

FIFTH DISTRICT COURT OF APPEALS
STATE OF FLORIDA

Case No. 5D24-0106
LT Case No. 2020-31399-CICI

JOURNEY'S END SUBDIVISION
PROPERTY OWNER'S ASSOCIATION
INC., a Florida corporation, and T&T
MANAGEMENT, INC., a Florida
corporation,

Plaintiffs/Appellants,

v.

PORT ORANGE SS ASSOCIATES, LLC,
A Florida limited liability company,
TOADSTOOL HOLDINGS, LLC,
A Florida limited liability company, and
PORT ORANGE STOW A WAY, LLC,
A Florida limited liability company,

Defendants/Appellees.

APPELLANTS' BRIEF ON APPEAL

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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE AND FACTS	1
T&T Management, Inc. Purchases Unfinished Hotel and Becomes Successor Developer	2
Establishment of the Journey’s End Property Owner’s Association.....	4
Master Development Agreement as of 2011	5
Control of Journey’s End POA	6
Expansion of the Subdivision in 2018	7
Stow-A-Way’s Improper 2020 Request to Allow a Hotel on its Property	7
Defendant Port Orange Stow-A-Way, LLC’s Motion for Summary Judgment.....	8
T&T’s Motion for Reconsideration.....	10
SUMMARY OF THE ARGUMENT	11
STANDARD OF REVIEW	12
ARGUMENT	13
I. The Circuit Court Erred In Failing To Construe The POA Governing Documents Along With The Master Development Agreement	13
II. The Circuit Court Erred In Failing To Find That Stow-A-Way Breached The Covenant Of Good Faith And Fair Dealing	16

TABLE OF CONTENTS (cont.)

	<u>Page(s)</u>
III. The Circuit Court Erred In Failing To Enforce The Master Development Agreement, Because T&T Was In Control Of The POA In 2020	17
CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	20
CERTIFICATE OF FONT COMPLIANCE	21

TABLE OF CITATIONS

<u>CASES</u>	<u>Page(s)</u>
<i>Baxter v. Northrup</i> , 128 So. 3d 908, 909 (Fla. Dist. Ct. App. 2013).....	13
<i>City of Brevard v. Miorelli Engineering, Inc.</i> , 703 So.2d 1049 (Fla.1997)	16
<i>Crawford v Baker</i> , 64 So. 3d 1246, 1256 (Fla. 2011)	18
<i>Crawford & Seat v. Waterson</i> , 5 Fla 472 (1854)	17
<i>Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.</i> , 937 So.2d 695, 698 (Fla. 5th DCA 2006)	13
<i>FCCI Ins. Co. v. Horne</i> , 890 So.2d 1141 (Fla. 5th DCA 2004)	12
<i>Gallagher v. Dupont</i> , 918 So. 2d 342, 346 (Fla. Dist. Ct. App. 2005).....	12
<i>Hahamovitch v. Hahamovitch</i> , 174 So. 3d 983, 986 (Fla. 2015)	17
<i>Huntington on the Green Condo. v. Lemon Tree I-Condo.</i> , 874 So.2d 1, 4 (Fla. 5th DCA 2004).....	13
<i>J. M. Montgomery Roofing Co. v. Fred Howland, Inc.</i> , 98 So.2d 484 (Fla. 1957)	13
<i>Krol v. City of Orlando</i> , 778 So.2d 490, 491–492 (Fla. 5th DCA 2001)	12
<i>Pier 1 Cruise Experts v. Revelex Corp.</i> , 929 F.3d 1334, 1340–41 (11th Cir. 2019)	13,16

CASES

Page(s)

Quix Snaxx, Inc. v. Sorensen,
710 So. 2d 152, 153 (Fla. 3d Dist. Ct. App. 1998)..... 13,16

Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.,
966 So.2d 1 (Fla. 2d DCA 1997)..... 16

Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.,
760 So.2d 126, 130 (Fla. 2000) 12

STATEMENT OF THE CASE AND FACTS

The gist of the case is this: In 2011, Plaintiff/Appellant, T&T Management, Inc. (“T&T”), purchased an unfinished hotel and became the successor developer of an unfinished commercial subdivision. It did so in reliance on a restriction that only its hotel would be located in the subdivision. There could not be another hotel competing against it in the subdivision. T&T made a substantial investment in reliance on the “no other hotel” restriction.

Before T&T became involved, Defendant Port Orange Stow-A-Way, LLC (“Stow-A-Way”) got the option to add two adjacent lots owned by it into the subdivision, but those lots would also be subject to the “no other hotel” restriction. Stow-A-Way subsequently added its two parcels to the subdivision in 2018, subject to that restriction.

This appeal is about what Stow-A-Way did next – it went to the City of Port Orange and asked that the “no other hotel” restriction be eliminated. This violated the terms of Stow-A-Way’s joining the subdivision. Furthermore, Stow-A-Way did not have authority to make the request without T&T’s consent, and T&T definitely did not consent.

T&T seeks money damages because there is now a hotel on the adjacent lot. The circuit court erred by granting Stow-A-Way summary judgment on Count II of the Complaint. (All the other claims and

counterclaims in the case were settled).

**T&T Management, Inc. Purchases Unfinished Hotel
and Becomes Successor Developer**

In April 2011, T&T purchased a partially-constructed hotel on Lot 3 in the Journey's End Subdivision ("the Subdivision") from First Southern Bank, as well as vacant Lot 2, and additional land which has been dedicated for use as common areas in the Subdivision, including roadway, park and retention pond. At that time, the Subdivision consisted of 3 lots. However, the governing documents provided for the possible future expansion of the Subdivision were to include what are now Lots 4 and 5, owned by Stow-A-Way.

As a condition of being allowed to complete the hotel, T&T agreed with the City of Port Orange to complete the construction of the infrastructure for the Subdivision, which was only partially completed. T&T agreed to complete the development of the Subdivision based upon the terms, conditions and restrictions contained in the Subdivision Governing Documents, which included restrictions on the permitted uses of the other lot in the Subdivision that was not being purchased by T&T. This included an express prohibition on another competing hotel being constructed on another lot in the Subdivision. T&T would not have agreed to purchase the partially-constructed hotel and to pay to complete the Subdivision infrastructure if a

competing hotel could be constructed in the Subdivision.

The “Subdivision Governing Documents” consisted of the Master Development Agreement for the Peacock Way Planned Commercial Development (PCD), dated November 2, 2000 (**EX A**); the Subdivision Improvement Agreement, dated November 15, 2006 (**EX B**); and the Declaration of Easement Agreement, dated April 19, 2011 (**EX C**).

In reliance upon the Subdivision Governing Documents and the POA Governing Documents (defined below), T&T funded the completion of the common areas in the Subdivision at a cost of at least \$500,000.00. This was in addition to the price paid to purchase the land and the cost to complete construction of the hotel.

T&T’s expenses to complete the infrastructure for the Subdivision included, but were not limited to, the following:

- Repair of existing roads within the Subdivision;
- Design and construction of a drainage system, a retention pond, a park, and a walking path around the retention pond;
- Design and construction of a sewage lift station;
- Installation of a well for irrigation;
- Installation of landscaping in common areas of the Subdivision;
- Clearing of title to the Subdivision roads;

- Installation of lighting in common areas of the Subdivision; and
- Installation of signage for the Subdivision.

Establishment of the Journey's End Property Owner's Association

As a condition of T&T's purchase, T&T and First Southern Bank established the Property Owner's Association ("POA") on December 5, 2011, to provide for the administration of the Common Facilities of the Subdivision. The POA and the lots in the Subdivision are bound by the governing documents for the POA, which include the Declaration of Covenants and Restrictions and Notice of Provisions for Journey's End Subdivision Planned Commercial Development, Port Orange, Volusia County, Florida, dated December 5, 2011 (**EX D**); the Articles of Incorporation of Journey's End Subdivision Property Owners' Association, Inc., dated December 5, 2011 (**EX E**); and By-Laws of Journey's End Subdivision Planned Commercial Development, dated December 5, 2011 (**EX F**) (**EXs D, E and F** are collectively "the POA Governing Documents").

All lots in the Subdivision are subject to all the terms, conditions and restrictions contained in the Subdivision Governing Documents and the POA Governing Documents. Membership in the POA is required of each owner of the lots in the Subdivision.

The common facilities of the Subdivision consist of accessways,

landscaped areas, open space, and other areas dedicated to service the entire development, including the Stormwater Retention Area. The POA maintains the common areas, including the stormwater retention and conveyance systems. The POA is also obligated to operate and maintain the stormwater management system, and to provide for maintenance, preservation, and repair of the common areas within the Subdivision.

Master Development Agreement as of 2011

Section 2.A of the Master Development Agreement for the Peacock Way Planned Commercial Development states that the “Development of the PCD property shall be controlled by the terms of this Agreement . . .” The Master Development Agreement further provides that the property owners association (“the POA”) will have control over the use of all the individual lots:

Not only will the [POA] board of directors be able to regulate and govern the common areas, the board will also regulate each and every member to maintain and service his own individual building site.

(EX A, Section 7, p. 6).

In 2008, before T&T’s involvement, Stow-A-Way entered into a First Amendment to the Master Development Agreement with the City of Port Orange and the second developer (JAI-AMBE, Inc.) **(EX G)**. The developer sold land to Stow-A-Way, and Stow-A-Way wanted to have the option to

incorporate its property into the Subdivision (then designated as Lot 4). Stow-A-Way agreed, as a condition of being able to join the Subdivision, that its property could **only** be used for the following purposes: professional/medical office; banks; business services; financial services; retail sales/service; or restaurant- Type A.

A hotel was specifically excluded from this list. A hotel was only allowed on Lot 3, owned by T&T. Stow-A-Way agreed to this restriction in 2008, and this restriction was in effect when T&T became the successor developer in 2011. T&T relied on that restriction when it made its purchase.

Control of Journey's End POA

T&T remained in control of the POA under the POA Governing Documents in 2020, because T&T (the developer) has not “sold and closed on two thirds (2/3) of the acreage in the property to third parties . . .” In fact, T&T had not sold or closed on any of its land in 2020, when Stow-A-Way took action to amend the rules to allow another hotel to be built next to T&T's hotel.

Section 2.2, p. 4 of the Declaration states:

Until such time as the developer [T&T] has sold and closed on two thirds (2/3) of the acreage within the Property to third parties, the Developer shall remain in control of the Association. When two thirds (2/3) of the acreage has been conveyed to third party purchasers, the Developer will schedule a meeting of

the owners for the purposes of electing a new Board of Directors for the Association.

(EX D).

Because T&T controlled the POA in 2020, only T&T had authority to seek or agree to amendment of the Master Development Agreement. Stow-A-Way had no such authority.

Expansion of the Subdivision in 2018

The Subdivision Governing Documents provided for the future expansion of the Subdivision to include what are now Lots 4 and 5. In approximately 2018, the Subdivision was expanded to add Lots 4 and 5, both owned by Stow-A-Way, to the Subdivision (**EX H**, Supplemental Declaration).

At that time, Lots 4 and 5 were vacant. These lots are subject to the terms, conditions, and restrictions of the Subdivision Governing Documents and the POA Governing Documents, including the “no other hotel” restriction.

Stow-A-Way’s Improper 2020 Request to Allow a Hotel on its Property

When Stow-A-Way joined the Subdivision in 2018, a hotel was a prohibited use for either of the added lots under the Master Development Agreement. But, in 2020, Defendant Stow-A-Way requested that the City of Port Orange amend the Journey’s End PCD Master Development Agreement and Conceptual Development Plan to permit construction of a

hotel on Lot 4 (**EX I**, Development Review Application). This request was granted by the City of Port Orange on or about May 19, 2020, despite T&T's objections.

At the Port Orange Planning Commission meeting on February 27, 2020, Stow-A-Way described its plans to the City. They promised to provide a "nice" hotel for the City, implying that it would have a higher price point than the existing Country Inn & Suites hotel on T&T's property. Instead, a WoodSpring Suites hotel, an economy extended-stay hotel, is under construction on the Stow-A-Way property. The statement to the Planning Commission by Todd Marshall of Stow-A-Way can be found on the City's website, beginning at about Minute 43 of the video: https://www.youtube.com/watch?v=ZpjIXhc_7RY.

Defendant Port Orange Stow-A-Way, LLC'S
Motion for Summary Judgment

On November 16, 2022, Stow-A-Way filed its Motion for Summary Judgment as to Count II of Plaintiff's Complaint. Count II of Plaintiff's Complaint pleads breach of contract due to Stow-A-Way's actions in requesting and obtaining an amendment of the Journey's End PCD Master Development Agreement (**EX A**) to permit construction of a hotel on Lot 4 without the consent of T&T as the developer. In its Motion for Summary Judgment, Defendant argued that the Property Owner's Association's

Governing Documents do not contain any covenants restricting hotel use, nor do the Governing Documents incorporate the original Master Development Agreement, or any subsequent iterations thereof.

On December 29, 2022, T&T filed its Response to Defendant Port Orange Stow-A-Way's Motion for Summary Judgment. In its Response, T&T argued that the Master Development Agreement and POA documents cannot be read in isolation, but rather must be interpreted together because they concern the same subject matter and are part and parcel of the same general transaction: how the land comprising the Subdivision will be governed and used.

Further, as T&T argued, Stow-A-Way's actions created a breach of the POA Governing Documents and the Master Development Agreement because Stow-A-Way had no legal authority to try to amend either agreement. That authority rested solely with T&T, the successor developer. T&T further argued that Stow-A-Way breached the implied covenant of good faith and fair dealing.

On January 24, 2023, the circuit court issued its Order on Port Orange Stow-A-Way's Motion for Summary Judgment. The circuit court found as follows:

[T]here is no disputed issue of material fact that no contract term has been breached by Port Orange

Stow-A-Away, LLC as alleged in Count II of the Complaint . . . and the Court will not read a new contract term into an agreement between Port Orange Stow-A-Way, LLC and any other party precluding Port Orange Stow-A-Way, LLC from building a hotel on its property or seeking an amendment of the Master Development Agreement from the City of Port Orange, Florida, where one does not exist.

(EX J).

T&T's Motion for Reconsideration

On February 8, 2023, T&T filed a Motion for Reconsideration regarding the circuit court's January 24, 2023 Order. T&T argued that: 1) Stow-A-Way's conduct breached the implied covenant of good faith and fair dealing and the circuit court failed to rule on this argument in its January 24, 2023, Order and 2) Stow-A-Way did not have the authority to amend the Master Development Agreement without T&T's consent, as T&T is in control of the POA based on the plain terms of the Declaration. On April 20, 2023, Port Orange Stow-A-Away filed its Response to T&T's Motion for Reconsideration.

On May 23, 2023, the circuit court enter an Amended Order denying T&T's Motion for Reconsideration "for the reasons stated on the record" (EX K).

On September 29, 2023, the circuit court issued an Order regarding a Motion for Temporary Injunction, and ruled that T&T was no longer in control

of the Subdivision (**EX L**).

SUMMARY OF THE ARGUMENT

The circuit court erred in several ways:

(1) The circuit court failed to consider the Subdivision Governing Documents and the POA Governing Documents together.

(2) Stow-A-Way acted in bad faith and unfairly when it sought and obtained approval from the City of Port Orange to build a hotel on its property. Stow-A-Way had become a party to the Master Development Agreement based on a restriction that its lots could not contain a hotel. Then Stow-A-Way reneged on that agreement to the detriment of T&T, another party to the Master Development Agreement. Even worse, Stow-A-Way misrepresented its plans for the property to the City in order to obtain the City's consent. During its presentation to the Planning Commission, Stow-A-Way placed a great emphasis on the notion that its proposed hotel development would serve a completely different customer base than the existing County Inn & Suites. Stow-A-Way went a step further in characterizing the proposed hotel as "nice," which cannot be used to describe an economy extended-stay hotel. The hotel that is actually being built on the Stow-A-Way property is a WoodSpring Suites hotel, which is an economy, extended-stay hotel (**EX M**). Based on these facts, there is a

question of fact to be resolved at trial about whether Stow-A-Way acted fairly and in good faith.

(3) The change to the Master Development Agreement could not have been sought by Stow-A-Way without the approval of the POA. Under the POA governing documents, T&T was in control of the POA in 2020, and Stow-A-Way had no authority to request a change to the rules of the subdivision without T&T's consent. For these reasons, this Court should reverse the circuit court's granting of summary judgment to Stow-A-Way on Count II of the Complaint.

STANDARD OF REVIEW

On appeal, the standard of review for construction of a contract is *de novo*. *Gallagher v. Dupont*, 918 So. 2d 342, 346 (Fla. Dist. Ct. App. 2005), citing *FCCI Ins. Co. v. Horne*, 890 So.2d 1141 (Fla. 5th DCA 2004). A trial court's ruling on a motion for summary disposition is also reviewed *de novo*. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000). Further, "[i]n order to determine the propriety of a summary judgment, [the] court must resolve whether there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Id.* citing *Krol v. City of Orlando*, 778 So.2d 490, 491–492 (Fla. 5th DCA 2001). "An appellate court must consider the evidence contained in the record,

including any supporting affidavits, in the light most favorable to the non-moving party; if the slightest doubt exists, summary judgment must be reversed.” *Baxter v. Northrup*, 128 So. 3d 908, 909 (Fla. Dist. Ct. App. 2013), citing *Delta Fire Sprinklers, Inc. v. OneBeacon Ins. Co.*, 937 So.2d 695, 698 (Fla. 5th DCA 2006).

ARGUMENT

I. The Circuit Court Erred In Failing To Construe The POA Governing Documents Along With The Master Development Agreement

Under Florida law, “[w]here a writing expressly refers to and sufficiently describes another document, the other document, or so much of it as is referred to, is to be interpreted as part of the writing.” *Pier 1 Cruise Experts v. Revelex Corp.*, 929 F.3d 1334, 1340–41 (11th Cir. 2019), quoting *Quix Snaxx, Inc. v. Sorensen*, 710 So. 2d 152, 153 (Fla. 3d Dist. Ct. App. 1998). Further, it is well-established that “where two contracts are part and parcel of the same general transaction, they may under some circumstances be interpreted together.” *Huntington on the Green Condo. v. Lemon Tree I-Condo.*, 874 So.2d 1, 4 (Fla. 5th DCA 2004).

In *J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484 (Fla. 1957), the Court found that, even though the plaintiff’s subcontract with defendant general contractor was unambiguous on its face, it needed to be

interpreted in conjunction with another subcontract for the same project, even though the plaintiff was not a party to that contract. The Florida Supreme Court stated:

While the situation does not fall strictly within the rule that where an agreement is evidenced by two or more writings, the writings must be construed together, it has been said that ‘This rule is not necessarily confined to instruments executed at the same time by the same parties for the same purpose; instruments entered into on different days, but concerning the same subject matter, may under some circumstances be regarded as one contract and interpreted together.

Id. at 486 (citation omitted).

Here, the Master Development Agreement and the POA documents are clearly part of the same transaction and concern the same subject matter. Section 2.A of the Master Development Agreement states that the “[d]evelopment of the PCD property shall be controlled by the terms of this Agreement . . .” The Master Development Agreement further provides that, “If the PCD Property is subdivided, the Owner [T&T] shall establish a property owners association to which Owner **may** transfer ownership operation and maintenance responsibilities of the common areas and facilities. The POA’s purpose will be maintenance of common areas and facilities on or otherwise serving the PCD Property, including the Offsite Stormwater Facility referenced herein.” Section 7, p. 5. The Master

Development Agreement also provides that, “[n]ot only will the [POA] board of directors be able to regulate and govern the common areas, the board will also regulate each and every member to maintain and service his own individual building site.” Section 7, p. 6.

The circuit court erred in refusing to construe the Master Development Agreement together with the POA documents. As illustrated above, there are numerous provisions in the POA documents that show that the Master Development Agreement and the POA documents must be construed together and treated as a single document. As discussed above, the Master Development Agreement provides for the creation of the POA and its authority to regulate the use of individual lots. The Master Development Agreement also provides that the developer may, but is not required to, transfer control of the POA board. Under the POA documents, T&T retains control of the POA.

Further, the Master Development expressly refers to “the POA documents.” Section 7 of the Master Development not only directly references “the POA documents,” but also goes on to describe—among other things—the role of the POA’s board of directors, the POA rules, POA fines and liens, and the POA board’s power and authority. Notably, all of these provisions are expressly provided for in the POA documents, namely—

the Declaration. Therefore, the Master Development not only references the POA documents, but also describes the content of these documents.

As stated previously, “[w]here a writing expressly refers to and sufficiently describes another document, the other document, or so much of it as is referred to, is to be interpreted as part of the writing.” *Pier 1 Cruise Experts*, 929 F.3d at 1340–41, quoting *Quix Snaxx, Inc.*, 710 So. 2d at 153. Here, the Master Development sufficiently describes the POA documents by expressly identifying them and also sufficiently their contents. Therefore, the Master Development and POA documents must be construed together.

II. The Circuit Court Erred In Failing To Find That Stow-A-Way Breached The Covenant Of Good Faith And Fair Dealing

It is well-established that “every contract includes an implied covenant that the parties will perform in good faith.” *City of Brevard v. Miorelli Engineering, Inc.*, 703 So.2d 1049 (Fla.1997). “[T]he implied covenant of good faith and fair dealing is designed to protect the contracting parties’ reasonable expectations.” *Speedway SuperAmerica, LLC v. Tropic Enterprises, Inc.*, 966 So.2d 1 (Fla. 2d DCA 1997).

The circuit court erred in failing to find that Stow-A-Way breached the covenant of good faith and fair dealing through its conduct. When Stow-A-Way wanted to gain the benefits of becoming part of the Subdivision, it expressly agreed that its property could not be used as a hotel. Stow-A-Way

agreed to a list of the permitted uses—including a bank, retail, medical office, etc.—but *not* a hotel. Stow-A-Way did not seek to amend the hotel restriction when T&T took over the project and spent millions of dollars to construct the infrastructure and complete the hotel on one of T&T’s lots. Stow-A-Way acted in bad faith and unfairly when it subsequently sought to change the rules and allow a use of its property that it had previously agreed would never be done.

T&T is not seeking injunctive relief against Stow-A-Way. Instead, T&T is entitled to recover damages from Stow-A-Way. Based on its change of position, Stow-A-Way should be required to reimburse T&T for a portion of the value and cost of developing the Subdivision infrastructure, as well as the cost of any changes that may be needed because of construction of the hotel on the Stow-A-Way property. As the Florida Supreme Court recognized long ago, “The general principle is that there is no wrong without a remedy.” *Crawford & Seat v. Waterson*, 5 Fla 472 (1854).

III. The Circuit Court Erred In Failing To Enforce The Master Development Agreement, Because T&T Was In Control Of The POA In 2020

It is a well-established tenet of contract interpretation that “[w]here a contract is clear and unambiguous, it must be enforced pursuant to its plain language.” *Hahamovitch v. Hahamovitch*, 174 So. 3d 983, 986 (Fla. 2015).

In the case of a clear and unambiguous contract, “the language itself is the best evidence of the parties' intent, and its plain meaning controls.” *Crawford v Baker*, 64 So. 3d 1246, 1256 (Fla. 2011).

Here, the plain terms of the Declaration (**EX D**) state that T&T is in control of the POA. The express terms of Section 2.2, page 4 of the Declaration state:

Until such time as the developer [T&T] has sold and closed on two thirds (2/3) of the acreage within the Property to third parties, the Developer shall remain in control of the Association. When two thirds (2/3) of the acreage has been conveyed to third party purchasers, the Developer will schedule a meeting of the owners for the purposes of electing a new Board of Directors for the Association.

T&T has not sold any of its property, much less sold and closed on 2/3 of its acreage in 2020. This is consistent with the Master Development Agreement (**EX A**), which provides that, “If the PCD Property is subdivided, the Owner [T&T] shall establish a property owners association to which Owner **may** transfer ownership operation and maintenance responsibilities of the common areas and facilities.” Section 7, p. 5.

Stow-A-Way did not have authority to alter the Master Development Agreement without T&T’s consent, since permitting a hotel on that lot alters the requirements for sewage transportation and storm water management for the Subdivision. The infrastructure was designed, constructed, and

permitted on the basis that there would not be a hotel on the Stow-A-Way property.

Stow-A-Way's actions created a breach of the POA Governing Documents and the Master Development Agreement because it had no legal authority to try to amend either agreement. That authority rested solely with T&T, the developer. Therefore, the circuit court erred in failing to enforce the Declaration as written and finding that Stow-A-Way breached the plain term of the Master Development Agreement and POA Governing Documents.

CONCLUSION

For the reasons stated above, this Court should reverse the circuit court's Order granting summary judgment to Stow-A-Way on Count II, and remand the case to allow T&T to pursue its claim for damages against Stow-A-Way.

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Dated: April 24, 2024

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Holly W. Zitzka, Esq., PO Box 2491, Daytona Beach, FL 32114, by mail, this 24th day of April, 2024, and a true and correct copy of the foregoing has been filed electronically through this Court's CM/ECF system.

Appellant's Brief was originally e-filed on April 22, 2024. It is being refiled as a result of an email received from the Clerk of the Court rejecting the earlier filing.

/s/ Brian L. Wagner
BRIAN L. WAGNER

CERTIFICATE OF FONT COMPLIANCE

This document complies with Arial 14-point font requirements of Florida Rules of Appellate Procedure 9.210(2).

Counsel certifies that the word count of this document is 3989 words.

/s/ Brian L. Wagner
BRIAN L. WAGNER