IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE CITY OF PENSACOLA, a Florida Municipal Corporation,

Appellant,

CASE NO.: 1D16-2481

vs.

LT Case No.: 2014-CA-000081

SEVILLE HARBOUR, INC., a Florida Corporation, MERRILL LAND, LLC, a Florida Limited Liability Company, and GREAT SOUTHERN RESTAURANT GROUP OF PENSACOLA, INC., a Florida Corporation,

Appellees.

_____/

CITY OF PENSACOLA'S
MOTION TO STAY ISSUANCE OF MANDATE

Plaintiff, City of Pensacola, pursuant to Florida Rules of Appellate Procedure 9.340(a) and 9.310(e) and *State ex rel. Price v. McCord*, 380 So. 2d 1037 (Fla. 1980), moves this Court to stay the issuance of its mandate in the above-styled case. In support, the City states:

The City will be filing a notice to invoke the discretionary jurisdiction of the Florida Supreme Court within the time permitted by Florida Rule of Appellate Procedure 9.120(b). Factors that should be considered when reviewing a motion to

stay issuance of a mandate are (a) the likelihood that jurisdiction will be accepted by the supreme court, (b) the likelihood of ultimate success on the merits, (c) the likelihood of harm if no stay is granted, and (d) the remediable quality of any such harm. *State ex rel. Price v. McCord*, 380 So. 2d at 1038 n.3. The case satisfies all of these factors.

JURISDICTION IN THE SUPREME COURT IS LIKELY

This Court's opinion, issued on June 1, 2017, expressly and directly conflicts with two decisions of the Florida Supreme Court on the same issue of law—the nature of an easement and its effect on an assignment. Thus, conflict jurisdiction is established pursuant to Florida Rule of Appellate Procedure 9.030(2)(A)(iv) and art. V, § 3(b)(3), Fla. Const. The conflict is with *C.N.H.F., Inc. v. Eagle Crest Dev. Co.*, 128 So. 844, 845 (Fla. 1930) and *Rogers v. United States*, 184 So. 3d 1087 (Fla. 2015).

"The discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that expressly and directly conflict with a decision of . . . the supreme court on the same question of law." Fla. R. App. P. 9.030(2)(A)(iv). The supreme court has defined the term "express" to mean "to represent in words" or "to give expression to." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). "Expressly" is defined as "in an express manner." *Id*. As the supreme court observed in *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla.

1981), a "discussion of the legal principles which the [district] court applied supplies a sufficient basis for a petition for conflict review." It is not necessary that the court explicitly identify conflicting supreme court decisions in its opinion to create an express conflict under section 3(b)(3). *Id*. As discussed in detail below, this Court's June 1, 2017 opinion satisfies the "express" requirement.

Where the conflict is with a supreme court opinion, the supreme court's discretionary jurisdiction may be based on *dictum* in the supreme court opinion. *See, e.g., Cowan, Liebowitz & Latman, P.C. v. Kaplan*, 902 So. 2d 755, 756 (Fla. 2005) (where the district court's "holding expressly and directly conflicts with our statements in *KPMG* and *Forgione* (albeit in *dictum*) implying a blanket prohibition against assignment of legal malpractice claims. Therefore, we accept jurisdiction."); *Watson Realty Corp. v. Quinn*, 452 So. 2d 568, 569 (Fla. 1984) (accepting jurisdiction based on conflict between the district court opinion and *dictum* in a prior supreme court case and receding from the *dictum*).

One test of express and direct conflict is whether the decisions are irreconcilable. *Aravena v. Miami-Dade Cnty.*, 928 So. 2d 1163, 1166 (Fla. 2006). This Court's opinion is irreconcilable with the supreme court's opinion in *Eagle Crest* that the nature of an interest in land sufficient to defeat an assignment is either a "reversionary interest" in the "estate," *see Eagle Crest*, 128 So. at 1240 ("Where the lessee assigns his whole estate without reserving to himself a

reversion therein, a privity of estate is at once created between the assignee and the original lessor . . . .") or the term transferred is less than the term remaining in the original lease, *see id*. ("As regards the original lessor or his grantee of the reversion, the criterion for determining whether a transfer in the form of a lease constitutes an assignment or a sublease is whether the entire interest *in the term* is transferred without a reversion being retained by the original lessee.").

The June 1, 2017 opinion also is irreconcilable with the supreme court's opinion in *Rogers* that labeling an easement a reversion is not consistent with the traditional classification scheme. *See Rogers*, 184 So. 3d at 1098 n. 6 ("[L]abeling the retained interest a 'reversion' is not consistent with the traditional classification scheme, which views the retained interest as a present estate in fee simple, subject to the burden of the easement.").

The supreme court has also said that express and direct conflict can be found from the misapplication by the district court of a decision of the supreme court. *See, e.g., Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, (Fla. 2006) ("We have jurisdiction because *Engle* misapplies our decision in *Young v. Miami Beach Improvement Co.*, 46 So. 2d 26 (Fla. 1950).); *see also Dorsey v. Reider*, 139 So. 3d 860, 862 (Fla. 2014) (applying "misapplication conflict"). Whether the incompatibility is labeled a direct conflict with (or a misapplication of) *Eagle Crest* and *Rogers*, the supreme court is likely to find discretionary jurisdiction.

Further, the supreme court is likely to accept jurisdiction because this case addresses an important issue in real property law—whether a party scheming to avoid the obligations of an assignment may defeat that assignment by reserving an easement, even just a *de minimis* easement. The issue is especially important where the issue affects a governmental entity's responsibility to protect its citizens from scheming or overreaching by private parties for their personal monetary gain at the expense of public funds.

ULTIMATE SUCCESS ON THE MERITS IS LIKELY

This Court agreed that Florida recognizes *pro tanto* assignments. This Court, citing *Eagle Crest Dev. Co*., 128 So. At 845, also recognized that the test for determining whether a real estate transaction is an assignment (either *pro tanto* or full) or a sublease is whether the lessee transfers his entire interest in all or part of the leased property for the unexpired term of the original lease. However, this Court then determined that an easement is an "interest" in land such that it will defeat a *pro tanto* assignment making the transaction instead a sublease. This Court's decision expressly and directly conflicts with *Eagle Crest* and *Rogers* or misapplies these cases regarding the test for an assignment and the nature of an easement and the nature of a reversion.

This Court based its decision on case law from outside this jurisdiction, *see* 6/1/2017 Op. p. 8, and on a loose general definition of "interest," *id*. at p. 9.[1] Such reliance is contrary to the supreme court's definition of an assignment as explained in *Eagle Crest*. In *Eagle Crest*, the supreme court distinguished between an "interest" in land and an "estate" in land and discussed how the two terms apply to assignments. Critical to that evaluation is an understanding of the Florida Supreme Court's use of the terms "interest," "estate," and "reversion."

"Entire interest" was consistently used by the *Eagle Crest* Court in conjunction with "the term of the lease." The phrase "entire interest" is only contained in the discussion in headnotes 1 and 3 of the Court's opinion and, in each case, referred to the term of the lease:

> An assignment by a lessee transfers his ***entire interest*** in the demised premises or a part thereof ***for the unexpired term*** of the original lease.
>
> * * *
>
> As regards the original lessor or his grantee of the reversion, the criterion for determining whether a transfer in the form of a lease constitutes an assignment or a

[1] Additionally, none of the cases cited by this Court at page 9 of its opinion concerning an "interest" in land involved assignments or subleases. Rather, the cases involved ownership questions. In fact, these cases support the City's position—an easement is not an estate or an ownership interest in land. It is merely the right to use the land for some particular purpose or purposes. Where a party owns land in fee simple, that fee simple ownership is not defeated because an easement is granted. Likewise, where a party owns a lease and transfers that estate to another party, but reserves an easement, the former party retains no ownership interest or reversion in the property.

> sublease is whether the ***entire interest in the term*** is transferred without a reversion being retained by the original lessee.

128 So. at 1240 (emphasis added; internal citations omitted).

Furthermore, the term "estate" was used only when the court discussed privity between the original lessor and the assignee. The transfer of the entire "estate" creates privity in the assignee and thus an assignment.

The *Eagle Crest* court explained:

> Where the lessee assigns his ***whole estate*** without reserving to himself ***a reversion*** therein, a ***privity of estate*** is at once created between the assignee and the original lessor, and the latter has a right of action directly against the assignee upon breach of the covenant to pay rent.
>
> If a lessee transfers ***all his estate*** to another, the transfer is not converted into a sublease by the use of the words of demise and reservation of a new and different rent and the right to re-enter for nonpayment of rent.
>
> The right to enter for breach of a condition subsequent is ***not a reversion and is not an estate in land***.
>
> The relations of landlord and assignee of the term result from ***privity of estate***, and, when the original lessee has divested himself of his entire term, and thus ceased to be in ***privity of estate*** with the original landlord, the person to whom he transmits that entire term must necessarily be in ***privity of estate*** with the original landlord, and hence liable as assignee of the term.

Id. at 1240-41 (emphasis added; internal citations omitted).

With respect to reversionary interest, the Florida Supreme Court recently explained:

> [A] 'reversion' is a future interest remaining in the transferor following the conveyance of certain lesser estates to a transferee, typically when the transferee takes a possessory estate of freehold, for example a life estate. ***An easement is not such a possessory estate of freehold*** . . . . Therefore ***labeling the retained interest a 'reversion' is not consistent with the traditional classification scheme***, which views the retained interest as a present estate in fee simple, subject to the burden of the easement.

Rogers v. United States, 184 So. 3d at 1098 n. 6 (*in dicta*) (emphasis added).

This Court's finding that an easement is the type of "interest" in land that defeats an assignment expressly and directly conflicts with the supreme court's statement in *Eagle Crest* that "[w]here the lessee assigns his whole ***estate*** without reserving to himself ***a reversion*** therein, a ***privity of estate*** is at once created between the assignee and the original lessor, and the latter has a right of action directly against the assignee upon breach of the covenant to pay rent." 128 So. at 1240 (emphasis added). It also expressly and directly conflicts with the supreme court's statement in *Rogers* quoted above regarding the nature of an easement and the nature of a reversion.

The City is likely to prevail on the merits in this case because its interpretation of the requirements for an assignment, as well as its interpretation of

the nature of an easement and the nature of a reversion, is consistent with *Eagle Crest* and *Rogers*.

THE CITY WILL BE HARMED IF THE STAY IS NOT GRANTED
THE REMEDY IF THE STAY IS NOT GRANTED IS INSUFFICIENT

"When a public body timely files a notice of appeal, the issue under appeal is automatically stayed pending review by the appellate court. *See* Fla. R. App. P. 9.310(b)(2)." *City of Delray Beach v. Desisto,* 204 So. 3d 954, 956-57 (Fla. 4th DCA 2016); *see also Miami-Dade Cnty. Bd. of Cnty. Comm'rs v. An Accountable Miami-Dade*, 208 So. 3d 724 (Fla. 3d DCA 2016) ("The County's motion correctly noted that, pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), the County's Notice of Appeal automatically stayed the trial court's order."); *Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1077 (Fla. 2nd DCA 2005) ("filing of notice of appeal" stayed preliminary injunction pursuant to Fla. R. App. P. 9.310(b)(2)); *Gervais v. City of Melbourne*, 890 So. 2d 412, 413 (Fla. 5th DCA 2004) (City entitled to automatic stay pursuant to Fla. R. App. P. when notice of appeal filed); *So. States Utilities, Inc. v. Fla. PSC*, 704 So. 2d 555, 559 (Fla. 1st DCA 1997) (stay was in effect because governmental entity, Citrus County, appealed the original PSC order).

Pursuant to Florida Rule of Appellate Procedure 9.310(b)(2), an automatic stay of the judgment was in effect in this case pending review in this Court. This Court issued its opinion on June 1, 2017. The mandate will issue 15 days

thereafter. *See* Fla. R. App. P. 9.340(a) ("[T]he clerk shall issue mandate . . . after expiration of 15 days from the date of an order or decision."). The automatic stay will dissolve after the mandate issues. *See* Fla. R. App. P. 9.310(e) ("A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues . . . .").

The 1977 Committee Notes to Florida Rule of Appellate Procedure 9.310 provide, in relevant part:

> This rule interacts with rule 9.340 [] so that a party has 15 days between rendition of the court's decision and issuance of mandate (unless issuance of mandate is expedited) to move for a stay of mandate pending review. If such motion is granted, any stay and bond previously in effect continues, except to the extent of any modifications, by operation of this rule."

This Court has recognized that a continuation of the automatic stay is proper while discretionary review is sought in the supreme court:

> In sum, if the City, or other public body desires to stay the decision of the district court while discretionary review is sought in the supreme court, they should, in accordance with *Price v. McCord*, file a motion to stay the mandate in the district court, before the mandate issues. Once the mandate has issued, a motion to stay the effect of the mandate must be filed in the supreme court. *McKinnon*, 540 So. 2d at 113.

City of Miami v. Arostegui, 616 So. 2d 1117, 1121 (Fla. 1st DCA 1993).

This Court has agreed with other courts "that the automatic stay is based upon a policy rationale and involves the fact that planning-level decisions are made

in the public interest and should be accorded a commensurate degree of deference and that any adverse consequences realized from proceeding under an erroneous judgment harm the public generally. *State, Dept. of Environmental Protection v. Pringle*, 707 So. 2d 387, 390 (Fla. 1st DCA 1998). Such a stay should be denied only "under the most compelling circumstances." *Id*. Unless a stay of the issuance of the mandate is granted, the automatic stay of the underlying judgment will end and the citizens of the City of Pensacola will be harmed by payment of public funds that potentially could not be recovered or that may be difficult, expensive, and time-consuming to recover.

Seville Harbour is seeking attorneys' fees and costs. Merrill Land and Great Southern are seeking costs. The fees and costs will be paid from public funds and resources. The Florida Legislature and the courts of Florida routinely seek to protect public funds. *See, e.g.*, *Hardee Cnty, v. FINR II, Inc.*, 2017 WL 2291004 (Fla. May 25, 2017) ("This Court construes waivers of sovereign immunity narrowly to protect public funds."); *Jackson-Shaw Co. v. Aviation Authority*, 8 So. 3d 1076, 1086 (Fla. 2008) ("[L]ike the 1885 provision before it, the 1968 prohibition [of Section 10, Article VII, Florida Constitution of 1968] acts to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would be most only incidentally benefited."); *Green v.*

City of Pensacola, 108 So. 2d 897, 901 (Fla. 1st DCA 1959) ("the necessity of protecting public funds is of paramount importance").

Where the matter involves public funds, no remedy other than the stay is sufficient because the City may not be able to recoup any monies paid. The City and its residents will be harmed if the City is not granted a stay of the mandate. Conversely, there is no harm to appellees because there is no risk the City will become insolvent and unable to pay fees and costs if the matter is resolved in appellees' favor.

WHEREFORE, the City respectfully requests that this Court stay the issuance of its mandate pending resolution of these matters in the Florida Supreme Court.

/s/ Terrie L. Didier
J. NIXON DANIEL, III
Florida Bar No. 228761
jnd@beggslane.com
ch@beggslane.com
TERRIE L. DIDIER
Florida Bar No.: 0989975
tld@beggslane.com
aeh@beggslane.com
jkm@beggslane.com
Beggs & Lane, RLLP
501 Commendencia Street
Pensacola, FL 32502
(850) 469-3306
(850) 469-3331 – fax

Attorneys for Appellant
THE CITY OF PENSACOLA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *City of Pensacola's Motion to Stay Issuance of Mandate* was served by electronic mail upon the following counsel of record this 15th day of June, 2017:

Robert A. Emmanuel, Esq.
Adam J. White, Esq.
Emmanuel, Sheppard, & Condon, P.A.
30 South Spring St.
Pensacola, FL 32502
rae@esclaw.com
ajw@esclaw.com
jal@esclaw.com
Attorneys for Appellee
Merrill Land, LLC

Charles F. Beall, Jr., Esq.
Moore, Hill & Westmoreland. P.A.
350 West Cedar Street, Suite 100
Pensacola, FL 32502
cbeall@mhw-law.com
ljohnson@mhw-law.com
Attorneys for Appellee
Great Southern Restaurant Group of Pensacola, Inc.

Edward P. Fleming, Esq.
R. Todd Harris, Esquire
McDonald – Fleming - Moorhead
719 S. Palafox Street
Pensacola, FL 32502
epfleming@pensacolalaw.com
flemingservice@pensacolalaw.com
Attorneys for Appellee
Seville Harbour, Inc.

/s/ Terrie L. Didier
TERRIE L. DIDIER
Beggs & Lane, RLLP