

IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

MARY LOU SMITH and  
SHARON DENSON,

Appellants/Plaintiffs,

v.

CASE NO. 2D11-315  
LT NO. 2008 CA 11315

TRAILER ESTATES PARK AND  
RECREATION DISTRICT,

Appellee/Defendant.

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**ANSWER BRIEF**

Respectfully submitted,

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## STATEMENT OF THE CASE AND THE FACTS

### *Trailer Estates Park and Recreation District*

The Trailer Estates mobile home park is a 55-and-older, mobile-home community located in Manatee County, Florida. (R. LVIII 8497) The community was platted in stages between 1955 and 1960 and contains 1,285 lots. (R. LVIII 8497)

In 1969, Trailer Estates Park and Recreation District (“Trailer Estates” or “Park”) was created as an independent special district by special act, which was subsequently re-created and reenacted as Chapter 2002-361, Laws of Florida. (R. LVI Pls. Ex. 237; A. 41-49)<sup>1</sup> The property of Trailer Estates consists of, among other things, a recreation hall, shuffleboard courts, marina, playgrounds, and walkways. (R. LVI Pls. Ex. 237; A. 45-46)

Trailer Estates is unique from other local government entities in that the bulk of the Park’s work is carried out by its nine-member, volunteer Board of Trustees. (R. LVIII 8497; R. LVI Pls. Ex. 237; A. 41-49; XLVIII 457:16-20) The Board does not simply set policies which are then carried out by an administrative staff. (R. LVI Pls. Ex. 237; A. 152-164) The volunteer Trustees themselves serve in administrative roles and carry out the Park’s work. (R. LVI Pls. Ex. 237; A. 152-

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<sup>1</sup> For the Court’s convenience, references to Plaintiffs’ Exhibit 237, Policy and Procedure Manual 2008, will also include a reference to the applicable page number from Appellant’s Appendix.

164) Trailer Estates's By-Laws provide for individual Trustees to be assigned areas of responsibility to plan, implement, and supervise various operations and activities, such as Maintenance, Future Planning, Health and Welfare, Public Relations, Continuing Recreational Activities, and Seasonal Social and Recreational Activities. (R. LVI Pls. Ex. 237; A. 64) Trailer Estates generally employs only one full-time administrative office manager to handle the administrative functions of the Park's office, including notices, resident services, and record keeping. (R. LVIII 8497, 8504)

The types of activities that are carried out at the Park's facilities include dinners, arts and crafts, classes, dances, billiards, Bingo, shuffleboard, "pickle ball," card games, and wood shop. (R. LVI Pls. Ex. 237; A. 74-81) Some of the activities are provided by Trailer Estates and other activities are conducted by "clubs" formed by residents. (R. LVI Pls. Ex. 237; A. 91) The Board of Trustees adopts policies, procedures, rules, and regulations regarding the Park's operation and the use of its facilities. (R. LVI Pls. Ex. 237)

#### *Plaintiffs Get Upset With Trailer Estates*

In February 2006, Mary Lou Smith received an invoice at her Michigan home, which indicated that Trailer Estates had raised its storage space rental fees. (R. LVIII 8498; XLVI 209:17-23) When she returned to Florida in March, Ms. Smith went to the Park office to get answers. (R. LVIII 8498; XLVI 209:24-

210:6) What would become clear later is that Ms. Smith did not believe Trailer Estates had the authority to impose any rental fees on Trailer Estates property owners. (R. XLVII 288:22-289:3; LVI Pls. Ex. 272; Pls. Ex. 279)

At trial, it became obvious that Ms. Smith and her sister, co-plaintiff Sharon Denson, did not agree with a number of Trailer Estates's policies, including the allegedly unlawful imposition of rental charges on the residents and the leasing of dock slips to non-residents. (R. LI 748:17-750:1; LVI Pls. Ex. 279; Pls. Ex. 283) Instead of bringing these issues before the Court for resolution, the sisters initiated Sunshine Law and Public Records litigation which raised the potential for Trailer Estates to be liable for plaintiffs' attorneys' fees. (R. I 2)

*Plaintiffs Bombard Trailer Estates With Accusations, Demands, And Public Record Requests*

The plaintiff sisters began a four-year campaign of letters, calls, and personal visits to the Park's office demanding actions by staff and Trustees on various and sundry matters, exercising their rights, and "educating" the Park staff and Trustees on their duties and legal requirements. (R. XLVI 209:24-210:11, XLVII 276:16-18, LVI Pls. Ex. 298) They barraged the Park with public records requests on their own and through their attorneys resulting in Trailer Estates's production of thousands of records including documents, videos, and audio tapes covering a 40-year time period. (R. LVIII 8503-5; LVI Pls. Ex. 398) The requests and inspections were so intensive that Trailer Estates was forced to hire additional

office support staff to accommodate the demands and, at times, Trailer Estates was forced to close the office to resident services to accommodate the requests. (R. LVIII 8497, 8504)

Ms. Denson also sought political recourse for her perceived wrongs by twice running for election to the Board of Trustees. (R. LI 752:16-23) Two weeks before the election in December 2008, she and her sister filed the instant action naming four sitting Trustees personally for violations of Florida Sunshine and Public Records laws. (R. I 2) Nevertheless, Trailer Estates's voters supported their incumbent Board members. (R. LI 752:16-753:19)

Having been unsuccessful at the ballot box, Plaintiffs attempted, and are still attempting, to control Trailer Estates through the use of the judicial system and the threat of exorbitant attorneys' fees. (R. X 1845-1846; XLVI 173:18-174:1)

Plaintiffs poured through mountains of records over a three-year period searching for any potential deficiencies, regardless of whether the matters had become moot, whether they could possibly be changed, whether they had already been corrected, or whether they had any impact upon the Plaintiffs. (R. X 1812-1926; XLV 48:9-17) The hunt continued after the filing of the initial complaint, and, as potential deficiencies were discovered, they were added until the pleading that proceeded to trial was a Third Amended Complaint, supplemented by an Addendum, that

contained more than a hundred alleged violations of the Sunshine law and thirty alleged Public Records law violations. (R. X 1812-1926; XII 2170-2176)

In addition to the barrage of public records requests, Plaintiffs sought discovery of Park staff, Trustees, volunteers, and residents through hours upon hours of depositions and requests to produce even more documents. (R. XX 3786-3822; XXI 3869-4060; XXII 4061-4216; XXIX 5519-5716; LVIII 8504)

Even when Plaintiffs received the documents they requested from Trailer Estates, if they felt the response was untimely, an allegation was added to the complaint. (R. X 1836-1837) Indeed, one of the issues in this appeal involves a document which Plaintiffs admit was produced more than a year before the filing of the instant action. (R. X 1836-1837)

At trial, Plaintiffs boasted more than 1,000 exhibits, including hours of video and cassette tapes, needlessly increasing the burden of defense to Trailer Estates. (R. XXXVII 6984-7014) Much of the testimony in support of Plaintiffs' claims was provided by Plaintiffs themselves and their counsel and paralegal, who testified as fact witnesses. (R. XLVI 128-203, 203-231; XLVII 238-344; XLVIII 345-358; L 678-697; LI 708-787; LIII 950-951) Plaintiffs' counsel testified that her firm took this case on a contingent fee agreement, and that her firm sought \$1,600,000.00 in attorneys' fees before the start of the trial. (R. XLVI 173:18-174:1)

Trial testimony included such matters as whether two Trustees discussed the impact of “pickle ball” on the large hall’s flooring and whether a Trustee had circulated a memo about posting photos of the “85-and-older Party” on Trailer Estates’s website. (R. LI 802:13-20; LII 836:25-838:6; LIV 1179:23-1180:18)

Before trial, the trial court entered summary judgment against Plaintiffs on twenty-two of Plaintiffs’ allegations. (R. XXX 5809-5816) At the conclusion of Plaintiffs’ case-in-chief, the trial court involuntarily dismissed twenty-one of Plaintiffs’ allegations on Plaintiffs’ admission that they failed to provide any evidence regarding the claims. (R. LV 1318-1324) The trial court ruled against Plaintiffs on their more than 100 remaining allegations of impropriety in the Final Judgment. (R. LVIII 8496-8507)

*Sunshine Law Allegations Raised By Plaintiffs On Appeal*

Executive Committee Meetings In June And September 2006 Regarding Appointment Of Replacement Trustees – 37(c) & 37(f)<sup>2</sup>

Plaintiffs make general statements in their Initial Brief regarding the Park’s Executive Committee meeting in violation of the Sunshine law. (Appellants’ Initial Br. 9-11) Plaintiffs appear to focus their argument on two allegations related to Executive Committee meetings where applicants were interviewed for

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<sup>2</sup> References to paragraphs correspond to Plaintiffs’ Third Amended Complaint as supplemented by Plaintiffs’ Addendum. (R. X 1812-1926; XII 2170-2176)

vacant Board positions. (R. LVIII 8499) The trial court found that any violation had been cured through subsequent action of the Board. (R. LVIII 8499)

The two Executive Committee meetings argued in the Initial Brief occurred in June and September 2006 and involved the Board's appointment of people to fill the unexpired terms of two trustees. (Appellants' Initial Br. 9-10) On both occasions, the Executive Committee kept minutes of their meetings and the minutes were on file for public inspection in the Trailer Estates office. (R. LVI Pls. Ex. 49; Pls. Ex. 50; Pls. Ex. 55) In both instances, the Executive Committee's findings were reported to the Board at a subsequent public meeting prior to a vote being taken. (R. LVI Pls. Ex. 51; Pls. Ex. 56) The trial court found that the public had the opportunity to provide comment and that no objection was made. (R. LVIII 8499) After their appointments, the two "new" Trustees participated in numerous public meetings without objection from the Plaintiffs or any other member of the public. (R. LIV 1152:1-1153:6, 1241:8-19) Both of the appointed Trustees served out the remainder of their terms and had been off the Board for almost a year prior to the initial complaint in this case. (R. LVIII 8499; LIV 1152:1-1153:6) At least one of the alleged participants in these meetings passed away during the two-years prior to the filing of this action. (R. XLVIII 368:18-23)

In 2006, shortly after Kirk Pinkerton, P.A., was retained as Trailer Estates's general counsel, the Park was advised to cease holding Executive Committee

meetings. (R. XLVIII 459:4-460:3) Executive Committee meetings ended more than two years prior to the filing of this action and there was no evidence at trial that any Executive Committee meetings occurred after September 2006. (R. I 2; XLVIII 460:1-460:3)

Executive Committee Meeting Regarding DeSears Fence – 37(a)

Plaintiffs provide facts in their brief related to an allegation that the Executive Committee met in November 2005 to discuss whether DeSears could tap into a County water line within the Park. (Appellants’ Initial Br. 9) Although Plaintiffs’ allegation was that the Executive Committee had met to discuss “the DeSears fence issue,” the trial testimony actually pertained to a tap into a county water line. (R. X 1818 ¶ 37(a); 470:20-471:13; LIV 1141:19-1142:4; LIV 1143:25-1145:6) The trial court did not specifically address this allegation in the Final Judgment but, instead, included it among the allegations for which Plaintiffs failed to carry their burden of proof. (R. LVIII 8499) The trial court did find, however, that any violations related to the Executive Committee were otherwise cured through subsequent action of the Board. (R. LVIII 8499; 470:20-471:13; LIV 1141:19-1142:3, 1143:25-1145:6) While Plaintiffs make arguments related to the court’s cure discussion, they fail to address the court’s primary determination that Plaintiffs failed to carry their burden of proof related to this allegation. (Appellants’ Initial Br. 9)

Meetings To Hire Legal Counsel - 37(s)

Plaintiffs alleged that in October 2006, Trailer Estates's Board of Trustees held meetings to interview and hire legal counsel and the meetings were not properly noticed. (R. X 1820)

The evidence presented at trial was that Ms. Denson's husband saw a notice posted on the Trailer Estates bulletin board the day before an October 24 Board meeting at which the Board would be interviewing legal counsel. (R. XLVII 282:18-283:5) Both Plaintiffs attended this meeting, and Ms. Denson took personal notes. (R. III 202:16-24; VII 743:3-11; XLVII 282:16-283:8; LIV 1271:8-11, 1272:13-1273:2; LVI Pls. Ex. 794) Ms. Denson also testified that there was an "audience" of the public present. (R. LIV 1272:3-9) Ms. Smith testified that she requested a copy of the minutes of this meeting, but that she has never received a copy of the minutes. (R. XLVII 284:15-20) However, Plaintiffs' pleadings do not include an allegation related to the failure to take minutes for this meeting, only that the meeting was not properly noticed. (R. X 1820)

The Board met again with attorneys from Kirk Pinkerton on October 30, 2006. (R. LIV 1246:23-1247:3) The minutes of that meeting reflect that members of the public were again present, and those members of the public, including Ms. Denson, posed questions to the Board and to Attorney Mark Barnebey prior to the

Board hiring Kirk Pinkerton. (R. XV 2855)<sup>3</sup> Attorneys from Kirk Pinkerton attended numerous public meetings of the Board of Trustees between 2006 and 2008 as Park counsel and the Board regularly took action to approve invoices from Kirk Pinkerton without objection. (R. XLVII 285:9-286:5; LIV1253:3-7; LVI Pls. Ex. 69; Pls. Ex. 177)

Trustees Discuss Budget Vote - 37(yy)

Plaintiffs alleged that Trustees Margo Cushman and Joe Bigley met during the recess of the March 2007 budget hearing and discussed the upcoming vote. (R. X 1824) In support of this allegation, Plaintiffs offered only the testimony of Tom Featheringill. (R. LIII 1026:3-1027:5) Mr. Featheringill testified at trial that he considered Plaintiffs to be his adopted sisters and that he supported what the sisters were trying to accomplish through the lawsuit. (R. LIII 1030:13-1131:15)

Mr. Featheringill was a sitting Trustee and actively participated in the budget discussions during both the March and April 2007 meetings. (R. LIII 1024:16-22; LVI Pls. Ex. 79; Pls. Ex. 82) In neither meeting did Mr. Featheringill raise any objection or make any claim about a discussion outside of the meeting between Trustees Cushman and Bigley. (R. LIV 1170:25-1172:9, 1244:24-

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<sup>3</sup> Plaintiffs' Exhibit 60 was not admitted into evidence. Of the 1,054 documents Plaintiffs marked as exhibits, Plaintiffs only caused approximately 150 to be admitted. (R. XXXVII 6984-7014; LVI Pls. Ex.) However, this allegation was resolved by summary judgment and the referenced minutes might be treated as record evidence.

1245:11; LVI Pls. Ex. 79; Pls. Ex. 82) There was no evidence presented that Mr. Featheringill ever raised this issue with the Park prior to it appearing in a version of Plaintiffs' complaint.

Martha Brauer, who was in attendance at the meeting, testified that she did not remember a break in the March 2007 budget meeting and, indeed, the minutes of that meeting do not reflect any recess. (R. LIV 1169:17-1170:24; LVI Pls. Ex. 79) The Board discussed the budget again in April 2007. (R. LIV 1170:25-1172:9; LVI Pls. Ex. 82)

The court found that the Plaintiffs failed to carry their burden of proof as to this allegation. (R. LVIII 8499, 8508)

#### Attorney-Client Session - 65

Plaintiffs argue in their Initial Brief that the Park violated the Sunshine law by holding an attorney-client session, sometimes referred to euphemistically as a "shade meeting," without strict compliance with the requirements of Section 286.011(8), Fla. Stat. (Appellants' Initial Br. 42-43) However, Plaintiffs' only plead that Trailer Estates violated Public Records laws by failing to provide a copy of the subject attorney-client session transcript. (R. X 1839 ¶ 65)

The undisputed facts related to this issue are that Trailer Estates held an attorney-client session which was attended by the members of the Board of Trustees and two of its attorneys. (R. XLVI 138:20-139:13) A notice was posted

outside the meeting hall which listed the names of all of the Trustees and the two Kirk Pinkerton attorneys who would attend. (R. XLVI 167:6-15) During the public portion of the meeting, the Board's Chairperson read a list of people who would be attending the attorney-client portion of the meeting. (R. XLVI 138:20-25) One of the Trustee's names was inadvertently read twice, while another Trustee's name, John Vander Molen, was inadvertently omitted from the read list. (R. XLVI 138:20-25, 175:2-4) All of the Trustees were present at the public portion of the meeting, and Plaintiffs, Plaintiffs' counsel, and members of the public in attendance witnessed all of the Trustees enter the attorney-client session per the posted notice. (R. XLVI 138:20-25, 166:8-167:15)

If a notice issue existed, Plaintiffs could have objected at this time, and the oversight could have been easily remedied by the Park. Plaintiffs made no objection, but they promptly made a public records request for a copy of the attorney-client session transcript. (R. LVI Pls. Ex. 371)

Architectural Review Committee – 37(i), 37(l), 37(n), 37(o), 37(p) & 37(q)

Plaintiffs' brief avers that if the Park's Board of Trustees failed to appoint Architectural Review Committee ("ARC") members, then the Board would have to take over the responsibilities of the ARC to ensure that the deed restrictions were enforced. (Appellants' Initial Br. 32-33) Hence, they conclude, the ARC must be subject to the Sunshine law. (Appellants' Initial Br. 31) This statement is not

supported by the evidence and, indeed, Plaintiffs failed to introduce the deed restrictions into evidence.<sup>4</sup>

Based on the testimony presented, the trial court found that the ARC is created by and derives its authority from the deed restrictions for the Trailer Estates community, and that the Park's only interaction with the ARC is that the Board is authorized by the deed restrictions to appoint members of the ARC. (R. LVIII 8500, L 671:20-673:4) The ARC does not derive its authority from the Board, the ARC does not act in an advisory capacity to the Board, and there are no appeal rights from the ARC to the Board for the denial of a permit. (R. LVIII 8500; L 671:20-673:4; LVI Pls. Ex. 237; A. 51)

Pursuant to the deed restrictions, property owners are required to obtain approval from the ARC prior to making improvements to their property. (R. LVI Pls. Ex. 237; A. 51) The deed restrictions do not provide for the Board of Trustees to issue such approvals, and the Park's Charter grants the Board no authority to issue such approvals. (R. LVI Pls. Ex. 237; A. 50-61)

The deed restrictions do provide that the Park, *or any other property owner*, may bring a civil action to enforce compliance with the deed restrictions. (R. LVI

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<sup>4</sup> Plaintiffs' Exhibit 237, which contains portions of the deed restrictions, was admitted into evidence only for Trailer Estates's policies and procedures contained therein. Exhibit 237 was not admitted as a true and correct copy of the deed restrictions. (LIII 957:1-961:6; LVI Pls. Ex. 237)

Pls. Ex. 237; A. 51) The Park's right to enforce the deed restrictions was and is shared by all of the Trailer Estates property owners. (R. LVI Pls. Ex. 237; A. 51)

"Seasonal Recreation Committee" – 37(III)

Plaintiffs' complaint contains a blanket allegation that "[d]uring 2007 through 2009, [the] Trailer Estates Seasonal Recreation Committee or Entertainment Committee has met outside the Sunshine." (R. X 1828 ¶ 37(III)) The evidence at trial revealed that Trustee Joe Salerno was designated by the Board as the Seasonal Recreation Trustee and that it was his responsibility to organize social events for the Park's residents. (R. LVI Pls. Ex. 223; LI 793:11-794:25) His "committee" consisted of the volunteers who assisted him in what the trial court termed "the mechanics" of presenting the activities. (R. LI 795:8-796:25; LII 834:21-835:22; LVIII 8500) The evidence revealed that they were the people who decorated, brought food, helped with the cleanup, etc. (R. LII 834:21-835:22) There was no evidence presented at trial that this "committee" was appointed by the Board of Trustees or that they served any role in the decision-making process of the Board. (R. LII 834:7-16)

Referendum Committee – 37(cccc)

Plaintiffs alleged that the Referendum Procedure Committee met outside the Sunshine between January 2006 and January 2007 and developed the procedure for placing a referendum on the ballot. (R. X 1827) While Plaintiffs note in their brief

that two Trustees were present for these meetings, there was no evidence presented at trial that those Trustees engaged in any discussions amongst themselves at those meetings. (Appellants' Initial Br. p. 7)

As to the Referendum Committee meetings themselves, the trial court found that the committee met three times during January 2006, concluding its work almost three years before the filing of the instant action. (R. LVIII 8501) The evidence at trial revealed that the recommendation of the committee was presented to the Board at a public meeting, as was a minority report which was prepared by one of the lay members of the committee. (R. L 661:6-666:5; LVI Pls. Ex. 523; Pls. Ex. 524; LVIII 8501) The Board ultimately rejected the recommendation of the committee and chose to take no action to establish a referendum policy. (R. LVIII 8501)

*Public Records Law Allegations Raised By Plaintiffs On Appeal*

Request For Legal Opinion - 64(h)

In April 2006, shortly after becoming aware of the increased charges for rental storage, Ms. Smith began sending letters to the Park from her home in Michigan demanding that Trailer Estates obtain a legal opinion as to whether it had authority to charge Park residents rent for the use of Park property. (R. LVI Pls. Ex. 272; Pls. Ex. 279; Pls. Ex. 280; Pls. Ex. 281; Pls. Ex 283; Pls. Ex 287) These multiple page, single-spaced letters contained requests for multiple documents in

addition to questions and demands on various matters. (R. LVI Pls. Ex. 272; Pls. Ex. 279; Pls. Ex. 281) In these letters, Ms. Smith did not offer to pay for the cost of having the documents copied and mailed to her, she did not inquire as to the cost of having documents copied and mailed to her, and she did not offer to come to the Park office to review any documents. (R. LVI Pls. Ex. 272; Pls. Ex. 277; Pls. Ex. 281) Indeed, Ms. Smith indicated that she had “no intention of coming to the office” to inspect the documents. (R. LVI Pls. Ex. 279)

In August 2006, Ms. Smith sent a letter to the Park requesting copies of invoices from the Park’s attorney. (R. LVI Pls. Ex. 287) For the first time, this letter included an offer to pay for the documents. (R. LVI Pls. Ex. 287) Ms. Smith received a prompt reply from the Park detailing the cost of copying and mailing such documents. (LVI Pls. Ex. 290) When Ms. Smith sent payment for the copying and mailing charges, the documents were copied and mailed to her. (R. LVI Pls. Ex. 292) There was no evidence presented that Ms. Smith ever followed up with a request related to the opinion letter offering to pay for copies of public records.

Plaintiffs admit that the subject legal opinion was provided by the Park during a public records inspection in July 2007, more than a year before the filing of the initial complaint in this matter. (R. XLVI 229:6-16; LVI Pls. Ex. 525)

Database – 62(d)

When new residents move into Trailer Estates, they fill out a form containing information such as their address, phone number, date of birth, etc. Trailer Estates inputs this information into a Quickbooks database, for use by the Park. (R. LIII 1001:23-1002:16; LVI Pls. Ex. 237; A. 147-148)

In April 2008, Ms. Denson requested a copy of the database information in Excel format. (R. LI 754:7-10; LVI Pls. Ex. 349; Pls. Ex. 350) Even though the Park did not maintain those records in Excel format, Ms. Denson testified that Excel format was the only format that was acceptable to her. (R. LI 754:7-14; LIII 1014:20-23; LVI Pls. Ex. 349; Pls. Ex. 350) The Park's office manager testified that she did not know how to convert the entire database from a Quickbooks to an Excel format and that her attempts to do so resulted in errors in the information. (R. LIII 1002:17-1003:18, 1014:12-23) The office manager testified that she offered to print out individual reports of whatever information Ms. Denson sought. (R. LIII 1016:3-10) The office manager testified that the paper forms which were filled out by the residents and which contained all of the information stored in the database were made available to Ms. Denson. (R. LIII 1014:24-1015:2) These offers were not satisfactory to Ms. Denson. (R. LI 754:7-14; LIII 1014:20-23; LVI Pls. Ex. 349; Pls. Ex. 350)

“Item #76” - 64(a)

Plaintiffs allege in their brief that Ms. Denson requested and never received a copy of “Item #76” from the Park’s public records log book. (Appellants’ Initial Br. 17-18) However, Plaintiffs’ pleadings contain no allegation that the Park failed to produce “Item #76.” (R. X 1812-1926) Plaintiffs’ allegation was that the “Item” was untimely produced in January 2009. (R. X 1836-1837)

December 12, 2008, Request – 64(g)

On December 12, 2008, Plaintiffs submitted a public records request for all emails sent between Board members, or which carbon copied another Board member, regarding Park issues, from January 1, 2006, to present, as well as any blogs, chat rooms, chalkboards, bulletin boards, instant messages, groups, or other electronic mediums where two Board members have communicated regarding Park issues from January 1, 2006, to present. (R. LVI Pls. Ex. 366) Plaintiffs alleged in their complaint that the Park unreasonably delayed by producing 187 documents more than one month later and 800 documents three months later. (R. X 1838)

The subject public records request was dated December 12, 2008. (R. LVI Pls. Ex. 366) Also on December 12, 2008, Plaintiffs’ counsel sent the Park a request for production. (R. LIV 1184:20-1185:5; LVI Pls. Ex. 367) Martha Brauer testified that the two document requests appeared to request the same information, so the office manager focused on one of the document requests in compiling the

records. (R. LIV 1185:14-1186:4) However, there was a word or two different, resulting in different sets of documents being requested. (R. LIV 1185:17-24)

Between December 12, 2008, and April 13, 2009, Plaintiffs' counsel also sent the Park numerous public records request letters containing multiple individual requests covering varying subjects and wide expanses of time. (R. LIV 1275:9-14; LVI Pls. Ex. 371; Pls. Ex. 372) A paralegal from Plaintiffs' attorneys' office testified that she had personally prepared 24 written public records requests, made six verbal public records requests, and had visited the Trailer Estates office approximately 30 times to view documents. (R. XLV 48:9-17) The total production of documents by the Park was in the thousands. (R. LVIII 8505) There were also 60 court filings in the subject action between December 12, 2008, and April 13, 2009. (R. I 82-189; II 190-331)

The trial court found that the public records requests by Plaintiffs were "sustained, voluminous, substantial in breadth, and were at times simultaneous with requests for production in this litigation." (R. LVIII 8504) The court also found that:

The District has only one full time employee who was required to search for the documents, make sure they were reviewed for any appropriate exemption, oversee the examination of the documents and copy the documents that were requested by Plaintiffs or their attorneys. She was also responsible for her general office work and dealing with the residents who requested services.

(R. LVIII 8504)

Plaintiffs failed to prove that the instant action was filed to gain access to the records cited in this allegation. (R. LVIII 8507) Plaintiffs filed their initial complaint in November 2008, but this allegation was not contained in the initial complaint. (R. I 2) Plaintiffs' counsel testified at trial that the Park produced the remaining documents responsive to the request after the hearing on Plaintiffs' Motion For Temporary Injunction which occurred on March 17, 2009. (R. XLVI 135:10-23) Plaintiffs did not add this allegation to their pleadings until April 13, 2009. (R. III 347) While Plaintiffs' brief contains the statement that the records were produced in June 2009, they have cited to no evidence in the record to support this statement. (Appellants' Initial Br. 19-20) Plaintiffs failed to produce any evidence that the documents were not produced prior to the filing of their amended complaint in April 2009. Moreover, the documents themselves were not introduced into evidence to prove to which request they might be responsive or for comparison with the other previously produced documents.

Budget Video – 62(b)

Plaintiffs allege that on August 27, 2006, they requested a copy of the video of the Park's 2006 budget hearing. (R. X 1835) The testimony from Trustee McNulty and the Park's office manager was that the Board meetings were videotaped by the residents' Video Club and that the Park did not possess a copy of the requested video at the time of the request. (R. XLVIII 466:5-22; LIII 966:11-

24) Plaintiffs inspected a number of video and audio tapes of meetings that were in the possession of the Park. (R. XLV 74:10-19) There was much made as to whether the Plaintiffs had requested video or audio tapes, how many budget meetings had occurred, the relationship between the Video Club and the Park, and who had possession of the video tapes. (R. XLVIII 442:9-443:13, 446:5-22; LIII 966:11-24; LVIII 8504) The trial court found that when Trailer Estates obtained the video, it was turned over to Plaintiffs. (LVIII 8504)

## SUMMARY OF THE ARGUMENT

Plaintiffs' pleadings grew over the course of this action until there was a scattershot Third Amended Complaint and Addendum to the Third Amended Complaint. Plaintiffs plead more than 150 allegations of Sunshine law and Public Records law violations by Trailer Estates. While some of the allegations were resolved by summary judgment orders during the almost two year period preceding trial, the trial court resolved the bulk of the allegations through a seven day non-jury trial.

The trial court carefully reviewed the matter and the evidence presented at trial in its 11 page, single spaced Final Judgment. The trial court found that Plaintiffs failed to carry their burden of proof on a myriad of claims and, in a few instances, found that any violation had been cured.

On appeal, Plaintiffs fail to demonstrate that the trial court erred in its judgments. Plaintiffs provide general hornbook statements about the Sunshine and Public Records laws, but they spend little, if any, time applying such law to the evidence presented at trial or the plead allegations. When so applied, it is clear that the trial court ruled correctly.

Because the trial court's factual findings come before this Court clothed with a presumption of correctness, and because the trial court reached the right result with respect to each of the challenged allegations, this Court should affirm the June

14, 2010, Order Granting In Part and Denying In Part Trailer Estates Park And Recreation District's Motion For Partial Summary Judgment and the November 3, 2010, Final Judgment.

## ARGUMENT

### *Standard of Review*

Plaintiffs appeal one part of the trial court's summary judgment orders (Third Amended Complaint, ¶37(s)) and a few other parts of the Final Judgment which followed the seven day non-jury trial of this action.

Appellate review of an order granting summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000).

When the Court reviews a final judgment entered after a non-jury trial however, it defers to the factual findings of the trial court which are supported by substantial competent evidence and only conclusions of law are reviewed de novo. *Sarasota Citizens for Responsible Gov't v. City of Sarasota*, 48 So.3d 755, 761 (Fla. 2010); *McDougall v. Culver*, 3 So.3d 391, 392 (Fla. 2d DCA 2009)(referencing standard of review in *Liner v. Workers Temp. Staffing, Inc.*, 990 So.2d 473, 476 (Fla.2008)). It is the trial court's function "to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause." *Shaw v. Shaw*, 334 So. 2d

13, 16 (Fla. 1976). “It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it.” *Id.*

*Sunshine Law Allegations Raised By Plaintiffs On Appeal*

Issue I.A. & III: The Trial Court Correctly Found Any Violation Of The Sunshine Law By The Executive Committee In Appointing Replacement Trustees Had Been Cured – Executive Committee Meetings – 37(c) & 37(f)<sup>5</sup>

Plaintiffs alleged that Trailer Estates’s Executive Committee violated the Sunshine law in 2006 when it met and interviewed candidates for appointment to Board vacancies. (R. X. 1818-1819) The evidence presented at trial was that the Executive Committee kept minutes of these meetings, the Executive Committee reported their findings to the Board at a subsequent public meeting prior to a vote being taken, and the public had the opportunity to discuss the recommendations at these meetings. (R. LIV 1152:1-1153:6, 1241:8-19; LVI Pls. Ex. 49; Pls. Ex. 50; Pls. Ex. 51; Pls. Ex. 55; Pls. Ex. 56; LVIII 8499) In both instances, the appointed Trustee served out the remainder of their term, without objection, and had not served on the Board for nearly a year prior to Plaintiffs’ commencement of this action. (R. LIV 1152:1-1153:6, 1241:8-19; LVIII 8499) Moreover, to avoid the possibility of future Sunshine law questions, Trailer Estates’s current counsel recommended against holding any further Executive Committee meetings in

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<sup>5</sup> References to paragraphs correspond to Plaintiffs’ Third Amended Complaint as supplemented by Plaintiffs’ Addendum. (R. X 1812-1926; XII 2170-2176)

September 2006 and there have not been any Executive Committee meetings since.

(R. I 2; XLVIII 460:1-460:3)

When determining whether a local government has cured an alleged Sunshine violation, the trial court examines whether the governing body took independent action in the Sunshine, as the court described in *Tolar v. School Bd. of Liberty Cnty.* 398 So.2d 427 (Fla. 1981).

Here, as in *Tolar*, the court found that the governing board discussed the matter at a public meeting and that interested members of the public were able to provide comment. Indeed, the facts here were more favorable for a finding of “cure”. In *Tolar*, the board members met privately on at least two occasions to discuss the subject action and those meetings included “some or all” of the board members; whereas here, only three members of the nine-member board met and in each instance they met only once. Further, unlike *Tolar*, the Executive Committee took minutes of the meetings, filed the minutes in the Park office, and publicly revealed the Executive Committee meeting at the public meeting prior to the vote being taken. Also unlike *Tolar*, there was no objection raised during the public meeting nor during any subsequent meeting of the Board to either the Executive Committee meeting or to the two replacement Trustees.

The trial court found that Trailer Estates took independent action at the subsequent public meetings, and there is substantial competent evidence in the record to support this finding. (LVIII 8499)

Plaintiffs delayed more than two years after these alleged incidents to bring their claims. The two replacement Trustees attended public meetings as Trustees, voted on matters, and served out their terms long before any objection was raised. Even if the court had determined that the alleged Sunshine violations had not been cured, the court was without authority to invalidate the appointments or the subsequent actions of the Board. If Plaintiffs wanted to challenge the validity of the appointments, they were required to bring a timely challenge via *quo warranto*. See *McSween v. State Live Stock Sanitary Bd. of Fla.*, 122 So. 239, 244 (Fla. 1919) (In the absence of statutory provision to the contrary, *quo warranto* is exclusive method of determining right to public office.) The actions taken by these appointed Board members are presumed to be valid unless the right to office is attacked directly. *Treasure, Inc. v. State Beverage Dept.*, 238 So.2d 580, 585 (Fla. 1970). In this case, the appointments were not timely challenged and the Trustees were permitted to serve out their terms, without objection, and to participate in Board actions which were relied upon by third parties and the public. Therefore, Plaintiffs either failed to state a cause of action or their claims for injunctive relief were moot.

The trial court did not have to determine whether Plaintiffs stated a cause of action or reach issues of mootness, waiver, or laches, but the Final Judgment contains factual findings which further support the judgment in favor of Trailer Estates. (R. LVIII 8499)

Issue I.B.: The Trial Court Correctly Ruled That Plaintiffs Failed To Prove Any Conversation Occurred During A Recess In A March 2007 Meeting – Trustees Discuss Budget Vote - 37(yy)

Witness testimony at trial was conflicting as to whether there was a recess during the March 2007 budget meeting, but the minutes of that meeting support the testimony that there was no recess. (R. LIII 1026:3-1027:5; 1030:13-1031:12; LIV 1169:17-1170:24; LVI Pls. Ex. 79); *North Beach Yellow Cab Co. v. Village of Bal Harbour*, 135 So.2d 4, 5 (Fla. 4<sup>th</sup> DCA 1961) (“... the minutes themselves are the best evidence of the action of the Village...”). Plaintiffs’ sole witness to this alleged incident admitted a close relationship to the Plaintiffs and support for Plaintiffs’ actions against the Park, and he did not say anything at the meeting about the alleged incident even though he was a Trustee at the time. (R. LIV 1170:25-1172:9, 1244:24-1245:11, LVI Pls. Ex. 79; Pls. Ex. 82) Moreover, the Board of Trustees did not approve the budget until its next public meeting. (R. LIV 1170:25-1172:9; LVI Pls. Ex. 82) The trial court correctly found that Plaintiffs failed to prove that the alleged conversation took place. (R. LVIII 8499, 8508)

Issue II. A.: The Trial Court Correctly Found That The ARC Is Not A Trailer Estates Committee – 37(i), 37(l), 37(n), 37(o), 37(p) & 37(q)

The trial court properly found that the ARC derives its authority from the community's deed restrictions which are contractual in nature amongst the property owners in Trailer Estates and are voted on by all of the property owners within Trailer Estates. (R. LVIII 8500) The trial court found that the ARC does not derive its authority from the Board, the ARC does not act in an advisory capacity to the Board, and there are no appeal rights from the ARC to the Board for the denial of a permit. (R. LVIII 8500) Contrary to Plaintiffs' assertion in their brief, if the ARC were to cease functioning, the Board would not be able to step into the shoes of the ARC, because it has no authority under its Charter or under the deed restrictions to issue permits for improvements.

Committees of lay persons may become subject to the Sunshine law when they are appointed to serve in an advisory capacity to the governing board or when they take on a decision-making function of the governing body, but the ARC serves in neither capacity to the Board of Trustees. (R. LVIII 8500; L 671:20-673:4; LVI Pls. Ex. 237; A. 51) In fact, the powers of the ARC and Board of Trustees are mutually exclusive. (R. LVIII 8500; L 671:20-673:4; LVI Pls. Ex. 237; A. 51) The trial court properly found that Plaintiffs failed to prove that the ARC was a committee of the Park and that determination is supported by substantial competent record evidence. (R. LVIII 8500)

Issue II. B.: The Trial Court Correctly Found No Sunshine Law Violation With Respect To The Referendum Committee - Referendum Committee – 37(cccc)

The trial court found that the Referendum Committee met three times during January 2006, concluding its work almost three years before the filing of this action. (R. LVIII 8501) The evidence at trial revealed that the recommendation of the committee was presented to the Board at a public meeting, as was a minority report prepared by one of the lay members of the committee. The Board ultimately chose not to accept the recommendation of the committee and, in fact, took no action to establish a referendum policy. (R. LVIII 8501) Thus, it cannot be argued that this action by the Board was a “ceremonial acceptance of secret actions” or a “perfunctory ratification of secret decisions,” as alleged by Plaintiffs. *See B.M.Z. Corp. v. City of Oakland Park*, 415 So.2d 735, 738 (Fla. 4<sup>th</sup> DCA 1982). By taking action contrary to the committee’s recommendation, the Board by definition took independent action at the public meeting and, thus, cured any alleged violations. (R. LVIII 8501)

Issue II.C.: The Trial Court Correctly Ruled That The Seasonal Recreation Committee Was Not A Trailer Estate Committee Subject To The Sunshine Law - “Seasonal Recreation Committee” – 37(III)

Plaintiffs’ complaint contains a blanket allegation that “[d]uring 2007 through 2009, the Trailer Estates Seasonal Recreation Committee or Entertainment Committee has met outside the Sunshine.” (R. X 1828) The evidence at trial revealed that Trustee Joe Salerno was designated by the Board as the Seasonal

Recreation Trustee and that it was his responsibility to organize social events for Trailer Estates's residents. (R. LVI Pls. Ex. 223; LI 793:11-794:25) His "committee" consisted of the volunteers who assisted him in what the trial court termed "the mechanics" of presenting the activities. (R. LI 793:11-796:25; LII 834:7-835:22; LVIII 8500) These were the volunteers who decorated, brought food, cleaned up, etc., for the mobile home park's events. (R. LII 834:21-835:22)

Plaintiffs failed to prove any Sunshine law violation.

Issue III: The Trial Court Correctly Ruled That Plaintiffs Failed To Prove Their Claim Regarding The DeSears Waterline Or That Any Violation Had Been Cured – Executive Committee Meetings – 37(a)

Plaintiffs contend that the trial court erred in its decision regarding an allegation that the Executive Committee met in November 2005 to discuss whether DeSears could tap into a County water line within the Park. (Appellants' Initial Br. 9; R. X 1818 ¶ 37(a); 470:20-471:13; LIV 1141:19-1142:4; LIV 1143:25-1145:6) The trial court did not specifically address this allegation in the Final Judgment but, instead, included it among the allegations for which Plaintiffs failed to carry their burden of proof. (R. LVIII 8499) While Plaintiffs make arguments related to the court's cure discussion, they fail to address the court's primary determination that Plaintiffs failed to carry their burden of proof.

Regarding cure, the trial court also found that any violations related to the Executive Committee were cured through subsequent action of the Board. Indeed,

the testimony at trial was that the water tap issue was discussed at subsequent public meetings. (R. LVIII 8499; XLVIII 470:20-471:13; LIV 1141:19-1142:3, 1143:25-1145:6)

Issue IV: The Trial Court Properly Entered Summary Judgment On The Claim That Two Years Before This Action There Was Insufficient Notice Regarding The Hiring of District Counsel - Meeting To Hire Legal Counsel - 37(s)

Plaintiffs alleged that in October 2006, the Board held meetings wherein they interviewed and hired legal counsel and the meetings were not properly noticed. (R. X 1820) Plaintiffs alleged that the Sunshine law was violated, even though notice was posted at the Trailer Estates office for both meetings, Plaintiffs actually attended the meetings along with a number of other members of the public, and the public in attendance was invited to provide comments and pose questions to the attorney and the Board prior to the Board taking action. (R. X 1820; XV 2855; XLVII 282:18-283:8, 284:15-20; LIV 1246:23-1247:3, 1271:8-11)

The posting of a meeting notice at the government office constitutes reasonable notice under the Sunshine law. In *Yarbrough v. Young*, 462 So.2d 515 (Fla. 1<sup>st</sup> DCA 1985), the court found that the City of Perry provided reasonable notice of an \$8.8 million bond approval by the City Council when it posted an agenda outside of City Hall two days prior to the meeting. Similarly, in *News and Sun-Sentinel Co. v. Cox*, 702 F.Supp. 891 (S.D. Fla. 1988), the court found that the

City of Fort Lauderdale provided reasonable notice of its City Commission meeting by posting a general notice on the bulletin board outside of City Hall five days before the meeting.

Plaintiffs claim in their Initial Brief that Trailer Estates violated Florida Statute, §189.417, which provides specific publishing requirements for special districts. (Appellants' Initial Br. 39-40) However, Plaintiffs did not plead an action to enforce the provisions of Chapter 189, and Trailer Estates does not consent to Plaintiffs' attempt to now amend their pleadings.

When the Sunshine law was originally adopted in 1967, it contained no provision requiring notice for public meetings, just that the meetings be open to the public. Courts subsequently interpreted this open meeting requirement to include a "reasonable notice" component. *See Hough v. Stembridge*, 278 So.2d 288, 290 (Fla. 3d DCA 1973)("... as a practical matter in order for a public meeting to be in essence 'public', we hold reasonable notice thereof to be mandatory.").

Language explicitly requiring reasonable notice was not added to the Sunshine law until 1995. Ch. 95-353, §1, Laws of Fla. The judicial gloss of cases like *Hough*, *Yarbrough* and *News and Sun-Sentinel Co.*, defining what constituted reasonable notice under the Sunshine law had long been on the books. In *Yarbrough*, the appellate court noted that the legislature requires advertised notice in certain instances but found that under the Sunshine law, the government "had no

duty to give notice by paid advertisements.” 462 So.2d at 517. If the Legislature wished to counteract the courts’ decisions as to reasonable notice or wished to include specific advertising requirements from other statutes in the Sunshine law, it certainly could have done so when it added the reasonable notice language in 1995.

Plaintiffs also waived or are estopped to assert any claims related to defective notice because they appeared and participated in the subject meetings.

*See Malley v. Clay County Zoning Comm’n*, 225 So.2d 555, 557 (Fla. 1<sup>st</sup> DCA 1969)(landowner waived or was estopped to assert defect in notice where he appeared at hearing and availed himself of opportunity to present his position); *Schumacher v. Town of Jupiter*, 643 So.2d 8, 9 (Fla. 4th DCA 1994)(same).

Trailer Estates does not admit its notice was defective under the Sunshine law, but Plaintiffs are barred from raising the issue by their presence and participation in the subject meetings.

The trial court also found that, if any violations had occurred related to the hiring of Kirk Pinkerton as counsel, Trailer Estates cured these violations. (R. XXX 5814-5815) Kirk Pinkerton publicly served as counsel, sat with the Board, provided legal advice at public meetings, and submitted invoices that were approved by the Board in public meetings, without objection, for more than two years prior to the filing of this action. (R. XLVII 285:9-286:5; LIV 1253:3-7; LVI Pls. Ex. 69; Pls. Ex. 177)

Issue V: The Trial Court Correctly Ruled That The Transcript Of The Attorney-Client Session May Be Withheld Until This Litigation Concludes - Attorney-Client Session – 65

Plaintiffs argue that the Park violated the Sunshine law by holding an attorney-client session without strict compliance with the requirements of Florida Statute, § 286.011(8). (Appellants’ Initial Br. 42-43) However, Plaintiffs’ only allegation in their pleadings was that Trailer Estates violated the Public Records law by failing to provide a copy of the subject attorney-client session transcripts. (R. X 1839) Plaintiffs did not allege a violation of the Sunshine law related to this meeting. (R. X 1839) Trailer Estates denies that a Sunshine law violation occurred under the facts of this matter, but such a claim is not properly before this Court. *See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So.2d 561, 563 (Fla. 1988)(“... we conclude that litigants at the outset of a suit must be compelled to state their pleadings with sufficient particularity for a defense to be prepared.”).

The meeting at issue was an attorney-client session regarding “[t]his litigation.” (R. XLVI 139:11) The notice posted outside the meeting hall which identified Trustee Vander Molen and the physical presence of the Trustee Vander Molen during the public portion of the meeting made it clear to all in attendance that the meeting was with the Board of Trustees and that Mr. Vander Molen, as a Trustee, would be attending the attorney-client meeting. (R. XLVI 166:8-167:15)

By definition, this type of meeting is a meeting between a governing body and its legal counsel, so the public would anticipate that the members of the governing body would be in attendance. There was no confusion to the public as to who was attending the attorney-client meeting.

Plaintiffs' proffer of authorities where courts have found Sunshine law violations related to technical defects in the conduct of a attorney-client meeting are inapposite and readily distinguishable because they do not involve a member of the actual governing body. Plaintiffs' cases involve instances where the public was not privy to the identity of a staff member or member of the legal team who was in attendance at the attorney-client meeting.

Assuming *arguendo* a Sunshine violation occurred, Plaintiffs have failed to provide any authority for the proposition that a Sunshine violation would nullify the statutory provision which exempts production of attorney-client session transcripts during the pendency of the subject litigation. (R. X 1839); § 286.011(8)(e), Fla. Stat. ("The transcript *shall* be made part of the public record upon *conclusion* of the litigation." (emphases added)). Plaintiffs refer to cases wherein the court found a Sunshine violation related to attorney-client sessions, but in none of those cases did the courts take the inequitable leap to requiring the local government to divulge the transcripts of those sessions while the subject litigation was ongoing. Attorney-client session transcripts contain protected attorney-client

communications, as well as attorney's trial strategies and mental impressions. The attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party an undue advantage over the other party. Requiring such information to be turned over to an adverse litigant during the pendency of litigation would be grossly unjust to the local government, and it is not required by the letter or the spirit of the exemption.

*Public Records Law Allegations Raised By Plaintiffs On Appeal*

Issue VI.A.: The Trial Court Correctly Found That Plaintiffs Failed To Prove Unreasonable Delay In Producing Documents - Request For Legal Opinion - 64(h)

Under Florida Statute, § 119.07(4), “[t]he custodian of public records shall furnish a copy or a certified copy of the record *upon payment of the fee prescribed by law.*” (emphasis added) In this case, there was no evidence presented that Ms. Smith ever paid or offered to pay the fees prescribed by law to receive documents related to the attorney's opinion nor was she willing to come to the Trailer Estates office to view such a document. (R. Pls. Ex. 272; Pls. Ex. 277; Pls. Ex. 279; Pls. Ex. 281)

Florida's Public Records law does not require local governments to answer questions and respond to arguments posed by members of the public. *See In re Report of Supreme Court Workgroup on Public Records*, 825 So.2d 889, 898 (Fla. 2002)(“ The custodian is required to provide access to or copies of records but is

not required either to provide information from records or to create new records in response to a request.”)(citations omitted); Op. Att’y Gen. Fla. 92-38 (“Chapter 119, F.S., does not require the town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.”)

In *Wootton v. Cook*, 590 So.2d 1039, 1040 (Fla. 1st DCA 1991), the plaintiff mailed a request to the government office and asked them to furnish a list of documents in a certain file and a statement of charges for copying such documents. After finding that the records custodian had no duty to prepare a list of documents for the requestor, the court held that the records custodian “must respond to requests by mail for information as to copying costs”, and if the requestor forwards the appropriate fee, the custodian must furnish by mail a copy of the records.

In this case, while Plaintiffs sent multiple letters with various questions, objections and requests for multiple documents, they never inquired about copying costs or evidenced any willingness to pay the Park’s costs to retrieve, copy and mail the documents. Upon receipt of the first request which evidenced any willingness to pay for copies and mailing charges, Trailer Estates responded promptly and provided the requested records. (R. Pls. Ex. 287; Pls. Ex. 290)

Plaintiffs also admit that Trailer Estates provided the subject legal opinion during a public records inspection in July 2007, more than a year before the commencement of this action. (R. X 1838; XLVI 229:6-16) Florida Statute, §

119.12, requires a plaintiff to prove that they instituted a civil action to enforce the provisions of Chapter 119 and that the local government unlawfully refused to permit the record to be inspected. Because Trailer Estates provided the subject document prior to the filing of the lawsuit, this action was not instituted to obtain access to this record and Plaintiffs' claim under must also fail as a matter of law. *See Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So.2d 759 (Fla. 2d DCA 2007) (“This brief survey of the case law suggests that attorney's fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.”)

Issue VI.A.: The Trial Court Correctly Found That Trailer Estates Did Not Deny Access To The Information In The Database - Database – 62(d)

Trailer Estates is a 55-and-older community. (R. LVIII 8497; LVI Pls. Ex. 237; A. 2) New residents are asked to fill out a form containing demographic information. *See* 42 U.S.C. §3607 (describing requirements for housing for older persons); (R. LVI Pls. Ex. 237; A. 147-148) Trailer Estates input this information into a database which it maintained in a Quickbooks format. (R. LIII 1001:23-1002:16)

In April 2008, Ms. Denson requested a copy of the database information in Excel format. (R. LI 754:7-10; LVI Pls. Ex. 349; Pls. Ex. 350) Ms. Denson testified that Excel format was the only format that was acceptable to her. (R. LI 754:7-14; LVI Pls. Ex. 349; Pls. Ex. 350) The Park's office manager did not know how to convert the entire database into Excel format and her attempts to do so resulted in errors. (R. LIII 1014:12-23) The office manager offered to print out individual reports, and the completed paper forms which contained all of the database information were made available to Ms. Denson. (R. LIII 1016:3-10; LVIII 8504) These offers were not, however, satisfactory to Ms. Denson.

This situation was specifically addressed in *Seigle v. Barry*, 422 So.2d 63 (Fla. 4<sup>th</sup> DCA 1982). The *Seigle* court held:

It is not the intent of the law to put public officials in the business of compiling charts and preparing documentary evidence. The intent is rather to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers.

We, therefore, adopt the rule that access to computerized records shall be given through the use of programs currently in use by the public official responsible for maintaining the public records.

422 So.2d at 66.

Because Trailer Estates offered Ms. Denson access to the information contained in its database in at least two different forms and because Trailer Estates was under no obligation to convert the information into Ms. Denson's preferred

format, the trial court properly held that Trailer Estates did not unlawfully refuse access to the requested information. (R. LVIII 8504)

Issue VI.A.: The Trial Court Correctly Ruled That Trailer Estates Did Not Unlawfully Refuse To Produce Documents - December 12, 2008, Request – 64(g)

On December 12, 2008, Plaintiffs submitted a public records request for all emails sent between Board members or which copied another Board member regarding Park issues from January 1, 2006, to present, and any blogs, chat rooms, chalkboards, bulletin boards, instant messages, groups, or other electronic mediums where two Board members have communicated regarding Park issues from January 1, 2006, to present. (R. LVI Pls. Ex. 366) Plaintiffs alleged that Trailer Estates unreasonably delayed in providing 187 documents more than one month later and then 800 documents three months later. (R. X 1838)

As discussed above, Florida Statute, §119.12, authorizes a court to assess attorneys' fees against a government agency if (1) a civil action is filed against the agency to enforce the provisions of Chapter 119 and (2) the court determines that the agency unlawfully refused to permit a public record to be inspected or copied. Plaintiffs contended that Trailer Estates unreasonably delayed in producing these documents, but Plaintiffs failed to meet their burden of proof as to either statutory element. (R. X 1838; R. LVIII 8505-8506)

Plaintiffs filed this action in November 2008, but this allegation was not contained in the initial complaint. (R. I 2) Plaintiffs' counsel testified at trial that

Trailer Estates produced the remaining documents responsive to the request after the March 17, 2009, hearing on Plaintiffs' Motion For Temporary Injunction. (R. XLVI 135:10-23) Plaintiffs did not add this allegation to their complaint, however, until April 17, 2009. (R. III 347) While Plaintiffs' brief contains the statement that the records were produced in June 2009, Plaintiffs fail to refer to any evidence to support this statement. (Appellants' Initial Br. 19-20)<sup>6</sup> Plaintiffs failed to produce any evidence that the documents were not produced prior to the filing of the amended complaint in April 2009.

It cannot be said that Plaintiffs filed this civil action to enforce the provisions of Chapter 119, as it relates to this claim. Plaintiffs cannot tack on this claim after the documents are produced and then claim that the lawsuit was brought to enforce the provisions of Chapter 119 as to those added claims. *See Jackson-Shaw Co. v. Jacksonville Aviation Authority*, 510 F.Supp.2d 691, 737 (M.D. Fla. 2007)(“Rather, Jackson-Shaw added its claim under Chapter 119 in its amended complaint, filed on March 30, 2006, three months after it had filed the initial complaint in this action. Cases awarding attorneys' fees to plaintiffs who received the requested documents *after* a lawsuit was filed to enforce the public records law and to obtain public records are inapposite.”)

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<sup>6</sup> Plaintiffs' record citations do not support this contention.

The trial court correctly found that many of the Plaintiffs' requests for inspection occurred after the lawsuit was filed and, thus, some of Plaintiffs' claims were not filed in an attempt to gain access to public records. (R. LVIII 8507)

Plaintiffs also failed to prove that any delay under the facts of this case amounted to an unlawful refusal to produce the documents. There was trial testimony that there were requests for production and public records requests made approximately two weeks after this action was commenced, on December 12, 2008, which caused confusion because they appeared to request the same documents and things. (R. LIV 1185:14-1186:4) While Trailer Estates was attempting to respond to the requests and prepare a defense to the recently-filed complaint, Plaintiffs' counsel barraged the Park with multiple public records request letters, containing numerous individual requests covering varying subjects and wide expanses of time. (R. LIV 1275:9-14; LVI Pls. Ex. 371; Pls. Ex. 372)

Plaintiffs' attorney testified that a single request letter submitted during the time of Plaintiffs' public records assault contained sixteen different categories of records. Plaintiffs' lawyers visited the Park office many times and Plaintiffs' paralegal testified that she personally prepared twenty-four written requests, made six verbal requests, and visited the Trailer Estates office thirty times to view documents. In total, Trailer Estates produced thousands of documents. (R. XLV 48:9-17) Plaintiffs' public records requests were found by the court to be

“sustained, voluminous, substantial in breadth, and were at times simultaneous with requests for production in this litigation.” (R. LVIII 8504)

In *Jackson-Shaw Co.*, the court took note of the fact that public records requests at the JAA were handled by a single administrative assistant, who was accustomed to fielding 10 to 12 requests per month. The developer’s attorneys made multiple records requests, and the records custodian produced many documents. However, some requested records were inadvertently omitted, including a proposal, pro forma documents, and two e-mails. The court found that the JAA never denied any requests for documents and that all of the requested documents had since been produced during the course of the litigation. Under those facts, the court determined that the JAA’s response did not amount to an unjustifiable delay or an unlawful refusal to allow the records to be inspected.

The facts here are similar to those in *Jackson-Shaw Co.* and support the trial court’s determination.

Further, plaintiffs failed to prove that the “additional documents” produced were responsive to the December 12 request. While Plaintiffs admit that they submitted numerous public records requests during the pertinent time period, the only evidence presented that the “additional documents” produced were in response to the December 12 request was the testimony of Plaintiffs’ counsel. The documents themselves were not introduced into evidence to prove to which request

they were responsive or for comparison with the other documents that had been produced throughout this time period.

In light of all of the circumstances surrounding this request, the trial court made the factual finding that Trailer Estates's response did not rise to the level of an unlawful refusal to provide the requested records. (R. LVIII 8504-8505)

Issue VI.B.: The Trial Court Properly Ruled That Plaintiffs Failed To Prove That A Document Was Not Produced - "Item #76" - 64(a)

Plaintiffs allege in their brief that Ms. Denson requested and never received a copy of "Item #76" from the Park's public records log book. (Appellants' Initial Br. 25) However, Plaintiffs' pleadings contain no allegation that Trailer Estates failed to produce "Item #76." (R. X 1812-1926) To the contrary, Plaintiffs plead that the requested document *was* produced by Trailer Estates, albeit not quickly enough for Plaintiffs. Trailer Estates does not agree to an amendment of Plaintiffs' pleadings. The trial court correctly found that Plaintiffs failed to carry their burden of proof as to this claim.

"Issue VII.:"<sup>7</sup> The Trial Court Correctly Ruled That Trailer Estates Did Not Unreasonably Delay In Providing The Budget Video - Budget Video – 62(b)

Plaintiffs alleged that on August 26, 2006, they requested a copy of the video of the Park's 2006 budget hearing. (R. X 1835) The testimony from Trustee

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<sup>7</sup> Plaintiffs make reference to this allegation in their Statement Of The Case And Facts, but Plaintiffs do not include any argument concerning this matter in their Initial Brief. Trailer Estates addresses the issue in an abundance of caution.

McNulty and the Park's office manager was that the Board meetings were videotaped by the resident Video Club and that Trailer Estates searched for and did not possess a copy of the requested video at the time of the request. (R. XLVIII 466:5-22; LIII 966:11-24) There was much made as to whether Plaintiffs had requested video or audio tapes, how many budget meetings had occurred, the relationship between the Video Club and the Park, and who had possession of the video tapes. (R. XLVIII 442:9-443:13, 446:5-22; LIII 966;11-24; LVIII 8504) The court found that when the video appeared in the Park's office in April 2009, it was promptly turned over to Plaintiffs. (R. LVIII 8504)

The court in *Grapski v. City of Alachua*, 31 So.3d 193 (Fla. 1st DCA 2010), laid out the requirements for a claim under Chapter 119: "On their claim under chapter 119, appellants had to prove they made a specific request for public records, the City received it, *the requested public records exist*, and the City improperly refused to produce them in a timely manner.")(emphasis added) Further, a local government is not required to respond to "standing requests" for documents which may come into their possession. *See* Inf. Op. Att'y Gen. Fla. June 15, 1995 ("This office has stated that upon receipt of a public records request, the agency must comply by producing all non-exempt documents in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Ch. 119, F.S. However, the request applies only to those documents

in the custody of the agency at the time of the request; nothing in Ch. 119, F.S., appears to mandate that an agency respond to a so-called ‘standing’ request for production of all public records that it may receive at any point in the future.”)

In the case of *Hillier v. City of Plantation*, 935 So.2d 104 (Fla. 4th DCA 2006), the plaintiff made several public records requests and was provided with several records, but he alleged that a number of documents had not been produced. When questioned, plaintiff was unable to confirm or deny that some of the documents existed or were in the City’s possession. The evidence revealed that the City had never denied the plaintiff access to inspect the records in the possession of the City, but the alleged records were not found, and the City testified that the records did not exist. The trial court found that the plaintiff never proved that the requested records were in the possession of the City at the time of the request, and the appellate court upheld this determination.

Plaintiffs’ counsel testified that they were granted access to review the videos at the Park office, but the 2006 budget meeting video was not among them. (R. XLV 74:10-19) Plaintiffs failed to establish that the residents’ Video Club had provided a copy of the requested video to the Park at the time of the request or any time before April 2009. (R. LVIII 8504) When Trailer Estates obtained the video, it was produced. (R. LVIII 8504)

The court found that the delay was not unreasonable under the facts of this case, and that determination is supported by substantial competent evidence on the record. (R. LVIII 8504)

### CONCLUSION

For all the foregoing reasons, the trial court's challenged rulings in the Final Judgment and the June 14, 2010, Order Granting In Part and Denying In Part Trailer Estates Park And Recreation District's Motion For Partial Summary Judgment should be affirmed.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been sent via US Mail to Kevin S. Hennessy, Esq., Lewis, Longman & Walker, P.A., 1001 Third Avenue West, Suite 670, Bradenton, Florida 34205, on this 29<sup>th</sup> day of July, 2011.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this document was prepared in accordance with the font requirements of Florida Rules of Appellate Procedure 9.100(1) and 9.210(a)(2).

Respectfully submitted,

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