BLALOCK WALTERS
ATTORNEYS AT LAW
WE MAKE A DIFFERENCE

Mark P. Barnebey
Anthony D. Bartirome
Robert G. Blalock
Ann K. Breitinger
Lisbeth P. Bruce
Anne W. Chapman
Jonathan D. Fleece
Dana Carlson Gentry
Alexander K. John
Charles F. Johnson, III
Mary Fabre LeVine
Jason H. Levy
Melanie Luten
Fred E. Moore
Stephen G. Perry
Matthew R. Plummer
Marisa J. Powers
William C. Robinson, Jr.
Scott E. Rudacille
Jenifer S. Schembri
Robert S. Stroud
Amanda C. Tullidge
Clifford L. Walters

TO: Riverwood Community Development District
Board of Supervisors

CC: Cal Teague, District Manager

FROM: Scott E. Rudacille, Esq. SER 1/15/16

RE: Lake Bank Restoration Projects

DATE: January 15, 2016

Issue:

A number of questions have been raised by members of the community related to the two lake bank restoration projects which are currently underway. At the last Board meeting, the Board asked that we research these issues and prepare a memo to the Board discussing my findings. A summary response is provided, along with a more detailed discussion which includes responses to specific subjects that have been raised.

Summary Response:

It is our opinion that the District's performance of lake maintenance projects, including lake bank restoration, appears to be consistent with Florida law and the various governing documents of the District. Further, the failure to maintain the lakes in a reasonable manner and in accordance with applicable government standards creates potential liability for the District. The projects also do not appear to be inconsistent with formal policies adopted by prior Boards.

It appears that the current confusion is being created by the notion that erosion control is separate and distinct from lake maintenance activities. While the District may have authorized individualized requests for erosion control structures over time, that does not obviate the District's underlying responsibility to ensure that the lakes are maintained in accordance with applicable Southwest Florida Water Management District ("SWFWMD") regulations and permit requirements. Clearly the slope of the lake banks is an integral part of the permit conditions and has implications on the safety of the lake as well its functionality for water management and ecological purposes.

BRADENTON
802 11th Street West
Bradenton, FL 34205

SARASOTA
2 North Tamiami Trail
Suite 408
Sarasota, FL 34236

941.748.0100 phone
941.745.2093 fax
www.blalockwalters.com

srudacille@blalockwalters.com

So to the extent that the District's engineers have advised that lake bank restoration is recommended as a measure to help conform the District's lakes to applicable SWFWMD standards and permit conditions, in our opinion such actions are lawful and appropriate actions by the District, and serve to limit the potential for liability. The District may still consider individual requests by homeowners to install erosion control structures, provided those features are consistent with the District's stormwater management plan and permit conditions.

Detailed Discussion:

1. **Are the District's current lake maintenance projects consistent with Florida law and the various governing documents of the District?**

It is our understanding that the current lake bank restoration projects are being conducted upon lakes which have been dedicated to the District and which also contain dedicated lake maintenance easements around the perimeter of the lake. Under Florida law, local governments which accept dedication of facilities are required to maintain those facilities in a reasonable manner. See generally *Jordan v. St. Johns County*, 63 So.3d 835 (Fla. 5th DCA 2011).

Further, under §190.012(1)(a), *Fla. Stat.*, community development districts are specifically granted the authority to operate and maintain systems for water management and control, subject to the regulatory jurisdiction and permitting authority of applicable government agencies. It is our understanding that the lakes at issue are both subject to permits issued by the SWFWMD, and the District is the entity responsible for maintaining those lakes in accordance with the permit conditions.

It has been suggested that the scope of the "lake maintenance easement" may not encompass the lake bank restoration activities being undertaken by the District. However, under Florida law dedications of land to public use are construed broadly in order to effectuate the public purposes for which the property was dedicated. See generally *Dade County v. Harris*, 90 So.2d 316 (Fla. 1956) and *Kosanke v. City of Saint Petersburg Beach*, 256 So.2d 395 (Fla. 2d DCA 1972). Provided the activities are consistent with the requirements of the applicable permit conditions for maintenance of the lakes, we do not see any merit to the suggestion that the work exceeds the scope of the dedicated easement.

It has also been suggested that the lake bank restoration projects are inconsistent with the Declaration of Covenants, Conditions and Restrictions for Riverwood ("Covenants"). Based upon our review of the Declaration, we see no such inconsistency. The Covenant provisions are clear that the CDD is responsible for maintaining the Surface Water Management System in accordance with applicable government standards. Section 6.6.3 provides as follows:

> "Pursuant to a Surface Water Management Plan approved by SWFWMD the Surface Water Management System shall be owned and maintained by the Community Development District."

And Section 6.6.5 provides as follows:

> "It is the responsibility of the Community Development District to operate and maintain the Surface Water Management System, including but not limited to aquatic weed control, in a manner consistent with the original design thereof, and in accordance with the requirements of all applicable government authorities."

With regard to the property owner's responsibilities, Section 6.4 of the Covenants states as follows:

> "Owners of Private Property fronting on the water's edge or upon greenbelt buffer fronting the water's edge of any lake or other body of water within the Properties shall maintain and irrigate all landscaping between the Private Property boundary and such water's edge; provided the Owners shall have no right to remove trees, shrubs or similar vegetation from this area without prior approval pursuant to Article XIII hereof."

Thus, the Property Owner's responsibility is specifically limited to maintaining the landscaping, whereas the District's responsibility is to maintain the system itself. This is no different than the 10'-15' portion of a homeowner's front yard which is frequently located within a public right-of-way easement. The applicable government entity is authorized to install sidewalks, drainage systems, utilities, etc., in this area, and the homeowner is still expected to maintain their lawn.

2. How can the District's failure to conduct maintenance activities result in liability for the District?

The District has accepted the dedication of the lakes and lake maintenance easements which were shown on the various plats of Riverwood, and as discussed previously this creates a duty on the part of the District to maintain those lakes. In addition, the District has a statutory duty under §190.012(1)(a), *Fla. Stat.*, to maintain its facilities in accordance with applicable government and permitting standards. Once that duty is established, the breach of that duty can create liability for any damages that are caused.

In many cases, it may be difficult to establish what standard of care is required, and in general the government is only required to provide "reasonable" maintenance. See *Jordan v. St. Johns County, 63 So.3d 835 (Fla. 5th DCA 2011)*. However, if an applicable government regulation exists, then the failure to

comply with that regulation can establish the appropriate standard of care. The following is the court's discussion on the issue from *Gilbertson v. Lennar Homes, Inc.*, 629 So.2d 1029 (Fla. 4th DCA 1993):

> "The different rule here is that a duty is imposed by a government safety regulation. In this case, pursuant to a valid and statutorily mandated purpose of protecting public safety, the SFWMD issued Lennar a permit to excavate the lake with a required 4:1 slope. As indicated in the evidence, the public safety rationale behind requiring a 4:1 slope is that there is inherent danger in constructing a steep slope at the very edge of a body of water. Constructing a 4:1 slope creates a shallow shelf at the edge of a body of water which enables people, including children, to climb out from danger and thus minimize the risk of drowning or injury. Thus, we conclude the SFWMD regulations and permit requirement of a 4:1 slope created a duty which, if breached by Lennar, would give rise to a cause of action for negligence."

Thus, the failure to comply with applicable SWFWMD standards can constitute a breach of duty which creates liability for damages.

It has been suggested that the *Gilbertson* case is not relevant to this discussion, because it involved the builder of a lake and not the maintenance entity. In our opinion, that is too narrow a reading of the decision.

In the *Gilbertson* case, the Plaintiffs had alleged that the developer had not constructed the lake to water management district standards, so that was the only issue the court discussed. And, since the developer had turned the lake over to the HOA in 1987, and the drowning occurred in 1989, the failure of the HOA to maintain the lake was likely not at issue. However, as time goes on, the maintenance entity will take on more responsibility to ensure compliance with the permit maintenance standards. The court's determination that the standard of care is set by the applicable SWFWMD permit is just as applicable to the maintenance entity as it is to the original developer.

To the extent the District can show that erosion issues were caused by factors outside of the District's maintenance, it may be possible to avoid liability or to seek contribution for restoration efforts. However, establishing such external causes and securing such contribution on an individualized basis could be speculative and costly.

It should be noted that the Riverwood Community Association ("RCA") was sued by a homeowner in 2011 for erosion damage caused by the failure to properly maintain a lake owned and maintained by the RCA. This matter was settled by the payment of $12,000 from the RCA's insurance carrier as a contribution toward the construction of a retaining wall by the Plaintiffs. The matter carried

on for a number of years after the settlement as there was apparent disagreement as to the permitting and construction of the retaining wall, so it is unclear what the RCA's ultimate cost was in defending against that claim. It should also be noted that the claim involved no allegation of personal injury or damage to the home, which could increase potential exposure significantly.

3. **Are the District's current lake bank restoration projects consistent with prior policies adopted by the Board of Supervisors or opinions issued by counsel for the District?**

We have reviewed various documents, meeting minutes, and meeting tapes provided to me by the District Manager's office on this topic, as well as documents on file in our office, and my comments are based upon those records. There certainly could be additional records which could provide additional insight into prior actions of the Board, and we are happy to review such documents if they are provided.

We are not aware of any instance in which the Board was provided legal counsel as to the District's responsibilities for the maintenance of lakes which are dedicated to the District. On April 23, 2007, Margaret Ware, as President of the Silver Lakes Board of Directors, sent a letter to Sue Fischer, Chair of the District, requesting a legal review of a number of issues, including the District's potential responsibility for lake bank erosion. This letter was forwarded to Jeffrey Steinsnyder, my former partner at Kirk Pinkerton, P.A., who was the primary attorney for the District at that time.

This matter was discussed at the next two Board meetings, but the discussion turned into a more general discussion as to the District's lack of knowledge regarding ownership of various assets and easements within Riverwood. Mr. Steinsnyder suggested that the District authorize him to research these matters so as to be able to properly advise the Board on issues as they arise. This advice was memorialized in a memo from Mr. Steinsnyder to Sue Fischer dated June 19, 2007. When the matter was discussed at the Board, it was determined that Supervisor Powers would assist Mr. Steinsnyder in obtaining applicable records in order to reduce the cost of research.

We were not provided any records, nor could we find any on file, indicating that the matter related specifically to Silver Lakes erosion was ever revisited by the Board. A couple of years later the Board did authorize, and my prior firm, Kirk Pinkerton, P.A., did conduct a complete title search and review of the public records of the Riverwood community. However, again, we found no records indicating that the Silver Lakes matter, or the District's role and responsibilities for lake maintenance in general, was revisited by the Board until this current Board discussion.

During this same timeframe, at the May 15, 2007, meeting, the Board considered a separate matter as to whether to authorize a proposal from the District Engineer to conduct a study regarding erosion issues on Pond #5. The Board elected not to conduct the study, stating that they did not want to set a precedent and that the policy had already been discussed, that individual owners were responsible for installing erosion control structures on their property. It was noted that there was no comprehensive plan for the ponds, and that the Board did not want to piecemeal them.

At this same meeting, there was a separate discussion at the Board regarding the formal policy for homeowners seeking to install erosion control structures on their property. This policy was being formulated by the RCA's Modifications Committee, on which Supervisor Bunker participated as a liaison. Supervisor Bunker reported that the Modifications Committee had reviewed the policy, and were recommending that the Board approve the policy that the homeowner was responsible for installing erosion control, and that it was not the responsibility of the RCA or the District. This policy was not in written form but Supervisor Bunker's oral recitation was approved by the Board.

Following this action by the Board, a member of the public (Harry Ruiz) asked if the Board was adopting a policy that the residents were responsible for maintaining the stormwater ponds. The Board responded that no, the policy only applied to homeowner requests.

At the next regular meeting, on June 19, 2007, Supervisor Hansen asked if there was a written version of the policy that had been adopted by the Board at the prior meeting. It was discussed that there was not a written policy to review, but Supervisor Bunker was tasked with finalizing the policy in writing with the Modifications Committee and then making it available to the residents.

To the extent there was a formal policy adopted by the Board, the scope of that policy appears to have been specifically limited to requests by property owners to install erosion control structures on their property. As such, it is our opinion that the current lake bank restoration projects being undertaken by the District are not inconsistent with such prior policy. It does appear that there was some confusion at the time in that the Board seemed to assume that the District's lake maintenance responsibilities did not include repair to the slope of the shoreline. This assumption, however, does not appear to have been memorialized into formal District policy.

Even if the Board had adopted such a policy at some point in time, under Florida law prior policy decisions are not binding upon future boards. A change in such policy only requires action by the Board with the same level of formality as was used in adopting the initial policy, which in this case would be by motion and majority vote at a meeting of the Board.