**DOUGHTIE**  
(1) 1:17  
**Down**  
[2] 30:13 44:11  
**Draft**  
[2] 15:3 40:14  
**Drafting**  
(1) 8:3  
**Draw**  
(1) 45:9  
**Drop**  
(1) 45:3  
**Dropped**  
(1) 11:7  
**Drops**  
(1) 11:5  
**Due**  
(1) 46:15  
**DUNNE**  
[3] 1:23 50:8 50:20  
**During**  
[4] 6:12 9:17 30:4 46:14

**E**

**E-mails**  
(1) 6:7  
**Edge**  
(1) 10:18  
**Effect**  
[5] 34:12 41:3 45:4 46:8 46:19  
**Effected**  
[4] 8:10 10:10 38:4 43:14  
**Effective**  
[5] 7:22 7:23 8:1 15:8 23:20  
**EIGHT**  
(1) 1:1  
**Either**  
[2] 3:14 25:12  
**Elected**  
(1) 45:18  
**Election**  
[5] 27:21 39:3 45:22 46:2 47:8  
**Elements**  
(1) 26:17  
**Eliminate**  
(1) 32:4  
**Emergency**  
[2] 46:18 46:24  
**Employee**  
(1) 50:15  
**Employee's**  
(1) 31:10  
**Enact**  
[2] 30:16 31:18  
**Enacted**  
[2] 45:1 45:4  
**Enacting**  
(1) 3:15  
**Encroach**  
(1) 31:7  
**End**  
(1) 41:18  
**Enforcement**  
[3] 25:6 25:7 29:25  
**Enforcing**  
(1) 27:2  
**Eng**  
[5] 3:11 4:17 8:17 21:9 48:4  
**Engage**  
[2] 10:15 11:1  
**Engineer**  
(1) 3:11  
**Engineering**  
[2] 5:21 9:6  
**Enjoin**  
[10] 23:17 25:1 25:21 26:24 27:1  
27:4 43:5 32:2 37:7 37:9  
**Enjoined**  
[2] 22:22 43:17  
**Enjoining**

(1) 25:16  
**Enraged**  
(1) 45:18  
**Enrolling**  
(1) 43:23  
**Ensure**  
(1) 14:25  
**Entitled**  
(2) 12:18 16:9  
**Environmental**  
[2] 24:6 33:18  
**Equitable**  
[10] 5:11 16:12 17:5 20:11 22:14  
36:16 40:5 46:9 47:12 48:13  
**Equities**  
(1) 42:4  
**Equity**  
[4] 3:24 27:7 36:12 45:8  
**Ernie**  
(1) 3:9  
**Erupting**  
(1) 47:4  
**Especially**  
(1) 33:1  
**Essentially**  
[3] 4:23 25:19 34:15  
**Established**  
(1) 27:24  
**Establishing**  
(1) 28:1  
**Estate**  
[3] 15:25 16:22 44:3  
**Estopped**  
[2] 46:21 47:6  
**Estoppel**  
[9] 17:5 20:12 29:7 40:5 40:8 46:  
10 47:12 47:21 48:13  
**Evening**  
[4] 10:4 10:5 12:14 38:10  
**Event**  
(1) 19:15  
**Evidence**  
[6] 9:19 10:20 24:4 34:12 34:14  
36:10  
**Evidentiary**  
**Exact**  
(1) 29:19  
**Exactly**  
[3] 5:18 10:22 21:16  
**Example**  
[2] 16:15 39:22  
**Exceed**  
(1) 12:2  
**Except**  
(1) 6:25  
**Excuse**  
[2] 15:4 30:15  
**Exercise**  
[2] 29:11 29:15  
**Exercised**  
(1) 28:11  
**Exhibit**  
(1) 23:23  
**Exist**  
(1) 43:17  
**Existing**  
[2] 5:19 9:11  
**Expanded**  
(1) 34:6  
**Expert**  
(1) 38:24  
**Expedite**  
(1) 21:13  
**Expended**  
(1) 48:7  
**Experience**  
[1] 12:5  
**Expert**  
(1) 24:5  
**Expire**  
(1) 5:12  
**Expires**  
(1) 41:16  
**Explain**  
(1) 8:17  
**Explained**  
(1) 39:13  
**Exquisitely**  
(1) 12:12  
**Extend**  
(1) 16:2  
**Extraordinary**

[1] 22:15

**F**

**Face**  
[2] 13:14 22:25

**Facility**  
[2] 4:23 5:6

**Facing**  
[1] 44:24

**Fact**  
[12] 10:17 10:21 12:16 15:3 17:6  
21:19 28:24 28:15 41:17 44:25 46:  
4 48:4

**Facts**  
[5] 3:22 10:12 36:21 42:11 43:1

**Failed**  
[1] 20:16

**Fair**  
[1] 42:4

**Faith**  
[1] 20:14

**Familial**  
[2] 13:1 45:20

**Fast**  
[2] 10:3 13:1

**Fear**  
[2] 16:3 18:24

**February**  
[14] 6:8 7:22 7:24 9:1 9:8 9:11  
10:23 35:2 35:18 35:22 39:12 42:2  
42:3 45:2

**Fee**  
[1] 36:9

**Feet**  
[1] 45:15

**Fell**  
[1] 44:24

**Felt**  
[1] 39:23

**Fifth**  
[1] 47:22

**File**  
[1] 36:9

**Filed**  
[7] 3:19 4:16 11:12 11:18 22:18  
35:19 35:22

**Filing**  
[2] 7:5 36:8

**Fill**  
[2] 10:21 11:21

**Final**  
[8] 4:14 9:7 11:6 12:9 31:13 32:  
10 39:17 40:7

**Finalized**  
[1] 23:3

**Financially**  
[1] 50:16

**First**  
[18] 7:3 7:6 8:16 10:6 12:16 15:7  
23:13 23:14 28:16 30:23 33:8 33:  
10 33:11 40:2 41:20 43:2 44:13 47:  
18

**Fit**  
[1] 33:9

**Five**  
[2] 45:23 46:4

**Fix**  
[1] 20:22

**FL**  
[3] 1:24 2:3 2:6

**Flag**  
[1] 35:14

**Florida**  
[13] 1:2 23:9 25:10 27:18 28:2 28:  
7 31:8 31:9 31:9 37:16 46:12 47:  
23 50:2

**Flushed**  
[1] 34:24

**Follow**  
[1] 43:16

**Following**  
[1] 3:1

**Forces**  
[1] 5:13

**Form**  
[1] 23:12

**Formal**  
[3] 9:2 9:4 37:3

**Formalities**  
[1] 31:1

**Forth**  
[1] 14:7

**Forum**  
[1] 40:12

**Forward**

[11] 10:4 13:9 14:23 15:12 16:6  
33:22 36:13 41:9 42:23 45:3 48:7

**Forwarded**

**Foundation**  
[1] 21:11

**Founded**  
[1] 28:22

**Four**  
[1] 45:21

**Full**  
[10] 5:17 5:25 17:22 18:1 18:1 18:  
4 19:21 29:9 29:10 42:3

**Function**  
[1] 29:12

**Functioning**  
[1] 28:6

**Fundamental**  
[1] 27:24

**Funds**  
[1] 16:2

**Future**  
[1] 32:6

**G**

**Gables**  
[1] 47:3

**Gainesville**  
[17] 1:8 1:24 2:3 2:6 2:8 4:2 16:  
1 19:16 21:20 22:4 24:19 26:13 30:  
9 30:10 44:10 44:12 45:10

**Gas**  
[4] 45:13 45:16 46:8 46:19

**Given**  
[2] 24:23 42:11

**Glad**  
[2] 25:24 38:5

**GNB**  
[2] 30:10 44:12

**Governing**  
[1] 26:12

**Government**  
[4] 10:20 17:8 31:16 40:10

**Grant**  
[1] 17:18

**Grants**  
[1] 19:18

**Gravel**  
[1] 4:24

**Great**  
[1] 4:17

**Greater**  
[1] 16:5

**Grounds**  
[2] 28:4 48:13

**Grouping**  
[1] 7:17

**Guess**  
[2] 39:21 40:24

**Guidelines**  
[1] 8:8

**H**

**Half**  
[2] 6:24 37:5

**Hand**  
[1] 50:5

**Hands**  
[1] 15:18

**Hard**  
[1] 15:18

**Hardship**  
[8] 16:14 36:6 36:7 36:12 36:15  
36:21 43:21 44:5

**Harm**  
[7] 12:20 16:10 16:25 17:1 26:14  
32:9 43:5

**Harmed**  
[3] 25:8 25:23 36:3

**Hate**  
[2] 32:15 42:8

**Head**  
[1] 10:8

**Health**  
[1] 17:13

**Hear**  
[7] 21:43 21:21 22:10 28:15 35:17  
41:1 48:24

**Heard**  
[7] 13:19 28:15 33:8 33:10 33:25  
48:11 48:25

**Hearing**  
[26] 4:14 7:11 8:16 8:16 9:15 11:  
6 11:25 12:10 13:19 14:12 15:6 15:  
10 18:2 19:21 20:5 22:9 24:15 28:

21 33:22 35:18 38:3 39:24 41:11  
41:16 41:19 43:6

**Hearings**

[5] 9:3 15:13 25:17 29:13 47:21

**Held**  
[5] 19:4 19:10 20:2 27:3 31:8

**Hence**  
[4] 31:1

**Hernandez**  
[1] 27:18

**Hidden**  
[1] 5:17

**High-rise**  
[2] 42:18 47:4

**Hilliard**  
[1] 43:6

**Hillsboro**  
[1] 27:19

**Hiring**  
[1] 33:15

**Holding**  
[2] 25:17 29:13

**Holds**  
[1] 20:1

**Hole**  
[1] 18:22

**Homes**  
[1] 42:15

**Honor**  
[28] 3:6 7:4 7:25 8:21 10:1 11:22  
14:4 21:9 22:2 22:8 23:6 26:20 28:  
9 31:21 32:15 33:6 34:11 35:24 37:  
1 38:2 38:19 39:1 40:12 42:5 43:  
21 44:10 49:8 49:9

**HONORABLE**  
[1] 1:17

**House**  
[1] 35:10

**Hundreds**  
[2] 24:2 24:2

**I**

**Idea**  
[3] 5:5 15:4 15:9

**IL**  
[1] 1:22

**Ill**  
[1] 28:22

**Ill-founded**  
[1] 28:22

**Imminent**  
[1] 17:13

**Impact**  
[1] 5:7

**Imperial**  
[1] 42:15

**Important**  
[3] 9:12 48:22 49:1

**Imposed**  
[1] 24:12

**Improper**  
[1] 27:4

**Improperly**  
[1] 36:3

**Inappropriate**  
[1] 33:18

**Incompatible**  
[1] 33:17

**Incumbent**  
[2] 19:24 21:11

**Indiana**  
[1] 32:8

**Indicating**  
[1] 43:3

**Industrial**  
[19] 4:5 4:19 6:11 6:19 6:23 7:16  
7:16 15:22 19:16 20:17 20:20 20:24  
21:1 24:2 24:10 24:11 33:17 34:4  
43:11

**Industrial-zoned**  
[1] 4:1

**Inequity**  
[1] 15:18

**Inevitable**  
[4] 29:21 32:5 32:19 32:21

**Inference**  
[1] 10:12

**Inform**  
[2] 11:11 29:14

**Initiating**  
[1] 48:2

**Injunction**  
[14] 3:14 11:10 12:19 16:10 17:19  
19:18 19:19 21:7 22:13 25:16 26:  
16 27:23 48:17 49:4

**Injunctive**  
[6] 3:22 26:4 29:8 29:24 32:3 44:8

**Injury**

[2] 19:17 32:6

**Inquired**  
[1] 48:5

**Institutions**  
[1] 16:2

**Instruct**  
[1] 6:23

**Instruction**  
[1] 42:9

**Integral**  
[1] 29:15

**Intended**  
[1] 46:17

**Intent**  
[1] 10:21

**Intentionally**  
[1] 36:15

**Interest**  
[4] 12:22 16:5 16:8 45:5

**Interested**  
[1] 50:16

**Interesting**  
[1] 45:11

**Interfere**  
[2] 26:25 27:6

**Interfered**  
[1] 29:17

**Interfering**  
[1] 28:5

**Interpretation**  
[2] 8:11 31:19

**Interrupt**  
[2] 12:25 17:15

**Intervention**  
[1] 5:12

**Invalid**  
[3] 27:14 29:25 30:16

**Invasion**  
[1] 32:7

**Invested**  
[1] 5:19

**Investment**  
[2] 18:13 18:14

**Investments**  
[2] 30:10 44:13

**Invoked**  
[1] 27:15

**Invokes**  
[1] 22:14

**Involved**  
[1] 37:24

**Involves**  
[1] 47:3

**Involving**  
[1] 29:12

**Ironically**  
[2] 4:14 12:11

**Irreparable**  
[6] 12:20 16:10 17:1 19:17 40:8  
43:5

**Issue**  
[8] 4:12 17:23 20:12 27:17 27:23  
36:22 39:2 45:17

**Issued**  
[5] 7:15 11:12 25:16 39:19 46:23

**Items**  
[2] 9:15 24:11

**J**

**January**  
[1] 5:24

**Job**  
[2] 12:12 24:22

**JOHNS**  
[3] 1:23 50:8 50:20

**Judge**  
[1] 40:1

**Judgment**  
[2] 3:21 16:25

**Judicial**  
[6] 1:1 15:17 27:9 31:15 41:3 41:8

**Judiciary**  
[1] 31:18

**Jump**  
[1] 36:23

**Jumping**  
[3] 16:7 25:9 25:11

**Juncture**  
[1] 38:4

**June**

[1] 10:18  
**Jurisdiction**  
 [1] 27:14  
**Justice**  
 [1] 27:21  
**Justify**  
 [1] 29:12

**K**

[3] 22:11 42:20 47:13  
**Killed**  
 [1] 39:9  
**Kind**  
 [1] 39:18  
**Knock**  
 [1] 12:17  
**Knowing**  
 [1] 41:15  
**Known**  
 [2] 31:5 33:6

**L**

**Labor**  
 [1] 25:17  
**Laid**  
 [2] 3:22 42:11  
**Land**  
 [7] 4:5 4:18 4:19 5:19 45:13 46:15 47:17  
**Language**  
 [1] 37:2  
**Largo**  
 [1] 42:14  
**Largo's**  
 [1] 47:13  
**Larry**  
 [2] 3:8 12:24  
**Last**  
 [3] 41:18 43:8 44:19  
**Late**  
 [1] 28:15  
**Latter**  
 [1] 11:23  
**Law**  
 [1] 2:5 5:11 22:13 23:2 23:16 24:13 27:7 38:9 42:23 45:13 45:20  
**Laws**  
 [1] 23:9  
**Lawsuit**  
 [1] 31:21  
**Lay**  
 [1] 10:13 21:11 38:17  
**Least**  
 [1] 17:19  
**Lecture**  
 [1] 38:8  
**Legal**  
 [1] 12:20 16:22 18:4 18:20 19:22 21:6 22:17 33:4 34:17 36:22 46:21  
**Legions**  
 [1] 25:2  
**Legislative**  
 [18] 10:21 15:15 26:8 27:6 27:10 28:5 28:11 28:25 29:12 29:14 29:16 30:5 31:14 31:25 32:20 40:12 41:1 41:13  
**Legislature**  
 [6] 24:16 24:21 25:17 31:13 31:17 37:14  
**Lending**  
 [1] 16:1  
**Lengthy**  
 [2] 14:19 38:8  
**Letter**  
 [1] 45:25  
**Lie**  
 [1] 47:21  
**Lies**  
 [3] 22:16  
**Light**  
 [1] 16:12  
**Likelihood**  
 [4] 12:19 12:21 17:2 20:11  
**Likely**  
 [4] 18:23 19:2 39:4 44:1  
**Liken**  
 [1] 32:16  
**Likewise**  
 [1] 47:22  
**Limits**  
 [1] 7:13  
**Line**  
 [1] 27:8  
**List**

[4] 23:24 33:16 34:6 47:14  
**Listed**  
 [1] 11:2  
**Litigating**  
 [1] 16:16  
**Lobbied**  
 [1] 41:24  
**Located**  
 [2] 5:6 44:16  
**Location**  
 [1] 46:20  
**Locked**  
 [1] 38:11  
**Logic**  
 [1] 43:16  
**Look**  
 [9] 6:23 16:11 34:20 35:2 35:25 37:25 40:4 41:7 49:1  
**Looked**  
 [3] 20:18 20:21 33:13  
**Looking**  
 [1] 19:16  
**Looks**  
 [1] 18:7  
**Loses**  
 [3] 16:12 16:19 18:12

**M**

**Magic**  
 [1] 35:3  
**Mails**  
 [1] 6:7  
**Main**  
 [3] 1:24 4:12 17:4  
**Manager**  
 [1] 43:7  
**Mandamus**  
 [2] 39:22 39:25  
**Manner**  
 [2] 29:19 30:14  
**Manufacturing**  
 [1] 7:18  
**March**  
 [4] 8:1 10:4 10:25 15:5  
**Marion**  
 [4] 2:5 2:7 10:7 22:3  
**Market**  
 [1] 16:1  
**Material**  
 [2] 4:22 5:3  
**Materials**  
 [2] 4:24 6:14  
**Matter**  
 [6] 1:14 10:1 10:3 25:23 33:13 33:14  
**Matters**  
 [3] 4:13 12:4 25:18  
**Mayor**  
 [1] 14:21  
**Mayor's**  
 [2] 38:21 38:25  
**Mean**  
 [2] 8:7 13:13  
**Means**  
 [1] 29:24  
**Meanwhile**  
 [2] 44:21 45:21  
**Measures**  
 [1] 31:18  
**Median**  
 [1] 15:15  
**Meet**  
 [6] 26:16 37:14 37:16 37:18 37:21 44:2  
**Meeting**  
 [4] 6:5 6:8 10:25 25:25  
**Meetings**  
 [2] 9:3 47:20  
**Member**  
 [1] 12:3  
**Members**  
 [1] 11:24  
**Mention**  
 [1] 3:8  
**Mentioned**  
 [2] 31:10 38:6  
**Mere**  
 [1] 28:2  
**Merit**  
 [2] 13:20 17:3  
**Merits**  
 [6] 11:9 12:21 20:11 41:10 42:10 45:6  
**Met**

[2] 11:25 44:17  
**Miami**  
 [1] 46:14  
**Might**  
 [7] 18:7 21:13 34:7 42:6 46:13 47:7 49:6  
**Mind**  
 [1] 39:4  
**Minds**  
 [1] 47:9  
**Minimum**  
 [1] 12:2  
**Minute**  
 [3] 25:12 37:11 37:15  
**Miracle**  
 [1] 44:4  
**Misused**  
 [1] 41:13  
**Mitigate**  
 [2] 19:25 43:19  
**Mixing**  
 [2] 4:2 4:25  
**Monetary**  
 [1] 16:24  
**Money**  
 [3] 5:20 38:17 48:7  
**Months**  
 [2] 7:21 9:6  
**Moratorium**  
 [67] 3:15 3:16 3:17 6:10 6:16 6:19 7:2 7:7 7:12 7:14 7:19 8:9 8:12 9:18 9:24 10:5 10:10 10:13 12:13 12:17 13:3 13:11 14:15 15:4 15:7 15:16 15:23 16:15 16:16 17:6 17:7 20:17 24:18 18:19 19:4 19:10 19:21 20:2 20:16 22:20 23:10 23:21 23:25 24:7 24:12 26:7 28:14 28:22 30:2 30:12 30:13 30:16 30:24 33:1 33:23 35:15 36:5 41:19 43:13 43:15 44:22 44:25 45:4 46:5 48:3 48:15 49:5  
**Moratoriums**  
 [1] 40:22  
**Moreover**  
 [1] 38:19  
**Motion**  
 [15] 3:4 3:13 11:10 12:5 14:24 22:18 22:25 28:12 28:13 30:18 30:20 31:22 32:23 37:7 48:17  
**Motivated**  
 [2] 15:21 30:21  
**Motivation**  
 [1] 48:20  
**Move**  
 [1] 39:25  
**Moved**  
 [1] 42:23  
**Municipal**  
 [1] 27:11  
**Must**  
 [3] 18:9 20:21 46:11

[6] 5:17 6:24 9:16 9:20 31:23 38:13  
**Notice**  
 [11] 9:16 10:23 14:9 38:11 39:10 39:14 40:10 44:24 44:25 45:1 45:3  
**Number**  
 [3] 10:15 11:5 11:7  
**Nut**  
 [1] 15:11

**O**

**OATH**  
 [1] 50:1  
**Objection**  
 [1] 27:12  
**Objective**  
 [1] 12:4  
**Obtain**  
 [1] 4:11  
**Obverse**  
 [1] 40:4  
**Obvious**  
 [1] 41:4  
**Occur**  
 [2] 20:6 32:25  
**Occurred**  
 [1] 7:4  
**Ocean's**  
 [1] 10:18  
**OFFICES**  
 [1] 2:5  
**Official**  
 [8] 3:10 37:9 39:3 39:14 39:15 39:17 47:8 50:5  
**Offing**  
 [1] 48:3  
**Often**  
 [1] 16:21  
**Old**  
 [1] 42:23  
**One**  
 [22] 6:19 7:16 10:9 23:6 23:13 24:10 24:11 25:10 25:12 29:13 30:18 31:10 32:8 33:9 34:9 35:24 36:1 38:4 41:22 41:22 43:8 46:13  
**Open**  
 [1] 3:2  
**Opening**  
 [8] 2:9 2:10 2:11 3:5 21:22 22:1 23:10 45:7  
**Opined**  
 [1] 11:25  
**Opining**  
 [1] 14:22  
**Opinion**  
 [3] 35:13  
**Opponents**  
 [2] 6:9 9:17  
**Opportunity**  
 [4] 9:13 13:18 18:12 45:5  
**Opposing**  
 [1] 6:20  
**Opposition**  
 [2] 6:6 10:2  
**Option**  
 [2] 3:25 45:25  
**Optional**  
 [1] 35:21  
**Orange**  
 [1] 47:24  
**Ordinance**  
 [49] 6:25 7:20 8:3 10:5 12:13 15:10 20:23 22:20 22:21 23:2 23:7 23:12 23:16 23:18 23:19 23:23 25:1 25:2 25:5 25:6 25:7 25:8 26:1 26:1 27:13 28:14 30:17 30:24 30:25 31:1 31:2 33:11 33:23 34:20 35:25 36:3 36:4 36:14 36:23 36:24 37:8 38:16 40:14 43:18 43:23 44:7 45:15 46:16 46:18  
**Ordinances**  
 [8] 23:10 23:10 23:11 26:25 27:2 27:4 27:13 30:2  
**Orleans**  
 [4] 26:22 26:23 26:24 27:25  
**Otherwise**  
 [1] 47:15  
**Ought**  
 [3] 33:21 33:22 34:17  
**Ourselves**  
 [1] 43:17  
**Outlaw**  
 [1] 46:8  
**Outlawing**  
 [1] 47:15  
**Outside**  
 [1] 26:9

**N**

**NATH**  
 [1] 1:17  
**Near**  
 [3] 45:13 45:19 46:6  
**Nearly**  
 [1] 21:4  
**Necessary**  
 [2] 4:6 14:24  
**Need**  
 [6] 4:8 21:12 22:9 30:6 35:3 42:9  
**Needed**  
 [2] 14:8 20:22  
**Needs**  
 [1] 35:7  
**Neighborhood**  
 [1] 32:14  
**Net**  
 [1] 23:21  
**Never**  
 [2] 17:14 38:17  
**New**  
 [6] 6:4 26:22 26:22 26:24 27:25 45:18  
**Night**  
 [4] 7:11 8:1 9:11 15:9  
**Nobody**  
 [4] 14:22 14:23 25:8 43:11  
**None**  
 [1] 26:10  
**North**  
 [1] 1:24  
**Notes**  
 [1] 50:14  
**Nothing**

[1] 1:17  
**Near**  
 [3] 45:13 45:19 46:6  
**Nearly**  
 [1] 21:4  
**Necessary**  
 [2] 4:6 14:24  
**Need**  
 [6] 4:8 21:12 22:9 30:6 35:3 42:9  
**Needed**  
 [2] 14:8 20:22  
**Needs**  
 [1] 35:7  
**Neighborhood**  
 [1] 32:14  
**Net**  
 [1] 23:21  
**Never**  
 [2] 17:14 38:17  
**New**  
 [6] 6:4 26:22 26:22 26:24 27:25 45:18  
**Night**  
 [4] 7:11 8:1 9:11 15:9  
**Nobody**  
 [4] 14:22 14:23 25:8 43:11  
**None**  
 [1] 26:10  
**North**  
 [1] 1:24  
**Notes**  
 [1] 50:14  
**Nothing**

**Overall**  
[1] 49:2  
**Overnight**  
[1] 9:5  
**Own**  
[3] 8:7 8:10 18:6  
**Owner**  
[2] 46:15 47:7  
**Owms**  
[3] 5:2 18:20 18:21

**P**

**P.M.**  
[1] 1:15  
**P.O.**  
[2] 2:2 2:6  
**Page**  
[2] 2:9 23:14  
**Painful**  
[1] 12:12  
**Paragraph**  
[1] 29:10  
**Parallels**  
[1] 46:11  
**Paraphrase**  
[1] 12:3  
**Parol**  
[1] 46:22  
**Parsing**  
[1] 37:2  
**Part**  
[4] 13:17 14:10 19:17 29:15  
**Participated**  
[1] 5:25  
**Particular**  
[13] 6:11 14:22 30:13 32:25 33:25  
34:5 34:8 35:6 35:10 38:25 39:25  
42:21 46:20  
**Particularly**  
[2] 17:10 38:1  
**Parties**  
[1] 50:16  
**Pass**  
[10] 3:16 7:6 18:4 27:8 28:3 28:8  
36:24 40:3 40:14 40:22  
**Passage**  
[1] 43:23  
[1] 43:23  
**Passed**  
[14] 7:3 10:6 14:16 17:22 25:10  
25:11 27:13 28:3 30:18 36:23 40:1  
40:13 43:18 46:5  
**Passing**  
[1] 37:20  
**Past**  
[3] 7:1 37:20 43:2  
**Patently**  
[2] 39:5 41:4  
**Path**  
[1] 44:11  
**Patrice**  
[2] 2:3 3:6  
**Paving**  
[1] 4:25  
**Peace's**  
[1] 27:21  
**People**  
[3] 34:7 45:17 48:23  
**Perhaps**  
[1] 42:6  
**Period**  
[2] 20:3 46:15  
**Permit**  
[18] 4:11 11:14 11:20 12:10 13:7  
13:13 14:9 15:17 17:24 20:4 20:5  
26:2 41:9 45:23 45:24 46:2 47:5  
47:11  
**Permits**  
[7] 5:16 7:14 16:20 21:3 30:4 41:  
14 46:23  
**Permitted**  
[2] 4:4 47:14  
**Permitting**  
[1] 16:3  
**Person**  
[1] 33:2  
**Perspective**  
[1] 42:19  
**Persuasive**  
[1] 36:21  
**Petition**  
[1] 39:22  
**Petitions**  
[1] 43:10  
**Phase**  
[1] 16:3

**Pick**  
[1] 14:21  
**Picture**  
[1] 49:2  
**Piece**  
[1] 16:22  
**Pipeline**  
[8] 8:5 8:6 8:19 10:9 17:21 33:3  
34:2 43:9  
**Place**  
[1] 18:24 19:8 23:15 24:19 25:22  
27:2 28:16 29:22 39:15 39:16 39:18  
**Placed**  
[1] 23:24  
**Plaintiff**  
[10] 1:6 2:10 3:3 3:5 22:16 22:18  
26:14 26:15 32:18 36:19  
**Plaintiff's**  
[2] 22:23 23:4  
**Plaintiffs**  
[2] 28:13 32:5  
**Plan**  
[20] 4:8 4:21 6:1 6:2 6:4 6:12 8:  
17 9:7 9:18 11:2 11:15 11:16 12:  
11 14:2 14:2 16:23 44:14 44:15 44:  
17 47:21  
**Planned**  
[1] 5:18  
**Planner**  
[1] 10:8  
**Planning**  
[1] 43:6  
**Plans**  
[1] 40:15  
**Plant**  
[13] 4:3 4:3 6:20 11:5 11:14 11:  
20 18:18 18:21 18:25 19:5 19:7 20:  
20 21:4  
**Platform**  
[2] 39:5 45:19  
**Pleadings**  
[1] 14:9  
**Pled**  
[1] 29:6  
**Point**  
[11] 4:7 5:9 5:23 21:8 22:12 26:  
20 33:3 33:12 38:6 47:23 49:3  
**Pointed**  
[1] 25:24  
**Police**  
[2] 17:9 20:13  
**Policy**  
[1] 23:2  
**Political**  
[3] 5:13 47:3 48:20  
**Politically**  
[2] 15:21 38:21  
**Politicians**  
[1] 38:23  
**Politics**  
[1] 38:23  
**Portable**  
[2] 18:17 19:7  
**Portion**  
[1] 11:23  
**Posed**  
[1] 26:4  
**Position**  
[1] 34:18  
**Possibility**  
[1] 32:5  
**Possibly**  
[1] 10:9  
**Post**  
[1] 47:4  
**Potential**  
[1] 44:5  
**Power**  
[1] 31:18  
**Powers**  
[10] 17:9 20:13 22:14 24:23 25:19  
26:9 28:6 28:11 31:7 41:2  
**Precluded**  
[3] 38:13 38:14 41:12  
**Predictable**  
[1] 32:21  
**Pregnant**  
[1] 3:24  
**Prejudged**  
[1] 41:11  
**Prejudgment**  
[1] 48:24  
**Preliminary**  
[5] 22:13 32:12 40:6 40:6 47:19  
**Premature**

[5] 23:1 30:1 31:22 31:22 49:4  
**Prepare**  
[1] 11:8  
**Prerogative**  
[1] 26:8  
**Present**  
[4] 2:1 9:21 22:5 36:10  
**President**  
[1] 3:9  
**Prevail**  
[4] 17:5 42:10 47:1 47:12  
**Prevalled**  
[1] 46:9  
**Prevent**  
[3] 30:4 39:25 43:5  
**Prevented**  
[1] 22:20  
**Previously**  
[1] 42:12  
**Principle**  
[3] 25:20 27:24 28:1  
**Private**  
[2] 6:8 27:16  
**Problem**  
[6] 7:21 8:4 14:6 14:15 15:11 40:  
24

**Problems**  
[2] 32:24 33:4  
**Procedure**  
[1] 30:14  
**Procedures**  
[1] 8:7  
**Proceed**  
[3] 15:1 15:20 36:13  
**Proceeded**  
[1] 46:7  
**Proceeding**  
[1] 22:11  
**Proceedings**  
[1] 1:13 2:9 3:1 11:18 14:19 49:  
11 50:4 50:13  
**Process**  
[14] 8:9 9:3 13:17 13:21 15:13 20:  
4 24:15 24:16 29:16 31:4 31:14 37:  
19 41:13 44:2  
**Product**  
[1] 31:14  
**Professional**  
[1] 33:14  
**Progress**  
[5] 35:14 38:9 39:11 39:16 45:7  
**Prohibiting**  
[2] 42:17 46:16  
**Prohibition**  
[1] 45:19  
**Project**  
[29] 3:11 3:12 3:16 3:17 4:8 5:23  
5:25 6:2 6:5 6:12 8:4 9:10 10:8  
10:14 12:1 14:23 15:2 15:21 15:24  
16:3 16:6 16:17 17:6 17:21 20:2  
41:3 41:10 43:9 45:6  
**Prong**  
[1] 46:25  
**Proof**  
[1] 36:3  
**Proper**  
[3] 11:10 30:3 30:12  
**Properties**  
[1] 43:10  
**Property**  
[22] 5:6 5:11 16:13 18:6 18:20 18:  
21 18:24 19:3 19:13 19:20 19:23  
20:15 20:24 21:1 22:24 29:6 29:18  
30:19 37:24 44:16 45:24 46:7  
**Proposed**  
[1] 7:20  
**Proposition**  
[1] 30:11  
**Protecting**  
[1] 27:15  
**Provide**  
[1] 31:11  
**Provided**  
[2] 6:7 23:6  
**Proving**  
[1] 16:9  
**Provision**  
[2] 16:15 44:5  
**Public**  
[7] 6:1 12:22 16:5 16:8 17:13 29:  
13 31:9  
**Publication**  
[1] 26:3  
**Pull**  
[1] 35:8  
**Purchase**

[2] 3:25 16:13  
**Purchased**  
[2] 18:17 21:4  
**Purposes**  
[1] 18:11  
**Pursue**  
[2] 5:15 15:14  
**Pursued**  
[2] 21:3 41:14  
**Pursuing**  
[2] 14:5 40:10  
**Put**  
[3] 18:24 19:8 45:2

**Q**

**Quasi**  
[3] 15:17 41:3 41:8  
**Questioned**  
[1] 43:7  
**Questioning**  
[1] 10:7  
**Quibbling**  
[1] 8:14  
**Quite**  
[1] 45:20

**R**

**Race**  
[2] 38:21 38:25  
**Radson**  
[14] 2:5 2:7 10:7 22:2 22:3 24:9  
25:14 33:6 33:8 34:11 34:14 34:25  
35:11 49:9  
**Rail**  
[1] 5:4  
[1] 5:4  
**Raised**  
[1] 27:17  
**Ralph**  
[2] 31:1 37:13  
**Ramifications**  
[1] 48:21  
**Rather**  
[4] 11:11 16:5 30:16 38:7  
**Raw**  
[3] 4:22 4:24 5:3  
**Reach**  
[1] 42:19  
**Reached**  
[1] 5:23  
**Reaction**  
[1] 39:2  
**Read**  
[2] 6:14 29:9  
**Reading**  
[25] 7:3 7:7 7:10 10:6 12:13 13:3  
15:7 23:5 23:7 23:14 23:15 26:1  
28:16 28:18 32:23 33:8 33:11 34:  
24 38:16 38:18 40:2 42:7 43:2 43:  
22 44:7  
**Readings**  
[3] 23:12 23:13 31:2  
**Real**  
[4] 15:25 16:22 44:3 45:11  
**Realized**  
[1] 30:20  
**Really**  
[6] 15:16 17:12 41:6 43:12 48:11  
48:25  
**Reason**  
[2] 35:10 47:7  
**Rebut**  
[2] 11:2 42:13  
**Received**  
[4] 4:21 24:5 45:25 47:25  
**Recently**  
[1] 25:15  
**Recognized**  
[2] 30:3 30:12  
**Recommend**  
[2] 11:17 13:24  
**Recommendation**  
[2] 9:23 12:7  
**Recommending**  
[1] 11:13  
**Record**  
[5] 21:10 41:4 41:24 43:14 50:14  
**Records**  
[1] 40:15  
**Red**  
[1] 35:14  
[1] 4:20  
**Redesignated**  
[1] 4:20  
**Redirected**  
[1] 31:19  
**Redistrict**

[1] 27:21  
**Reduced**  
 [1] 45:14  
**Reducing**  
 [1] 5:7  
**Refer**  
 [1] 9:22  
 [1] 43:16  
**Refers**  
 [1] 47:17  
**Relaid**  
 [1] 50:15  
**Relative**  
 [1] 50:15  
**Reliance**  
 [1] 48:18  
**Relieved**  
 [3] 5:18 9:11 20:14  
**Relief**  
 [9] 3:22 28:5 29:8 29:24 32:4 38:1  
 14 38:15 41:15 44:8  
**Relies**  
 [1] 46:12  
**Rely**  
 [4] 44:4 44:7 46:1 47:19  
**Remedies**  
 [2] 14:15 15:14  
**Remedy**  
 [6] 12:20 16:23 16:25 22:15 36:1  
 43:15  
**Remote**  
 [1] 32:16  
**Repeated**  
 [2] 40:11 46:1  
**Repeatedly**  
 [1] 14:25  
**Replete**  
 [1] 38:19  
**Report**  
 [5] 10:16 11:1 11:4 11:13 50:13  
**Reported**  
 [2] 1:22 50:4  
**Reporter**  
 [3] 50:8 50:12 50:20  
**REPORTER'S**  
 [1] 50:11  
**REPORTERS**  
 [3] 1:23 50:9 50:21  
**Representing**  
 [2] 3:7 22:3  
**Reptile**  
 [1] 39:9  
**Request**  
 [1] 14:25  
**Requesting**  
 [1] 9:18  
**Require**  
 [1] 23:11  
**Required**  
 [3] 8:14 12:2 24:15  
**Requirements**  
 [2] 44:18 45:15  
**Requiring**  
 [1] 4:10  
**Rescinded**  
 [2] 47:5 47:11  
**Research**  
 [1] 34:18  
**Researching**  
 [1] 35:12  
**Resolution**  
 [4] 28:3 30:22 37:2 40:13  
**Resolve**  
 [1] 36:16  
**Respond**  
 [1] 36:20  
**Restoring**  
 [1] 45:19  
**Retroactive**  
 [2] 14:17 33:2  
**Retroactively**  
 [2] 8:23 8:24  
**Reversal**  
 [1] 5:13  
**Reverse**  
 [1] 38:18  
**Reversed**  
 [2] 25:15 25:18  
**Review**  
 [9] 4:8 6:1 8:16 9:3 9:6 9:13 31:15  
 32:12 36:15  
**Reviewed**  
 [1] 32:11  
**Revisit**

[1] 11:4  
**Rezone**  
 [2] 21:1 46:7  
**Rezoned**  
 [2] 20:24 29:19  
**Rezoning**  
 [5] 4:5 20:15 29:6 29:20 29:21  
**Rights**  
 [6] 23:4 26:25 27:16 32:7 37:24  
 38:11  
**Ripped**  
 [1] 16:4  
**Rolled**  
 [1] 7:22  
**Room**  
 [1] 42:25  
**Rule**  
 [2] 17:19 39:20  
**Rules**  
 [1] 19:21  
**Ruling**  
 [2] 39:19 39:20  
**Rumored**  
 [1] 32:14  
**Run**  
 [1] 26:19  
**Rush**  
 [1] 30:4

**S**

**Safety**  
 [1] 17:14  
**Sakolsky**  
 [1] 47:2  
**Save**  
 [1] 43:4  
**Schedule**  
 [1] 7:2  
**Scheduled**  
 [7] 4:13 7:10 12:9 12:14 13:16 23:1  
 7 28:18  
**School**  
 [2] 45:14 45:20  
**Seal**  
 [1] 50:5  
**Second**  
 [2] 7:10 12:13 13:2 17:16 23:5  
 23:7 23:15 24:14 25:25 28:19 29:9  
 29:10 32:23 34:24 37:22 38:16 38:18  
 42:7 42:16 43:22 44:7  
**Secretary**  
 [1] 43:23  
**Section**  
 [3] 34:21 35:25 36:7  
**See**  
 [4] 14:18 15:19 20:8 42:6  
**Seek**  
 [1] 29:24  
**Seeking**  
 [3] 13:10 14:14 32:11  
**Seeks**  
 [1] 4:2  
**Select**  
 [1] 34:16  
**Selecting**  
 [1] 24:3  
**Seller**  
 [2] 4:21 5:10  
**Senate**  
 [3] 25:10 31:8 31:9  
**Senior**  
 [1] 3:10  
**Separate**  
 [1] 14:12  
**Separates**  
 [1] 27:9  
**Separation**  
 [2] 25:19 41:2  
**Set**  
 [2] 37:6 40:16  
**Setting**  
 [1] 9:9  
**Settled**  
 [1] 29:11  
**Several**  
 [2] 25:3 46:12  
**Shape**  
 [1] 18:7  
**Sheep**  
 [1] 32:14  
**Shopping**  
 [2] 44:16 44:22  
**Show**  
 [4] 4:18 5:21 12:19 22:17

**Showing**  
 [1] 26:4  
**Shown**  
 [1] 23:8  
**Shows**  
 [2] 23:12 23:13  
**Side**  
 [2] 48:12 48:25  
**Similar**  
 [4] 29:2 42:18 44:18 46:17  
**Similarly**  
 [2] 45:1 47:22  
**Simply**  
 [2] 31:22 32:4  
**Sink**  
 [1] 13:16  
**Sit**  
 [1] 31:25  
**Site**  
 [9] 4:8 4:21 6:2 6:4 14:2 14:2 16:1  
 23 44:15 44:17  
**Sitting**  
 [3] 18:25 19:7 21:6  
**Situation**  
 [2] 24:21 47:25  
**Six**  
 [1] 7:20  
**Skating**  
 [1] 44:15  
**SKY**  
 [1] 35:9  
**Smith**  
 [1] 37:13  
**Sneak**  
 [1] 35:6  
**so.2d**  
 [1] 42:15  
**Sometimes**  
 [2] 39:24 49:23  
**Somewhat**  
 [2] 32:13 40:9  
**Sorry**  
 [1] 15:5  
**Sounds**  
 [1] 8:18  
**Spacing**  
 [1] 45:14  
**Sparingly**  
 [1] 22:15  
**Speaking**  
 [1] 6:3  
**Spearheaded**  
 [1] 39:1  
**Special**  
 [12] 4:11 10:24 11:14 11:20 12:10  
 13:6 13:13 13:24 14:8 20:3 26:2  
 41:9  
**Specifically**  
 [2] 10:14 48:5  
**Specified**  
 [1] 7:17  
**Speculating**  
 [1] 19:14  
**Speculative**  
 [1] 48:15  
**Spite**  
 [1] 36:14  
**Springs**  
 [1] 46:14  
**Staff**  
 [5] 6:23 11:12 14:7 20:20 47:20  
**Stake**  
 [2] 16:5 42:8  
**Stand**  
 [3] 15:23 21:9 39:8  
**Standard**  
 [1] 11:25  
**Standards**  
 [1] 12:2  
**Standpoint**  
 [3] 33:18 34:18 41:8  
**Stands**  
 [1] 41:11  
**Start**  
 [1] 35:15  
**Started**  
 [1] 18:22  
**State**  
 [5] 21:5 23:9 24:24 43:24 50:2  
**Statement**  
 [5] 2:10 2:11 3:5 22:1 45:7  
**Statements**  
 [1] 21:22

**States**  
 [4] 26:21 27:3 27:7 27:25  
**Station**  
 [3] 45:13 45:16 46:19  
**Stations**  
 [1] 46:8  
**Stayed**  
 [1] 16:18  
**Stenographically**  
 [4] 50:4 50:13  
**Stenography**  
 [1] 50:14  
**Step**  
 [2] 14:23 24:19  
**STEPHENSON**  
 [3] 1:23 50:8 50:20  
**Stepped**  
 [1] 43:4  
**Still**  
 [4] 17:23 18:15 19:13 34:7  
**Stone**  
 [1] 40:16  
**Stop**  
 [9] 3:14 6:11 15:21 22:11 22:12  
 38:2 41:8 43:4  
**Street**  
 [1] 1:24  
**Strong**  
 [1] 10:11  
**Struck**  
 [1] 30:13  
**Study**  
 [3] 9:20 11:5 20:20  
**Subcommittee**  
 [1] 9:22  
**Subdivide**  
 [1] 43:10  
**Subject**  
 [3] 3:12 31:14  
**Submit**  
 [1] 26:16  
**Submitted**  
 [1] 9:7  
**Subsequent**  
 [2] 7:5 9:15  
**Substance**  
 [1] 7:13  
**Substantial**  
 [4] 12:21 17:2 20:10 45:5  
**Success**  
 [4] 12:21 17:3 20:11 42:8  
**Suddenly**  
 [2] 10:25 46:24  
**Suffering**  
 [1] 36:5  
**Suggest**  
 [1] 20:1  
**Suit**  
 [1] 30:1  
**Suite**  
 [1] 1:24  
**Summer**  
 [1] 5:16  
**Super**  
 [1] 32:1  
**Supersede**  
 [1] 24:18  
**Support**  
 [1] 12:1  
**Supports**  
 [1] 35:15  
**Suppose**  
 [1] 14:11  
**Supreme**  
 [15] 3:24 25:15 25:18 26:21 27:3  
 27:8 27:22 27:25 28:7 31:8 31:12  
 31:16 37:16 46:12 46:21  
**Surrounding**  
 [1] 5:7  
**Swim**  
 [1] 13:16  
**Synopsis**  
 [1] 3:19

**T**

**Tab**  
 [7] 23:5 26:21 27:18 29:2 30:8 30:18  
 36:1  
**Tallahassee**  
 [1] 37:13  
**Target**  
 [3] 14:22 15:16 17:6  
**Targeted**