

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
CASE NO. 4D10-990**

**LEGACY PLACE APARTMENT
HOMES, LLC,**

Appellant

v.

L.T. No.: 502006CA003460

PGA GATEWAY, LTD.,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT,
FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Introduction

The primary issue in this case can be summarized as follows. A buyer and seller of real property agree to share the costs of several infrastructure improvements, including the widening of a road, that serve both the property sold to the buyer and the seller's adjacent property. The buyer and seller further agree that: (i) the seller is responsible for widening the road; (ii) the seller shall complete the road within 150 days of the issuance of the necessary permit; and (iii) most critically, time is of the essence in completing the road. The seller completes the road three plus years late and nearly two years after the buyer has sold the property to a third party. Is the buyer still obligated to share the cost of the road? Or, instead, is the buyer's contractual liability discharged by the seller's breach of the time-of-the-essence provision? The buyer (the Appellant) says the answer to the latter question is "Yes", while the seller (the Appellee) says the answer is "No."

The secondary issue is whether a credit granted to the seller for a utility connection fee for a lift station should have been treated as an "impact fee credit" or a "cost savings" under the parties' agreement. The buyer says "Yes," while the seller says "No." If the buyer is correct, then the credit should have been (but was not) shared between the parties.

Background

This is an appeal of a final judgment entered in a commercial case after a five-day bench trial. The parties litigated numerous issues below. (R2:346-49.) This appeal narrowly focuses on two issues, stated immediately above, in which the material facts are largely, if not entirely, undisputed.

In late 1999, Appellee, PGA Gateway, Ltd. (“PGA”), as seller, and Appellant, Legacy Place Homes Apartment, LLC (“Legacy”),¹ as buyer, entered into a purchase and sale agreement for over twenty acres of land.² (Pl.’s Ex. 2, at 1, ¶ 1; R2:344.) The parties understood that Legacy would develop an apartment community on the land, which was adjacent to PGA’s retail development. (Pl.’s Ex. 2, at 1, ¶ 1.) The parties further understood that certain improvements, some required by governments, would have to be built to serve both Legacy’s residential development and PGA’s retail development. (Pl.’s Ex. 2, at 5, ¶ 3.A.) PGA agreed that, after closing, it would complete the construction of “any . . . improvement necessary for [Legacy] to use and occupy the Property in accordance

¹ Throughout the record, the abbreviated names for the parties’ corporate affiliates were often used – Beztak for Legacy and Catalfumo for PGA.

² Beztak Land Company actually was the buyer under the purchase and sale agreement. (Pl.’s Ex. 2.) It later assigned this agreement to Legacy. (R2:344.) Because this assignment is not material to the appeal, this brief refers to the buyer as “Legacy” even if the incident being described occurred before the assignment.

with [Legacy's] construction schedule.” (Pl.’s Ex. 2, at 7, ¶ 3.D.) And the parties agreed that they would share the costs of these improvements. (*Id.*; R2:345.)

In August 2002, the parties entered into the Post-Closing Agreement (also referred to herein as the “Agreement”), a copy of which is in the attached appendix. (Pl.’s Ex. 87.) The purpose of the Agreement was to confirm how the parties would share the costs for the construction of improvements related to both their developments (the “Shared Cost Work”). (Pl.’s Ex. 87, at 1; R2:345.) PGA was responsible for contracting for the Shared Cost Work to be completed. (Pl.’s Ex. 87, at 1, ¶ 2.) The Shared Cost Work included improvements to widen RCA Boulevard, as well as for the Lift Station, Force Main, and Water project (“Lift Station Project”). (Pl.’s Ex. 87, at 5, Ex. A; Tr. 362.) Exhibit A to the Agreement specified how the costs would be allocated between the parties for each project. (Pl.’s Ex. 87, at 5, Ex. A.)

***Provisions of the Post-Closing Agreement Pertaining
to the Schedule, Delay, and Waiver***

The Post-Closing Agreement had several provisions pertaining to the schedule for completing the Shared Cost Work, including RCA Boulevard. Most importantly, paragraph 5 of the Agreement provided, “The parties agree that the Shared Cost Work shall be completed in accordance with the construction schedule attached hereto as Exhibit ‘B’, *time being of the essence.*” (Pl.’s Ex. 87, at 3 (emphasis added).) Paragraph 5 further provided, “Completion times shall be

measured from the date of issuance of permits provided that [PGA] represents that it has submitted all applications for permits for the Shared Cost Work . . . and [PGA] shall diligently attempt to obtain such permits.” (Pl.’s Ex. 87, at 3, ¶ 5.) Exhibit B of the Agreement was titled “Construction Schedule,” and the word “Proposed,” which had preceded this title, was stricken by hand.³ (Pl.’s Ex. 87, at 6, Ex. B.) Exhibit B specified that the improvements to RCA Boulevard were to be completed within 150 days of September 15, 2002, subject to the issuance of the required permits. (*Id.*) The Agreement required PGA’s construction contracts to have completion dates that complied with the completion dates set forth in Exhibit B. (Pl.’s Ex. 87, at 1, ¶ 2.b.) And the Agreement provided, “The time for completion shall not be extended for the failure of [Legacy or PGA] to perform its obligations or its failure to timely pay the amount due under the contract.” (Pl.’s Ex. 87, at 2, ¶ 2.c.iv.)

The Agreement also had provisions regarding delay damages. One provision required Legacy to provide bonds for the Shared Cost Work. (Pl.’s Ex. 87, at 3, ¶ 4.) Another provision entitled Legacy to exercise its rights under the bonds “if construction [was] delayed due to the actions or failure to act of [PGA] or owner under the construction contracts.” (Pl.’s Ex. 87, at 2, ¶ 3.) The

³ Legacy’s in-house counsel testified that he had stricken the word “Proposed” because the schedule in Exhibit B was meant to be “real” and “actual,” not “tentative” or “proposed.” (Tr. 541-42.)

Agreement lacked any provision allowing for liquidated damages or forfeiture in the event of a construction delay. (Pl.'s Ex. 87.)

The Agreement also provided a process for billing the Shared Cost Work. PGA's contractor was required to bill both parties on the twenty-fifth day of each month "for their respective portion of the *completed* Shared Cost Work." (Pl.'s Ex. 87, at 2, ¶ 3 (emphasis added).) As discussed below, PGA's contractor sent no invoices for RCA Boulevard for all of 2004 and the first quarter of 2005 (Pl.'s Ex. 381, at 1), confirming that no work on RCA Boulevard was completed during this time period.

Lastly, an anti-waiver provision in the purchase and sale agreement stated that no waiver would be effective "unless it [was] in writing signed by the party against whom it is asserted."⁴ (Pl.'s Ex. 2, at 21, ¶ 25.) Furthermore, any waiver would apply only to "the specific provision and instance to which it [was] related and [would] not be deemed to be a continuing or future waiver as to such provision or as to any other provision." (*Id.*)

⁴ Provisions under the purchase and sale agreement survived the closing of both the Post Closing Agreement and the purchase and sale agreement. (Pl.'s Ex. 87, at 3, ¶ 7; Pl.'s Ex. 2, at 19, ¶ 17.)

***PGA's Untimely Completion of RCA Boulevard
and Legacy's Response***

The section summarizes PGA's failure to timely complete the improvements to RCA Boulevard and Legacy's response to this failure. On the next page is a line graph depicting the most critical dates.

Giving PGA every benefit of the doubt, the contractual commencement date for RCA Boulevard was July 10, 2003. This date – 298 days after the default commencement date (9/15/2002) (Pl.'s Ex. 87, at 6, Ex. B) – was the date on which the permit for RCA Boulevard was issued.⁵ (Def.'s Ex. 85.) The Agreement thus required PGA to complete RCA Boulevard by no later than December 7, 2003 (150 days after the issuance of the permit). (Pl.'s Ex. 87, at 3, 6, ¶ 5 & Ex. B.). By December 2003, the other three projects litigated in the trial court (Fairchild Gardens South, the Lift Station Project, and Lake 4 & Outfall) were completed.⁶ But PGA did not complete RCA Boulevard by December 2003. Nor did it complete RCA Boulevard by 2004, 2005, or 2006. Instead, PGA completed RCA Boulevard three plus years late, sometime in March 2007 or later. (Tr. 127, 129, 621; Pl.'s Ex. 381, at 1, 27; Pl.'s Ex. 423.)

⁵ Legacy relied on this date in the trial court. (R3:510.) PGA did not dispute it.

⁶ This is demonstrated by the fact that the final invoices on these three other projects were dated December 2003. (Pl.'s Ex. 381, at 1-2, 6, 32, 36.) Two of these projects (Fairchild Gardens South and the Lift Station Project) were also untimely, but not nearly as untimely as RCA Boulevard. (*See* R3:510.) Therefore, Legacy seeks relief on this appeal for delays concerning solely RCA Boulevard.

No physical work was done on RCA Boulevard during the 2003-04 time frame, according to the testimony of PGA's in-house counsel, James Jacoby. (Tr. 56, 1194.) This testimony was largely confirmed by the invoices of PGA's contractor (Pl.'s Ex. 381, at 3-36),⁷ which was PGA's corporate affiliate (Tr. 75). PGA's contractor sent no invoices at all in 2004 for RCA Boulevard, and it sent only seven invoices for the time period from September 25, 2002 to November 25, 2003.⁸ (Pl.'s Ex. 381, at 1, 7-11.) These initial seven invoices totaled \$102,178.40, less than twenty percent of total damages, before interest, claimed by PGA for the unpaid work on RCA Boulevard. (*Id.*)

The total on these initial seven invoices for RCA Boulevard was less than the \$560,479.15 of credits that, under the Agreement, Legacy was entitled to (or at least arguably entitled to). One portion of these credits, in the amount of \$150,997, was from a credit for the County Road Impact Fees that Legacy was guaranteed to receive under the Agreement. (Pl.'s Ex. 87, at 4, ¶ 9; *id.*, at 5, Ex. A; Tr. 326) A second portion, \$267,705, was from a credit for the City Impact Fees that, though not guaranteed, Legacy was expected to, and later did, receive under the

⁷ Plaintiff's Exhibit 381 contains the invoices and a summary of the invoices. It was prepared by Paul Simonson, PGA's chief operating officer and former chief financial officer. (Tr. 308, 317-18, 400.) Because this summary was difficult to read, we have replicated this summary in a more readable format and attached it to the appendix.

Agreement. (Pl.'s Ex. 87, at 4, ¶ 9; *id.*, at 5, Ex. A; Pl.'s Ex. 381, at 2.) The third portion, \$141,797.15, was from a credit for a connection fee charged by Seacoast Utility. *See infra* at 12-14. This third portion is the only portion that PGA has disputed in this lawsuit (Pl.'s Ex. 381, at 1-2), but PGA did not dispute this portion when first notified of it by Legacy in June 2003 (Tr. 574-75; Def.'s Ex. 80). Legacy applied these credits and did not pay any of the initial seven invoices for RCA Boulevard generated in 2002 and 2003. (Tr. 574-78; Pl.'s Ex. 381, at 7.) PGA did not contemporaneously object to Legacy's failure to pay these seven invoices. (Tr. 618.)

In January 2004, in-house counsel for Legacy, Mr. Sturing, sent a letter to PGA's in-house counsel, Mr. Jacoby, in which he objected about several projects, including RCA Boulevard, that had not been timely completed. (Def.'s Ex. 165; Tr. 596.) Legacy demanded that PGA comply with the Agreement and remedy all delays immediately. (Def.'s Ex. 165.) However, as demonstrated by the testimony of PGA's own counsel and by its own contractor's invoices, PGA and its contractor did nothing in response. No work occurred on RCA Boulevard for the remainder of 2004 and the first quarter of 2005. (Tr. 1194; Pl.'s Ex. 381, at 1.)

⁸ PGA's contractor also sent one invoice for RCA Boulevard that pre-dated the Agreement, which Legacy paid. (Pl.'s Ex. 381, at 1 (referring to invoice dated 5/25/02).)

The next significant event, a year and half later, was Legacy's sale of its property to a third party on June 28, 2005. (R1:93, ¶15; R2:345; Tr. 619, 638.) To effectuate the sale, Legacy was required to post \$350,000 in escrow to cover any liability for potential litigation arising out of RCA Boulevard that would involve the third-party buyer. (Pl.'s Ex. 360, at 1; Tr. 298-99, 304-06.) Just before this sale, PGA's contractor generated three invoices, one each dated on the twenty-fifth of April, May, and June 2005.⁹ (Pl.'s Ex. 381, at 1, 12, 13.) The May 2005 invoice resulted in a total amount claimed by PGA for RCA Boulevard (\$186,851.75) that, for the first time, exceeded the credit of \$150,997 guaranteed to Legacy under the Agreement, but this total amount still did not exceed the credits of \$560,479.15 that Legacy expected to receive under the Agreement. (*Compare id. with supra* at 7-8.) Indeed, as of May 2005, the amount that PGA claimed was unpaid for all projects under the Agreement was \$466,709.47,¹⁰ which, of course, was less than the credits of \$560,479.15 that Legacy expected to receive.

Ten days after the June 2005 invoice and one week after the sale of the property, Legacy sent another letter to PGA on July 5, 2005. (Def.'s Ex. 187; Tr.

⁹ The summary sheet of PGA's exhibit references an April 2005 invoice, but, unlike most the other invoices, no such invoice was included in the exhibit. (Pl.'s Ex. 381.) Nevertheless, we assume that an April 2005 invoice was generated and sent to Legacy.

303-04, 615.) It informed PGA that, “before any work [was] done,” the parties needed to resolve issues arising from PGA’s failure to timely complete RCA Boulevard:

We have recently began [sic] receiving invoices for RCA Boulevard, which is about two years after it was supposed to be completed. We have not been kept informed of the progress or reasons for the delay, nor does the billing reflect any of the offsets or credits previously forwarded to your office.

We will be happy to deal with any amount due, if any, once we receive the appropriate credits and offsets including those for the delay of RCA Boulevard and Fairchild Gardens North. We should have an understanding and resolve this before any work is done.

Please call me if you have any questions.

(*Id.*) PGA did not respond to this letter. (Tr. 616.) Instead, its contractor just continued to send monthly invoices that went unpaid. (Pl.’s Ex. 381.) Indeed, after this letter and the sale to the third party, PGA’s contractor sent invoices totaling another \$313,556.73 for the widening of RCA Boulevard, approximately sixty percent of the amount claimed in this lawsuit before interest is added. (Pl.’s Ex. 381.)

After receiving two more invoices in late July and August 2005 (Pl.’s Ex.

¹⁰ This amount is calculated by adding the following: (i) amount claimed by PGA as due under its contractor’s May 2005 invoice for RCA Boulevard (\$186,851.75) (Pl.’s Ex. 187, at 12); and (ii) the total amounts claimed by PGA as unpaid for Fairchild Gardens South (\$101,688.89), the Lift Station Project (\$167,540.83), and Lake 4 & Outfall (\$10,628.20) (Pl.’s Ex. 187, at 1; Tr. 324, 382.)

381, at 1, 14-15), Legacy sent a third letter to PGA in mid-September 2005 stating that the parties “have no current agreement on RCA Boulevard” (Def.’s Ex. 189; Tr. 303-04, 617). In the same letter, Legacy suggested a “realistic approach to settling out differences” on how to share the cost for RCA Boulevard. (Def.’s Ex. 189.) PGA did not respond to this letter either. (Tr. 617.) Instead, its contractor sent more monthly invoices that also went unpaid. (Tr. 618; Pl.’s Ex. 381.)

After receiving two more invoices in September 2005 and February 2006 (Pl.’s Ex. 381, at 1, 16-17), Legacy sent to PGA’s contractor a fourth letter dated late February 2006 (Def.’s Ex. 192; Tr. 618). It reiterated that the parties had no current agreement on sharing the costs of RCA Boulevard:

I irregularly receive from your office applications and certifications for payment . . . and an invoice, which generally appears to reflect half of that amount to [Legacy].

I am not sure why you keep sending these to me. Whatever previous arrangement existed for RCA Boulevard has long terminated due to the delay and default of [PGA] in doing this work. There is no current understanding to my knowledge with [Legacy] regarding RCA Boulevard and even if there is, none of these invoices reflect offsets for work previously done by [Legacy] or credits for county impact fees.

Please feel free to call me if you have any questions.

(Def.’s Ex. 192.) Neither PGA nor its contractor responded to this letter. (Tr. 617.) Instead, PGA’s contractor just continued to send monthly invoices that went

unpaid (Pl.'s Ex. 381, at 1, 18-27), and the last invoice was dated April 25, 2007 for \$515,353.43. (Pl.'s Ex. 381, at 1, 27; Def.'s Ex. 194; Tr. 621).

The Seacoast Connection Fee Credit

Paragraph 9 of the Post-Closing Agreement provided in pertinent part, “[Legacy] and [PGA] shall share all *impact fee credits* for the Shared Cost Work in the same proportion as the Shared Cost Work.” (Pl.'s Ex. 87, at 3 (emphasis added).) Similarly, paragraph 2.c.vi of the Agreement provided, “Any *cost savings* shall be split between [Legacy] and [PGA] in the same proportion as the costs for the Shared Cost Work are split.” (Pl.'s Ex. 87, at 2 (emphasis added).) In the trial court, Legacy relied on both of these provisions, as well as Exhibit A of the Agreement, to argue that it was entitled to a 64.81 percent share of a connection fee credit granted to PGA by Seacoast Utility. (Tr. 574-75; R3:479, 580-82; Def.'s Ex. 51, at 14, Ex. B.)

The Seacoast connection fee credit, which amounted to \$218,789.00, was granted to PGA under a developer agreement between it and Seacoast. (Def.'s Ex. 51, at 14, Ex. B.) It was granted due to *PGA's construction* of the Lift Station Project on the commercial portion of the retail-residential development. (Tr. 573-74, 733-34; Def.'s Ex. 51, at 14, Ex. B.) Though constructed on the commercial portion, the Lift Station Project served both Legacy's residential development and PGA's retail development. (Tr. 69, 243, 725.) Indeed, part of the Lift Station

Project was constructed and maintained *by Legacy* on the residential portion of the development, and a separate developer agreement between Seacoast and Legacy granted Legacy a separate connection fee credit of \$17,800 for *Legacy's construction* of the Lift Station Project (Tr. 243, 734; Pl.'s Ex. 72; Def.'s Ex. 17.)

Importantly, however, PGA was *not* obligated to pay for any of *Legacy's* construction costs. (*See generally* Pl.'s Ex.87.) Thus, as one would expect, there is no evidence in the record that PGA ever claimed any entitlement to the connection fee credit of \$17,800 granted to Legacy for Legacy's construction of the Lift Station Project. On the other hand, Legacy was obligated to pay for a share of *PGA's* construction costs on the Shared Cost Work. (Pl.'s Ex. 87, at 2, ¶ 3; *id.* at 5, Ex. A.) In particular, subject to a cap, the Agreement required Legacy to pay 64.81 percent of the costs borne by PGA's contractor for work on the Lift Station Project. (Pl.'s Ex. 87, at 1, ¶ 1; *id.* at 5, Ex. A.) Thus, Legacy argued to the trial court that, under the "impact fee" and "cost savings" provisions (Pl.'s Ex. 87, at 2, ¶ 2.c.vi; *id.* at 3, ¶ 9), it was entitled to 64.81 percent of the \$218,789.00 connection fee credit granted to PGA by Seacoast, which amounted to \$141,797.15 ($\$218,789.00 \times 64.81\% = \$141,797.15$). (Tr. 572, 574-575; R3:580-82.) PGA calculated the pre-judgment interest on this \$141,797.15 Seacoast credit to be \$58,336.84. (Pl.'s Ex. 381, at 2 & n.2.)

This Seacoast developer agreement that granted the connection fee credit to PGA required PGA to pay several “connection charges” in order “[t]o induce [Seacoast] to provide water and sewer service.” (Def.’s Ex. 51, at 1, ¶ 4.) The connection charges paid for, among other things, the allocable portion of the Lift Station Project’s water treatment plant, sewage treatment plant, master water transmission lines and master pumping stations and sewage force mains. (Def.’s Ex. 51, at 1, ¶ 4(a).) PGA acknowledged in the developer agreement that it would pay these connection charges and other related fees at the time when service was required. (Def.’s Ex. 51, at 15, Ex. B.)

***Procedural History, Damages Sought and Awarded,
and the Final Judgment***

PGA was the plaintiff below, and it asserted a single claim for breach of contract. (R1:103-05.) It did not assert a claim for restitution or unjust enrichment. (*Id.*) Legacy was the defendant, and it asserted a four-count counterclaim that included a count for breach of contract. (R2:225-34.) The central allegations under Legacy’s count for breach of contract were that PGA failed to timely complete the offsite improvements in accordance with the schedule in the Post Closing Agreement. (R2:227-29.) In the pre-trial stipulation, PGA stipulated that Legacy was disputing whether the work under the Agreement was timely completed and that this dispute was an issue for trial. (R2:345, 347.)

At trial, PGA sought damages of \$515,353.43 as the unpaid balance for the widening of RCA Boulevard. (Pl.'s Ex. 381, at 1; Tr. 318-25; R3:478-79.) As noted earlier, approximately sixty percent of this amount (\$313,556.73) was for invoices dated after the June 2005 sale of Legacy's property to a third party and after Legacy's July 2005 letter telling PGA the parties' differences needed to be resolved before any further work was done. (Pl.'s Ex. 381; R3:478-79; *supra* at 9-10.) PGA also sought \$198,632.89 as interest on the unpaid amount for RCA Boulevard, more than fifty percent of which (\$103,365.35) accrued on the principal amount unpaid after the June 2005 sale and the July 2005 letter. (Pl.'s Ex. 381, at 1-2; R3:478-79.) Thus, \$713,986.32 was the total amount sought by PGA for its work on RCA Boulevard. (Pl.'s Ex. 381, at 1; R3:536.)

This amount sought by PGA for the work on RCA Boulevard (\$713,986.32) was over eighty percent of the full amount sought by PGA for all the Shared Cost Work (\$864,745.85). (*Compare* Pl.'s Ex. 381, at 1-2 *with* R3:536.) In its final judgment, the trial court awarded PGA this full amount sought for all the Shared Cost Work (\$864,745.85), but then subtracted \$25,311.57 for a setoff not pertinent to this appeal,¹¹ resulting in a total award to PGA in the amount of \$839,434.28 (\$864,745.85 - \$25,311.57).

¹¹ The trial court awarded this setoff to Legacy as compensation for damages arising from PGA's delay in completing the Lift Station Project – the only delay by PGA that that trial court deemed to be a material breach. (R3:534-35 & n.2.)

In the final judgment, the trial court ruled that, with one exception not relevant to this appeal (*see supra* note 11), PGA's failure to timely complete the Shared Cost Work (including the work on RCA Boulevard) was not a material breach of the Post-Closing Agreement and that Legacy had substantially performed its obligations under the Agreement. (R3:534 & n.2.) The final judgment failed to address Legacy's claim of \$141,797.15 for a credit based on the Seacoast connection fee. (R3:533-36.) The final judgment also did not adopt PGA's arguments, made in its written closing (R3:470, 474-76), that Legacy had waived its rights under the Agreement's time-of-the-essence provision, and it made no factual findings on the issue of waiver. (R3:533-36.)

Legacy moved for rehearing (R3:570-83), and this motion was heard at a hearing held in early February 2010 (Supplemental Record, Tr. on 2/5/10 Hearing). Legacy's motion for rehearing raised again its arguments pertaining to PGA's failure to timely complete RCA Boulevard and Legacy's entitlement to a share of the Seacoast credit. (R3:571-76, 580-82.) At the hearing on the motion, PGA correctly conceded that the doctrine of waiver "had no bearing on the result" because the final judgment did not address PGA's waiver arguments. (Supplemental Record, Tr. on 2/5/10 Hearing, at 13.) The trial court denied the motion for rehearing (R4:602), and Legacy timely appealed (R4:618).

SUMMARY OF ARGUMENT

This appeal concerns two issues, the first concerning PGA's three-plus-year delay in completing RCA Boulevard and the second concerning the allocation between the parties of a public utility's connection fee credit.

Starting with the first issue, PGA and Legacy specifically agreed that time was of the essence with respect to the completion of RCA Boulevard. The words "of the essence" are synonymous with the term "material." If something is "of the essence" to an agreement, it must also be material, or indispensable, to the agreement. Accordingly, PGA's three-plus-year delay – which resulted in RCA Boulevard being completed nearly two years after Legacy sold the property – must have been a material breach of the Agreement. And because PGA's delay was a material breach, PGA as matter of law could not have substantially performed the Agreement. The concepts of material breach and substantial performance are exact opposites. They cannot co-exist. This is a basic principle of contract law.

Another basic principle of contract law is that a material breach by one party discharges the other party of its contractual liability and any further performance. Therefore, PGA's material breach in failing to timely complete RCA Boulevard discharged Legacy of its contractual liability for RCA Boulevard. And PGA has no restitution claim, as it did not plead or prove such a claim. Indeed, PGA could

not have proven such a claim because PGA conferred no benefit to Legacy when it completed RCA Boulevard nearly two years after Legacy sold the property.

Legacy did not waive its right to treat PGA's material breach as a discharge of its contractual liability. This right was not impaired or diminished simply because Legacy also may have had, or given up, the right to seek remedies such as delay damages or liquidated damages. Nor was Legacy required to plead PGA's material breach as an affirmative defense, and even it were, no prejudice resulted to PGA, as it was fully aware before the trial that its untimely performance under the Agreement was a critical issue to be tried.

Moreover, because the trial court made no factual findings of a waiver, this Court may not affirm on the basis of waiver. A remand for factual findings is not necessary because the record demonstrates, as a matter of law, that no waiver occurred. Legacy repeatedly objected to PGA's delay. After the sale of the property to a third party, Legacy repeatedly warned PGA that the parties no longer had an agreement on the cost allocation for RCA Boulevard and that PGA should not do any further work until an agreement was reached. PGA, at its own peril, ignored these warnings and allowed its captive contractor to continue the work on RCA Boulevard – work that only benefited PGA.

Turning to the second issue, Legacy was contractually entitled to a share of the credit granted to PGA by Seacoast Utility for a connection fee attributable to

the Lift Station Project. This credit was an “impact fee credit,” or alternatively, a “cost savings” under the Agreement. As such, this credit, or savings, had to be shared between Legacy and PGA by the same proportion that the parties were sharing the costs of the Lift Station Project – 64.81 percent for Legacy and 35.19 percent for PGA. If the credit (or savings) is not shared, it results in PGA making a profit on the Lift Station Project, rather than sharing in the costs – a result at odds with the Agreement’s purpose and plain language. Finally, the allocation of any credit for a connection fee is determined by how the Agreement allocated the costs for the work between the parties, not by where the work occurred (*i.e.*, not by whether the work occurred on PGA’s or Legacy’s property).

ARGUMENT

I. PGA DID NOT SUBSTANTIALLY PERFORM BECAUSE IT MATERIALLY BREACHED THE TIME-OF-THE-ESSENCE PROVISION BY COMPLETING RCA BOULEVARD THREE PLUS YEARS LATE, AND THUS LEGACY WAS DISCHARGED FROM ITS CONTRACTUAL LIABILITY FOR RCA BOULEVARD.

Standard of Review. This Court reviews *de novo* the trial court’s interpretation of a contractual provision, such as the time-of-the-essence provision in this case. *E.g.*, *Detroit Diesel Corp. v. Atlantic Mut. Ins. Co.*, 18 So. 3d 618, 620 (Fla. 4th DCA 2009). This Court also reviews *de novo* the trial court’s determination of whether a delay in performance constitutes a material breach of a contract. *See Atlanta Jet v. Liberty Aircraft Servs., LLC*, 866 So. 2d 148, 149 (Fla.

4th DCA 2004). The trial court’s determination of whether a party substantially performs under a contract is normally a question of fact. *Ocean Ridge Dev. Corp. v. Quality Plastering, Inc.* 247 So. 2d 72, 75 (Fla. 4th DCA 1971). However, where the evidence pertaining to substantial performance is sufficiently clear, the issue may be decided as a matter of law and thus should be reviewed *de novo*. See *id.*

The standard of review for issues concerning waiver is a mixed standard. *Bueno v. Workman*, 20 So. 3d 993, 996 (Fla. 4th DCA 2009). Any legal conclusions are reviewed *de novo*, while the trial court’s factual findings, if any, are reviewed for an abuse of discretion. *Id.* In this case, the trial court in its final judgment did not make any findings of fact or conclusions of law related to waiver. (R3:533-36.) Thus, this Court may affirm the final judgment on the basis of a waiver only if the record shows, as a matter of law, that a waiver occurred.¹²

Merits. The trial court correctly acknowledged that the Agreement “specifically provided that time was of the essence with respect to completion of

¹² See *Bueno*, 20 So. 3d at 998 (holding that it would be inappropriate for an appellate court to affirm on an alternative ground, not relied upon by the trial court, if the trial court failed to make the factual findings required for the alternative ground); see also Philip J. Padovano, *Florida Appellate Practice* § 19.2, at 377 (2010 ed.) (noting that the “tipsy coachman” doctrine may not be invoked if the alternative ground requires an evaluation of evidence or relies on a discretionary decision).

[the] work.” (R3:534.) The court, however, concluded that the three-plus-year delay in completing the improvements to RCA Boulevard was not material and that PGA was entitled to payments for its work on RCA Boulevard because, in the court’s view, PGA substantially performed under the Agreement. (*Id.*) This conclusion was erroneous.

Given that the Agreement provided that time was of the essence with respect to the completion of RCA Boulevard, PGA’s three-plus-year delay in completing RCA Boulevard was, as matter of law, a material breach, meaning PGA could not have substantially performed. *Infra* Argument I.A, at 21-25. Because PGA materially breached the Agreement, Legacy’s contractual liability for RCA Boulevard was discharged. *Infra* Argument I.B, at 25-29. And Legacy did not waive this right to be discharged from its contractual liability. *Infra* Argument I.C, at 29-37.

A. PGA’s three-plus-year delay in completing RCA Boulevard was a material breach of the Agreement’s time-of-the-essence provision and thus PGA did not substantially perform.

There are two undisputed facts in this case that demonstrate, as a matter of law, that PGA materially breached the Agreement and did not substantially perform: (1) the Agreement expressly provided that the “parties agree that the Shared Cost Work[, including RCA Boulevard,] shall be completed in accordance with the construction schedule attached. . . as Exhibit ‘B’ [to the Agreement], *time*

being of the essence” (Pl.’s Ex. 87, at 3, ¶ 5 (emphasis added)), and (2) PGA failed to timely complete RCA Boulevard in accordance with the agreed construction schedule, and instead it completed RCA Boulevard three plus years late, *supra* at 6.

To constitute a material breach, a party’s non-performance must go to the essence of the agreement. *E.g., Sublime, Inc. v. Boardman's Inc.*, 849 So. 2d 470, 471 (Fla. 4th DCA 2003). Timely performance is considered to be of the essence and thus material if the agreement expressly specifies that time is of the essence. *E.g., id.; Blaustein v. Weiss*, 409 So. 2d 103, 105 (Fla. 4th DCA 1982) (citing *Realty Securities Corp. v. Johnson*, 111 So. 532 (1927)); *Thomas v. Fusilier*, 966 So. 2d 1001, 1003 (Fla. 5th DCA 2007). As dictionaries and thesauruses teach, if something is “of the essence,” it is indispensable, or stated another way, it is “of such vital importance that a sufficient performance of the contract cannot be had without exact compliance with it.” *Black’s Law Dictionary* 546 (6th ed. 1990); *see also, e.g., Webster’s Collegiate Thesaurus* 297 (1976); *Webster’s Ninth New Collegiate Dictionary* 425 (1987); *Black’s Law Dictionary* 546 (6th ed. 1990).

In this case, the Agreement unequivocally stated that timely completion of RCA Boulevard was of the essence. (Pl.’s Ex. 87, at 3, ¶ 5). Thus, timely completion of RCA Boulevard must have been material to the Agreement. Accordingly, PGA’s three-plus-year delay and its failure to timely complete RCA

Boulevard must have been a material breach of the Agreement – specifically of the Agreement’s time-of-the-essence provision. The trial court’s conclusion to the contrary (R3:354 n.2) cannot be reconciled with the plain meaning of the words “of the essence” and the aforementioned case law.

Because PGA materially breached the Agreement’s time-of-the-essence provision, PGA’s performance under the Agreement could not have constituted “substantial performance.” *See Nat’l Constructors, Inc. v. Ellenberg*, 681 So. 2d 791, 793 (Fla. 3d DCA 1996) (“In the context of contracts for construction, the doctrine of substantial performance is applicable only where the contractor has *not . . . materially breached* the terms of his contract.” (emphasis added)). As one leading treatise has aptly noted: “Substantial performance is the antithesis of material breach; if it is determined that a breach is material, or goes to the root or essence of the contract, it follows that substantial performance has not been rendered, and further performance by the other party is excused.” Richard A. Lord, *Williston on Contracts* § 44:55 & nn.49-50 (4th ed. May 2010). Stated another way, “[s]ubstantial performance is that performance of a contract which, while not full performance, *is so nearly equivalent to what was bargained for* that it would be unreasonable to deny the promisee the full contract price subject to the promisors right to recover whatever damages have been occasioned him by the promisees failure to render full performance.” *J.M. Beeson Co. v. Sartori*, 553 So.

2d 180, 182 (Fla. 4th DCA 1989)¹³ (emphasis added) (citing 3A *Corbin on Contracts*, § 702 *et seq.*); accord *Nat'l Constructors*, 681 So. 2d at 793.

PGA's performance on RCA Boulevard cannot be considered substantial performance because that performance was not "so nearly equivalent to what was bargained for" by Legacy and PGA. See *J.M. Beeson*, 553 So.2d at 182. Legacy expressly bargained for PGA to complete RCA Boulevard no later than 150 days after the issuance of the permits. (Pl.'s Ex. 87, at 3, ¶5; *id.* at 6, Ex. B.) And PGA represented in the Agreement that it already had applied for, and would diligently attempt to obtain, any necessary permits. (Pl.'s Ex. 87, at 3, ¶5.) Yet, PGA did not complete RCA Boulevard until three plus years after the issuance of the permit and nearly two years after Legacy sold the property to a third party. *Supra* at 6, 9. This performance by PGA is not "nearly equivalent" – or even remotely equivalent – to the bargain negotiated by the parties.

Lastly, though the wording of the Agreement alone is dispositive of Legacy's claim that PGA's delay was a material breach and thus PGA did not substantially perform, there is one other, alternative reason that also supports this claim. The parties agreed to share the costs for the widening of the RCA

¹³ In the trial court, PGA attempted to analogize the facts of *J.M. Beeson* (where substantial performance was found despite a delay in constructing improvements) to the instant case to argue that PGA here substantially performed. (R.3.472 & n.7.) This analogy is faulty because the contract in *J.M. Beeson* lacked any time-of-the-essence provision.

Boulevard because that road served both of their efforts to develop their respective properties (Legacy's residential development and PGA's retail development). (Pl's Ex. 87, at 1, ¶ b of "Background;" *see supra* at 2.) But by the time that PGA finally got around to doing a substantial portion of the work on RCA Boulevard, Legacy already had fully developed its residential property and had sold it to a third party. *Supra* at 6, 9. After the sale (when approximately sixty percent of the costs were incurred), PGA's widening of RCA Boulevard did not benefit Legacy. Thus, even if the Agreement had lacked the time-of-the-essence provision, PGA's three-plus-year delay in completing RCA Boulevard would have been a material breach.

Accordingly, the trial court erred when it concluded that PGA substantially performed its obligations under the Agreement. The trial court erred because PGA materially breached the Agreement – the antithesis of substantial performance – when it completed RCA Boulevard three plus years after the agreed deadline.

B. PGA's material breach in completing RCA Boulevard three plus years late discharged Legacy from its contractual liability to pay for the work on RCA Boulevard.

A party's material breach of the contract allows the other, non-breaching party to treat the breach as a discharge of its contractual liability and to be relieved

of any further payments under the contract.¹⁴ This rule applies where, as here: (i) the parties agree that time is of the essence, (ii) one party materially breaches this agreement by delaying its performance, and (iii) the other party did not cause the delay or waive it.¹⁵ This rule also applies to construction contracts where, as here, the parties expressly agree that time is of the essence in completing the construction by a deadline specified in the contract and the contractor fails to meet

¹⁴ *Colucci v. Kar Kare Auto. Group, Inc.*, 918 So. 2d 431, 437 (Fla. 4th DCA 2006) (internal quotations omitted); *accord Benemerito & Flores, M.D.S, P.A. v. Roche*, 751 So. 2d 91, 93 (Fla. 4th DCA 1999); *Jones v. Warmack*, 967 So. 2d 400, 402 (Fla. 1st DCA 2007); *Toyota Tsusho Am., Inc. v. Crittenden*, 732 So. 2d 472, 477 (Fla. 5th DCA 1999); *Bradley v. Health Coal., Inc.*, 687 So.2d 329, 333 (Fla. 3d DCA 1997); Lord, *supra* § 44:55 & nn.49-50 (quoted *supra* at 23).

¹⁵ Lord, *supra* § 43:7, & n. 90; *see also* Restatement (Second) of Contracts § 242 cmt. a (1981) (noting that “in some instances timely performance is so essential that any delay immediately results in discharge”); *cf. Thomas*, 966 So. 2d at 1003 (holding that a “brief delay” by one party in performing did not discharge other party’s contractual obligations because time was not of the essence). PGA has never alleged, and there is no evidence, that Buyer caused the delay in the completion of RCA Boulevard. And, as discussed later, Legacy did not waive the time-of-the-essence provision. *Infra* Argument I.C, at 29-37.

that deadline.¹⁶ Accordingly, PGA's material breach in failing to timely complete RCA Boulevard discharged Legacy from its duty to pay for RCA Boulevard.¹⁷

The rule stated above is also found in the Restatement (Second) of Contracts, though it is worded differently: “[I]t is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no *uncured material failure by the other party to render any such performance due at an earlier time.*” Restatement (Second) of Contracts

¹⁶ See Lord, *supra* § 46:7 & n.60 (noting that, for construction contracts, “[c]ompletion by a specified day . . . may be made a condition precedent to the builder’s right to recover payment, either by an express stipulation or necessary implication from the contract language.”); *Carriger v. Ballenger*, 628 P.2d 1106, 1109 (Mont. 1981) (holding that, where the contractor and the owner expressly had agreed that time was of the essence in completing the work and where the contractor failed to timely complete the work, the contractor was not entitled to any payment for its work).

¹⁷ Granted, in an equitable proceeding, when a contract contains a “general” time-of-the-essence clause that does not specifically govern the breached promise, delays in performance may not necessarily result in a discharge of the non-breaching party’s contractual liability. See *Jackson v. Holmes*, 307 So. 2d 470, 472 (Fla. 2d DCA 1975) (cautioning, in an equitable proceeding, against applying “general” time-of-the-essence provisions to every contractual promise). The same could be said for “brief delays” if the breaching party promptly cures the delay. See Restatement (Second) of Contracts § 242, cmts. c & d, illustrations 4 & 10 (1981) (discussing how one-day delay would not result in discharge if it was promptly cured). These principles, however, do not apply in this case because: (i) this is an action at law for money damages, not an equitable proceeding; (ii) PGA’s three-plus-year delay was neither brief nor promptly cured; and (iii) the time-of-the-essence provision was specifically intended to govern the construction schedule incorporated into the Agreement (Pl.’s Ex. 87, at 3), see *Arvilla Motel, Inc. v. Shriver*, 889 So. 2d 887, 891 (Fla. 2d DCA 2004) (distinguishing *Jackson*, 307 So. 2d at 472 and holding that a party had a right cancel a contract due to

§ 237 (1981) (emphasis added). As the commentary to the Restatement recognizes, “an uncured material failure” to perform by one party is just another way of saying that the party did not substantially perform. *Id.* at cmt. d.

This same commentary from the Restatement also provides a “typical example” that is analogous to the instant case. This example illustrates that PGA’s failure to substantially perform (i.e., its failure to timely complete RCA Boulevard) means that PGA has no contractual claim against Legacy for the work on RCA Boulevard:

A typical example is that of the building contractor who claims from the owner payment of the unpaid balance under a construction contract. In such cases it is common to state the issue, not in terms of whether there has been an uncured material failure by the contractor, but in terms of whether there has been substantial performance by him. . . . If there has been substantial although not full performance, the building contractor has a claim for the unpaid balance and the owner has a claim only for damages. *If there has not been substantial performance, the building contractor has no claim for the unpaid balance, although he may have a claim in restitution.*

Id. (emphasis added).

Similarly, in this case, Legacy’s contractual liability was discharged and PGA has no contractual claim for the unpaid balance on RCA Boulevard because PGA did not substantially perform under the Agreement when it did not complete RCA Boulevard until three plus years after the agreed deadline. *See id; supra*

untimely performance because the parties intended for the time-of-the-essence provision to apply to the breached promise to perform by a certain date).

Argument I.A., at 21-25. And PGA has no claim in restitution because it neither pled nor proved such a claim. Indeed, PGA could not have proved such a claim because Legacy received no benefit from PGA's work on RCA Boulevard in light of the fact that PGA did not complete RCA Boulevard until nearly two years after Legacy sold the property.

C. Legacy did not waive the time-of-the-essence provision or its right to be discharged from its contractual liability for RCA Boulevard.

To circumvent the general rule stated above (that PGA's material breach discharged Legacy's contractual liability), PGA made several waiver arguments in the trial court. (R3:470, 474-77.) In its final judgment, the trial court did not adopt these waiver arguments. (R3:533-36.) Nevertheless, we address these waiver arguments herein in anticipation that PGA will raise them again in its answer brief and argue in the alternative that the final judgment was right for the wrong reasons. *See, e.g., Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645-46 (Fla. 1999) (discussing tipsy coachman doctrine).

1. By its conduct, Legacy did not waive the time-of-the-essence provision or its right to be discharged from its contractual liability for RCA Boulevard.

“Waiver is the intentional relinquishment of a known right.” *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) (internal quotations omitted). A waiver “may be express, or implied from conduct or acts that lead a party to believe a right has been waived.” *Id.* (internal quotations omitted). A non-

breaching party waives a time-of-the-essence provision if the finder of fact determines that the non-breaching party failed to object to the breaching party's continued work on the project after the deadline and then accepted the benefits of the untimely completed work. *See Horovitz v. Levine*, 755 So. 2d 687, 688 (Fla. 4th DCA 1999) (discussed *infra* at 31-32). The trial court in this case made no such findings. (R3:533-36.) In the absence of such factual findings, this Court may not affirm on the basis of waiver. *See Bueno*, 20 So. 3d at 998. Any such factual findings would have to be made by the trial court on remand. *See id.*

However, a remand is not required in this case because the record, as a matter of law, demonstrates that Legacy by its conduct did not waive the time-of-the-essence provision or its right to treat PGA's material breach as a discharge of its contractual liability. The Agreement required PGA to complete RCA Boulevard by December 2003. *Supra* at 6. One month later (January 2004), Legacy sent a letter to PGA objecting to its failure to timely complete RCA Boulevard, and it demanded that PGA comply with the Agreement and remedy all delays immediately. (Def.'s Ex. 165.) PGA responded by doing nothing for the remainder of 2004 and the first quarter of 2005. *Supra* at 8; (Pl.'s Ex. 381, at 1). Then, shortly before Legacy sold the property to a third party in late June 2005, PGA sent three invoices in April, May, and June 2005. *Supra* at 9; (Pl.'s Ex. 381, at 1.)

But, in early July 2005 just after the sale of the property and the June 2005 invoice, Legacy sent a second letter, telling PGA that, “before any work is done,” the parties needed to reach an understanding and resolve certain issues. (Def.’s Ex. 187; Pl.’s Ex. 381.) PGA ignored this letter, continued the work, and kept billing. *Supra* at 10. After receiving two more invoices, Legacy sent a third letter in September 2005, informing PGA that the parties had no current agreement on RCA Boulevard and thus they needed to reach a new agreement on sharing the costs. (Def.’s Ex. 189; Pl.’s Ex. 381.) PGA again failed to respond, continued the work, and kept billing. *Supra* at 10-11. After receiving two more invoices, Legacy sent a fourth letter in February 2006, confirming, again, that the parties had no current understanding on sharing the costs for RCA Boulevard, as whatever agreement had existed was “long terminated.” (Def.’s Ex. 192; Pl.’s Ex. 381) PGA ignored this letter too, kept working, and sent a final bill for \$515,353.43, sixty percent of which had accrued after the June 2005 sale of the property and after Legacy’s July 2005 letter warning PGA that the parties needed to reach an understanding before any more work was done. *Supra* at 11-12.

Legacy’s repeated objections – in particular, its instruction to PGA in July 2005 not to do any work until an understanding was reached – distinguish the instant case from *Horovitz*, 755 So. 2d at 687, a decision of this Court relied on heavily by PGA in the trial court (R3:476). The appellees in *Horovitz* were forty-

five days late in completing a parking lot. 755 So. 2d at 688. Under the parties' agreement, the appellants had a right to cancel a note and a mortgage held by the appellees if the appellees failed to timely complete the parking lot. *Id.* This Court, however, affirmed the trial court's determination that the appellants had waived this right because the trial court found:

. . . that appellants allowed appellees to expend money and resources to finish the parking lot after the completion date, appellants knew that appellees were continuing to work on the parking lot after the agreed-upon date of completion and did not object to appellees' presence on the property after that time, and appellants accepted the use and benefit of the finished parking lot.

Id.

In contrast, the trial court in this case could not have made the same types of findings as were made in *Horvitz*. Here, Legacy repeatedly objected in writing to PGA's delay beginning in January 2004 (one month after the contractual deadline passed). And, unlike the appellants in *Horovitz*, Legacy never accepted the benefits of a completed RCA Boulevard because it was not completed until nearly two years after Legacy sold the property served by RCA Boulevard.¹⁸ *Supra* at 6, 9.

¹⁸ Because RCA Boulevard was not timely completed, Legacy was required to post \$350,000 in escrow in case the buyer ever became involved in litigation over RCA Boulevard. (Pl.'s Ex. 360; Tr. 298-99, 304-06.) In the trial court, PGA cited this fact as proof that Legacy received a benefit from RCA Boulevard. (R3:374.) The opposite is true. Because of PGA's delay in completing RCA Boulevard, Legacy was not free to use its money but rather it had to leave the funds restricted in an escrow account for a period of time.

In addition to the aforementioned facts, PGA's waiver claim is also negated by the anti-waiver provision in the purchase and sale agreement, which the Post-Closing Agreement contemplated would survive closing. (Pl.'s Ex. 87, at 3, ¶ 7; Pl.'s Ex. 2, at 21, ¶ 25.) The anti-waiver provision stated that no waiver would be effective "unless it [was] in writing signed by the party against whom it is asserted." (*Id.*) This Court has enforced this identical anti-waiver provision to *per se* reject a party's claim that a course of dealings resulted in waiver of a time-of-the-essence provision. See *Rybovich Boat Works, Inc. v. Atkins*, 587 So. 2d 519, 521-22 (Fla. 4th DCA 1991). Likewise, in this case, this Court should rely on the anti-waiver provision to *per se* reject PGA's argument that Legacy by its conduct waived the time-of-the-essence clause or its right to be discharged from its contractual liability.

2. Legacy did not waive its right to be discharged from contractual liability merely because of potential contractual remedies that Legacy either bargained for or failed to bargain for.

PGA argued to the trial court that Legacy waived its right to treat PGA's material breach as a discharge of its contractual liability because of potential contractual remedies that Legacy bargained for or failed to bargain for. Specifically, PGA emphasized Legacy's contractual right to seek delay damages, either by way of a lawsuit or from the performance bonds, required by the Agreement, and PGA argued waiver based on Legacy's failure to seek such

damages from the performance bonds. (R3:471, 475 & n.12.) PGA also argued that Legacy's failure to bargain for a forfeiture or liquidated damages provision waived Legacy's right to treat PGA's material breach as a discharge of its contractual liability. (R3:475.) These arguments are without merit. Legacy's rights to seek remedies for PGA's material breach do not limit or abrogate its right to treat the material breach as a discharge of its contractual liability.

Once again, the Restatement (Second) of Contracts is instructive. It provides, "[A] breach by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance." Restatement (Second) of Contracts § 243(1) (1981). Stated another way, where a breach is sufficiently material so as to discharge the non-breaching party's remaining contractual duties (as occurred in this case, *see supra* Argument I.A, at 21-25), this same material breach also gives rise to a claim for damages. Therefore, the right to seek damages and the right to a discharge of one's contractual liability are compatible rights. The availability of one right does not exclude the availability of the other right.

The compatibility of these two rights (damages and discharge) is demonstrated by an illustration from the Restatement, which is similar to the facts of the instant case:

A promises to sell to B a lot in a subdivision for \$8,000. B promises to pay in four installments of \$2,000 each, beginning one year after

execution of the contract. A promises to begin to make improvements and pave the streets within 60 days and to complete work within a reasonable time and promises to deliver a deed at the time of the final payment. A commits a material breach by unjustifiably failing to pave the streets, and B thereupon refuses to pay any installments. After a reasonable time for A to cure his material breach has passed (§ 242), *B's duty to pay the price is discharged, and he has a claim against A for damages for total breach.*

Restatement (Second) of Contracts § 243, cmt. a, illustration 1 (1981) (emphasis added). Similarly, in this case, PGA materially breached the Agreement by failing to timely complete RCA Boulevard, and it did not cure this breach within a reasonable time because it finished RCA Boulevard three plus years after the agreed deadline. Therefore, just as in the illustration, Legacy's duty to pay for RCA Boulevard was discharged, *and* Legacy also had a claim against PGA for damages for material breach.

Accordingly, Legacy's failure to seek delay damages from the performance bonds, as well as its failure to bargain for a liquidated damages or forfeiture provision, did not waive Legacy's right to treat PGA's material breach as a discharge of its contractual liability. (R3:475.)

3. Legacy did not waive its right to discharge its contractual liability by failing to plead PGA's prior material breach as an affirmative defense.

PGA argued below that Legacy was required to plead PGA's prior material breach as an affirmative defense and that its failure to do so was a waiver of that

defense.¹⁹ (Tr. 52-55, 526, 1153; R3:470, 534 n.2.) PGA cited no case or other authority that supported its argument. Nor could it.

No Florida appellate court has held that a prior material breach is an affirmative defense that must be pled by the party defending a breach-of-contract action. Indeed, no Florida appellate court has directly addressed this issue. One Florida court, however, has held that a similar contract doctrine, anticipatory repudiation, is not an affirmative defense and thus need not be pled by the defendant. *Twenty-Four Collection, Inc. v. M. Weinbaum Constr., Inc.*, 427 So. 2d 1110, 1112 (Fla. 3d DCA 1983). The court held this because of the well-settled principle that the party suing on a contract bears the burden of first establishing its own performance.²⁰

The same reasoning applies to the instant case. A prior material breach, like an anticipatory repudiation, is not an affirmative defense and thus need not be pled by the defendant. This is so because the party suing for breach of contract (PGA)

¹⁹ The trial court in its final judgment stated that it “tend[ed] to agree” with this argument, but it did not expressly adopt the argument. (R3:534 n.2)

²⁰ *Twenty-Four Collection*, 427 So.2d at 1112 (citing *Babe, Inc. v. Baby's Formula Service, Inc.*, 165 So. 2d 795, 798 (Fla. 3d DCA 1964) and *Massey-Ferguson, Inc. v. Santa Rosa Tractor Co.*, 366 So. 2d 90 (Fla. 1st DCA 1979)); accord *Marshall Const., Ltd. v. Coastal Sheet Metal & Roofing, Inc.*, 569 So. 2d 845, 848 (Fla. 1st DCA 1990); see also *Rollins, Inc. v. Butland*, 951 So. 2d 860, 876 (Fla. 2d DCA 2006) (“[I]n order to maintain an action for breach of contract, a claimant must also prove performance of its obligations under the contract or a legal excuse for its nonperformance.”)

bears the burden of first establishing that it performed its own contractual obligations under the Agreement. *Supra* note 20. PGA could not satisfy this burden because, as argued above, PGA materially breached the Agreement when it failed to timely complete the work on RCA Boulevard. *Supra* Argument I.A., at 21-25.

Moreover, Legacy's failure to plead prior breach as an affirmative defense did not prejudice PGA, contrary to PGA's arguments in the trial court (R3:470, 471 n.5.) In Legacy's counterclaim (which was tried with PGA's claim), Legacy repeatedly alleged that PGA failed to timely complete the offsite improvements in accordance with the schedule in the Post Closing Agreement. (R2:227-29.) And, in the pre-trial stipulation, PGA stipulated that Legacy was disputing whether the work under the Agreement was timely completed and that this dispute was an issue for trial. (R2:345, 347.) Perhaps most importantly, PGA could not have presented any evidence to contradict Legacy's allegation that PGA failed to timely complete RCA Boulevard. PGA's own counsel admitted on the witness stand that RCA Boulevard was not completed until 2007 (Tr. 127), well after the December 2003 deadline under the Agreement.

D. Conclusion on Issue No. 1

The trial court erred as a matter of law when it concluded that PGA substantially performed and did not commit a material breach. PGA did commit a

material breach when it failed to timely complete RCA Boulevard. This material breach discharged Legacy of its contractual liability for RCA Boulevard. Accordingly, the trial court erred when it awarded to PGA the \$713,986.32 that it sought as the unpaid balance and interest for its work on RCA Boulevard. (*See* Pl.’s Ex. 381, at 1.) This amount, \$713,986.32, should be subtracted from the \$839,434.28 awarded to PGA in the final judgment. (*See* R3:536.)

II. LEGACY WAS CONTRACTUALLY ENTITLED TO A SHARE OF THE SEACOAST CREDIT.

Standard of Review. This Court reviews *de novo* the trial court’s interpretation of a contractual provision, including the “impact fee credits” and the “costs savings” provisions of the Agreement. *E.g., Detroit Diesel Corp. v. Atlantic Mut. Ins. Co.*, 18 So. 3d 618, 620 (Fla. 4th DCA 2009).

Merits. Seacoast Utility granted a “connection fee credit” of \$218,789 to PGA for PGA’s construction of the Lift Station Project. (Tr. 573-74, 733-34; Def.’s Ex. 51, at 14, Ex. B.) Legacy was contractually entitled a 64.81 percent share of this credit under two separate provisions of the Post-Closing Agreement. *Infra* Argument II.A, at 39-40. PGA’s arguments to the contrary advanced in the trial court are without merit. *Infra* Argument II.B, at 40-44.

A. Legacy was contractually entitled a share of the Seacoast connection fee credit under two separate provisions of the Post-Closing Agreement.

Paragraph 9 of the Post-Closing Agreement required PGA to share with Legacy “all *impact fee credits* for the Shared Cost Work” – which included the Lift Station Project – “in the same proportion as the Shared Cost Work [i.e., 64.81 percent].”²¹ (Pl.’s Ex. 87, at 3 (emphasis added); *see also id.* at 5, Ex. A.) A “connection fee” for a utility is an “impact fee.” As the Second District has explained, “[i]mpact fees, which include connection fees, are the method by which a new user of a municipally-owned water or sewer system pays his or her fair share of the costs that the new use of the system involves.”²² *City of Zephyrhills v. Woods*, 831 So. 2d 223, 224 (Fla. 2d DCA 2002). This was precisely the purpose of the “connection charges” in this case as set forth in the Seacoast-PGA developer agreement. (Def.’s Ex. 51, at 1.) Accordingly, the connection fee charged by

²¹ Subject to a cap, Legacy was contractually obligated to pay PGA’s contractor for 64.81 percent of the cost of constructing the Lift Station Project. (Pl.’s Ex. 87, at 1, ¶ 1; *id.* at 5, Ex. A.)

²² The Seacoast Utility is a public entity created under an Interlocal Agreement entered into by five local governments: Palm Beach Gardens, Palm Beach County, North Palm Beach, Lake Park, and Juno Beach. *See* Interlocal Agreement Establishing the Seacoast Water Utility (Aug.17, 1988) (filed on Aug. 24, 1988 with the Clerk for the Circuit Court, in and for the Fifteenth Judicial Circuit) (available upon request to Andrea Holmes, Director of Administrative Services, Seacoast Utility Authority); *see also* Florida Interlocal Cooperation Act of 1969, *currently codified* at § 163.01, Fla. Stat. (2008).

Seacoast was an impact fee, and any credit given on that connection fee was an “impact fee credit” under paragraph 9 of the Agreement.

Alternatively, paragraph 2.c.vi of the Agreement required PGA to split with Legacy “[a]ny *cost savings* . . . in the same proportion as the costs for the Shared Cost Work are split.” (Pl.’s Ex. 87, at 2, ¶ 2.c.vi (emphasis added).) The connection fee credit saved \$218,789 of costs on the Lift Station Project. Thus, this connection fee credit was a “cost savings” under paragraph 2.c.vi, and 64.81 percent of this cost savings should have been allocated to Legacy, *see supra* note 21. This construction of the Agreement is dictated by the plain meaning of the term “cost savings.”

This construction also comports with the Agreement’s intent of *sharing* the costs of certain infrastructure projects, like the Lift Station Project. (*See* Pl.’s Ex. 87, at 1, ¶¶ b & c under Background; *id.* at 5, Ex. A.) Under the Agreement, Legacy’s share of the costs for the Lift Station Project was \$341,015, while PGA’s share was \$185,162. (Pl.’s Ex. 87, at 5, Ex. A.) If the Agreement were construed so that cost savings of the \$218,789 connection fee credit were to be allocated solely to PGA, then PGA would not share in any of the costs of the Lift Station Project, and it would instead make a profit of \$33,627. ($\$218,789 - \$185,162 = \$33,627$.) This construction of the Agreement cannot be reconciled with the Agreement’s purpose or its plain meaning.

B. PGA was wrong insofar it argued that it alone was entitled to the entire Seacoast connection fee credit of \$218,789.

In the trial court, PGA argued that it alone was entitled to the entire \$218,789 Seacoast connection fee credit because, purportedly, the “Agreement only include[d] City and County ‘Impact Credits,’” not “utility connection credits.” (R3:479.) This argument fails for two reasons. First, paragraph 9 of the Agreement did not say “*City and County Impact Credits.*” It simply said “impact fee credits.”²³ (Pl.’s Ex. 87, at 3, ¶ 9.) Because a public utility’s connection fee is an impact fee, *see City of Zephyrhills*, 831 So. 2d at 224, a public utility’s connection fee credit must be an impact fee credit. Second, even if, as PGA argued, the connection fee credit was not an “impact fee credit” under paragraph 9 of the Agreement, the connection fee credit still would be a “cost savings” under paragraph 2.c.vi., which means that PGA is obligated to split the connection fee credit with Legacy on a percentage basis of 64.81% to 35.19%. *See supra* Argument II.A, at 39-40.

The other argument advanced by PGA in the trial court was based on two interrelated premises: (i) that the Seacoast connection fee credit of \$218,789 granted to PGA “related exclusively to the commercial component of the property

and not the residential component” and (ii) “Legacy obtained its own separate connection fee credits [of \$17,800] from Seacoast related to Legacy’s residential parcel.” (R3:479.) These premises misstate the record and are red herrings.

Contrary to PGA’s argument, the connection fee credit of \$218,789 did not “relate exclusively to the commercial *component*” of the property or the Lift Station Project. (R3:479 (emphasis added).) Instead, it related exclusively to the portion of the Lift Station Project that was *constructed on the commercial portion of the property*.²⁴ (Tr. 734.) But the location of the Lift Station Project or any Shared Cost Work was of no consequence. The Lift Station Project – wherever it

²³ Exhibit A to the Agreement did list amounts for a “Credit for County Impact Fees” and a “Credit for City Impact Fees,” but that same exhibit stated that this “information [was] based on data available on 8/20/2002 and [was] subject to change as new information [became] available.” (Pl.’s Ex. 87, at 5.) The developer agreement granting the connection fee credit to PGA was dated 2/23/2003 (Def.’s Ex. 51, at 1), and thus it was not available on 8/20/2002.

²⁴ PGA’s trial counsel made this same misstatement when he cross-examined Legacy’s in-house counsel at trial, and in answering, Legacy’s in-house counsel corrected the misstatement:

Q. Now, we had looked earlier at a developer agreement from my client, that's where you got that 140 some thousand dollar number? It was a portion of the 218, I believe?

A. Uh-huh.

Q. Now, that, as we discussed, related solely to the *commercial component*, correct, at least by its terms?

A. It refers to the portion of the system that is dedicated to Seacoast that was *constructed on the commercial portion*.

(Tr. 734 (emphasis added).)

was constructed – served both the commercial and residential properties. (Tr. 69, 243, 725.)

The Agreement’s allocation of “cost savings” or “impact fee credits” – including the Seacoast connection fee credit – did not hinge on the *location* of the Shared Costs Work to which the savings or credit was attributable. Rather, under the Agreement, the allocation of the savings or credit, including the connection fee credit, hinged on *who was paying what percentages for the costs* of constructing the Shared Cost Work to which the savings or credit was attributable. (Pl.’s Ex. 87, at 2, ¶ 2.c.vi; *id.* at 3, ¶ 9.) For example, no matter where a road may have been built or improved, the allocation of the impact fee credit attributable to that road hinged on the Agreement’s allocation of costs for the road.²⁵ (Pl.’s Ex. 87, at 3, ¶ 9.) The Agreement obligated Legacy and PGA to pay, respectively, 64.81 and 35.19 percent of PGA’s costs of constructing the Lift Station Project. (*Id.* at 5, Ex. A.) Accordingly, the connection fee credit – whether it is considered an “impact fee credit” or a “cost savings” – should have been allocated between the parties by the same percentages.

Location of construction is equally irrelevant in analyzing the allocation of the separate Seacoast connection fee credit of \$17,800 granted to Legacy for its

²⁵ One exception to this general rule was the allocation of credits for the County Road Impact Fees. Under the Agreement, Legacy was guaranteed \$150,997 as a minimum credit for these impact fees, irrespective of the cost allocation for any county roads. (Pl.’s Ex. 87, at 3-4, ¶ 9.)

construction of a portion of the Lift Station Project on its residential parcel. (Def.'s Ex. 17, at 1, 12; Tr. 734.) Under the Agreement, PGA was *not* obligated to pay Legacy or its contractors for any of Legacy's costs to construct the portion of the Lift Station Project located on Legacy's property. (*See generally* Pl.'s Ex. 87.) And there is no evidence that PGA ever paid Legacy or its contractor one penny for these costs, or that PGA ever asserted a claim for the separate \$17,800 connection fee credit attributable to work done on Legacy's property at Legacy's expense. Indeed, the Agreement was a one-way street. All the payments for construction costs flowed from Legacy to PGA's contractor. They did not flow from PGA to Legacy or its contractor. Accordingly, PGA was not entitled to any share of this \$17,800 credit because it was not obligated to pay the construction costs associated with this credit, and PGA's reliance on this \$17,800 credit is a red herring.

C. Conclusion on Issue No. 2

The trial court erred as a matter of law when it allowed PGA to alone enjoy the benefit of the impact fee credit, or cost savings, granted to PGA by Seacoast in the form of a connection fee credit of \$218,789. Legacy was entitled to 64.81% of this credit, meaning that Legacy was entitled to a credit of \$141,797.15. PGA calculated the pre-judgment interest on this \$141,797.15 Seacoast credit to be \$58,336.84. (Pl.'s Ex. 381, at 2 & n.2.) Thus, the combined amount for principal

and interest is \$200,133.99 (\$141,797.15 + 58,336.84). This combined amount, \$200,133.99, should be subtracted from the \$839,434.28 awarded to PGA in the final judgment. (*See* R3:536.)

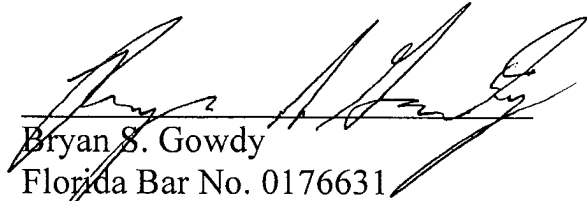
CONCLUSION

This Court should reverse the trial court's final judgment based on either issue 1 or 2, as stated above, or based on both issues. If this Court reverses based solely on *issue 1*, then, on remand, the trial court should be instructed to enter a new final judgment in favor of **PGA** in the amount of **\$125,447.96** ($\$839,434.28 - \$713,986.32 = 125,447.96$). *See supra* Argument I.D, at 37-38. If this Court reverses based solely on *issue 2*, then, on remand, the trial court should be instructed to enter a new final judgment in favor of **PGA** in the amount of **\$639,300.29** ($\$839,434.28 - \$200,133.99 = \$639,300.29$). *See supra* Argument II.C, at 44-45. If this Court reverses based on both *issues 1 and 2*, then, on remand, the trial court should be instructed to enter a new final judgment in favor of **Legacy** in the amount of **\$74,686.03**.²⁶

²⁶ This amount is calculated by first adding the amounts for issues 1 and 2 to which Legacy is entitled ($\$713,986.32$ [issue 1 amount] + $\$200,133.99$ [issue 2 amount] = $\$914,120.31$). The resulting sum, $\$914,120.31$, exceeds the amount awarded in the current final judgment to PGA ($\$839,434.28$). Therefore, the amount in the current final judgment in favor of PGA ($\$839,434.28$) must be subtracted from the resulting sum to which Legacy is entitled ($\$914,120.31$) in order to calculate the net amount due to Legacy in the new final judgment ($\$914,120.31 - \$839,434.28 = \$74,686.03$).

Respectfully submitted,

CREED & GOWDY, P.A.

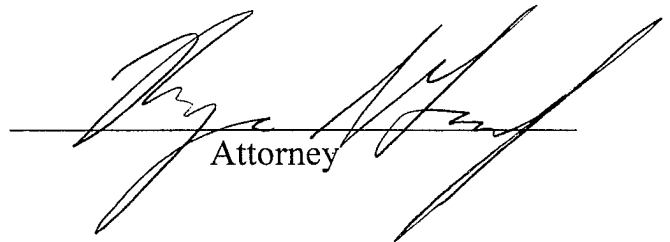


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Attorneys for Appellant

CERTIFICATE OF SERVICE

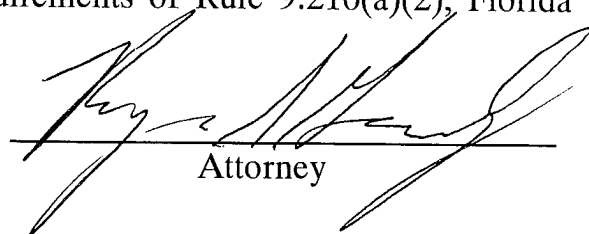
I HEREBY CERTIFY that a copy hereof has been furnished to counsel for Appellee, **Jason Okeleshen and Gary M. Dunkel**, Greenberg Traurig, P.A., 777 S. Flagler Dr., Ste. 300 E., West Palm Beach, FL 33401; and trial counsel for Appellant, **E. Cole Fitzgerald, III**, Fitzgerald Mayans & Cook, P.A., P.O. Box 3795, West Palm Beach, FL 33402, by United States Mail, this 12th day of July, 2010.



Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.



Attorney

INDEX TO APPENDIX

- 1. Final Judgment**
- 2. Plaintiff's Exhibit 87 – Post Closing Agreement, Exhibits “A” – “B” (other exhibits omitted)**
- 3. Plaintiff's Exhibit 381 – Catalfumo Construction Payment/Building Analysis as of October 30, 2009 (invoices omitted)**

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 2006 CA 003460 AA

PGA GATEWAY, LTD.,
a Florida limited partnership,

Plaintiff/Counter-Defendant,

vs.

LEGACY PLACE APARTMENT HOMES
LLC, a Florida limited liability company,

Defendant/Counter-Claimant.

FINAL JUDGMENT

This matter was tried non-jury before the Court. The Court has heard, reviewed and considered the evidence presented by the parties. The Court has also considered the submissions of the parties and the argument of counsel. Based on the evidence presented, the Court makes the following findings.

This case involves claims and counterclaims arising out of the development of a mixed use project located in Palm Beach Gardens known as Legacy Place. PGA Gateway, LTD (hereinafter "PGA") acquired a tract of land encompassing approximately 72 acres in Palm Beach Gardens which ultimately became Legacy Place. The property was platted such that it would be divided between a commercial tract and a residential tract. Legacy Place Apartments Homes, LLC (hereinafter "Legacy") acquired, by assignment, the residential tract.¹

The current dispute between PGA and Legacy arises out of a Post Closing Agreement executed by the parties on August 29, 2002. In the Post Closing Agreement, Legacy agrees to share certain costs associated with infrastructure improvements which were deemed to benefit, at least in part, both the commercial and residential tracts at Legacy Place. While the obligation to

¹ The original purchaser of the residential tract was actually Beztak Land Company, a Michigan Corporation. Beztak later formed Legacy Place Apartments LLC to develop the property and assigned its rights as purchaser to Legacy. For simplicity, the Court will simply refer to Legacy as if it were at all times the purchaser.

REC'D DEC 09 2006

share the costs of certain infrastructure improvements arose initially under the Purchase Agreement, the Post Closing Agreement was apparently intended to establish the maximum amount of the shared costs and to establish a method of payment.

PGA asserts that it completed the infrastructure work required to be performed under the Post Closing Agreement and that Legacy breached the Agreement by failing to pay its share of the costs. Legacy, essentially, asserts that PGA breached the Post Closing Agreement and that, as a result, Legacy suffered damages. Legacy claims a setoff for these damages and, by counterclaim, also seeks an affirmative judgment for its damages.

The Court will first address whether PGA is entitled to be paid for work performed pursuant to the Post Closing Agreement. The Court finds that PGA substantially performed the infrastructure work at issue and is entitled to payment pursuant to Post Closing Agreement. This is not to say that PGA's compliance with the Post Closing Agreement was stellar.

Legacy correctly points out numerous technical deficiencies in performance under the Post Closing Agreement. These deficiencies include such things as failing to provide copies of signed construction contracts. However, with one exception discussed below, based on the evidence presented these technical deficiencies were not material and do not excuse performance by Legacy under the Post Closing Agreement.²

Legacy has asserted one potential breach of the Post Closing Agreement which is not technical. The Post Closing Agreement contained a construction schedule which established a time frame for performance of the work by PGA. The Agreement specifically provided that time was of the essence with respect to completion of this work.

While various portions of the infrastructure improvements were alleged to be delayed, it is the construction of the lift station and water main which forms the basis of Legacy's delay

² PGA asserts that Legacy failed to plead "prior breach" as an affirmative defense and, as a result, a breach of the Post Closing Agreement could not be asserted as a defense to performance by Legacy. While the Court tends to agree that prior breach must be pled, the Court specifically finds that, with the exception of delay, the other breaches asserted by Legacy were not material in light of the evidence presented.

claim.³ Legacy asserts that delay in completion of the lift station and water main by PGA caused damages, including lost rental income and additional costs which would not have been incurred had this work been timely completed.

PGA acknowledges some delay in the construction of the lift station, but asserts – *inter alia* - that this delay is not the legal cause of any damages sustained by Legacy. For the most part, the Court agrees. As to the issuance of certificates of occupancy for the rental units themselves, there were concurrent delays not attributable to PGA. Based on these delays, Legacy is not entitled to recover for lost rental income or for tenant related expenses.

While PGA's delay in constructing the lift station did not cause a loss in rental income, the delay did cause additional expense related to the clubhouse. The clubhouse was used as a rental center as the Legacy Place apartments were being constructed. Because of the absence of a lift station and force main, Legacy was required to utilize portable restrooms. The evidence supports an award of \$25,311.57 for these expenses. The Court has considered the balance of the claims and setoffs asserted by Legacy and finds for PGA on these claims.

In calculating the amounts due for the shared cost work, the Court accepts the evidence presented by PGA as it relates to the amounts billed and paid, credits to be applied for impact fees and calculations relating to prejudgment interest. The Court does not credit Legacy with the Seacoast Utility connection fee as this fee is not provided for under the Post Closing Agreement.


Therefore, PGA is entitled to recover \$619,036.31 for shared costs, together with interest in the amount of \$245,709.54, for a total of \$864,745.85. This sum will be reduced by the sum of \$25,311.57 representing the setoff amount awarded to Legacy leaving a total due PGA of \$839,434.28

Based on the foregoing, it is hereby,

³ Other delays included road improvements and construction. However, Legacy did not present sufficient evidence of damages related to these delays.

ORDERED AND ADJUDGED that the PGA Gateway, LTD shall have and recover from Legacy Place Apartments Homes, LLC the total sum of \$839,434.28 for which let execution issue. Interest shall continue to accrue on this judgment at the legal rate. The Court retains jurisdiction to award costs and, if applicable, attorney's fees.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida this 7th day of December, 2009.



JUDGE GLENN D. KELLEY
CIRCUIT COURT JUDGE

Copies Furnished to:

Jason H. Okleshen, Esq.
E. Cole Fitzgerald, Esq.



POST CLOSING AGREEMENT

This Post Closing Agreement is executed this 21 day of August, 2002 by PGA Gateway, Ltd., a Florida limited partnership ("Seller") and Legacy Place Apartment Homes, LLC ("Buyer")

Background

- a. Seller and Beztak Land Company, the Assignor to Buyer, entered into that certain Agreement for Purchase and Sale dated November 8, 1999 as amended (the "Purchase Agreement").
- b. Pursuant to the Purchase Agreement Seller and Buyer are to share the costs of certain infrastructure improvements (the "Shared Cost Work") in connection with the development of the Property and Adjacent Property as defined in the Purchase Agreement.
- c. Seller and Buyer have agreed to the stipulated cost of the Shared Cost Work and desire to enter into this Agreement to confirm the said costs and the confirm the mechanism for payment of the Shared Cost Items after Closing, as defined in the Agreement.
- d. Seller and Buyer further desire to confirm that certain of their obligations under the Purchase Agreement survive the closing, as set forth in Paragraph 17 of the Purchase Agreement.

Now therefore, in consideration of Ten dollars (\$10.00) and other valuable consideration, the receipt and sufficiency of which is acknowledged, Seller and Buyer agrees as follows:

1. Agreed Costs: The maximum agreed amounts of the Shared Cost Work and Seller's and Buyer's respective Shares of said Costs are set forth on Exhibit "A" attached hereto and made a part hereof.
2. Contracts and Bonds: The Seller shall enter into construction contracts with respect to the Shared Cost Work which contracts shall be AIA 101-1997 Standard Form of Agreement between Owner and Contractor. Seller shall provide to Buyer copies of contracts entered into with respect to the Shared Cost Work with Seller's designated contractor, modified as follows:
 - a. Final plans and specifications shall be identified and referenced for each improvement covered under each contract.
 - b. The completion date shall be the date which complies with the completion date on the Construction Schedule set forth on Exhibit "B" attached hereto and in accordance with Seller's obligations under paragraph 5 herein.
 - c. The construction contracts shall also provide that:

- i. The Contractor agrees that [Legacy Development LLC or the named owner] may not modify, amend or change the Contract including, without limitation, the Contract Sum, the time for completion or the scope of the Work, without the prior written consent of Legacy Place Apartment Homes, L.L.C.
- ii. Copies of all Applications for Payment, together with copies of all waivers of lien, sworn statements and related documents shall be submitted to Buyer in a form reasonably satisfactory to Buyer and Buyer's lender.
- iii. Legacy Place Apartment Homes shall be entitled to attend all job progress meetings and shall receive all correspondence from the Owner, the Contractor or the Architect, including without limitation, all bulletins or change orders. Legacy Place Apartment Homes and its lender shall be entitled to all inspection and approval rights provided to the Owner under the contract documents.
- iv. The time for completion shall not be extended for the failure of [Legacy Development LLC or the Owner] to perform its obligations or its failure to timely pay the amount due under the contract.
- v. The retainage shall be 10%, reduced to 5% on 50% completion.
- vi. Any cost savings shall be split between Seller and Buyer in the same proportion as the costs for the Shared Cost Work are split. Any unused portion of the contingency shall be split between Seller and Buyer in the same proportion as the costs for the Shared Cost Work are split.

3. Payment: Upon satisfaction of the terms set forth in paragraph 2, above, Buyer and Seller shall pay Seller's designated contractor for their respective portions of the Shared Cost Work on a percentage of completion basis subsequent to Closing. Seller's Contractor shall bill Seller and Buyer monthly for their respective portion of the completed Shared Cost Work (including the sworn statements, lien waivers and related documents set forth in paragraph 2 above). Buyer and Seller shall make payment to Seller's Contractor on or before the 20th day of the month provided that Seller's contractor has submitted its request for payment and all supporting documentation to Buyer on or before the 25th day of the preceding month and the Contractor has otherwise complied with all of the terms of the contract as modified by paragraph 2, above. If Seller or Buyer fails to pay Seller's Contractor for its agreed share of said costs on the 20th day of the month in accordance with the preceding sentence, interest shall accrue on such unpaid amounts at the rate of one and one half percent (1.5%) per month until paid. Buyer shall not be entitled to exercise any of its rights under the bonds issued to Buyer in connection with the Shared Costs Work if Buyer has defaulted and is still in default payment of its agreed share of any such work in accordance with the provisions hereof. Buyer shall, however, be entitled to exercise any of its rights under the bonds if construction is delayed due to the actions or failure to act of Seller or owner under the construction contract or if Seller or owner is in default under the construction contract. The entry by Seller into a contract with a designated contractor shall not

relieve Seller of liability for the failure to complete the Shared Cost Work within the time provided in this Agreement.

4. Bonds: The Seller shall provide bonds for the Shared Cost Work substantially in the form of Exhibit D. In the event the Seller fails to provide the bonds in the form required in this paragraph, on or before September 20, 2002, Buyer may obtain the bonds on Seller's behalf and offset the cost of such Bonds against the cost otherwise payable with respect to the Shared Cost Work.

5. Schedule: The parties agree that the Shared Cost Work shall be completed in accordance with the construction schedule attached hereto as Exhibit "B", time being of the essence. Completion times shall be measured from the date of issuance of permits provided that Seller represents that it has submitted all applications for permits for the Shared Cost Work in the form required by the governing entities and Seller shall diligently attempt to obtain such permits. Seller shall pay all fees and take such other steps as may be necessary to obtain the issuance of the permits as soon as the governing entities make the same available for issuance.

6. Buffers: The parties agree to construct the landscape buffers in accordance with the approved buffer phasing plans approved by the City of Palm Beach Gardens. If either Seller or Buyer fails to construct its buffers in accordance with the approved buffer phasing plan to the extent that such failure causes delays in the development of the Property or the Adjacent Property, the non-defaulting party shall be entitled to go on the Property of the defaulting party and complete said buffers under and in accordance with Section 4.11 of the Declaration of Covenants for Parcel 28.01, Palm Beach Gardens Florida.

7. Survival: Parties acknowledge and agree that the provisions of this Agreement shall survive Closing between Seller and Buyer pursuant to Purchase Agreement. Further, parties agree that the Purchase Agreement as amended, which are expressly or impliedly intended to survive Closing as set forth in Paragraph 17 of the Purchase Agreement; shall also survive Closing. To the extent the terms of this Agreement are inconsistent with the terms of the Purchase Agreement, as amended, this Agreement shall control. The parties acknowledge and agree that both parties have fully performed their respective obligations under the Purchase Agreement, as amended, through the date of this Agreement.

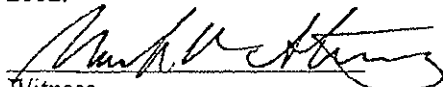
8. Lakes 5 and 6 Construction Contract: The parties shall enter into an AIA 101-1997 Standard Form of Agreement between Owner and Contractor for the construction of lakes 5 and 6 on the Property, for the stipulated sum set forth in Exhibit "C" attached hereto. Seller shall be obligated to cause Seller's Contractor to credit Buyer the sum of \$52,000 representing the agreed credit due Buyer for the fill removed from Lake 5 (the western lake) and deposited on the Adjacent Property, pursuant to the Purchase Agreement as amended by the Fourth Amendment.

9. Impact Fee Credits: Buyer and Seller shall share all impact fee credits for the Shared Cost Work in the same proportion as the Shared Cost Work. In the event Buyer receives from any governmental entity an impact fee credit solely for Prosperity Farms Road and/or Alternate A1A, Buyer will pay Seller the amount of such impact fee credits provided to Buyer. The

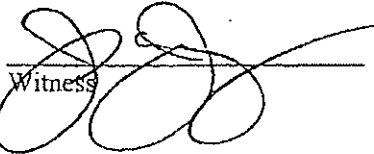
portion of the impact fees which Buyer shall be entitled to retain for County Road Impact Fees shall not be less than \$150,997.00. Seller shall provide Buyer with such reasonable information as Buyer may require to confirm the amount of such credits.

10. Contractor Buy Out: Seller and Buyer have exercised the option to allow Buyer to act as general contractor and to terminate the Seller as general contractor in accordance with the Fourth Amendment to the Purchase Agreement. The Seller and Buyer agree that the rights and obligations of the Seller (or Seller's affiliate) as General Contractor for the Buyer are terminated, except as provided in paragraph 8, herein.

IN WITNESS WHEREOF, the Agreement has been executed this 29 day of August, 2002.

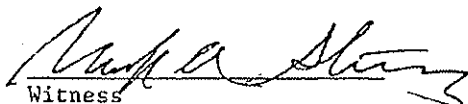

Witness

PGA Gateway, Ltd, a Florida limited partnership

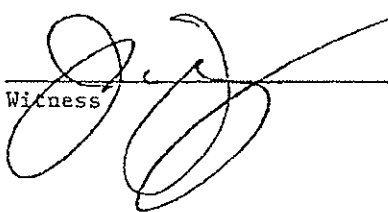

Witness

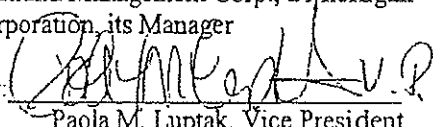
By: Diver Management, Inc., its general partner

By: 
Daniel S. Catalfano, President


Witness

Legacy Place Apartment Homes, LLC, a Florida limited liability company, by Beztak of Legacy Place, L.L.C., a Florida limited liability company, its Manager, by Oakland Management Corp., a Michigan corporation, its Manager


Witness

By: 
Paola M. Luptak, Vice President

R:\macarthur\mall\legacyplace\beztak\postclosingagreement331pm

CATALFUMO CONSTRUCTION AND DEVELOPMENT

4300 Catalfumo Way, Palm Beach Gardens, Florida 33410
(561) 694-3000 fax (561) 691-5288

MEMORANDUM

EXHIBIT "A"

To: Ed Almadovar - Beztak

From: Dan Catalfumo

Date: Wednesday, August 21, 2002 (Revised to show current off-site cost)

Re: Legacy Place Off-Site Infrastructure Estimates

Below is a summary of the shared cost items and their respective allocations.

**Table 1
Off-Site Project Cost Allocation**

ITEM	PROJECT	See Note	TOTAL PROJECT COST		ALLOCATED TO RESIDENTIAL	ALLOCATED TO COMMERCIAL
1	Prosperity Farms Road	B	3,432,746.00	0	0.00	3,432,746.00
2	A1A Turn Lane	B	150,588.00	0	0.00	150,588.00
3	Fairchild Gardens – North	C	608,462.00	0	0.00	608,462.00
4	Fairchild Gardens – South	C	795,386.00	50	397,693.00	397,693.00
5	RCA Boulevard	B	1,032,147.00	50	516,073.50	516,073.50
6	Lift Station, Force Main, Water	A	526,177.00	64.81	341,015.00	185,162.00
7	Lake 4 & Outfall	D	248,936.00	33	82,148.00	216,742.00
Total Shared Cost			\$6,869,001.00		\$1,338,929.50	\$ 5,507,466.50
Credit for County Impact Fees					-\$150,997.00	
Credit For City Impact Fees					-\$267,705.00	
Net Shared Cost					\$918,227.50	

Notes
A – Reference Table 2 for ERC Calculations
B – PBC Road
C – City of PBG
D – Includes lake equalization pipe and outfall

The above referenced information is based on data available on 8/20/02 and is subject to change as new information becomes available

EXHIBIT " B "

~~PROPOSED~~

CONSTRUCTION SCHEDULE

Fairchild North~	150 Days- commencing 9/15/02
Fairchild South~ site wall, irrigation and landscaping~	150 Days- commencing 9/15/02
RCA Blvd~	150 Days- commencing 9/15/02 ⁹ /15/02
Lift Station, Force Main and Water Main~	120 Days- commencing 9/15/02
Outfall Structure and Lake 4~	120 Days- commencing 9/15/02
Lakes 5 & 6 ~	90 Days- commencing 9/15/02
AIA Entrance East-West Linkage	300 Days- commencing 9/15/02
Northern extension (as defined in Paragraph 7 of Ordinance 10, 2001) or the deletion of said requirement from the Residential Tract.	420 Days- commencing 9/15/02

* Subject to issuance of required permits by proposed commencement date.

R:\Macarthur\legacyplace\Beztak\constructionschedule

Catalfumo Construction and Development, Inc.
 Payment/Billing Analysis – Beztak Companies
 As of October 30, 2009

Statutory Interest Index:

Year	Interest Rate	
	Annual	Daily
2002	9%	0.02466%
2003	6%	0.01644%
2004	7%	0.01918%
2005	7%	0.01918%
2006	9%	0.02466%
2007	11%	0.03014%
2008	11%	0.03014%
2009	8%	0.02192%

Fairchild Gardens South:

Invoice #	Invoice Date	Amount Billed	Payment Amount	Payment Date*	Check Number	Balance Due	Cumulative Balance	Statutory Interest Calculation							Total		
								2002	2003	2004	2005	2006	2007	2008		2009	
1	5/6/2003	\$ 214,397.44	\$ 192,957.70	7/8/2003	17099	**	\$ 21,439.74	\$ 21,439.74	\$ -	\$ 630.86	\$ 1,500.78	\$ 1,500.78	\$ 1,929.58	\$ 2,358.37	\$ 2,358.37	\$ 1,423.83	\$ 11,702.57
2	6/25/2003	\$ 114,496.23	\$ 103,046.61	8/27/2003	19909	**	\$ 11,449.62	\$ 32,889.36	\$ -	\$ 242.79	\$ 801.47	\$ 801.47	\$ 1,030.47	\$ 1,259.46	\$ 1,259.46	\$ 760.38	\$ 6,155.50
3	9/25/2003	\$ 63,789.74					\$ 63,789.74	\$ 96,679.10	\$ -	\$ 387.98	\$ 4,465.28	\$ 4,465.28	\$ 5,741.08	\$ 7,016.87	\$ 7,016.87	\$ 4,236.34	\$ 33,329.70
4	12/25/2003	\$ 5,009.59					\$ 5,009.59	\$ 101,688.69	\$ -	\$ -	\$ 298.79	\$ 350.67	\$ 450.86	\$ 551.05	\$ 551.05	\$ 332.69	\$ 2,535.13
		\$ 397,693.00	\$ 296,004.31				\$ 101,688.69		\$ -	\$ 1,261.63	\$ 7,066.33	\$ 7,118.21	\$ 9,151.98	\$ 11,185.76	\$ 11,185.76	\$ 6,753.24	\$ 53,722.91

* - Amount represents the fixed sum listed in Exhibit "A" which excludes a \$5,718.41 change order (\$11,436.81) allocation

** - Payment was reduced by 10% retention

RCA Boulevard:

Invoice #	Invoice Date	Amount Billed	Payment Amount	Payment Date*	Check Number	Balance Due	Cumulative Balance	Statutory Interest Calculation							Total		
								2002	2003	2004	2005	2006	2007	2008		2009	
1	6/25/2002	\$ 1,556.96	\$ 720.07	8/27/2003	19909		\$ 836.89	\$ 836.89	\$ 26.62	\$ 50.21	\$ 58.58	\$ 58.58	\$ 75.32	\$ 92.06	\$ 92.06	\$ 55.58	\$ 509.01
2	9/25/2002	\$ 999.03				**	\$ 999.09	\$ 1,835.92	\$ 9.11	\$ 59.94	\$ 69.93	\$ 69.93	\$ 89.91	\$ 109.89	\$ 109.89	\$ 66.35	\$ 584.97
3	12/25/2002	\$ 3,926.50					\$ 3,926.50	\$ 5,762.42	\$ -	\$ 200.74	\$ 274.86	\$ 274.86	\$ 353.39	\$ 431.92	\$ 431.92	\$ 260.75	\$ 2,228.42
4	3/31/2003	\$ 2,500.00					\$ 2,500.00	\$ 8,262.42	\$ -	\$ 88.36	\$ 175.00	\$ 175.00	\$ 225.00	\$ 275.00	\$ 275.00	\$ 166.03	\$ 1,379.38
5	6/25/2003	\$ 720.06					\$ 720.06	\$ 8,982.48	\$ -	\$ 15.27	\$ 50.40	\$ 50.40	\$ 64.81	\$ 79.21	\$ 79.21	\$ 47.62	\$ 387.12
6	8/25/2003	\$ 83,628.40					\$ 83,628.40	\$ 92,610.88	\$ -	\$ 934.81	\$ 5,853.99	\$ 5,853.99	\$ 7,526.56	\$ 9,199.12	\$ 9,199.12	\$ 5,553.84	\$ 44,121.43
7	9/25/2003	\$ 9,010.03					\$ 9,010.03	\$ 101,620.91	\$ -	\$ 54.80	\$ 630.70	\$ 630.70	\$ 810.90	\$ 991.10	\$ 991.10	\$ 598.36	\$ 4,707.68
8	11/25/2003	\$ 1,394.38					\$ 1,394.38	\$ 103,015.29	\$ -	\$ -	\$ 195.15	\$ 97.61	\$ 125.49	\$ 153.38	\$ 153.38	\$ 92.60	\$ 817.61
9	4/25/2005	\$ 17,446.75					\$ 17,446.75	\$ 120,462.04	\$ -	\$ -	\$ -	\$ 635.73	\$ 1,570.21	\$ 1,919.14	\$ 1,919.14	\$ 1,158.66	\$ 7,202.88
10	5/25/2005	\$ 66,389.73					\$ 66,389.73	\$ 186,851.77	\$ -	\$ -	\$ -	\$ 2,037.16	\$ 5,975.06	\$ 7,302.87	\$ 7,302.87	\$ 4,409.01	\$ 27,026.99
11	6/25/2005	\$ 15,665.00					\$ 15,665.00	\$ 202,516.77	\$ -	\$ -	\$ -	\$ 387.55	\$ 1,409.85	\$ 1,723.15	\$ 1,723.15	\$ 1,040.33	\$ 6,284.03
12	7/25/2005	\$ 8,541.80					\$ 8,541.80	\$ 211,058.57	\$ -	\$ -	\$ -	\$ 162.18	\$ 768.76	\$ 939.60	\$ 939.60	\$ 567.27	\$ 3,377.40
13	8/25/2006	\$ 2,275.19					\$ 2,275.19	\$ 213,333.76	\$ -	\$ -	\$ -	\$ 29.67	\$ 204.77	\$ 250.27	\$ 250.27	\$ 151.10	\$ 886.08
14	9/25/2005	\$ 18,894.30					\$ 18,894.30	\$ 232,228.06	\$ -	\$ -	\$ -	\$ 134.07	\$ 1,700.49	\$ 2,078.37	\$ 2,078.37	\$ 1,254.79	\$ 7,246.09
15	2/25/2006	\$ 28,935.80					\$ 28,935.80	\$ 261,163.86	\$ -	\$ -	\$ -	\$ -	\$ 1,776.58	\$ 3,182.94	\$ 3,182.94	\$ 1,921.65	\$ 10,064.11
16	3/25/2006	\$ 12,897.06					\$ 12,897.06	\$ 274,060.92	\$ -	\$ -	\$ -	\$ -	\$ 702.80	\$ 1,418.68	\$ 1,418.68	\$ 856.51	\$ 4,396.66
17	4/25/2006	\$ 41,827.30					\$ 41,827.30	\$ 315,888.22	\$ -	\$ -	\$ -	\$ -	\$ 1,959.58	\$ 4,601.00	\$ 4,601.00	\$ 2,777.79	\$ 13,939.38
18	6/25/2006	\$ 40,716.35					\$ 40,716.35	\$ 356,604.58	\$ -	\$ -	\$ -	\$ -	\$ 1,295.11	\$ 4,478.80	\$ 4,478.80	\$ 2,704.01	\$ 12,956.73
19	Balance to Bill	\$ 158,748.85					\$ 158,748.85	\$ 515,353.43	\$ -	\$ -	\$ -	\$ -	\$ 5,049.52	\$ 17,462.37	\$ 17,462.37	\$ 10,542.66	\$ 50,516.93
		\$ 516,073.50	\$ 720.07				\$ 515,353.43		\$ 35.73	\$ 1,404.12	\$ 7,308.61	\$ 10,597.43	\$ 31,684.12	\$ 56,688.88	\$ 56,688.88	\$ 34,225.12	\$ 198,632.89

** - Payment was reduced by 10% retention

Catalfumo Construction and Development, Inc.
 Payment/Billing Analysis – Beztak Companies
 As of October 30, 2009

Year	Interest Rate	
	Annual	Daily
2002	9%	0.02466%
2003	6%	0.01644%
2004	7%	0.01918%
2005	7%	0.01918%
2006	9%	0.02466%
2007	11%	0.03014%
2008	11%	0.03014%
2009	8%	0.02192%

Lift Station, Force Main, Water:

Invoice #	Invoice Date	Amount Billed	Payment Amount	Payment Date*	Check Number	Balance Due	Cumulative Balance	Statutory Interest Calculation									
								2002	2003	2004	2005	2006	2007	2008	2009	Total	
1	5/5/2003	\$ 1,731.72	\$ 1,558.55	7/8/2003	17099	**	\$ 173.17	\$ 173.17	\$ -	\$ 5.10	\$ 12.12	\$ 12.12	\$ 15.59	\$ 19.05	\$ 19.05	\$ 11.50	\$ 94.52
2	6/25/2003	\$ 54,051.93	\$ 48,646.74	8/27/2003	19909	**	\$ 5,405.19	\$ 5,578.36	\$ -	\$ 114.62	\$ 376.39	\$ 376.39	\$ 486.47	\$ 594.57	\$ 594.57	\$ 358.96	\$ 2,905.92
3	8/25/2003	\$ 146,948.94	\$123,269.08	1/16/2004	28170		\$ 23,679.86	\$ 29,258.22	\$ -	\$ 264.70	\$ 1,657.59	\$ 1,657.59	\$ 2,131.19	\$ 2,604.78	\$ 2,604.78	\$ 1,572.60	\$ 12,493.23
4	9/25/2003	\$ 107,174.80	\$ -				\$ 107,174.80	\$ 136,433.02	\$ -	\$ 651.86	\$ 7,502.24	\$ 7,502.24	\$ 9,645.73	\$11,789.23	\$11,789.23	\$ 7,117.58	\$ 55,998.10
5	12/25/2003	\$ 31,107.61	\$ -				\$ 31,107.81	\$ 167,540.63	\$ -	\$ -	\$ 1,855.38	\$ 2,177.53	\$ 2,799.68	\$ 3,421.84	\$ 3,421.84	\$ 2,065.89	\$ 15,742.15
		\$ 341,016.00	\$ 173,474.37				\$ 167,640.83		\$ -	\$ 1036.27	\$ 11,405.69	\$11,727.84	\$ 15,078.66	\$ 18,429.47	\$ 18,429.47	\$11,126.53	\$ 87,233.93

* - Amount represents the fixed sum listed in Exhibit "A" which excludes a \$15,581.00 change order (\$47,215.13) allocation and cost difference of \$24,604.47) 33% of 74,559 (due to a contract amount of \$323,495 versus \$248,936 per Exhibit "A").

** - Payment was reduced by 10% retention

Lake 4 & Outfall:

Invoice #	Invoice Date	Amount Billed	Payment Amount	Payment Date*	Check Number	Balance Due	Cumulative Balance	Statutory Interest Calculation									
								2002	2003	2004	2005	2006	2007	2008	2009	Total	
1	5/5/2003	\$ 13,409.68	\$ -			\$ 13,409.68	\$ 13,409.68	\$ -	\$ 453.42	\$ 1,078.68	\$ 1,078.66	\$ 1,396.87	\$ 1,695.06	\$ 1,695.06	\$ 1,023.37	\$ 8,411.15	
2	6/25/2003	\$ 22,591.75	\$ 20,332.58	8/27/2003	19909	**	\$ 2,259.17	\$ 17,668.65	\$ -	\$ 47.81	\$ 158.14	\$ 158.14	\$ 203.33	\$ 248.51	\$ 248.51	\$ 150.03	\$ 1,214.57
3	8/25/2003	\$ 56,274.69	\$ 51,187.22	11/24/2003	29388		\$ 5,087.47	\$ 23,356.32	\$ -	\$ 63.58	\$ 398.12	\$ 398.12	\$ 511.87	\$ 625.62	\$ 625.62	\$ 377.71	\$ 3,000.65
4	12/25/2003	\$ (12,728.12)	\$ -			\$ (12,728.12)	\$ 10,628.20	\$ -	\$ -	\$ (759.15)	\$ (890.97)	\$ (1,148.53)	\$ (1,400.09)	\$ (1,400.09)	\$ (845.28)	\$ (6,441.13)	
		\$ 62,148.00	\$71,519.60			\$ 10,628.20		\$ -	\$ 564.81	\$ 875.79	\$ 743.97	\$ 963.54	\$ 1,169.10	\$ 1,169.10	\$ 705.83	\$ 6,185.24	

* - Amount represents the fixed sum listed in Exhibit "A" which excludes a \$39,727.65 change order (\$61,296.63) allocation

** - Payment was reduced by 10% retention

Summary:	Amount Billed	Payment Amount	Balance Due	Statutory Interest Calculation									
				2002	2003	2004	2005	2006	2007	2008	2009	Total	
Fairchild Gardens South:	\$ 397,693.00	\$ 298,004.31	\$ 101,688.69	\$ -	\$ 1,261.63	\$ 7,058.33	\$ 7,118.21	\$ 9,151.98	\$ 11,185.76	\$ 11,165.76	\$ 5,753.24	\$ 53,722.61	
RCA Boulevard:	\$ 516,073.50	\$ 720.07	\$ 515,353.43	\$ 35.73	\$1,404.12	\$ 7,308.51	\$10,597.43	\$ 31,664.12	\$ 56,688.86	\$ 56,658.88	\$ 34,225.42	\$ 186,632.67	
Lift Station, Force Main, Water	\$ 341,015.00	\$ 173,474.31	\$ 167,540.63	\$ -	\$1,036.27	\$11,405.69	\$11,727.64	\$ 15,078.66	\$ 18,429.47	\$ 18,429.47	\$ 11,128.53	\$ 87,233.93	
Lake 4 & Outfall:	\$ 82,148.00	\$ 71,519.60	\$ 10,628.20	\$ -	\$ 564.91	\$ 875.79	\$ 743.97	\$ 956.54	\$ 1,169.10	\$ 1,169.10	\$ 705.83	\$ 6,185.24	
	\$1,336,929.50	\$ 543,718.29	\$ 795,210.85	\$ 35.73	\$ 4,266.93	\$26,656.42	\$ 30,187.48	\$ 56,871.30	\$ 87,473.20	\$ 87,473.20	\$ 52,810.72	\$ 345,774.97	
Less: County Impact Fee – Estimated per Exhibit 'A' of Post Closing Agreement			\$ (150,997.00)	\$ -	\$ -	\$ -	\$ (5,284.90)	\$ (13,589.73)	\$ (16,609.87)	\$ (16,609.87)	\$ (10,027.86)	\$ (62,121.82)	
Less: City Impact Fee – Estimated per Exhibit 'A' of Post Closing Agreement			\$ (287,705.00)	\$ -	\$ -	\$ -	\$ (8,369.85)	\$ (24,093.45)	\$ (29,447.55)	\$ (29,447.55)	\$ (17,778.55)	\$ (110,136.77)	
Less: Seacoast Connection Fee Credit – Per Letter from Beztak dated 09/30/2003 (unsubstantiated)			\$ (141,797.00)	\$ -	\$ -	\$ -	\$ (4,852.80)	\$ (12,781.73)	\$ (15,597.67)	\$ (15,597.67)	\$ (9,416.87)	\$ (58,336.84)	
Add: Short payments on check #17099 dated 07/08/03 for Impact Fees & Seacoast Connection Fee Credits of (\$720.07 and \$173,092.54 – see attached remittance for details).			\$143,812.65	\$ -	\$ 4,231.64	\$10,056.88	\$ 10,066.85	\$ 12,943.13	\$15,619.39	\$15,619.39	\$ 9,550.73	\$ 78,488.04	
Add: Short payments on check # 19809 dated 08/27/03 for Impact Fees & Seacoast Connection Fee Credits of (\$22,475.26, \$75,256.81 and \$210.66 see attached remittance for details).			\$86,642.75	\$ -	\$ 2,081.77	\$ 6,904.88	\$ 6,904.99	\$ 8,877.85	\$10,850.70	\$10,850.70	\$ 6,550.56	\$ 53,039.85	
Total Due From Beztak, net of Impact Fee Deductions			\$ 477,167.31	\$ -	\$ 6,323.40	\$ 18,971.86	\$ (2,645.58)	\$ (28,623.83)	\$ (34,984.80)	\$ (34,984.80)	\$ (21,121.58)	\$ (99,005.42)	
Add. Statutory Interest Calculation			\$245,709.54	\$ 35.73	\$10,590.33	\$43,628.29	\$ 27,541.87	\$ 26,247.37	\$ 52,488.40	\$ 52,488.40	\$ 31,683.1	\$ 246,709.54	
Grand Total Due from Beztak			\$ 723,875.85										

Notes: 1 The statutory interest for the Balance Due is calculated starting with the 61st day following the Invoice Date

2 The statutory interest for the County/City Impact Fees and Seacoast Connection Fee Credit is calculated from 07/01/2005, which serves as the median date of such fees being pad to the respective government entities