

**13. CITY ATTORNEY'S REPORT**

- a. Attached copy of August 6, 2010 Memorandum from City Attorney to City Council relating to the area north of Raintree Place and addressing related issues discussed at the July 20, 2010 Council meeting

**CITY OF SANIBEL**

**LEGAL DEPARTMENT**

**MEMORANDUM**



**TO:** Members of City Council

**FROM:** Kenneth B. Cuyler *KBC*  
City Attorney

**DATE:** August 6, 2010

**RE:** Response to Maxwell Allegations

The purpose of this Memorandum is to respond to the latest allegations presented by Mr. Maxwell, most recently at the City Council meeting of July 20, 2010. For purposes of clarity, I have organized this Memorandum under the following headings:

- A. The location and nature of the area Mr. Maxwell alleges is a road.**
- B. Factual background and analysis of the legal status of the easement.**
- C. The majority of the easement area depicted on the map submitted by Mr. Maxwell, which he claims is a “road”, does not even legally exist and was legally vacated and released in 2008 (and the “road” has never physically existed).**
- D. If, as Mr. Maxwell argues, the easement is actually an “extended road easement” or “extension of Raintree Place”, then why are the title records absolutely clear that Mr. Maxwell has no legal right to travel on or even enter upon the “extended Raintree Place”?**
- E. Whether the map submitted by Mr. Maxwell has any bearing on the prior legal conclusions or opinions that the easement is not a Road as defined by the Land Development Code.**
- F. Response to the comments of Mr. Kontinos who appeared at the Council meeting to support Mr. Maxwell.**
- G. Response to Mr. Maxwell’s complaint that he is not treated professionally.**

- H. The written public records requests on file with the City Clerk and City Attorney show that neither Mr. Maxwell nor any of his attorneys requested, in any of the written public records requests on file, the street map he pointed to at the Council meeting, as evidenced by a word by word review of those written public records requests.**

In order to understand the issues relating to the subject easement area, it is necessary to provide some degree of background information to the City Council. You may be aware of some or most of these facts, but for a complete understanding of the issues, it is necessary to again repeat them in at least a very summarized form. Additionally, many people, particularly those who have not been involved in this issue, are not familiar with the small strip of land in which Mr. Maxwell has no legal rights but which has been the subject of his allegations for the past eight years.

**A. The location and nature of the area Mr. Maxwell alleges is a road.**

- **Response:** As the saying goes, a picture is worth a thousand words. In this case, a picture may be worth more than that. Although I normally attach any exhibits to a memorandum at the very end so that the reader can reference the materials at their leisure, it is very important to the understanding and analysis of this situation for you to be familiar with the physical location and physical condition of the 15 foot wide easement which Mr. Maxwell contends is a road. So immediately following this page of the memorandum is Exhibit "A", Page 1 of 2 and Page 2 of 2.

Please refer to the following 2 pages:

Exhibit "A", Page 1 of 2 – this is an aerial photograph of the Gomberg's residential parcel (hereinafter referred to as the "Gomberg parcel") and the Fairman/Rothschild's residential parcel (hereinafter referred to as the "Fairman/Rothschild parcel"). Although the Fairman/Rothschild parcel has been sold to new owners it will be easier to reference the parcel as the Fairman/Rothschild parcel.

Exhibit "A", Page 2 of 2 - this is an aerial photograph taken from a higher elevation that shows the Gomberg parcel and Fairman/Rothschild parcel, as well as the Maxwell house and other surrounding houses. In addition, between the Gomberg house and Fairman/Rothschild house I have drawn on this photograph the approximate boundary of the 15 foot wide easement which Mr. Maxwell contends is a road (the drawing is not to scale and is not intended to be exact, although it provides a good representation of where the easement originally existed).



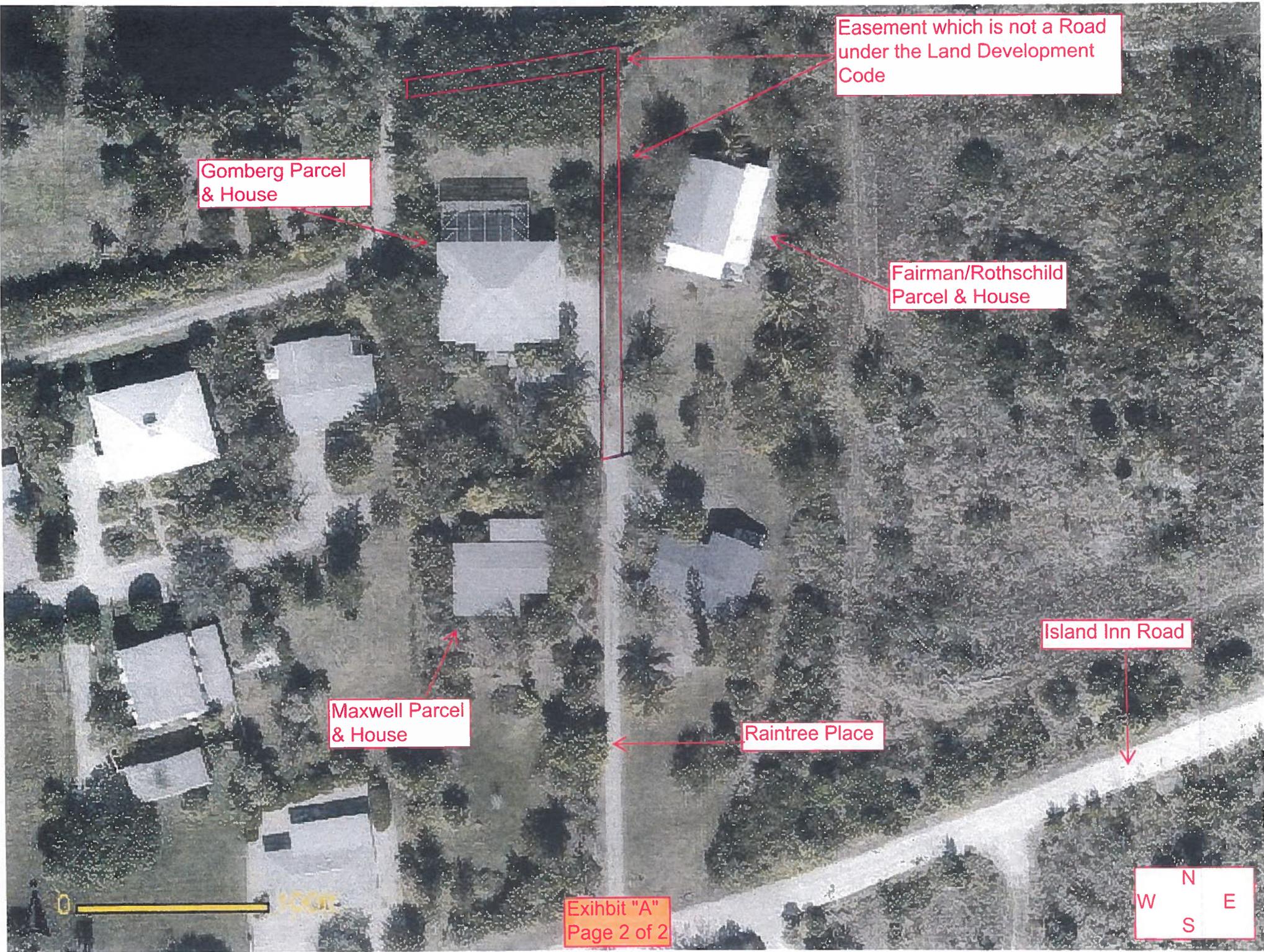
Gomberg Parcel & House

Fairman/Rothschild Parcel & House

0 65ft

Exhibit "A"  
Page 1 of 2

N  
W S E



Gomberg Parcel & House

Easement which is not a Road under the Land Development Code

Fairman/Rothschild Parcel & House

Maxwell Parcel & House

Island Inn Road

Raintree Place

Exhibit "A"  
Page 2 of 2



Unless you are intimately familiar with this case, you probably could not tell from your review of Exhibit "A", Page 1 of 2 where the road is alleged to exist. You should also note that this is an aerial photograph which is much more representative of today's physical condition than would be an aerial photograph from before 2002. In other words, before the Gombergs constructed their home and improved their driveway (which lies just west of the easement area), the entire area, including the easement area, appeared even more natural and less improved.

I want to make it clear, however, that this exercise in reviewing the physical improvement (or rather the total lack thereof) of the easement area is more than just an explanation of the background of this situation. As will be explained in more detail later in this memorandum, the physical condition and physical use or non-use of the easement area is taken into account as part of the legal analysis of the subject area, specifically in the definition of "Street or Road" found in the City of Sanibel Land Development Code.

**B. Factual background and analysis of the legal status of the easement.**

- **Response:** As part of Mr. Maxwell's efforts over the years to prove that he is correct and that the City is incorrect with respect to the legal status of the easement area, it appears that Mr. Maxwell has lost sight of the original issue that was reviewed and determined by the City Planning Staff. **From the date when these issues arose in 2002 through today, the Sanibel Land Development Code defined "Street or Road" as:**

**"any public or private right-of-way commonly used, or intended for use, by the public for motor vehicle movement and which is approved for purposes of issuing building permits." (emphasis added)**

In 2002, the Gomberg home had been partially constructed when Mr. Maxwell approached the City and claimed that the easement area located in between (and on) the Gomberg parcel and the adjacent Fairman/Rothschild parcel was a "road". He further argued that the Gomberg home was required by the Land Development Code to be set back 50 feet (i.e. a 50 foot residential structure setback) from what he alleged was the "road." The City Planning Staff was of the opinion that the area in question was clearly not a road as defined by the Land Development Code for several reasons, which I will describe in more detail subsequently in this Memorandum. At that point in time, the prior City Attorney was still employed by the City of Sanibel and I had not yet arrived at the City.

When I was retained in August 2002, initially as outside counsel to the City of Sanibel to serve in the capacity of City Attorney, this “road” issue, as well as various other issues that Mr. Maxwell was raising with regard to the Gomberg construction, together with other unassociated legal matters, were pending in the office of the City Attorney. When I started reviewing the legal issues my contact was the Planning Director at that time, Bruce Rogers, and I had never met or dealt with Ken Pfalzer in any capacity. As part of my research on the Gomberg issues and the Maxwell complaints, Bruce Rogers drove me to the subject property to view the area which Mr. Maxwell claimed was a “road” requiring a 50 foot principal structure setback. We drove to the point where the Raintree Place road improvements stopped, with the partially constructed Gomberg house on the left and the Fairman/Rothschild house on the right. A driveway led to the Fairman/Rothschild house, but in between the two properties was nothing but shrubs, plants, bushes, trees and/or assorted vegetation. This totally unimproved and natural condition of the land extended all the way to the back property lines of the two parcels and included all of the back and west part of the Gomberg parcel to Twin Ponds Drive (which is located on the opposite (west) side of the Gomberg house). My recollection of the physical condition of the easement area at that time was that it was even more vegetated and unimproved than the attached aerial photographs depict.

With respect to the Land Development Code definition of “Street or Road” cited above, it was clear then from observation (and still is to this day) that the area between the two houses was not a “public or private right-of-way commonly used” “by the public for motor vehicle movement.” However, an observation alone did not answer the question of whether such area could be “intended for use” “by the public for motor vehicle movement” and that analysis would require a review of the origin and purpose of the area located between the two houses and along the rear property line of the Gomberg parcel.

In 1976, the Rushworths were the owners of the entire one acre parcel at the northern end of what later became commonly known as Raintree Place (with Island Inn Road at the southern end of Raintree Place). The Rushworths applied for, and received approval for, a subdivision of their one acre parcel into two one-half acre lots. There was no “road” of any kind requested in the subdivision application by the Rushworths to be located between the two parcels and no “road” of any kind was ever considered by or approved by the Planning Commission as part of the approval of the subdivision. This is one common way for a “road” to be created, but it clearly did not occur as part of the City subdivision approval in this case. The Planning Commission did require “an adequate turnaround”, presumably for emergency vehicles, service vehicles and the like to turn around where the Raintree Place easement ended and the new two parcel subdivision began.

The Rushworths retained, and subsequently constructed a house upon, the eastern one-half acre lot. The Rushworths sold that lot and house to Fairman/Rothschild in 1999. The western one-half acre lot had been previously sold by the Rushworths to the Ingrams in 1995 and sold by the Ingrams to the Gombergs in 1997. The 1995 deed from the Rushworths to the Ingrams, as well as the subsequent deed from the Ingrams to the Gombergs, legally describes the parcel of property which was sold, together with the following description of the easement which is being discussed:

“Subject to an easement for ingress/egress over and across the east 9.50 feet and the northwesterly 15.00 feet thereof reserved unto Grantor herein, his heirs, successors and/or assigns.” (emphasis added)

This is the easement (the part of the easement located on the Gomberg Parcel) that Mr. Maxwell has always claimed is a “road.” You can see clearly from the easement wording above in the Gomberg’s actual deed to their lot, (i.e. the document by which they acquired their legal property rights) that the following two critical points are obvious and applicable:

- (a) The easement is specifically described as an “easement for ingress/egress.” It is not called a road or described as a road or depicted or designated as a road. It is also not described as a “private roadway easement” and the easement does not indicate it is for roadway purposes; and
- (b) The easement is “reserved unto Grantor herein, his heirs, successors and/or assigns.” It is not dedicated to the public or granted or reserved to any other party other than the Grantor (i.e. originally the Rushworths) and does not provide any other public or private access or roadway rights in the ingress/egress easement to any other person.

At that point, (1) after I had personally observed that there was no physical road, no road improvements and no observable use of any “roadway” for vehicles even by the adjacent property owners, much less by the public, and (2) after reviewing the property records applicable to the origin and status of the area located between the Gomberg house and the Fairman/Rothschild house, it was necessary for me to render an opinion as to whether the City Planning Department was correct that the subject area did not meet the Land Development Code definition of a “Street or Road.” My opinion was that Staff had correctly evaluated the situation and had correctly determined that the subject area was not a “Street or Road”, as defined by the Sanibel Land Development Code.

Based on the facts of this case, the subject area located between the two houses and extending along the rear of the Gomberg parcel has never been, and it is not now, a "Road" as defined by the Land Development Code. Further, based on the analysis described above, I see no way for any documentation in the City's records to ever show now or at some future date that it is a "Street or Road" as defined by the Land Development Code. This is why I have never been particularly concerned about Mr. Maxwell spending the last eight years sorting through City records trying to prove that the subject area is a Road as defined by the Land Development Code. It legally cannot be a Road as defined by the Land Development Code and cannot be shown to be a Road under that definition. If Mr. Maxwell produces half a dozen maps that "characterize" or depict the area as a roadway, it still is not a Road as defined by the Land Development Code definition set forth above, which has always been the only issue before the City.

Further, any comment I have ever made regarding this easement, whether orally or in writing, has always been in reference to the status of the easement area in the context of the Land Development Code, which was the legal opinion in 2002. This includes my public records response letter to Mr. Maxwell which he attached to his July 20, 2010 correspondence and in which I tell him that any map he produces does not make the easement a "road." One of the many flaws in Mr. Maxwell's argument has been his opinion that if he finds some formal City documentation (in the past it has been the Development Intensity Maps) that depicts the easement area in conjunction with the City's roadway system, he could claim that discovery makes him correct and the City would be forced to acknowledge that the easement really is a "road". As I have discussed above, if the easement area doesn't meet the Land Development Code definition of a "Street or Road", then depicting the easement on an unofficial or official Development Intensity Map, an unofficial or official City Street Map, an official or unofficial 911 Location Map, an unofficial or official City Road Maintenance Map or on any other kind of map cannot transform an easement that is not a Road under the definition of the Land Development Code into a Road that meets the definition of the Land Development Code.

- C. The majority of the easement area depicted on the map submitted by Mr. Maxwell, which he claims is a "road", does not even legally exist and was legally vacated and released in 2008 (and the "road" has never physically existed).**
- **Response:** As further evidence that the ingress/egress easement is clearly not a "Street or Road" as defined by the Land Development Code, most of the easement area does not even legally exist anymore. Approximately 80% of the length of the easement area was released and vacated by the Gomborgs

and the Fairman/Rothschilds pursuant to a legal instrument filed by them in the Official Records of Lee County in 2008. The release or vacation includes the entire 15' wide easement which extended along the northwestern (rear) boundary of the Gomberg parcel (99.78 feet long), as well as over half of the 9.5 foot wide easement which extended along the eastern (side) property line (119 feet long). A depiction of the vacated easement area is attached as Exhibit "B". You will note that a small portion of the ingress/egress easement was left for driveway purposes and to provide for an "adequate turnaround" for vehicles.

It is clear that the two private property owners had every right to legally eliminate the easement area because they were the only two parties who had any legal interest in that area (i.e. not the general public, not the City and certainly not Mr. Maxwell). Therefore, in light of the vacated easement area, the latest map submitted by Mr. Maxwell, to the extent that it purports to depict the private ingress/egress easement as Raintree Place, or as an existing easement of any kind, is factually and legally inaccurate.

However, you should be aware that Mr. Maxwell, in some of his past unsolicited correspondence, has argued that any alteration of the easement would require City Council approval since he argues that it is a "road" on City maps. He is incorrect in that position, as well. Any notion that a private easement that exists for only private purposes between two private property owners would require City Council involvement and approval in order to be released, vacated or adjusted is simply incorrect. Frankly, the fact that the private property owners do have the legal authority to privately vacate, annul, release and/or adjust their private easement adds additional weight to the argument that the subject easement area is not a "road" which any other person has any right to access or drive upon. In addition, Mr. Maxwell has no legal standing to object to the private actions of the Gombergs and Fairman/Rothschilds because Mr. Maxwell has no legal interest or rights whatsoever in the private easement that is located (or rather was located) only on the Gomberg parcel and Fairman/Rothschild parcel.

**D. If, as Mr. Maxwell argues, the easement is actually an "extended road easement" or "extension of Raintree Place", then why are the title records absolutely clear that Mr. Maxwell has no legal right to travel on or even enter upon the "extended Raintree Place"?**

- **Response:** Although it is undisputed that Mr. Maxwell has the legal right to access and travel upon Raintree Place between Island Inn Road and the southern boundary of the Gomberg and Fairman/Rothschild parcels, it is equally undisputed that Mr. Maxwell has no legal right whatsoever (and never did have any right) to cross the southern property line of the Gomberg and Fairman/Rothschild parcels to even enter upon or use the easement that Mr. Maxwell claims is the "extension of Raintree Place."

The City has known since July 2002 (before I even arrived at the City of Sanibel) that Mr. Maxwell's argument was that Raintree Place did not stop at the Gomberg property line, but rather extended onto the Gomberg parcel and Fairman/Rothschild parcel in the form of a roadway easement. I was also aware of and reviewed the documentation that Mr. Maxwell pointed out in 2002 that he felt supported his argument, which included some documentation and the depiction of the roadway on some surveys or maps. However, it is not just advisable, it is absolutely incumbent on the City to analyze all aspects of the legal and factual issues and take into account the arguments of all parties, not just Mr. Maxwell's arguments. Therefore, with respect to the easement, the City was mandated to look at all of the factual and legal arguments that might be applicable.

As described earlier in this Memorandum, it is not just a "tagline", title or name of an easement that dictates the legal status and legal analysis of the easement. It is also necessary to look at the location, physical condition, actual use, intended use, duration, parties benefited by the easement, and the function of the easement, in addition to the way in which the easement is "titled." Since an easement is analyzed through a review of all of these factors, and not just a depiction on a map, it is understandable why Mr. Maxwell seized upon the only part of the analysis that supported his argument (i.e. the way that the easement was "titled" on some documents), and even that point conflicted with other descriptions of the easement. For example, the Gomberg's deed described the easement as an "ingress/egress easement" that ran to the benefit of only the Rushworths (and then their successors in title, the Fairman/Rothschilds). But what the easement was called on a map was, at best, only one of many factors that had to be reviewed in order to determine the legal status and rights of the easement area, particularly in conjunction with the Land Development Code definition of "Street or Road."

The fact of the matter is that any argument that "Raintree Place" is a road that extends from Island Inn Road through the southern boundary of the Gomberg and Fairman/Rothschild parcels and around the Gomberg parcel, is factually and legally baseless. As pointed out earlier, one easy way to understand the difference is that the property owners south of the Gomberg property line, including Mr. Maxwell, have no legal right whatsoever to access or travel upon the easement north of the Gomberg property line. Mr. Maxwell has no credible basis to argue that the easement north of the Gomberg property line is an "extension of Raintree Place roadway" when the fact of the matter is, if Mr. Maxwell steps one foot over the Gomberg property line without their permission, he is trespassing. In addition, the easement north of the Gomberg property line does not look like Raintree Place, is not cleared and improved

as is Raintree Place, does not function as does Raintree Place, cannot be accessed by the same people who access Raintree Place and was formed in a different easement document and at a different time than the Raintree Place easement.

Therefore, the legal conclusion, taking into account all of the factors, was that the easement on the Gomberg and Fairman/Rothschild parcels (the easement described in the Gomberg deed as an “ingress/egress easement” running only to the benefit of the Grantor of the easement), was clearly not an “extension of Raintree Place” or any extension of the “roadway of Raintree Place” or any “extended roadway.” In addition, as explained earlier in this Memorandum, the easement on the Gomberg and Fairman/Rothschild parcels was clearly never a “Road” as defined by the Land Development Code.

**E. Whether the map submitted by Mr. Maxwell has any bearing on the prior legal conclusions or opinions that the easement is not a Road as defined by the Land Development Code.**

- **Response:** The map that Mr. Maxwell produced and displayed at the July 20, 2010 City Council meeting depicts virtually the same thing that Mr. Maxwell has been arguing since 2002. As a matter of fact, to illustrate that point, I have attached a reduced copy of the map Mr. Maxwell had at the July 20, 2010 Council meeting as Exhibit “C”, Page 1 of 3 to this Memorandum and, as Exhibit “C”, Page 2 of 3 and Page 3 of 3, I have attached two maps that Mr. Maxwell included and submitted to the Court as Exhibits in his 2003 lawsuit against the City of Sanibel and the Gomberts. The separate issue of whether Mr. Maxwell ever made a public records request for the map is addressed later in this Memorandum, but with respect to the information on the map, it is nothing new and Mr. Maxwell’s same argument is, in fact, now going into its ninth year.

The map touted by Mr. Maxwell does not change any of the facts of the situation and certainly does not change the legal analysis of the status of the ingress/egress easement located on the Gomberg parcel in any way. As explained earlier in this Memorandum, (1) the easement on the Gomberg and Fairman/Rothschild parcel is not a Road as defined by the Land Development Code and (2) the easement on the Gomberg and Fairman/Rothschild parcel is not, and does not function as, an extension of Raintree Place as evidenced by (among many other things) Mr. Maxwell’s legal inability to access or travel upon the easement north of the Gomberg’s property line.

Therefore, Mr. Maxwell’s newly discovered map adds nothing to his arguments and the legal analysis and conclusions remain exactly the same.

**F. Response to the comments of Mr. Kontinos who appeared at the Council meeting to support Mr. Maxwell.**

- **Response:** The person who showed up at the July 20, 2010 City Council meeting in support of Mr. Maxwell and who spoke just before Mr. Maxwell was Thomas Kontinos, the person that conducted an investigation of City Staff because of a complaint filed with the Sheriff's Office by Mr. Maxwell in 2003. Mr. Maxwell's apparent position was that the only way that the City Staff could have reached a different conclusion on these issues than he had reached was if everyone at the City had engaged in criminal wrongdoing and had conspired against him.

The first time that I recall talking to Mr. Kontinos at any length was when he interviewed Ken Pfalzer, who was the primary subject of Mr. Maxwell's complaint, and the apparent focus of Mr. (then Detective) Kontinos' investigation. During the two or three hour voluntary sworn statement provided by Mr. Pfalzer, it became increasingly apparent that not only did Mr. Kontinos have little or no knowledge of planning, zoning, real estate or the Sanibel Land Development Code, but that he was not particularly interested in any explanations that put forward the Planning Staff's facts, conclusions or opinions on these matters. It was apparent that Mr. Kontinos had already decided that someone had committed some criminal wrongdoing and he was intent on tracking down what he seemed sure was some criminally responsible person. Not long thereafter, Mr. (then Detective) Kontinos filed charges (or pressed for charges) with the State Attorney's Office for three misdemeanor counts and two felony counts against Ken Pfalzer, almost all counts alleging the crime of perjury. He submitted to the State Attorney's Office a 40 page investigative report after conducting sworn interviews with City Staff members, neighborhood residents, private surveyors and others and producing documentation that filled a large box. The investigation represented probably well into the thousands of dollars of taxpayer money and at least many dozens of City and private work hours expended.

In what appeared to me to be a fairly serious rejection of a detective's investigative work, the State Attorney's Office issued an Opinion, in writing, which stated that, not only did Mr. Kontinos produce no evidence of any criminal conduct on the part of the person Kontinos accused (or anyone for that matter), but that "Pfalzer's statements cannot, at this point, even be proven to be false or wrong." This was the State Attorney's comment on alleged perjury charges. The State Attorney went on to state that "[T]hus, even if Pfalzer's description of Raintree were wrong, by mistake or even by negligence, we could not prove that he was intentionally or knowingly wrong,

nor that he acted out of any criminal intent.” The full text of the State Attorney’s Office Opinion on Mr. Kontinos’ work product is attached as Exhibit “D”, Pages 1 through 3, for your review. Not unexpectedly, little or nothing was heard from Kontinos by my office after the State Attorney rejected Mr. Kontinos’ investigative work.

With respect to Mr. Kontinos’ appearance at the Council Meeting on July 20, 2010, it certainly was not apparent why a former Sheriff’s Deputy who is no longer even with law enforcement would still be personally interested in an investigation that he conducted six years ago (particularly since the State Attorney’s Office rejected, in no uncertain terms, Mr. Kontinos’ investigation and recommendation on these matters). I do not know Mr. Kontinos’ motive in making the trip to Sanibel to support Mr. Maxwell’s position, and I will let others speculate on those motives, but one thing is apparent. If Mr. Kontinos thinks that the map that he and Mr. Maxwell referred to at the Council meeting would have had any bearing on his investigation, then he is as misinformed as to the meaning and legal significance of that document as he was to virtually each and every other document that he evaluated during his original investigation in 2004. To put it very kindly at best, it is disingenuous for Mr. Kontinos to insinuate that if, during his 2004 investigation, he just had that map that he was waving around, then that investigation, otherwise devoid of evidence of criminal conduct according to the State Attorney’s Office, would have actually produced something. I also will not provide any personal comments on whether the gross waste of thousands of dollars in taxpayer money that went into Mr. Kontinos’ weeks of investigation was a direct result of the information provided by Mr. Maxwell, who initiated the criminal complaint.

**G. Response to Mr. Maxwell’s complaint that he is not treated professionally.**

- **Response:** I am addressing this point only because Mr. Maxwell made public comments about “his treatment”, both at the Council meeting and in the newspaper. In my professional career I have always endeavored to treat the people I interact with on a professional and respectful basis. However, there comes a point where that professional requirement, as well as my natural tendency to deal with people on a respectful and professional basis, comes to an end. Although it certainly has not occurred with any other individual within the City of Sanibel, it occurred with Mr. Maxwell when he started attacking the City Staff and me personally. Those attacks included the Sheriff’s Complaint (which he filed against me and others) and State Attorney’s Complaint described above, as well as numerous other complaints which had the potential to affect my reputation and livelihood, including an attack on my license to practice law. Mr. Maxwell’s position is that he can slander and attack anyone he chooses, alleging anything, including criminal conduct, in any manner or form that he wants and can then demand that he be

treated with professionalism and respect. He is wrong. Mr. Maxwell lost his right to any professional respect when he made his attacks on other City Staff members and me a personal objective as opposed to business. As you know, we all receive criticism or comments from time to time in our professional lives and that is something that we not only learn to deal with but which can actually be helpful in improving one's professional product or service. However, no City employee at any level (or anyone else for that matter) should be required to sit by and allow someone like Mr. Maxwell to engage in vindictive personal attacks and then pretend as if it is something he is entitled to do.

**H. The written public records requests on file with the City Clerk and City Attorney show that neither Mr. Maxwell nor any of his attorneys requested, in any of the written public records requests on file, the street map he pointed to at the Council meeting, as evidenced by a word by word review of those written public records requests.**

- **Response:** The way that public records requests are processed and completed by City Staff is the process which you would expect. All written public records requests are reviewed and, based on the specific request made, the Staff attempts to locate either a specifically requested document or multiple documents which appear to fulfill the request. A public records request may be file specific, department specific, date specific, or it may be a general request which would require a City-wide document review to produce the requested document or documents. As you would expect, it is the public records request itself that dictates the type, location and scope of the records searched in order to comply with the request.

I asked for and was provided with Mr. Maxwell's written public records requests on file with the City Clerk's office and have retrieved the written Maxwell public records requests on file with my office (many were duplicates). A page by page, word by word review of the written public records requests provided by the City Clerk's office, as well as those in the City Attorney's office files, has been conducted by my office. Contrary to Mr. Maxwell's allegations, there is no indication or evidence in Mr. Maxwell's written public records requests, or those of his attorneys, that any request was made for the map that Mr. Maxwell presented at the July 20, 2010 Council meeting or that any request was made that would reasonably have led anyone to search for the map.

The following is a list of items that Mr. Maxwell's written public records requests **DID NOT** request:

- (a) Any request for the specific map he was waving at the July 20, 2010 City Council meeting; and/or

- (b) Any general request for street or road maps (other than copies of the Development Intensity Maps and copies of certain specifically identified maps in the city files that he reviewed and copied) relating to Raintree Place; and/or
- (c) Any general request for all documents relating to Raintree Place; and/or
- (d) Any public records request which could reasonably have been interpreted to lead any City Staff member or any other reasonable person during the past 8 years to the map that Mr. Maxwell displayed at the July 20, 2010 City Council meeting.
- (e) “All forms of public records concerning Raintree Place” (this is a quote from Mr. Maxwell from his July 20, 2010 letter stating what he says he requested in the past); and/or
- (f) “City street maps available for public inspection and copying purposes after repeated requests that were made that the City produce all City documents, maps and surveys regarding Raintree Place” (this is a quote from Mr. Maxwell from his July 20, 2010 letter stating what he says he requested in the past);

All of the Maxwell written public records requests that are described above have been placed in a folder and are available for your review at your convenience. I can provide a full set of all copies of all of the written requests to you individually or you can review the written public records requests in my office at your convenience.

In order to simplify any review, on a copy of each page of each letter, memo or other writing I have identified each individual public records request of Mr. Maxwell or his attorneys with a checkmark and have placed the word “No” if the request did not seek, and could not reasonably be interpreted to have in any way requested, the map that Mr. Maxwell claims he asked for. I would invite you to read each public records request word for word as I have and make a determination for yourself. As a clarification, this is not a situation where Mr. Maxwell was close on his request and anyone is trying to construe any questionable wording against him; he did not even get close in any of these written public records requests to requesting the map that he now thinks is the key to his case.

Mr. Maxwell's statement in his July 20, 2010 letter to the Mayor and City Council, which states that "[T]he bottom line is that others and I had asked the City Attorney to produce all forms of public records concerning Raintree Place. The City failed to do so." is typical of Mr. Maxwell's casual approach to the facts and the truth. In his imagination he may have asked the City "to produce all forms of public records concerning Raintree Place", but we can find no evidence that any such request was in any of the written public records requests made by Mr. Maxwell or his attorneys. I am sure that Mr. Maxwell will claim that we should have produced the map in response to a public records request that he never made, but that would be unreasonable since the way the documents are located and produced is purely a function of the actual request that is made as described above. I also want to make sure the record is absolutely clear that I was not aware of the existence of the map and I would only have become aware of it if Mr. Maxwell had made a public records request for the map, or some request that could have been reasonably interpreted to have included a request for the map, in any of his dozens of written public records requests.

If Mr. Maxwell's position is that he has been searching for eight years for a City street map that showed his "roadway" on it, then why didn't he just make a public records request (or include it in one of the numerous written public records requests that he did make) to inspect and copy any City street or road map depicting that area? How difficult would that have been? As explained in this Memorandum, it would not have provided any legal support for his argument that the easement area is a "Road" as defined by the Land Development Code, but at least if Mr. Maxwell had requested the map then Staff could have looked for the map, located the map and provided a copy of the map to him.

## **CONCLUSION**

In conclusion, you have viewed the aerial photographs of the easement and have seen that the area is not improved or used as a road. The easement area clearly does not meet the definition of "Street or Road" in the Land Development Code, which was the sole legal issue to be decided in this matter in 2002. Therefore, there was no requirement that the Gombergs adhere to a 50 foot setback between the centerline of the easement area and their residential structure. (Ironically, when constructing their house in the late 1970's, the Rushworths, who established the easement, did not adhere to any 50 foot setback from the centerline of the easement area either, which is another indication that the area was not considered a "Road" by either the Rushworths or the City Staff at that time). Additionally, the majority of the easement area has not legally existed since 2008 when it was vacated and released by the Gombergs and the Fairman/Rothschilds.

With regard to Mr. Maxwell's argument that the easement area actually constitutes an "extended roadway easement" or "extension of Raintree Place", Mr. Maxwell has no legal argument as to why he cannot enter or drive upon the "extension of Raintree Place" as he can on the actual Raintree Place road. The reason is because Mr. Maxwell has never had any legal rights to enter or drive upon the ingress/egress easement located north of the property line of the Gomberg and Fairman/Rothschild parcels. Additionally, Mr. Maxwell has never tried to establish any legal rights of his own in that area. His sole objective in 2002 in claiming that the area was a "Road" was to halt or delay the construction of the Gomberg house and since that time his sole objective has been to prove that he was originally right with regard to his issues and that the City was wrong.

The map submitted by Mr. Maxwell at the July 20, 2010 City Council meeting has no bearing whatsoever on the original legal analysis or legal conclusion in 2002, or any legal conclusions that have been reached since that time. With regard to the comments by Mr. Kontinos at that Council meeting, I will refer you to the State Attorney's written Opinion which articulates the evaluation of Mr. Kontinos' investigative work product far better than I ever could.

Finally, the written public records requests on file with the City Clerk and City Attorney show that neither Mr. Maxwell nor any of his attorneys requested, in any of the written public record requests on file, the street map that he pointed to at the City Council meeting. Mr. Maxwell's general comments that he "asked for everything having to do with Raintree Place and the City failed to give it to him" is typical of his exaggerations, which would not be so offensive if he was not alleging an intentional public records violation by the City when he makes those kind of exaggerations.

In closing, as was pointed out during the July 20, 2010 City Council meeting after Mr. Maxwell's comments, the real victims of Mr. Maxwell's vindictive assaults are the Gombergs, who spent tens of thousands of dollars defending lawsuits filed by, or instigated by, Mr. Maxwell on these issues. Additionally, however, it is the City taxpayers who have had to fund the tens of thousands of dollars in taxpayer money and hundreds of hours in City Staff time necessary for the City to respond to the lawsuits filed by, or instigated by, Mr. Maxwell, as well as the numerous civil and criminal investigations prompted solely by the baseless complaints of Mr. Maxwell. Additionally, taxpayer money and Staff time are regularly spent responding to the dozens of public records requests filed by Mr. Maxwell which require research and response by City Staff.

Every citizen has the right to pursue their legitimate concerns and, whenever they feel necessary, make public records requests which the City is pleased to answer. However, the story in this particular situation, if there is a story, is the extensive taxpayer funds and City Staff time that have been wasted in responding to Mr. Maxwell's obsessive need to prove the City wrong on this "Road" issue (which he cannot do), which was really a fairly minor Staff decision made in 2002. To the extent that I or any other City Staff member have experienced any frustration in responding to Mr. Maxwell's complaints, it is only because the City Manager and City Council are going to great lengths to wisely use every dollar of the citizens' tax monies to provide required and requested public services, and the amount of time and taxpayer funds that have been wasted on City responses to Mr. Maxwell's various actions over the years on this non-issue is inexcusable. Every dollar of taxpayer money and every hour of Staff time spent in responding to Mr. Maxwell's baseless allegations is a dollar of taxpayer money and an hour of Staff time that is not spent in addressing the legitimate interests and concerns of the citizens of Sanibel.

If, after your review of this Memorandum, you wish to discuss any of these matters in more detail with me, please let me know and I will schedule an appointment with you at your convenience to discuss the matter.

KBC/jg  
Attachments

cc: Judith A. Zimomra, City Manager  
Pamela Smith, City Clerk

An existing ingress/egress easement to be released over and across the northerly 15.00 feet of the following described parcel and the northerly 119' of the east 9.50 feet of the following described parcel. The southerly line of the to be released portion of the 9.50' wide easement is intended to be on a line from the north edge of the north garage door of a residence as it exists on February 2008 along a line perpendicular to the east parcel line.

A tract or parcel of land lying in the southwest quarter of the southeast quarter of Section 27, Township 46 South, Range 22 East, City of Sanibel, Lee County, Florida, which tract or parcel is described as follows:

From the concrete post marking the northeast corner of said fraction of a section run  $S00^{\circ}53'50''E$  along the east line of said fraction for 103.41 feet to a concrete monument marking the northeasterly corner of lands described in Deed recorded in Official Record Book 639 at Page 699, Lee County Records; thence run  $S75^{\circ}29'50''W$  along the north line of said lands for 99.77 feet to a concrete monument and the Point of Beginning of the herein described parcel.

From said Point of Beginning continue  $S75^{\circ}29'50''W$  along the north line of said lands for 99.78 feet to the northwest corner of said lands; thence run  $S00^{\circ}53'50''E$  along the west line of said lands for 224.50 feet to a concrete monument; thence run  $N75^{\circ}29'50''E$  for 99.78 feet to a concrete monument; thence run  $N00^{\circ}53'50''W$  for 224.50 feet to the Point of Beginning.

TOGETHER WITH an easement for ingress/egress and utilities (15 feet wide) as described in deed recorded in Official Record Book 1028 at Page 1085, Lee County Records.

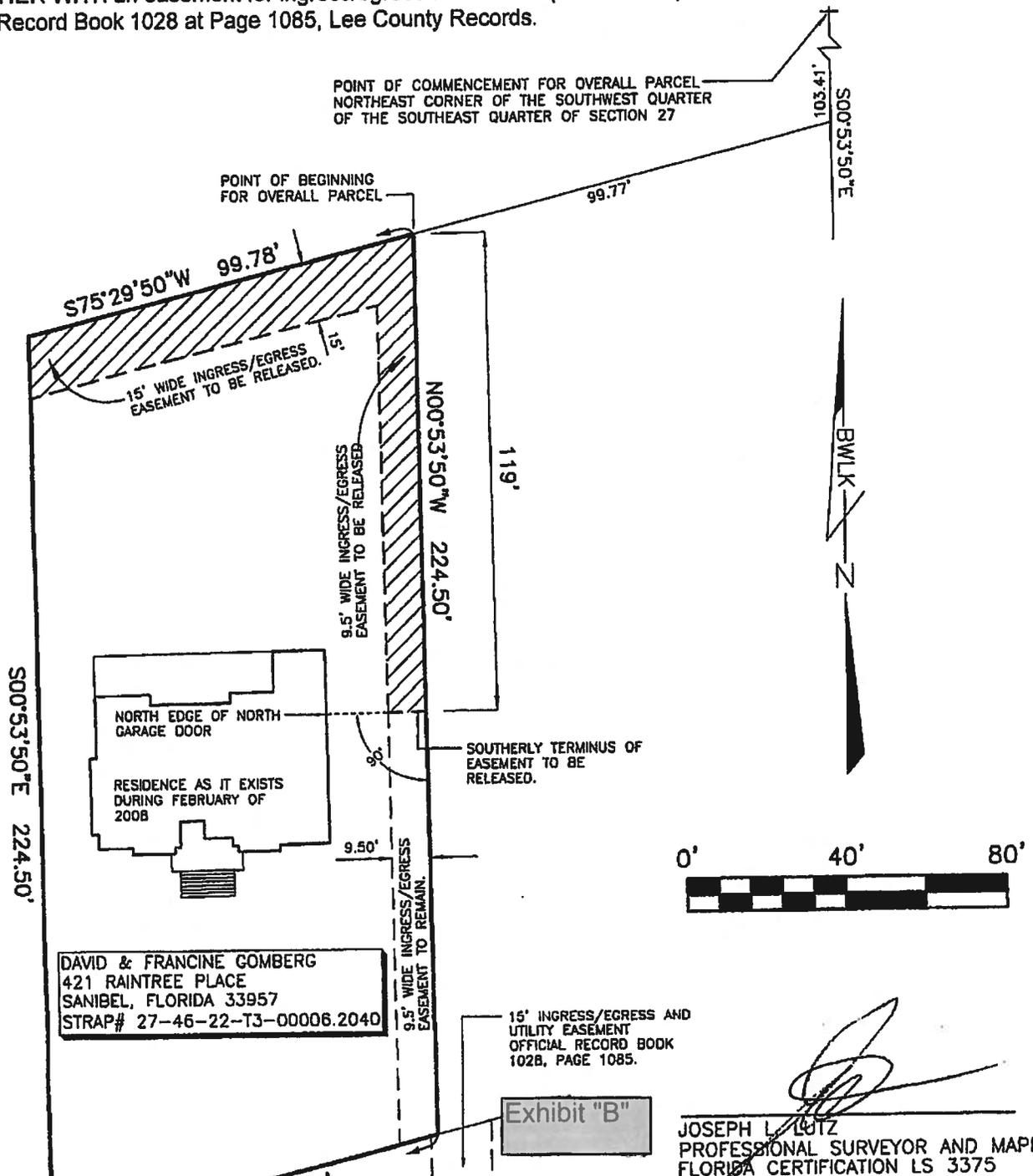
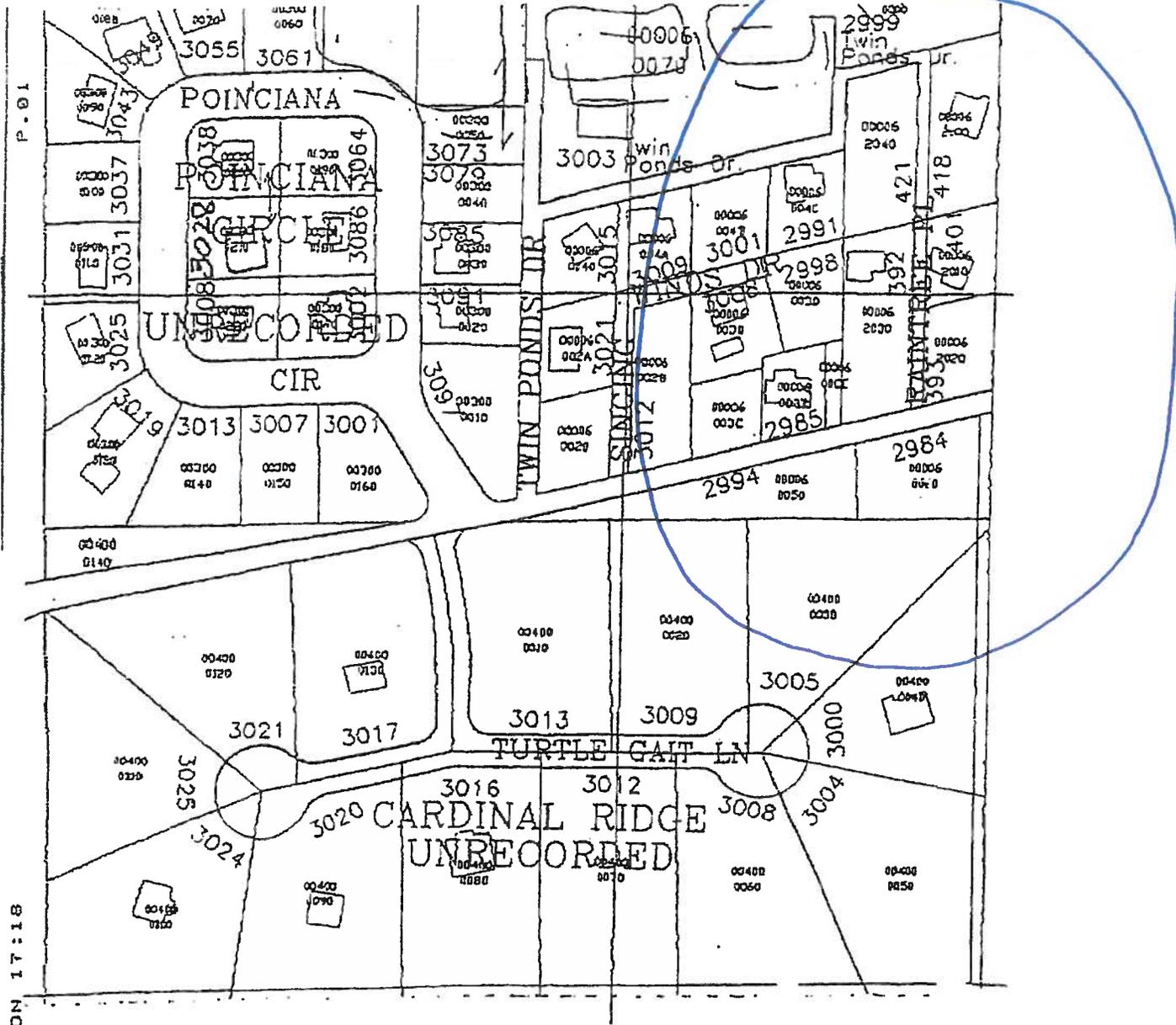




Exhibit "C"  
Page 1 of 3



P.01

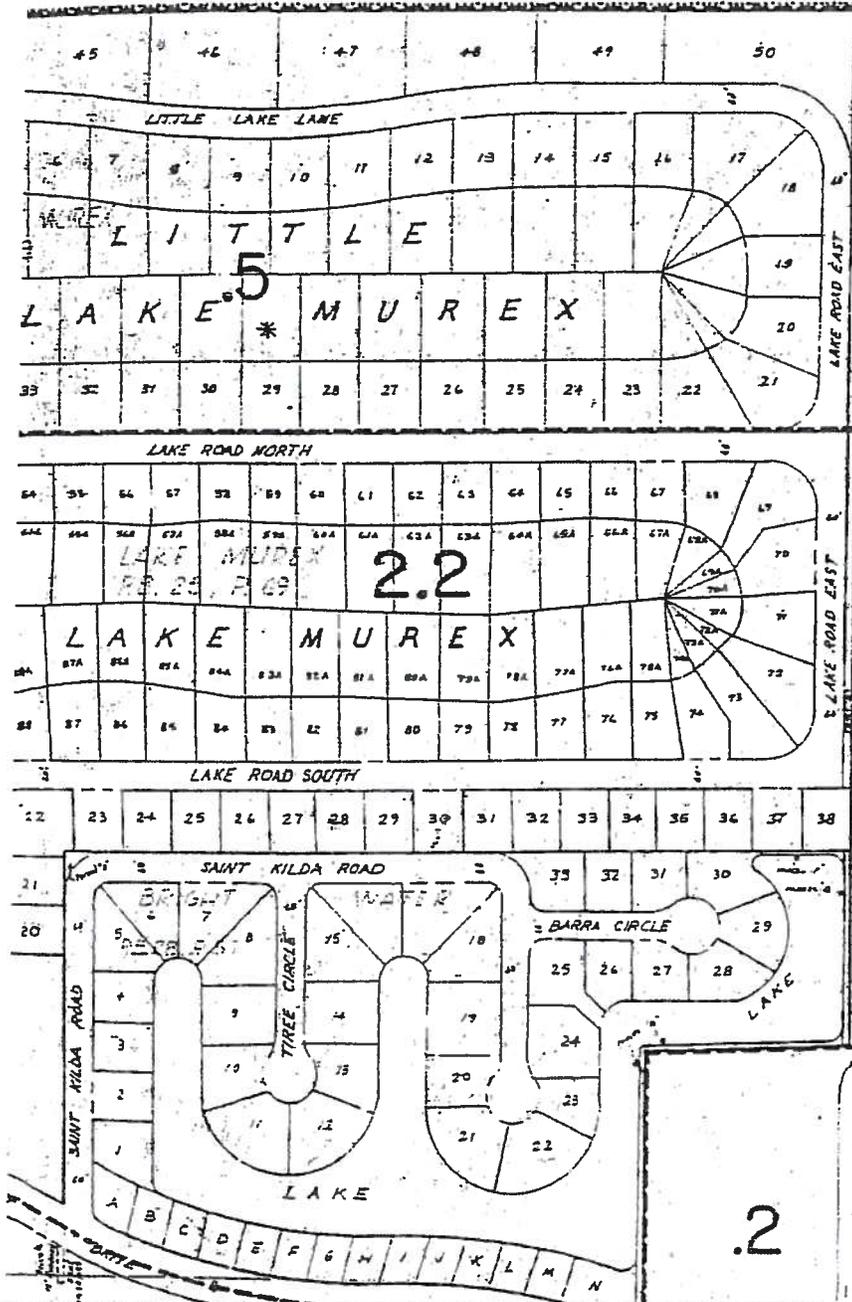
FEB-01-99 MON 17:18

SANIBEL  
 CAPTIVA  
 CONSERVATION  
 FOUNDATION

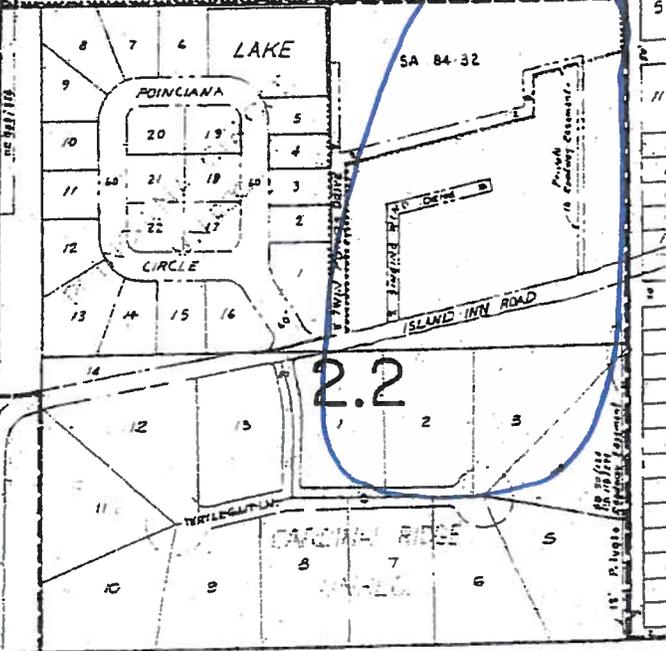
SA 83-31

SA 83-31

FOUNDATION



SA 83-31  
 .05



\* By final judgement entered in Lee County Court Case No. 78-418-CA, City of Sanibel is estopped from prohibiting, by application of permitted Residential Development Intensity, the construction of a single family dwelling unit on each of 45 platted lots.

City Lot

**OFFICE OF THE STATE ATTORNEY  
20<sup>TH</sup> JUDICIAL CIRCUIT  
P.O. BOX 399  
FORT MYERS, FLORIDA 33902**

**Stephen B. Russell, State Attorney**

PHONE: 335-2709  
FAX: 335-2787

**MEMO**

**TO:** Stephen B. Russell, State Attorney  
**FROM:** Dean R. Plattner, Assistant State Attorney  
**DATE:** October 21, 2004  
**RE:** Kenneth Pfalzer, SAO Warrant Request # 831196  
LCSO CR# 03-186341

The matter was investigated by the Lee County Sheriff's Office, and submitted to the SAO as a warrant request against Kenneth Pfalzer, an assistant city planner with the City of Sanibel. The investigation relates to the building permit and variance process on a parcel owned by the Gombergs, which is contiguous to the property owned by the complainant, Steve Maxwell.

The Gombergs were given a permit by the city to build a home on their property. Maxwell complained to the City about alleged setback violations on two sides of the Gomberg property. The planning department determined that there was a violation on one side, but recommended that a variance be approved. They determined that there was no violation on the other side (facing Raintree Place). After a hearing, the City approved the Gomberg's request for variance on the side where there had been a violation.

Maxwell claims that Pfalzer lied and prepared false documents in the course of the review process and hearings. The LCSO, after a lengthy and voluminous investigation has requested that we review 5 charges against Pfalzer: 1 – Perjury Not in an Official Proceeding (sworn statement given to LCSO Det. Nosbusch on 7/17/03); 2 – Perjury Not in an Official Proceeding (sworn statement to Det. Kontinos on 4/28/04); 3 – Perjury in an Official Proceeding (Sanibel Planning Commission Hearing on 9/10/02); 4 – Making a False Official Statement (written memo on 8/9/02) and 5 – Official Misconduct. Counts 3 and 5 would be felony offenses, and the others would be misdemeanor offenses.

The various charges requested by LCSO all related to the same underlying determination by Pfalzer, which he related in the various testimonies and written statements: that the street known as Raintree Place, which runs from Island Inn Road along the side of Maxwell's property, terminates in a "cul-de-sac" at the southern part of Gomberg's property (and the northern part of Maxwell's property). The effect of this determination is that Raintree Place does not continue as a "street" into the Gomberg's property, and therefore the home does not have the same setback requirement that it would have if Raintree was a street.

In order to prove that a crime occurred, we would have to first prove that the oral/written statements made by Pfalzer were, in fact, false. If we could prove it was false, we would then have to prove that Pfalzer knew it was false when he made the statements. Finally, as to the False Official Statement charge, we would have to prove that it was done with the "intent to mislead", and as to the Official Misconduct, that it was done with "corrupt intent".

Virtually all of the investigation has centered on the issue of whether or not Pfalzer's description of a "cul-de-sac" is, in fact, false. While the investigation presents and documents Maxwell's argument on this point, this element cannot be proved beyond a reasonable doubt. This is in great part because the term "cul-de-sac" is not specifically defined by the City.

Although Florida Statutes define "cul-de-sac" for certain purposes as being "a street terminated at the end by a vehicular turnaround," there are also other definitions for this term. Black's Law Dictionary defines the term as "a blind alley; a street which is open at one end only." Merriam-Webster's online dictionary is almost identical. This is also the way the term has been used in Florida appellate cases, i.e., synonymous for a dead end street or a blocked street.

Thus, Raintree Place is susceptible to being described as ending at or near the northern edge of Maxwell's property/southern edge of Gomberg's property in a "dead end" or a "cul-de-sac". The simple fact is that there is no other access to Raintree except by the one open end that connects to Island Inn Road.

At issue is the ongoing dispute relating to the easement that was created by an earlier property owner, when the Gomberg's property was subdivided from the parcel to the immediate east. The disagreement is over whether the easement creates a continuation of Raintree as a public street, or whether it is simply a private ingress/egress easement between the property owners. Maxwell basically takes the first position, while the City takes the latter. Again, while the investigative report presents Maxwell's position on this, we cannot establish the correctness of this position beyond a reasonable doubt. The City still maintains the accuracy of their treatment of this property, and there has not been any council, commission, or court ruling which has decided otherwise. (It should be noted that no improvement of any type has been made on the easement area in the more than 25 years since it was created).

Therefore, Pfalzer's statements cannot, at this point, even be proven to be false or wrong. However, even if the City's position were to be successfully challenged in appropriate civil proceedings, i.e., that the description was, in fact, wrong, we still could not establish that Pfalzer intentionally or knowingly made false statements. Rather, his statements are at least arguable as stating the City's position as to the status of the property.

Finally, it should be noted that there is no evidence that shows any improper influence by the Gombergs or anyone else, nor any *quid pro quo*, or other benefit to Pfalzer in order to get him to make the decisions relating to the property. Det. Kontinos has confirmed this in a previous meeting with Chief Investigator McQuinn and me. Although Maxwell argues that Pfalzer was acting with the intent to avoid getting himself or others at the city in trouble for making a wrong decision, this argument is, at best, speculation. Further, such an argument presumes that Pfalzer knew that his statements were false, and that presumption suffers from the problems discussed above. Thus, even if Pfalzer's description of Raintree were wrong, by mistake or even by negligence, we could not prove that he was intentionally or knowingly wrong, nor that he acted out of any criminal intent.

#### Conclusion

We cannot prove beyond a reasonable doubt that Pfalzer intentionally and knowingly made any false statements. We cannot prove that the statements are actually false at all, as there is ongoing dispute between Maxwell and the City as to the meaning of, and legal effect of, previous development permits and surveys. Therefore, we cannot prove that any crime occurred here. This is a civil land use dispute which needs to be dealt with in a civil forum.