



# MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229  
Box 46

071004

**TO:** Mayor and City Commissioners **DATE:** March 10, 2008

**FROM:** City Attorney

**SUBJECT:** *Ralph Dunne vs. Board of Adjustment, City of Gainesville (Banana Planet)*  
Circuit Court Case No. 01-2005-CA-003978  
District Court of Appeal Case No. 1D0817

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Recommendation: The City Commission 1) approve the terms of the Stipulation that resolves all issues concerning the nonconforming use of property located at 3 NW 24<sup>th</sup> Street, Gainesville, Florida; and 2) authorize the City Attorney to settle the claim on behalf of the City.

In 2005, Banana Planet, Inc. owned a dwelling that had been used for multi-family purposes in a single family zone. The use as multi-family was non-conforming. Under the City Code, if a non-conforming use is not used for nine months the status is lost and the use must be discontinued. City staff had issued an administrative decision that the non-conforming use lapsed when the owners, Banana Planet, did not use the premises as a multi-family dwelling in excess of nine months.

Banana Planet filed an appeal to the Board of Adjustment, along with an alternate petition seeking reestablishment of the non-conforming use. The Board voted to overturn City staff's decision that the non-conforming use had been lost. The testimony before the Board established that Banana Planet continuously intended to maintain the legal non-conforming use and renovations made during that time (during which there were no tenants) were in furtherance of maintaining the legal non-conforming use.

Neighbors asked the City Commission to review the Board's decision. Because the decision had been delegated to the Board, the City Commission was unable to do so. The Board declined to rehear the case.

Ralph Dunne, a neighboring property owner, filed a petition for writ of certiorari to the Circuit Court, challenging the Board's decision. After briefs and oral argument by the parties, on November 26, 2007, the Circuit Court entered an order granting the petition. The Court found that Banana Planet's intent was irrelevant and that the only relevant issue was whether the property's use had been discontinued for a period in excess of nine months. The court found that:


The clear language of the ordinance states that a non-conforming use has been abandoned after a period of non-use in excess of nine months. The clear language of the ordinance does not support any exceptions. In finding one [the intent of the property owner], the Board of Adjustment departed from the essential requirements of law.

The effect of the Court's order is to disallow the use of the dwelling as a multi-family dwelling unless the property owner is able to reestablish the non-conforming use through petition to the Board of Adjustment.

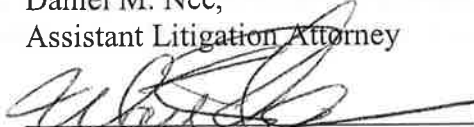
While the litigation ensued, Banana Planet, Inc. transferred ownership of the property to Luis and Carmen Manes. Upon being notified of the Circuit Court's decision, the Maneses sought to intervene in the lawsuit, and appeal to the District Court of Appeal. The Motion to Intervene and Notice of Appeal are both pending before the Court.

Presently, Mr. Dunne, with the apparent concurrence of the University Park Neighborhood Association as indicated by Mr. Jimmy Harnsberger, has reached an agreement in principal with the Maneses. The parties suggest that the Maneses, as owners of the property, will abandon any claim of a legal nonconforming use of the property as a two-family or multifamily dwelling as of August 16, 2008, if the City will allow until such time for the property owners to come into compliance with the RSF-2 zoning regulations. After August 16, 2008, the property will be limited to residence by one single family as defined by City Code of Ordinances sections 30-57 and 30-23. If the Stipulation is approved by all parties, all pending litigation on this subject will be dismissed.

Prepared by:

  
\_\_\_\_\_  
Daniel M. Nee,  
Assistant Litigation Attorney

Submitted by:

  
\_\_\_\_\_  
Marion J. Radson,  
City Attorney

## STIPULATION

This Stipulation is entered into by the CITY OF GAINESVILLE, FLORIDA (“City”), and RALPH DUNNE (“Dunne”) and LUIS F. MANES and CARMEN R. MANES (“Maneses”), in resolution of all claims and issues raised in Case No. 01-2005-CA-003978 in the Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, as well as Case No. 1D08-17 filed in the District Court of Appeal for the First District of the State of Florida.

WHEREAS, the property that is the subject of this Stipulation and the aforementioned litigation is located at 3 NW 24<sup>th</sup> Street in Gainesville, Florida (parcel no. 06447-043-000) and zoned RSF-2.

WHEREAS, per City Code of Ordinances section 30-57, occupancy of a dwelling within the RSF-2 zoning district by more than one family is prohibited. “Family” is defined by City Code of Ordinances section 30-23 as, “one natural person, or a group of two or more natural persons, living together and interrelated by bonds of blood, marriage or legal adoption, plus no more than two additional, unrelated, natural persons, occupying the whole or part of a dwelling unit as a separate housekeeping unit.”

WHEREAS, on May 4, 2005, the City Department of Community Development, Planning Division, issued an administrative decision finding that the subject property was previously used as a two-family dwelling, but, “since the property was not used for a period of more than nine months, it lost its legal, non-conforming status. Current use of the property as a two-family dwelling is, therefore, in violation of current city ordinances...”

WHEREAS, on May 24, 2005, Banana Planet, Inc., the then-owner of the subject property, filed Petition No. 10APP-05 BA before the City of Gainesville Board of Adjustment

seeking appeal of the May 4, 2005 administrative decision. The petition was scheduled to be heard at the July 7, 2005 meeting of the Board of Adjustment.

WHEREAS, after conclusion of the hearing on Petition No. 10APP-05 BA at the August 4, 2005 meeting of the City of Gainesville Board of Adjustment, the Board, per written notice dated August 9, 2005, granted Banana Planet, Inc.'s appeal, and, "reverse[d] staff decision and establishe[d] the subject property as a two-family, non-conforming use."

WHEREAS, on October 3, 2005, Ralph Dunne, a neighbor of the subject property and affected party in the action before the City of Gainesville Board of Adjustment, filed a Petition for Writ of Certiorari in Case No. 01-2005-CA-003978 before the Circuit Court of Florida's Eighth Judicial Circuit, seeking review of the decision of the City of Gainesville Board of Adjustment.

WHEREAS, on November 29, 2007, the Circuit Court of Florida's Eighth Judicial Circuit entered its Order Granting Petition for Writ of Certiorari in Case No. 01-2005-CA-003978, and ordered that, "[t]he decision of the Board of Adjustment granting the appeal of Banana Planet is hereby QUASHED."

WHEREAS, during the pendency of the litigation in Case No. 01-2005-CA-003978, Banana Planet, Inc. transferred ownership of the subject property to Luis F. Manes and Carmen R. Manes ("the Maneses").

WHEREAS, on December 21, 2007, the Maneses filed a Motion to Intervene in Case No. 01-2005-CA-003978 and a Notice of Appeal, seeking review of the decision of the Circuit Court's Order Granting Petition for Writ of Certiorari by Florida's First District Court of Appeal.

WHEREAS, due to the state of the pending appeal, the status of the subject property's legal use remains the subject of ongoing litigation.

WHEREAS, the Maneses affirmatively represent that the subject property is under leases to tenants as a multi-family dwelling, and that the leases expire in early August 2008.

WHEREAS, the Maneses further represent that the early termination of the leases of the subject property would create serious hardships for the tenants residing at the subject property, and for the Maneses.

WHEREAS, per section 30-346(a) of the City's Code of Ordinances, it is the intent of the Land Development Code, "to permit these nonconformities to continue until they are removed but not to encourage their continuation."

NOW THEREFORE, the parties as listed below hereby stipulate and agree as follows:

1. The City shall allow, as a reasonable period of time, until August 16, 2008 for the Maneses, their heirs, and successors in interest to bring the use of the subject property into compliance with the City's RSF-2 zoning district, including limitation on occupancy to one single family as set forth in City Code of Ordinances sections 30-57 and 30-23.

2. The Maneses abandon and waive all uses on the subject property that are nonconforming with the current RSF-2 zoning and all claims of legal nonconforming uses, specifically use of the property as a two-family or multifamily dwelling, as of August 16, 2008. Such abandonment and waiver shall be binding upon the Maneses, their heirs and successors in interest.

3. This Stipulation resolves all outstanding issues raised in Case No. 01-2005-CA-003978 in the Circuit Court of the Eighth Judicial Circuit in and for Alachua County, Florida, as well as Case No. 1D08-17 filed in the District Court of Appeal for the First District of the State of Florida, and the parties hereto agree to dismiss any and all pending claims, motions and

appeals asserted in those actions with prejudice with each party bearing its own attorneys' fees and costs incurred in connection with those actions.

4. Further, each party agrees to release and hold harmless all other parties to this Stipulation for any cause of action arising from this Stipulation, Circuit Court Case No. 01-2005-CA-003978, District Court of Appeal Case No. 1D08-17, and/or the circumstances underlying those causes of action.

EFFECTIVE this \_\_\_\_\_ day of March 2008.

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Luis F. Manes

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Carmen R. Manes

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Ralph Dunne

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City of Gainesville  
By: Russ D. Blackburn  
City Manager

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A. Bice Hope, Esq.  
Attorney for Luis F. & Carmen R. Manes  
P.O. Box 5217  
Gainesville FL 32627-5217  
Tel. 352/371-2066; Fax 352/376-2128

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Jefferson M. Braswell, Esq.  
Attorney for Ralph Dunne  
P.O. Box 23109  
Gainesville FL 32602  
Tel. 352/376-5242; Fax 352/375-0690

\_\_\_\_\_  
Daniel M. Nee, Esq.  
Assistant Litigation Attorney  
City of Gainesville  
P.O. Box 1110  
Gainesville FL 32602-1110  
Tel. 352/334-5011; Fax 352/334-2229