


MEMORANDUM

TO: Board, Central Florida Expressway Authority

FROM: James M. Spoonhour
S. Brendan Lynch
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
Special Counsel for CFX

DATE: April 23, 2015

SUBJECT: CFX response to business damage claim by Vickie Davis d/b/a/ Bay Hills Equestrian Center/Parcel 197/Wekiva Parkway



On April 22, 2015, the Right of Way Committee approved (5-0) the attached recommendations of counsel for CFX as to responses to the claim for business damages served by Vickie Davis d/b/a Bay Hills Equestrian Center. Ms. Davis is represented by Kurt Ardaman of the Fishback Dominick law firm.

The recommendations approved by the Right of Way Committee were as follows:

1. Provide a written counter-offer on business damages in the amount of \$30,000.00 exclusive of (not including) legal and expert fees.
2. Serve an Offer of Judgment in the same amount of \$30,000.00.

Request is made that this item be placed on the Board's agenda for the May 14, 2015 meeting for approval. Please advise if further information is needed.

MEMORANDUM

**TO: Right of Way Committee
Central Florida Expressway Authority**

**FROM: James M. Spoonhour
S. Brendan Lynch
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
Special Counsel for CFX**

DATE: April 15, 2015

**SUBJECT: CFX response to business damage claim by Vickie Davis d/b/a/ Bay Hills
Equestrian Center/Parcel 197/Wekiva Parkway**

A business damage claim has been filed by Vickie Davis d/b/a Bay Hills Equestrian Center, who is a tenant on part of Parcel 197. Project Orlando LLC is the owner of Parcel 197. Vickie Davis is represented by Kurt Ardaman of the Fishback Dominick law firm.

Attached is a graphic illustration of the 60 acres leased by Davis for a horse boarding operation. The leased property included a riding oval, stables, pasture and various other buildings, including trailers and apartments leased by Ms. Davis to others. Also shown is the area taken (Parcel 197) for an interchange of the Wekiva Parkway with Kelly Park Road. The taking impacted the pasture/grazing area and some of the buildings used by Ms. Davis. Ms. Davis has relocated her business to a 160 acre farm (the Allen Farm) which has stables, riding oval and pasture near Tavares.

Vickie Davis has submitted a business damage claim for \$616,345.78. That claim is broken down as follows:

\$450,794.00 – replacement cost new (RCN) of buildings
101,829.78 – relocation claim (less \$30,000 for building replacement)
<u>93,722.00</u> – loss of goodwill and increased rent (one year's average income
and two years increase in rents)
\$616,345.78 – total

This business damage claim was submitted by Vickie Davis on 12/18/14. CFX's counter-offer is due by 5/18/15. If CFX does not respond, the counter will be deemed by statute to be zero dollars.

The purpose of this memorandum is to assist the Right of Way Committee in determining the counter-offer which it wants to make with respect to this business damage claim.

Claim for Replacement Cost New of Buildings. This is a fairly novel claim. Normally, business damage claims are based on loss of income as determined by a forensic accountant. Ms. Davis' attorney hired either Lloyd Morgenstern or Steve Phifer of Morgenstern, Phifer & Messina, a forensic accounting firm in Tampa. Both Messrs. Morgenstern and Phifer are CPAs and well known for business damage valuations in eminent domain cases. We tried to hire their firm prior to receiving the formal business damage claim from Ms. Davis. When we contacted them, we were told that they had already been hired by Kurt Ardaman to work on Ms. Davis' business damage claim.

Interestingly enough, the business damage claim submitted by Ms. Davis contains no claim whatsoever for loss of income. The only paperwork from Morgenstern, Phifer and Messina is a chart summarizing Ms. Davis' net income for the past five years. That chart showed that she had lost money in each of the prior five years. That is the reason why there is no claim for loss of income.

Since the traditional business damage claim did not pan out for them, Ms. Davis and Mr. Ardaman crafted a claim for damages based on her new leased property not having the same buildings as she had at the Project Orlando property. The claim for replacement cost new of the buildings is supported by a draft report from Allen H. Angus, LLC, a general contractor. Mr. Angus valued the cost to replace on the Allen Farm those buildings which Ms. Davis leased at the Project Orlando property but which do not exist at the Allen Farm. This "draft" report from Allen Angus was dated the day before the deadline for submission of Ms. Davis' business damage claim.

There is very little authority addressing a claim for a loss of a building in connection with a business damages claim. The main case is System Components v. FDOT which is a Florida Supreme Court case from 2009. In that case, the court said that business damages are not limited to loss of income but can be case-specific. In System Components, the business owner was the actual owner of the property and the building. The building was taken and demolished by FDOT. The business owner had to relocate and build a new building. In the end, the business owner was paid to replace his prior building, but could not get a duplicate recovery for the demolition of the old building and the construction of the new building.

There are several differences here with Ms. Davis' business damage claim:

1. She did not own or build the buildings in question. She only leased them.
2. The status of her leasehold interest in the buildings is unclear because there had not been a written renewal of her lease since 2007. That lease was for one year and had an automatic renewal if not terminated (which could be done by either party on 90 days' notice).
3. Allen Angus put forth a replacement cost new (RCN) in order to reconstruct and duplicate those same buildings on Ms. Davis' new leased property (the Allen Farm).
4. The existing buildings on Parcel 197 were quite old. Brand new replacements certainly do not seem justified.
5. If Ms. Davis has such a claim related to the buildings on Parcel 197, logically it would be only for the depreciated value of the buildings for the remaining duration of

her lease (which would be 3 to 12 months). The useful remaining life of those buildings would also come into play in making this calculation.

The Claim for Relocation Expenses. The claim for \$101,829.78 is the second relocation claim form which had previously been submitted by Vickie Davis to CFX for reimbursement under the federal relocation program. The business damage claim deducts the \$30,000 in that relocation claim, presumably because Vickie Davis is now claiming \$450,794 for replacement of buildings. Thus, the net relocation expense which she is claiming as part of the business damage claim is \$71,829.78.

Relocation expenses are covered, if at all, under federal guidelines. Debra Reddick of Atkins Global is administering the relocation expenses on the Wekiva Parkway project.

Ms. Davis' initial relocation expense submission was for \$9,047.03. That relocation claim was paid on 1/16/15.

Ms. Davis also submitted another two part claim for relocation expenses in the amounts of \$101,829.78 and \$1,582.13. This is the same relocation submission which is included in the business damage claim. Debra Reddick has reviewed this relocation claim and determined that \$3,302.35 is recoverable under the federal relocation guidelines. A payment in that amount is being processed to be sent to Ms. Davis.

Relocation claims are only recoverable to the extent allowed by federal rules. This claim is not properly part of the business damage claim.

Claim for Loss of Goodwill and Increased Rents. The claim for loss of goodwill and increased rents in the amount of \$93,722.00 has no support for those figures in the business damage claim, despite the statutory requirement that the business owner provide to CFX the owner's business records that support this claim.

No such documentation was provided by Ms. Davis with respect to loss of goodwill in her business damage claim. There are no specifics as to the amount of the loss of goodwill being claimed or how it was calculated. There also is no documentation supporting a loss of goodwill. Finally, there may even be a question whether loss of goodwill is properly a part of a business damage claim.

As to the claim for increased rents for two years, there also is no supporting documentation. A copy of her lease with Allen Farms was not enclosed. No records as to the rents being paid at the Allen Farms property were included either. We believe, but do not have supporting documentation, that Ms. Davis is paying \$3,500/month in rent to Allen Farms.

No records were included as to the rents actually being paid to Project Orlando under the lease on a portion of Parcel 197. That lease said the rent was to be \$100 per horse per month. No records were provided as to the number of horses maintained on the Parcel 197 lease or the rents actually paid at that location, which makes a calculation of any rent differential essentially impossible.

Furthermore, the claim for two years of rent differential would appear to have no basis given that the lease with Project Orlando had a maximum remaining duration of 3 to 12 months. Another determination could be based on the number of months remaining under her Parcel 197 lease at the time she relocated to the Allen Farms property.

Given Ms. Davis' failure to provide any supporting documentation for either the loss of goodwill or the claim for increased rent differential, there is a significant chance that this portion of the claim can be stricken as being non-compliant with the business damage statute.

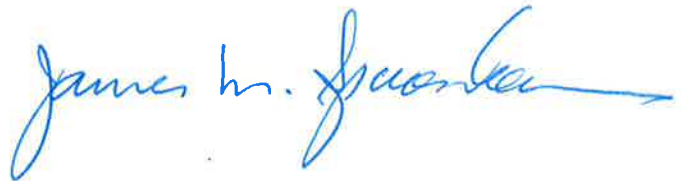
Unrelated Additional Claim by Vickie Davis. We have also been advised by Mr. Ardaman that Ms. Davis will be making an apportionment claim seeking part of the \$11,749,600.00 good faith deposit which CFX made on Parcel 197 and Parcel 230 in September of 2014. That deposit covered all of Parcel 197, while Ms. Davis' lease was partially within Parcel 197 and partially outside of the parcel. The portion of that good faith deposit attributable to Parcel 197 is \$11,730,000.00.

Given the short remaining duration of her lease rights, we do not know how much Ms. Davis would be entitled to receive, if anything, in an apportionment proceeding. Defendants are entitled to recover legal and expert fees as part of apportionment hearings. It is our understanding that Mr. Ardaman has retained Rick Dreggors of Calhoun Dreggors to appraise Ms. Davis' apportionment claim. This apportionment dispute will largely be played out by counsel for Ms. Davis (Kurt Ardaman) and counsel for Project Orlando (Kurt Bauerle) and the attorneys representing the three mortgage lien holders.

Recommendations:

1. CFX should make a counter-offer to this business damage claim.
 - a. The main reason for making a counter-offer is that the attorney's fees which Ms. Davis can seek in connection with the business damage claim are based on the difference she ultimately obtains and the amount of CFX's counter.
 - b. Should Ms. Davis get a recovery from the jury or in a mediated settlement, making such a counter-offer will reduce the legal fees which her attorney can obtain.
2. The amount of the counter-offer to be made is a strategic decision. It can range from a nominal amount because the claim is questionable to a more substantial amount given the cost to litigate this issue.
 - a. A nominal amount can be offered, although that somewhat defeats the point made above about minimizing the business owner's legal fees.
 - b. An offer can also be made based on the "costs of defense." In other words, how much is CFX likely to spend in defending this business damage claim. Approximate estimates for those costs of defense are as follows:

- i. \$20,000 – anticipated legal fees for discovery, depositions, preparation of motion to strike portions or the entire claim, hearings, mediation, working with our own experts to negate Ms. Davis' claims.
 - ii. \$50,000 - \$60,000 – anticipated additional legal fees if this business damage claim proceeds to jury trial.
 - iii. \$30,000 – \$40,000 - estimated fees for experts to negate business damage claims (forensic accountant to show no loss of income and no decrease in value of business, engineers to address buildings on both sites, contractor to properly estimate depreciated value of buildings, and appraiser to determine Ms. Davis' proportionate leasehold interest in the buildings given her short term lease duration).
 - iv. \$10,000 – estimated costs for court reporters (depositions, hearings and trial) and trial exhibits.
 - v. Total cost of defense is likely between \$110,000 and \$130,000.
 - vi. This estimate does not include CFX's exposure for legal and expert fees for Ms. Davis' team.
 - vii. We recommend a counter-offer of \$30,000 exclusive of legal fees and expert fees. Because the first offer acts as the floor in calculating attorney's fees, it is easier to determine attorney's fees if the counter-offer excludes legal fees and expert fees.
3. Offer of Judgment. If CFX makes an Offer of Judgment, the business owner has 30 days to accept or reject the offer. No response is the same as a rejection.
- a. The significance of an Offer of Judgment is that, if the business owner does not recover more than the offer of judgment, the experts on the business owner's team are at risk of not having their fees covered (fees incurred later than 30 days after the Offer of Judgment).
 - b. An Offer of Judgment can be withdrawn at any time.

A handwritten signature in blue ink, reading "James M. Guenther". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

PARCEL NO.: 197 AND 897

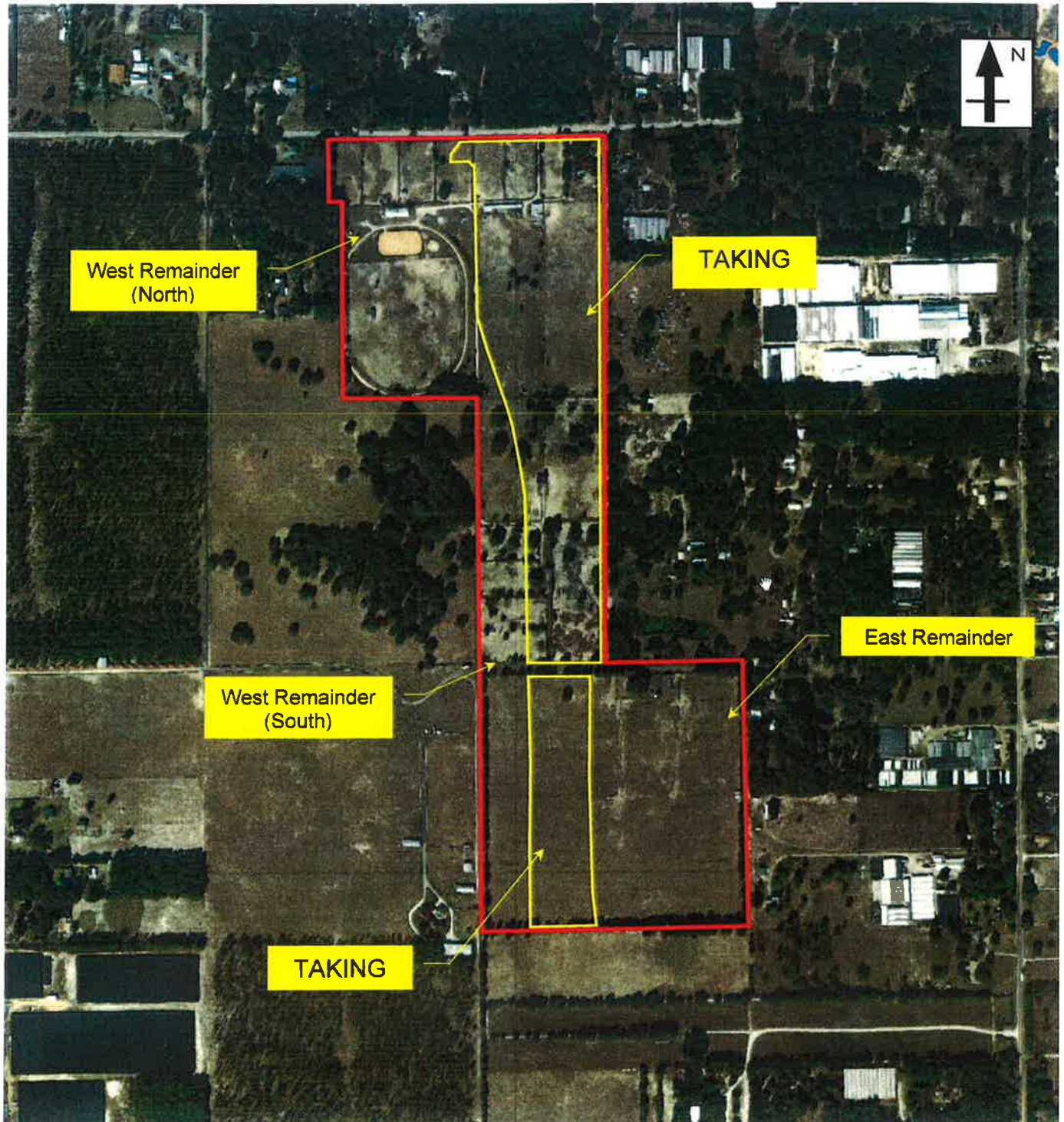
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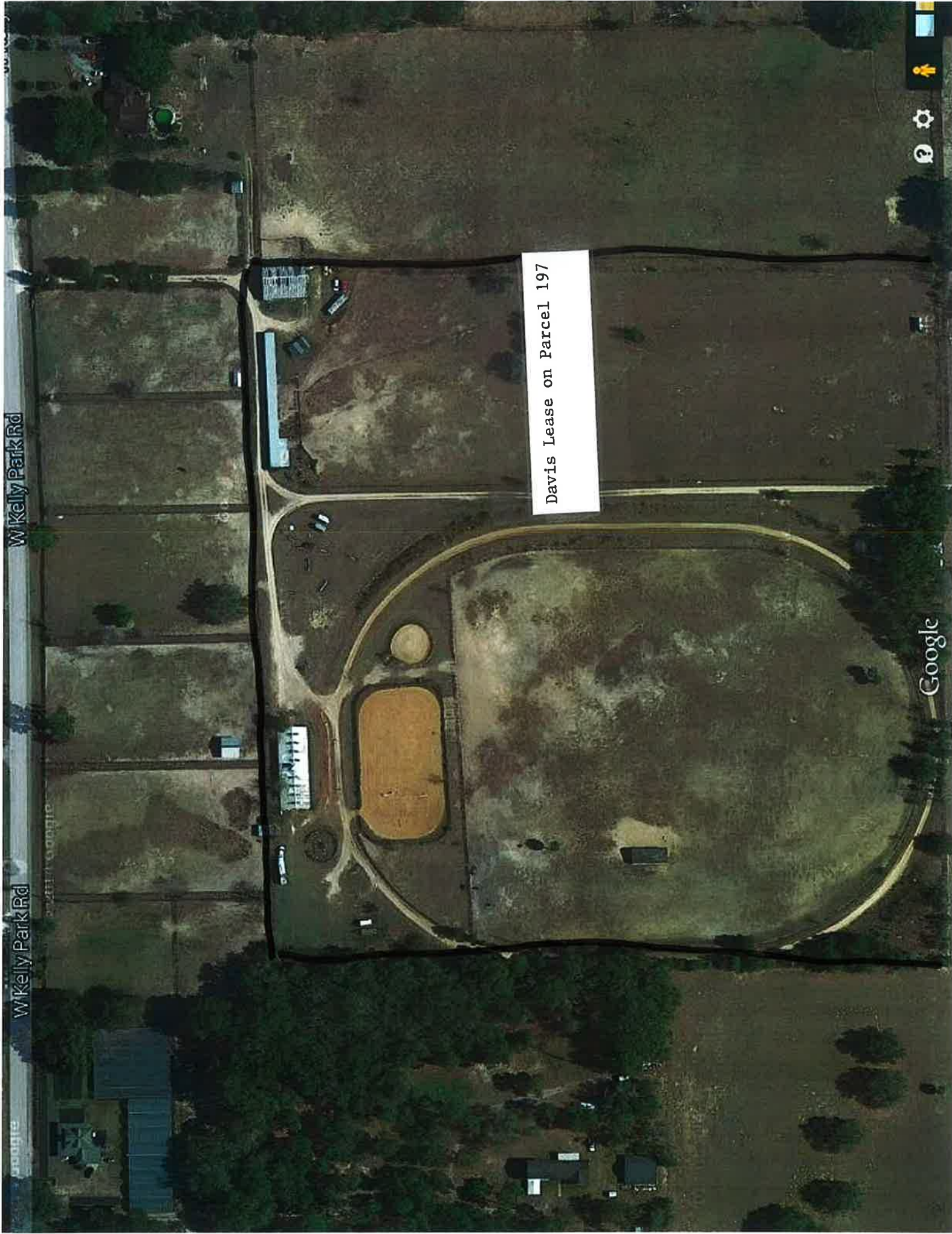
OWNER: PROJECT ORLANDO, LLC

PROJECT: STATE ROAD 429 WEKIVA PARKWAY EXTENSION PROJECT NO. 429-203

CITY/COUNTY: APOPKA/ORANGE

AERIAL PHOTO (ACQUISITION)
































W Kelly Park Rd

W Kelly Park Rd

Davis Lease on Parcel 197

Google

OCPA Web Map

	Florida turnpike		Major Roads		Proposed Road		Block Line		Commercial/Institutional		Hydro		Golf Course
	Interstate 4		Public Roads		Brick Road		Lot Line		Governmental/Institutional/Misc		Waste Land		Lakes and Rivers
	Toll Road		Gated Roads		Rail Road		Residential		Commercial/Industrial/Vacant Land		County Boundary		Building
	Road Under Construction		Proposed SunRail		Agriculture		Agricultural Curtilage		Parks		Hospital		



Created: 4/8/2015

This map is for reference only and is not a survey.

OCA Web Map

Florida turnpike	Major Roads	Proposed Road	Block Line	Commercial/Institutional	Hydro	Golf Course
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New Davis Lease at Allen Farms

Google