

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
FLORIDA COMMUNITIES TRUST**

IN RE:

**SEMINOLE COUNTY, FLORIDA,
a political subdivision of the State of Florida,**

OGC Case No. 18-1298

**PETITION FOR WAIVER
FROM RULE 62-818.016(3)(c), F.A.C., AND
RULE 62-818.016(1)(c), F.A.C.**

ORDER

On September 24, 2018, Seminole County, Florida (Petitioner) filed a petition for a waiver with the Florida Department of Environmental Protection, Florida Communities Trust, under section 120.542, Florida Statutes (F.S.). On September 28, 2018, Petitioner filed an amended petition for waiver. See Exhibit 1. The amended petition requests a waiver of Rules 62-818.016(1)(c) and 62-818.016(3)(c), Florida Administrative Code (F.A.C.), which generally require compensation when land being received by the agency in a proposed land exchange has a lower value than the land being released. Florida Communities Trust received no written comments in response to the notice of Petitioner's amended petition for waiver, which the Agency published in the Florida Administrative Register on October 8, 2018.

FINDINGS OF FACT

1. Petitioner received a 2004 Florida Communities Trust grant award to acquire a regional park known as Jetta Point Park ("Jetta Point").
2. In 2016, Petitioner filed a request for a land exchange pursuant to Rule 62-818.016, F.A.C. The request sought to exchange the Jetta Point parcel, comprised of 46 acres of land, for the Rolling Hills Golf Course, a 97-acre parcel.

3. As part of the requested exchange, Petitioner requested and received two rule waivers: a permanent waiver of Rule 62-818.016(1)(a), F.A.C. (requiring the exchange parcel be contiguous to the original parcel), and a temporary waiver of Rules 62-818.016(2)(d) and (e), F.A.C. (allowing the Petitioner to delay production of a title policy and survey for the exchange parcel). The Florida Communities Trust Board ("Board") granted both waivers.

4. As part of its application for a land exchange, Seminole County provided one appraisal for each of the relevant parcels. In this initial appraisal, Rolling Hills appraised for a higher value than the Jetta Point parcel. The appraisal of Rolling Hills did not account for any potential environmental contamination.

5. Seminole County requested conditional approval of the proposed land exchange before incurring the expense of a phase II environmental site assessment. The Board granted conditional approval of the exchange.

6. As one of the conditions of approval, Seminole County was to provide updated appraisals of both properties prior to final approval of the proposed exchange.

7. In the updated appraisals, the Rolling Hills parcel appraised for less than the Jetta Point parcel.

8. The Board required Seminole County to place \$1,500,000 in escrow with the State of Florida to cover the predicted cost of remediating the environmental contamination of Rolling Hills. Those funds will be released on a reimbursement basis as the site remediation progresses.

9. The Board considered and granted petitioner's request at its regular board meeting on November 29, 2018.

CONCLUSIONS OF LAW

UNDERLYING PURPOSE OF THE STATUTES

10. Section 120.542(2), F.S., provides that an agency should grant a variance or waiver when the person subject to a rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means or when application of the rule would create a substantial hardship or would violate principles of fairness. "Substantial hardship" is defined as a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. "Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

11. The statutes implemented by Rules 62-818.016(1)(c) and 62-818.0166(3)(c), F.A.C., are sections 259.105, 380.507, and 380.510, F.S. Section 259.105, F.S., states the intent of the Florida Forever Act is to promote the acquisition, preservation, and protection of open space for public recreation and conservation. Section 380.507(11), F.S., requires the Florida Communities Trust to adopt rules governing the acquisition of land with proceeds from the Florida Forever Trust Fund, including procedures to assure that the acquisition is voluntarily negotiated, to set a maximum purchase price, and to assure that the acquired property is surveyed, conveyed with marketable title, and examined for hazardous materials contamination. Section 380.510(3)(b), F.S., provides that the transfer of land acquired with a trust grant is subject to the approval of the trust.

12. Petitioner has demonstrated that the statutory purpose of encouraging acquisition, preservation, and protection of open space will be met by granting the rule waiver. Seminole County has purchased the Rolling Hills property, has set aside adequate funds to remediate the environmental contamination, and has allocated additional funds toward the proposed construction of recreational facilities on the site.

13. Petitioner has demonstrated that a literal interpretation of the rule would affect it differently than it would a local government seeking a land exchange where environmental contamination was not an issue. Where the rule requiring reimbursement generally operates to ensure the State of Florida receives the benefit of its original investment, here the funds placed in the escrow account to ensure remediation perform this function.

14. This order memorializes the Board's decision on Seminole County's petition made during the regular Board meeting held November 29, 2018, after the Board was fully apprised of the contents of the Petition.

NOTICE OF RIGHTS

This action is final and effective on the date filed with the Clerk of the Department of Environmental Protection ("Department") unless a petition for an administrative proceeding is timely filed pursuant to sections 120.569 and 120.57, F.S. On the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Florida Communities Trust ("FCT"). Because the administrative hearing process is designed to formulate final agency action, the hearing process may result in a modification of the agency action or even denial of the request for a variance or waiver.

Petition for Administrative Hearing

A person whose substantial interests are affected by the FCT's action may petition for an administrative proceeding (hearing) under sections 120.569 and 120.57, F.S. Pursuant to Rule 28-106.201, F.A.C., the petition must contain the following information:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, telephone number, and any e-mail address of each petitioner or petitioner's representative, which shall be the address for service purposes during the course of the

proceeding; the Department case identification number, and the county in which the subject matter or activity is located;

(c) A statement of how and when each petitioner received notice of the FCT action;

(d) A statement of how each petitioner's substantial interests are affected by the FCT action;

(e) A statement of the material facts disputed by the petitioner, if any. If there are none, the petition must so indicate;

(f) A concise statement of the ultimate facts alleged, including the specific facts that the petitioner contends warrant reversal or modification of the FCT action;

(g) A statement of specific rules or statutes the petitioner contends require reversal or modification of the FCT action, including an explanation of how the alleged facts relate to the specific rules or statutes;

(h) A statement of the relief sought by the petitioner, stating precisely the action that the petitioner wants the FCT to take with respect to the FCT's proposed action.

The petition must be filed (received by the Department Clerk) in the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS 35, Tallahassee, Florida, 32399-3000. Also, a copy of the petition shall be mailed to the applicant at the address indicated above at the time of filing.

Time Period for Filing a Petition:

In accordance with Rule 62-110.106(3), F.A.C., a person whose substantial interests are affected by the FCT's action may also request an extension of time to file a petition for an administrative hearing. The FCT may, for good cause shown, grant the request for an extension of time. Requests for extension of time must be filed with the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000, before the applicable deadline for filing a petition for an administrative hearing. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

Mediation:

Mediation under section 120.573, F.S., is not available in this proceeding.

Judicial Review:

Once this decision becomes final, any party to this action has the right to seek judicial review pursuant to section 120.68, F.S., by filing a notice of appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the Clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, MS 35, Tallahassee, Florida, 32399-3000; and by filing a copy of the notice of appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The notice of appeal must be filed within 30 days from the date this action is filed with the Clerk of the Department.

DONE and ORDERED this 26th day of February, 2019, in Tallahassee, Florida.

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
FLORIDA COMMUNITIES TRUST



Callie DeHaven
Chair, Florida Communities Trust

Filed on this date, pursuant to s. 120.52,
F.S., with the designated Department Clerk,
receipt of which is hereby acknowledged.



Clerk

Date

Copy furnished to:
Paul Chipok
Senior Assistant County Attorney
Seminole County, Florida
1101 East 1st Street
Sanford, FL 32771

September 28, 2018

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
FLORIDA COMMUNITIES TRUST

Dept. of Environmental Protection
Office of General Counsel

SEMINOLE COUNTY, FLORIDA,
a political subdivision of the State of Florida,

Petitioner,

vs.

CASE NO. _____

FLORIDA COMMUNITIES TRUST,

Respondent.

_____ /

**AMENDED PETITION FOR WAIVER OF RULE 62-818.016(1)(c)
AND RULE 62-818.016(3)(c), FLORIDA ADMINISTRATIVE CODE**

SEMINOLE COUNTY, FLORIDA, a political subdivision of the State of Florida, hereby files this Amended Petition and petitions the FLORIDA COMMUNITIES TRUST (FCT) for a waiver of Rule 62-818.016(1)(c) of the Florida Administrative Code, which states: “The proposed exchange parcel(s) must have at least the same real estate value (as determined through independent appraisal[s]) as the Trust parcel being given up (or monetary compensation of the difference). There will be no monetary compensation if the proposed parcel(s) to be exchanged have a value greater than the Trust parcel;” and Rule 62-818.016(3)(c) of the Florida Administrative Code, which states: “The entity receiving the exchange must provide monetary compensation to the Trust if the value of the land provided by the Recipient/Trust is greater than the land received by the Recipient/Trust in the exchange. Such funds will be distributed between the Trust and the Recipient in accordance with the percentages in the original grant award.” In support, Petitioner states the following:

1. The name, address, e-mail address, telephone number, and facsimile number of the

Petitioner is:

Seminole County
c/o Nicole Guillet, County Manager
1101 East First Street
Sanford, FL 32771
nguillet@seminolecountyfl.gov
Telephone: 407-665-7211
Fax: 407-665-7958

2. The name, address, e-mail address, telephone number and facsimile number of the Petitioner's qualified representative is:

Mr. Joseph R. Abel, CPRP
Director, Leisure Services Department
Seminole County Government
100 E. First Street, 4th Floor
Sanford, FL 32771
Email: jabel@seminolecountyfl.gov
Telephone: 407-665-2001
Fax: 407-665-2179

3. Rules from which the waiver is sought:

Petitioner requests a waiver from Rule 62-818.016(3)(c) of the Florida Administrative Code, which provides that:

"The entity receiving the exchange must provide monetary compensation to the Trust if the value of the land provided by the Recipient/Trust is greater than the land received by the Recipient/Trust in the exchange. Such funds will be distributed between the Trust and the Recipient in accordance with the percentages in the original grant award."

In an abundance of caution and even through the initial appraisals supplied established that the Rolling Hills Property had a greater real estate value than the Jetta Point Property, Petitioner requests a waiver from Rule 62-818.016(1)(c), which provides that:

"(1)...To be considered by the Trust, the proposal must at a minimum meet the following tests..."

(c) "The proposed exchange parcel(s) must have at least the same real estate value (as determined through independent appraisal[s]) as the Trust parcel being given up (or monetary compensation of the difference). There will be no monetary compensation if the proposed parcel(s) to be exchanged have a value greater than the Trust parcel;"

4. Citation to the statute Rules 62-818.016(1)(c) and 62-818.016(3)(c), Fla. Admin. Code are implementing:

Rules 62-818.016(1)(c) and 62-818.016(3)(c) implement Sections 259.105 and 380.510, Florida Statutes (2018). Section 259.105 provides the mechanism and criteria for acquisition and management of conservation and recreational lands through the Florida Forever Program. Section 380.510 governs the conditions applicable to grants and loans awarded through the Florida Communities Trust.

5. Type of action requested:

The Petitioner respectfully requests a waiver from Rule 62-818.016(1)(c) and Rule 62-818.016(3)(c) to conclude that no monetary compensation is required from the Recipient (County) to the Trust (FCT). Even though the value of the land being received by FCT in the exchange, and subject to the FCT Grant Award Agreement (the Rolling Hills Property), under FCT staff's interpretation, is less than the value of the land being released from the FCT Grant Award Agreement (the Jetta Point Property), and given the fact that the County has provided financial assurance to cover the full cost of implementing the Remedial Action Plan

Modification, for the FCT to receive monetary compensation from the County would violate the principles of fairness.

6. **Specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify the waiver from 62-818.016(1)(c) and Rule 62-818.016(3)(c):**
- a) **Initial appraisals submitted as part of the Application for Land Exchange pursuant to FAC Rule 62-818.016(1)(c) established that the Rolling Hills Property had a higher real estate value than the Jetta Point Property.** No issue with the initial appraisals or their values established therein were raised at the time of their submission. The initial appraisals met the minimum test of greater value of the Rolling Hills Property over the Jetta Point Property as required by Rule 62-818.016(1)(c).
 - b) **In accordance with FAC Rule 62-818.016(2)(f), the parcel to be provided by the Recipient (the County) “shall be appraised as if it did not have any development restrictions on it.”** The initial appraisal for the Rolling Hills Property was completed in such a manner and since the Phase II Environmental Site Assessment and Remedial Action Plan Modification were not completed at that time, the cost of the environmental remediation was not taken into consideration.
 - c) **The FCT Conditional Approval of the Land Exchange dated February 28, 2017 required remediation of the Rolling Hills Property and Financial Assurance to FCT that the remediation would be completed.** As part of the FCT Board’s “Conditional Approval of Seminole County’s Land Exchange Request Involving Jetta Point, FCT #03-055-FF3” dated February 28, 2017, the FCT required at Condition 6 that a remediation plan be established for the Rolling Hills Property and that the County perform all remediation activities so that the Florida Department of Environmental Protection (the Department) could issue a site rehabilitation completion order. At Condition 7, the County is required to provide sufficient Financial Assurance to complete the remediation plan. The Remedial Action Plan Modification (RAPM) Approval Order was issued on July 18, 2018 by the Department and the County is commencing implementation of the RAPM. The Escrow Agreement has been prepared by the Department as the Financial Assurance mechanism. The County has executed the Escrow Agreement and delivered the Escrow Agreement and check for the \$1,500,000.00 estimated cost of remediation to the Department.
 - d) **The FCT Conditional Approval of the Land Exchange dated February 28, 2017 required an additional appraisal of the Rolling Hills Property, as deemed sufficient by FCT, after the Phase II ESA is complete.** As part of Condition 8 of the FCT Conditional Approval, FCT staff required the County to provide updates to the original appraisals submitted with the initial Application for the Land Exchange and an additional appraisal for both the Jetta Point Property and the Rolling Hills Property. Regarding the Jetta Point Property update and the new appraisal, the property was appraised “as if it did not have any development restrictions on it” following FAC Rule 62-818.016(2)(f). Regarding the Rolling Hills Property update and new appraisal, those appraisals were required by FCT staff to take into consideration the “as is” condition of the property which included the RAPM and cost thereof. As confirmed in the “Review Comment of the Roper and Pendergast Appraisals for the Proposed Rolling Hills Reserve and Jetta Point Properties in Seminole County” prepared by Douglas Dane, Chief, Bureau of Appraisal, DSL/FDEP, the highest appraised value of the Rolling Hills Property “as if it did not have any development restrictions on it” or “as if clean”

is \$6,300,000.00 while the highest appraised value of the Jetta Point Property is \$6,282,700.00. See Exhibit A.

e) Imposition of the Condition to Appraise the Rolling Hills Property Subject to Remediation and Reduce the Value by the Cost of Remediation Violates the Principles of Fairness. Condition 6 of the Conditional Approval Letter of February 28, 2017 ensures in the event that FCT acquires fee simple title to the Rolling Hills Property through a default under the Section II.1 of the Grant Award Agreement for Florida Communities Trust, FF3 Award #03-055-FF3, FCT Contract #05-CT-a5-03-F3-J1-055, Jetta Point Property, dated October 21, 2004 (as to be amended to be applicable to the Rolling Hills Property) that the Rolling Hills Property will be clean and suitable for park purposes. This is further ensured and enhanced by Condition 8 of the Conditional Approval Letter through the creation and funding by the County of the Escrow Agreement in the amount of \$1,500,000.00 to secure the cost of implementing the RAPM on the Rolling Hills Property.

7. The reason why the variance or the waiver requested would serve the purposes of the underlying statute:

To require the County to pay the cost of the RAPM on the Rolling Hills Property and also deduct that same amount from the value of the Rolling Hills Property in the appraisals is not consistent with the purpose of the underlying statute. Application of Rule 62-818.016(1)(c) and Rule 62-818.016(3)(c) in such a manner would violate the principles of fairness in that literal application of the rule affects the County differently from the way it would affect the others since, given the unique facts and history of this matter, there are no similarly situated persons. Literal interpretation of FAC Rules 62-818.016(1)(c) and 62-818.016(3)(c) will lead to a windfall profit to FCT. The County is paying the cost of the clean-up of the Rolling Hills Property for use as a park. Use of the Rolling Hills Property as a park is consistent with the Grant Award Agreement. In the event FCT acquires title to the Rolling Hills Property, FCT receives such property either in its clean state or with the Escrow Agreement in place to ensure completion of the RAPM. The value of the Rolling Hills Property in the event FCT obtains fee simple title is the full value as if clean. FCT is kept whole. To require the County to pay for the cost of the RAPM and then further reduce the value of the land under Rule 62-818.016(3)(c) by the cost of the RAPM and retroactively apply that value to the initial appraisals submitted in accordance with Rule 62-818.016(1)(c) violates the principle of fairness. Since the FCT will receive a clean property in the event of a default of the Grant Award Agreement by the County, "the value of the land" as applying Rule 62-818.016(3)(c), in fairness, must be the value of the Rolling Hills Property as if clean. To do otherwise unfairly burdens the County not only with the cost of clean-up secured by the Financial Assurance but then charges the County a second time for that same clean-up cost in the form of a reduction in the value of the land which requires a payment to FCT under the Rule. Any payment which would be due under Rule 62-818.016(1)(c) and 62-818.016(3)(c) in this particular situation, in fairness, must be waived.

8. Statement of waiver timeframe:

The Petitioner requests that the waiver is permanent in regard to this applicable FCT project.

DATED this 28th day of September, 2018



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EXHIBIT A

CONDITION 8

Review Comments of the Roper and Pendergast Appraisals For the Proposed *Rolling Hills Reserve* and *Jetta Point* Properties in Seminole County

Paul Roper, MAI, SRA

Subject Property: THE ROLLING HILLS RESERVE, LLC PROPERTY
Report Date: 8/9/2018
Date of Value: 6/11/2018

Mr. Roper's appraisal is made subject to the **Hypothetical Condition** that a **Remedial Action Plan (RAP)** has been instituted successfully and that a **No Further Action** designation has been achieved. This means that the appraisal considers the site "**as if clean**".

Mr. Roper clearly points out that in fact the subject property is contaminated, and that the cost of remediation (clean-up) has been estimated at approximately \$1,500,000. Mr. Roper states that based on this information, and that the remediation was only to allow public park use, **the subject's current, "as is" value based on public park use, would be no greater than \$4,800,000**. To develop the subject at the stated H&BU of residential, the remediation required would be significantly higher. Mr. Roper's values are summarized as follows:

Estimated MV, based on H&BU , "As if Clean" is:	\$6,300,000
Estimated cost to remediate site, based on Public Park use is:	\$1,500,000
Estimated MV, based on H&BU , "As Is", would be <u>less than</u> :	\$4,800,000

Gary Pendergast, MAI, GAA

Subject Property: THE ROLLING HILLS RESERVE, LLC PROPERTY
Report Date: 8/6/2018
Date of Value: 8/2/2018

Mr. Pendergast's appraisal is made subject to **NO Hypothetical Conditions or Extraordinary Assumptions** and while the report does not clearly identify it as such, the appraisal was made of the current "**as is**" condition of the property, a "**contaminated**" site. Mr. Pendergast acknowledges that a **Remedial Action Plan (RAP)** has been developed for the subject that once completed and a **No Further Action** designation has been achieved, the total cost will have been approximately \$1,500,000. Mr. Pendergast did not analyze or present a valuation of the subject property "as if clean". Mr. Pendergast's values are summarized as follows:

Estimated MV, based on H&BU , "As if Clean"	N/A
Estimated cost to remediate site, based on Public Park use	\$1,500,000
Estimated MV, based on H&BU , would be less than	\$4,293,500

ROLLING HILLS RESERVE, LLC - Comparison of Reports and Divergence

The main difference between the two appraisals was that the Roper report included values for the property both "**as if clean**" and "**as is**", while the Pendergast report only included a value of the subject "**as is**". Both recognized the same remediation cost. Despite the two appraisals solving different appraisal problems, each report was well written, and the results were credible. Both reports were found to meet the minimum requirements of the USPAP, the UASFLA and the SASBOT, except that the Roper report **did not** analyze or present a larger parcel discussion, however all the rights of the entire subject are to be acquired (i.e. no remainder).

The divergence in value between the two appraisals for the "**as is**" value is about **11.8%**, low to high. Since both appraisers did not provide "**as if clean**" values, there is no divergence to measure for that.

**Review Comments of the Roper and Pendergast Appraisals
For the Proposed Rolling Hills Reserve and Jetta Point Properties in Seminole County**

Roper

Subject Property: THE JETTA POINT PROPERTY
Report Date: 6/15/2018
Date of Value: 6/11/2018

Mr. Roper's appraisal contains **NO Hypothetical Conditions** or **Extraordinary Assumptions** and the appraisal was made based on the current "*as is*" condition of the property and at its H&BU. Mr. Roper's value is summarized as follows:

Estimated MV, "*as is*" and *based on H&BU* is: \$5,950,000

Pendergast

Subject Property: THE JETTA POINT PROPERTY
Report Date: 8/6/2018
Date of Value: 8/2/2018

Mr. Pendergast's appraisal contains **NO Hypothetical Conditions** or **Extraordinary Assumptions** and the appraisal was made based on the current "*as is*" condition of the property and at its H&BU. Mr. Pendergast's value is summarized as follows:

Estimated MV, "*as is*" and *based on H&BU* is: \$6,282,700

THE JETTA POINT PROPERTY - Comparison of Reports and Divergence

The two appraisals for the Jetta Point property were very similar, other than the final conclusions of value. The two appraisals solved the appraisal problem in a similar way, more or less. Each report was well written, and the results were credible. Both reports were found to meet the minimum requirements of the USPAP, the UASFLA and the SASBOT, except that the Roper report once again *did not* analyze or present a "Larger Parcel" discussion, but again as was the case for the Rolling Hills property, all the rights of the entire subject are to be acquired (i.e. no remainder).

The divergence in value between the two appraisals for the "*as is*" value is about 5.6%, low to high.

Final Comments

Virtually all appraisal reports will contain some type of deficiency, small or large, which are observed and then corrected through the appraisal review process. The four appraisals prepared and reviewed in this case were no different. While one of the deficiencies was an omission from a UASFLA requirement, that being including a relevant discussion of the "Larger Parcel", the deficiency is considered minor because the full bundle of rights will be acquired (or exchanged) for the entire properties appraised. The presence of a few minor deficiencies can be acceptable if the deficiencies individually or in aggregate, do not affect the appraisal results, or the relevance and credibility of the appraisal itself.

It is notable however that both appraisers recognize that the subject, the contaminated former Rolling Hills Country Club property, was purchased 4 years ago by Rolling Hills Reserve, LLC, for \$1,500,000, and is now under contract to Seminole County for \$3,950,000. The contamination is **not yet remediated** and other than time, some engineering, planning and land use type soft costs have been spent, neither appraiser provided any opinion or analysis of the reason why a \$2,450,000 increase is relevant.

All four reports are considered reasonable, but it would be helpful to understand how the current sale price between the current owner and Seminole County was arrived at.