

BRAM CANTER-MEDIATOR
9554 Yashuntafun Road
Tallahassee, Florida 32311

May 2, 2023

The Honorable Greg K. Weiss
Mayor of Palm Beach County
301 N. Olive Avenue, Suite 1201
West Palm Beach, Florida 33401
(Via email at GWeiss@pbcgov.org)

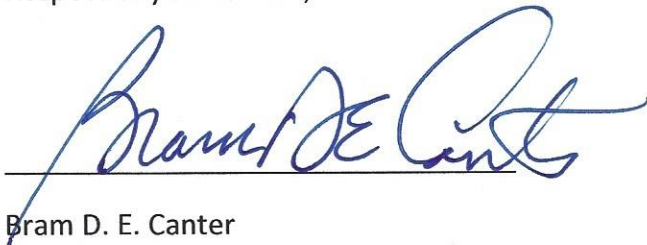
Verdenia C. Baker
Palm Beach County Administrator
301 N. Olive Avenue, Suite 1101
West Palm Beach, Florida 33401
(Via email at VBaker@pbcgov.org)

Denise Coffman, Esq.
Palm Beach County Attorney
301 N. Olive Avenue, Suite 601
West Palm Beach, Florida 33401
(Via email at DCoffman@pbcgov.org)

Dear Mayor Weiss, Ms. Baker, and Ms. Coffman:

Enclosed please find my Recommendation in the matter of the Request for Relief filed on February 24, 2023, by Moroso Investment Partners LLC and Moroso Investment Partners II LLC pursuant to section 70.51, Florida Statutes.

Respectfully submitted,



Bram D. E. Canter

Cc: Seth Behn (Via email at SBehn@llw-law.com)
Robert Diffenderfer (Via email at RDiffenderfer@llw-law.com)
Darren W. Leiser (Via email at DLeiser@llw-law.com)
Helene C. Hvizd (Via email at HHvizd@pbcgov.org)

IN AND FOR PALM BEACH COUNTY FLORIDA

IN RE:

**THE REQUEST FOR RELIEF FILED BY
MOROSO INVESTMENT PARTNERS LLC and
MOROSO INVESTMENT PARTNERS II LLC
PURSUANT TO SECTION 70.51, FLORIDA STATUTES.**

RECOMMENDATION

Section 70.51, Florida Statutes, the Florida Land Use and Environmental Dispute Resolution Act, provides that any owner of real property who believes a local government's development order is unreasonable or unfairly burdens the use of the property may apply for relief in a proceeding before a Special Magistrate who is to attempt to mediate a resolution of the conflict. If mediation is unsuccessful, the Special Magistrate is to consider the information presented by the parties and file a recommendation with the local government as to whether the development order should be left undisturbed or an alternative development order should be issued.

On January 26, 2023, the Palm Beach County Board of County Commissioners ("the Board") denied the applications of Moroso Investment Partners LLC and Moroso Investment Partners II LLC ("the Owners") to abandon an outdoor entertainment recreational use operated as the Palm Beach International Raceway, and simultaneously denied the Owners' application to redevelop the property for warehouses and accessory office space. On February 24, 2023, the Owners filed a Request for Relief with Palm Beach County pursuant to section 70.51. This Recommendation follows the hearing held before Special Magistrate Bram D.E. Canter on April 19, 2023, at the Governmental Center in West Palm Beach.

APPEARANCES

For the Owners: Seth C. Behn, Esq.
Robert P. Diffenderfer, Esq.
Lewis, Longman & Walker, P.A.
360 S. Rosemary Avenue, Suite 1100
West Palm Beach, Florida 33401-6055

John F. O'Sullivan, Esq.
Marianna Chapleau, Esq.
Shane Grannum, Esq.
Quinn Emanuel LLP
2601 S. Bayshore Drive, Suite 1550
Miami, Florida 33133-5417

For Palm Beach County: Helene C. Hvizd, Esq,
Darren Leiser, Esq.
301 N. Olive Avenue, Suite 601
West Palm Beach, Florida 33401-4700

The Owners presented the testimony of George Gentile, a landscape architect and planner; Jose Antonio Labrón, a capital market broker; Walter Duke, a commercial real estate appraiser; Bryan Kelly, a traffic engineer; and Ari Mazo, a former board member of the company operating the Raceway. The County presented the testimony of Quazi Bari, a County traffic engineer; Lisa Amara, the County Zoning Director, and Wendy Hernandez, the Deputy Zoning Director.

PUBLIC PARTICIPATION

Section 70.51(5) provides that owners of contiguous land and substantially affected persons who submitted testimony to the local government about a development order may request to participate in the proceeding. No owners of contiguous land requested to participate in the Moroso proceeding, but five people who submitted testimony to the Board requested and were allowed to participate: Madeline Marconi, Jennifer Davis, Zachary Boyajian, Drew Martin, and Marc Weinthal. At the hearing, Ken Zaron was allowed to speak for Madeline Marconi and Joe Costello was allowed to speak for Drew Martin. The five speakers

were people who enjoyed attending Raceway events, raced vehicles at the Raceway, and/or had a business that directly or indirectly benefited from racetrack operations. They were well-spoken and presented relevant information. They opposed the Owners' application to abandon the racetrack use.

THE PROPOSED REDEVELOPMENT

Much of the detailed information about the Owners' property and their proposed new use of the property contained in the Request for Relief, the County Staff Report, and other documents already submitted to the County will not be repeated here. It is undisputed information and unnecessary for an understanding of the issues in dispute or an understanding of the Recommendation.

The racetrack property consists of approximately 175 acres and is located west of the City of Jupiter on the Beeline Highway, State Road 710. It is adjacent to a facility operated by aerospace manufacturer Pratt & Whitney. The racetrack opened in 1964 and operated under various owners. It has a quarter-mile track for drag racing and a two-mile multi-turn course used by IndyCars, sports cars, and several other types of racing vehicles. These Owners began operating the racetrack in 2015.

After some years of financial losses, the Owners closed the Raceway in April 2022. The participating members of the public claimed the Raceway was unprofitable because it was not operated well. Although they presented some relevant information, they did not have special financial expertise or experience in operating a racetrack. Some of the information presented by them and by the Owners on this subject was hearsay statements of people who did not attend nor were qualified to participate in the hearing. Points were made on each side but the informal nature of the proceeding, and the amount and quality of the information that was presented, was not adequate to answer with any confidence the complex question of whether the Raceway could be operated differently and make a profit. However, as will be explained, the Recommendation does not depend on resolving this question.

The Owners applied to abandon the racetrack development order ("DO") and applied for a new DO to allow for warehouses with accessory office space totaling about 2.2 million square feet. In preparation for the Board's public

hearing on the Owners' applications to abandon the racetrack and redevelop the property for warehouses, the County staff issued a report recommending that the Board approve the applications. The staff found the applications met all applicable County standards and conditions for approval. However, following the Board's consideration of the Owners' applications, the Board voted to deny them. The Board formalized its decision in a resolution stating the reasons for the denial as: "fails to meet Article 2.B.7.F.6.c., Adequate public facilities for traffic; Article 2.B.7.F.6.d, Changed Conditions or Circumstances; and safety." The Owners then filed their Request for Relief pursuant to section 70.51.

MEDIATION

The County took the position that its attorneys and staff were not authorized to proceed to a compromise that deviated from the action taken by the Board. The Owners' representatives also came to the hearing without a "mediated position." Because a mutually acceptable solution could not be reached through mediation, the Special Magistrate considered the information presented in the Request for Relief, in the County's response, and at the hearing to formulate a recommendation for the Board to consider.

TRAFFIC AND SAFETY

No information or explanation was given by the County as to how the Owners failed to meet the requirement of Article 2.B.7.F.6.c. of the ULDC as it relates to public facilities for traffic. The traffic engineering witnesses for the Owners and the County agreed that the proposed redevelopment of the property meets all County traffic performance standards. The issue of safety was not explained by the Board nor addressed by the County in its response to the Request for Relief or at the hearing. The County never identified a ULDC standard for safety that can be reviewed to determine how the Owners failed to meet it. There was an allegation made at the hearing that there has been more illegal street racing since the Raceway was closed. If that allegation is the basis for the reference to safety in the Board's denial, the County did not explain how such a factor, even if properly established by competent evidence, could be the basis for denying the Owners' applications.

ABANDONMENT OF THE RACEWAY

The standards that must be met to abandon a DO are set forth in Article 2.B.7.F.6. of the ULDC. It is the following standard that caused the conflict in this case:

Changed Conditions or Circumstances

There are demonstrated changed site conditions or circumstances provided by the Applicant's Justification Statement that necessitate the abandonment.

Abandonment of the resolution approving the DO will not impact other DOs approved on the same site. There is no reliance by other parties for additional performances, or tasks to be implemented, that were required in the original DO.

The Owners' Justification Statement explained the changed conditions or circumstances that warranted approval of their applications:

With the evolving nature of the economy, transportation and shipping, there is a significant need for large industrial sites within Palm Beach County. Given the build out of Palm Beach Park of Commerce and lack of industrial space and land available within northern Palm Beach County, allowing this site to develop consistent with its existing Future Land Use designation will address those needs.

The County staff believed the Owners' justification satisfied the changed conditions standard. Without elaboration, the Board determined it did not.

The Special Magistrate is confident there is no support in law for the proposition that a landowner can be forced by a city or county to continue operating a business the landowner no longer wants to operate. It is unlikely the Owners asked for the County's permission before the Owners closed the Raceway in April 2022. The unspoken proposition in the statements made by members of the public in this matter is that the Owners must revive and operate the Raceway

or get someone else to do it. However, even a new owner cannot be forced to operate the racetrack. Property owners are free to not use their properties.

As indicated in the abandonment standard that is quoted above, there will be circumstances when a DO cannot be abandoned until certain conditions imposed by the DO are satisfactorily addressed. An example might be a DO that provided for a stormwater treatment system that handles the stormwater from another site. The County would have to be satisfied that after the DO is abandoned, the stormwater treatment system will continue to be maintained to meet treatment requirements. Even in this example, however, it is not the business activity that must continue to be operated, it is the DO condition that must continue to be performed.

Statements made by the opponents of the Owners' plans indicate they saw the changed circumstances standard as a high hurdle for the Owners to clear in order to abandon the racetrack DO, amounting to a requirement to show that continuing to operate the Raceway is impossible. Therefore, most of the information the public offered to the Board and to the Special Magistrate was to show the Raceway could be operated profitably, that there was no lack of interest and no economic impediment that qualified as changed circumstances necessitating its abandonment. However, that is not how the changed circumstances standard has been interpreted and applied in the past by Palm Beach County.

George Gentile, a land planner with over 40 years of experience with land use regulation in Palm Beach County, stated that he never heard of an application for abandonment being denied by the County. No County representative at the hearing said the County had previously denied an application for abandonment. As recently as November 2022 the same justification for abandonment given in this matter by the Owners was determined by the County staff and the Board to satisfy the changed circumstances standard in the Arrigo MUPD matter which involved the abandonment of a DO for restaurant and hotel uses to allow redevelopment for warehousing.

If the Owners had proposed to make a new use of the property that is not currently permissible under the Comprehensive Plan or ULDC, then the requirement to show changed circumstances would logically relate to justifying a use that was not previously considered or planned by the County. However, in this case, the proposed warehouse use is an allowable use under the Commercial Recreation/Industrial future land use designation in the Comprehensive Plan. The property is also located within the United Technologies Corporation Protection Area Overlay which explicitly seeks to prevent incursions by non-industrial uses. If the racetrack had not been built before Palm Beach County adopted its Comprehensive Plan and had not been accommodated as a "grandfathered" use, it would be inconsistent with the Comprehensive Plan.

The proposed warehouse use is also a use "permitted by right" under the property's zoning designation, which is Multiple Use Planned Development. The Staff Report noted that the approval for a use permitted by right is a "less restrictive process." That seems to be contradicted by the approval process followed in this case where the Owners were denied a use permitted by right because the Board determined the use was not necessitated by changed circumstances.

If the County wants to require landowners to show changed circumstances to abandon a DO, even when the landowner's proposed new use is permitted by right, then the Owners have shown such changed circumstances: substantial population growth since the racetrack was built and the continuous growth in online shopping have combined to greatly increase the need for warehousing. The property is ideally situated on the Beeline Highway, which is part of Florida's Strategic Intermodal System ("SIS"). The SIS was established to focus transportation resources on the facilities most significant for interregional and interstate travel and for Florida's economy.

At the Board meeting at which the Owners' applications were heard, the statements made by members of the public were persuasive to the Board. The Special Magistrate agrees with the County that the statements presented to a local governing body by members of the public can qualify as "competent substantial evidence" to support a decision. However, the statements made by members of the public to the Board and to the Special Magistrate in this matter, while showing there is strong support among a segment of the public for

reopening the Raceway, and suggesting the Raceway could be operated differently and become profitable, did not refute the fact that there has been a substantial increase in the need for warehousing and the racetrack property has become well-suited for that use, which are reasons the Board has previously found sufficient to meet the changed conditions standard.

UNFAIR BURDEN

The Owners were under contract to sell the property to a warehouse developer, but the Board's action caused the sale not to close. The Owners presented testimony to show that the effect of the Board's action was to severely reduce the value of the property. Walter Duke estimated the Owners' damages to be about \$81 million.

The term "unfairly burdens" in section 70.51 is also a term that is sometimes used in Florida and federal court cases involving the constitutional prohibition against taking private property for a public purpose without just compensation. However, an informal section 70.51 proceeding is not conducted with the rigor of a trial. There is no discovery, cross examination, or the other formalities that are designed to test factual allegations. The proceeding is not intended nor is it adequate to produce a judicial-type determination about whether the Board's action amounted to an unconstitutional "taking" or "inverse condemnation." It is also inadequate to determine monetary damages.

However, the Special Magistrate believes that being forced to continue an unprofitable racetrack use the Owners do not want to continue and being denied their request to make another use of the property that is permitted by right, unfairly burdens their use of the property. For this reason and because the Board's action was inconsistent with the County's previous interpretation and application of the ULDC, the Board's action was also unreasonable.

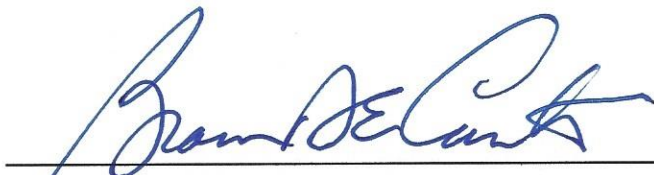
CONCLUSION AND RECOMMENDATION

The members of the racing community that spoke at the hearing and their supporters in the audience demonstrated that the Raceway was important to them for social and business reasons. Zachary Boyajian asked rhetorically if we are to just watch as golf courses, horse tracks, and racetracks are replaced by warehouses. His concern is not unreasonable but the Special Magistrate is unfamiliar with and was not shown any court decisions that would allow this situation to be remedied by taking away a landowner's ability to stop operating a business it no longer wants to operate and begin one of the other land uses allowed on the property when all requirements for the new use have been met. Nor should the remedy be for the County to apply the abandonment standards differently to the Owners than the way those standards have been applied in the past, which is what the information given to the Special Magistrate indicates.

A section 70.51 proceeding affords a landowner the opportunity to have an independent person with relevant experience and knowledge review a matter that was already decided by a city or county. It is a short detour so the parties might avoid judicial proceedings. The product of a section 70.51 proceeding is a recommendation for the local government's consideration. The recommendation can be accepted, modified, or rejected. Based on the information provided to the Special Magistrate and for the reasons stated above, it is

RECOMMENDED that the Board approve the Owners' applications that were denied on January 26, 2023, subject to the conditions for approval recommended by the County staff.

Filed this 2d day of May 2023.



Bram D.E. Canter, Special Magistrate

Copies Furnished:

Mayor Gregg K. Weiss (Via email at GWeiss@pbcgov.org)
Verdenia Baker (Via email at VBaker@pbcgov.org)
Denise Coffman (Via email at DCoffman@pbcgov.org)
Seth Behn (Via email at SBehn@llw-law.com)
Robert Diffenderfer (Via email at RDiffenderfer@llw-law.com)
Darren W. Leiser (Via email at DLeiser@llw-law.com)
Helene C. Hvizd (Via email at HHvizd@pbcgov.org)

Palm Beach County shall furnish copies to:

Department of Legal Affairs
Madeline Marconi
Jennifer Davis
Zachary Boyajian
Drew Martin
Marc Weinthal