IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. 2023-CA-005295-O

ASSOCIATION TO PRESERVE
EATONVILLE COMMUNITY, INC. and
BABETTA ROSE LEACH HATLER,

Plaintiffs,

v.

SCHOOL BOARD OF ORANGE
COUNTY, FLORIDA

Defendant.

_____/

DEFENDANT SCHOOL BOARD OF ORANGE COUNTY, FLORIDA'S MOTION TO DISMISS COMPLAINT WITH PREJUDICE

Defendant, the School Board of Orange County, Florida ("School Board"), by and through its undersigned attorneys, pursuant to Rule 1.140, Florida Rules of Civil Procedure moves the Court to dismiss, with prejudice, Association to Preserve Eatonville Community, Inc's (the "Corporation") and Babetta Rose Leach Hatler's ("Hatler") (collectively the "Plaintiffs") First Amended Complaint ("Complaint") and as grounds therefore, School Board states as follows:

I. INTRODUCTION

The Plaintiffs filed a two (2) count complaint for declaratory relief seeking the Court's determination that a court ordered use restriction on the Hungerford Property that requires the

operation of a public school for only African American children is valid and that the release of said restriction pursuant to an eight-year-old court-approved settlement agreement and a more recent deed release is invalid ("Count I"). Moreover, the Plaintiffs, without pleading any facts in support thereof, request this Court restrain the School Board from selling the Hungerford Property or otherwise disposing of same without complying with the Florida Statutes and the 1951 Court-imposed Use Restriction ("Count II"), as defined below.

II. BACKGROUND

Plaintiffs' Complaint sets out the long history of certain real property located in the Town of Eatonville, Florida. Without reciting the entire history, the School Board will focus on those events relevant to this Motion.

In 1951, the School Board acquired the Hungerford School and the Hungerford Property. *See* Compl. ¶4. The acquisition was disputed and eventually approved by the Florida Supreme Court. *See Fenske v. Coddington,* 57 So. 2d 452, 454 (Fla. 1952). *See* Compl. ¶34. During the litigation over the Hungerford Property, the circuit court ordered "[t]hat upon the conveyance of said real property to the Board of Public Instruction of Orange County, Florida, said real property be used as a site for the operation of a public school thereon for negroes with emphasis on the vocational education of [N]egroes and to be known as "Robert Hungerford Industrial School" and the personal property as conveyed to said Board shall be used in connection therewith." ("1951 Court-imposed Use Restriction") *See* Compl. ¶40. Other remaining property, assets and funds pertaining to the Hungerford School, namely, its religious chapel and chapel assets, that were not transferred to the School Board, were specifically reserved to the Public Charitable Trust and Property and Assets of the Robert Hungerford Chapel Trust ("Hungerford Chapel Trust"). *See* Compl. ¶41.

In 1974, the School Board sought to sell a portion of the Hungerford Property over objections of the successor trustees of the Hungerford Chapel Trust. *See* Compl. ¶62. After litigating the matter, the circuit court found that the successor trustees of the Hungerford Chapel Trust had no title or interest in the Hungerford Property since the 1951 conveyance of the Property to the School Board. *See* Compl. ¶63. The circuit court authorized the sale and lifted the 1951 Court-imposed Use Restriction for that portion of the Hungerford Property. *See* Compl. ¶64.

In 2010, the Town of Eatonville ("Eatonville") and the School Board agreed to cooperate and work together to remove the 1951 Court-imposed Use Restriction from the Hungerford Property. *See* Compl. ¶¶68-69. In 2011, Eatonville brought an action against the School Board and the Hungerford Chapel Trust to release the 1951 Court-imposed Use Restriction (the "2011 Allen Litigation") because it contended that the Hungerford Property would be better suited for commercial development to increase Eatonville's "ad valorem tax base and to provide health and safety to its citizens." *See* Compl. ¶¶70-75. Eatonville and the Hungerford Chapel Trust executed a joint stipulation for release of the 1951 Court-imposed Use Restriction ("2011 Joint Stipulation"). *See* Compl. ¶86.

In 2015, Eatonville, the Hungerford Chapel Trust and the School Board entered a Joint Stipulation for Settlement that was substantially similar to the 2011 Joint Stipulation ("2015 Settlement") and moved the 2011 Allen Litigation court to approve the Joint Stipulation for Settlement. *See* Compl. ¶¶92-93. The 2011 Allen Litigation court entered an Order Approving Joint Stipulation for Settlement on November 10, 2015. *See* Compl. ¶94.

The parties to the 2011 Allen Litigation entered into a First Amendment to Settlement Agreement in 2016 ("Amended Settlement Agreement"). *See* Compl. ¶97. The Amended Settlement Agreement provided for the School Board to pay the Hungerford Chapel Trust

$1,000,000.00 dollars in exchange for releasing the 1951 Court-imposed Use Restriction. *See* Compl. ¶103. The release of the 1951 Court-imposed Use Restriction contemplated in the 2015 Settlement Agreement and the Amended Settlement Agreement resulted in the sale of a portion of the Hungerford Property to HostDime, LLC for $1,400,000.00. *See* Compl. ¶107.

The School Board entered into two (2) contracts with Eatonville, one in 2010 and a second in 2019 regarding the sale of the Hungerford Property. *See* Compl. ¶¶68 and 125. The 2019 contract provided that the School Board, upon selecting a developer, would sell the land to Eatonville for $10 million plus reimbursement of other costs. *See* Compl. ¶122. In February 2020, the School Board issued a Request for Proposals to develop the Hungerford Property, which was reissued again in June 2021. *See* Compl. ¶¶127-128. The School Board entered into one (1) contract resulting from the competitive solicitation for Requests for Proposals issued in June 2021 with Falcone & Associates LLC. *See* Compl.¶129. Falcone & Associates LLC attempted to obtain the necessary entitlements from Eatonville, but ultimately assigned the contract to Hungerford Park, LLC ("Hungerford Park") in June of 2022. *See* Compl. ¶129. Also in June 2022, Edwin C. Wright, Treasurer of the Hungerford Chapel Trust executed a Release of Hungerford Trust Restrictions to remove the 1951 Court-imposed Use Restriction that the Hungerford Property was only to be used for the education of Black children ("2022 Deed Release") and executed a quitclaim deed conveying the chapel property to the School Board. *See* Compl. ¶¶111 – 114. The 2022 Deed Release specifically references the 2015 Settlement and the Amended Settlement Agreement, specifically, that the Hungerford Chapel Trust agreed to "execute any and all documents necessary to release the portions of the Property owned by the School Board from the Hungerford Trust Restrictions and to cooperate in order to consummate the sale of the land as contemplated." *See* Exhibit 2 to the Complaint.

While the contract was set to close on October 26, 2022, the School Board extended closing several times while Hungerford Park attempted to obtain the necessary entitlements for its development from Eatonville. *See* Compl. ¶133. However, the Corporation spoke at multiple public hearings and submitted written objections, including the February 7, 2023, final hearing, in opposition to Hungerford Park's development plans. See Compl. ¶¶211-214. Even though Eatonville had requested that the 1951 Court-imposed Use Restriction be lifted for the express purpose of commercial development to increase its ad valorem tax base, on February 7, 2023, it voted to reject Hungerford Park's proposal. *See* Compl. ¶¶133, 135 -136. Unable to obtain the entitlements to support its development, Hungerford Park notified the School Board that it was terminating the contract as of March 31, 2023. *See* Compl. ¶137. On March 31, 2023, the School Board issued a statement that it has decided not to accept new bids on the Hungerford Property. *See* Compl.¶140. As of the date of filing the Complaint, there is no active contract for the purchase of the Hungerford Property and the School Board has taken no action since Hungerford Park's termination of the contract on March 31, 2023, related to the Hungerford Property. *See* Compl.¶¶138, 140-141.

Plaintiffs, both of which were in existence since at least 2009 and neither one of which is a member, trustee or trust beneficiary of the Hungerford Chapel Trust, nor a party to the 2011 Allen Litigation, nor sought to intervene in the 2011 Allen Litigation, nor a party to any contract referenced in the Complaint, now brings this case to unwind a court-approved settlement, a court order, a settlement agreement to which neither was a party to, and a recorded deed release, and is asking the Court to reinstate the 1951 Court-imposed Use Restriction which is illegal on its face and unenforceable. Because Plaintiffs have failed to plead ultimate facts upon which relief may be granted, failed to state a cause of action for either declaratory relief or injunctive relief, failed

to join indispensable parties and failed to attach documents that are the basis of the purported counts, Plaintiffs' Complaint should be dismissed with prejudice.

III. ARGUMENT

Standard for Motion to Dismiss

"On a motion to dismiss, a trial court must accept the facts alleged in the complaint as true and must draw all reasonable inferences in favor of the pleader." *Cocco v. Pritcher*, 1 So. 3d 1246, 1248 (Fla. 4th DCA 2009) (citing *Taylor v. City of Rivera Beach,* 801 So. 2d 259, 262 (Fla. 4th DCA 2001)). However, the court is not required to accept legal conclusions as true. *First Nat'l Bank in St. Petersburg v. Ferris* 156 So. 2d 421, 424 (Fla.2d DCA1963); *Esposito v. Horning,* 416 So. 2d 896, 898 (Fla. 4th DCA 1982) (citations omitted) ("In testing the complaint to see if it can withstand a motion to dismiss … the well-pleaded facts are admitted, but not conclusions of law or the opinions of the pleader.")

A. The Complaint is Defectively Pleaded

The Complaint is defectively plead because it fails to set forth a short plain statement of the ultimate facts upon which Plaintiffs are entitled to relief as required by Rule 1.110, Florida Rules of Civil Procedure. To be sufficient, a complaint must adequately allege ultimate facts which, if established by competent evidence, would establish a cause of action upon which relief may be given. *See Barrett v City of Margate,* 743 So. 2d 1160, 1163 (Fla. 4th DCA 1999) ("It is a cardinal rule of pleading that a complaint be stated simply, in short plain language.") Additionally, a complaint must set out elements and the facts that support them. *Barrett,*732 So. 2d at 1162. Plaintiffs' Complaint is anything but a short plain statement of facts. Instead of pleading ultimate facts upon which this Court may grant relief, including any facts showing

Plaintiffs are entitled to any relief whatsoever, Plaintiffs plead their opinion, legal theories, and conclusions in an attempt to have this Court ultimately declare and reinstate an illegal 1951 Court-imposed Use Restriction as enforceable and declare that the School Board has not complied with Florida Statutes for action(s) that have not occurred yet.

B. Plaintiffs Fail to State a Cause of Action for Declaratory Relief

The Complaint fails to state a cause of action for declaratory judgment because Plaintiffs have failed to allege ultimate facts showing a bona fide, actual, present, practical need for the declaration. The test for sufficiency of a complaint seeking a declaratory judgment is not whether Plaintiffs will prevail in obtaining their desired outcome, but whether they are entitled to a declaration of rights at all. *See Messett v. Cohen, 741 So.2d 619 (Fla. 5th DCA 1999) citing Fla. State Bd. Of Dispensing Opticians v. Bayne,* 204 So. 2d 34, 36 (Fla. 1967). Plaintiffs must show they are in doubt as to the existence or nonexistence of some right, status, immunity, power or privilege and that they are entitled to have such doubt removed. *See Wilson v. County of Orange*, 881 So. 2d 625, 631 (Fla.5th DCA 2004). Additionally, an aggrieved party must make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future. *See State of Fla., et al. v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002).

In this regard, a plaintiff who seeks declaratory judgment must show the following:

> Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and

> adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952); *Santa Rosa Cty. v. Admin. Comm., Div. of Admin. Hrgs.,* 661 So. 2d 1190, 1192-93 (Fla. 1995). A declaratory judgment "may not be invoked if it appears that there is no bona fide dispute with reference to a present justiciable question." *Ashe v. City of Boca Raton, 133 So. 2d 122, 124 (Fla. 2d DCA 1961)*; *see Ready v. Safeway Rock Co.,* 157 Fla. 27, 24 So. 2d 808, 811 (Fla. 1946) (Brown, J., concurring specially) (explaining that it is well settled that declaratory judgment proceeding must be based on actual controversy, and that no proceeding lies under declaratory judgments act to obtain judgment that is merely advisory or merely answers moot or abstract question*); see also Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992) (reiterating that case becomes moot when "it presents no actual controversy," "issues have ceased to exist," or "when the controversy has been so fully resolved that a judicial determination can have no actual effect"). The Complaint fails to allege any of the elements required for a declaratory judgment, namely, that there is a present, actual controversy, and, thus, fails to provide any basis for this Court to exercise any jurisdiction under Chapter 86, Florida Statutes.

1. <u>Plaintiffs lack standing as a matter of law because neither will ever attend a school located on the Hungerford Property.</u>

As an initial matter, Plaintiffs lack standing in general and thus are not entitled to the relief they are seeking. Florida recognizes a general standing requirement in the sense that every case must involve a real controversy as to the issue or issues presented. *Interlachen Lakes Estates Inc. vs. Brooks*, 341 So 2d 993 (Fla. 1976). "Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation." *Nedeu et al, v. Gallagher*, 851 So.2d 214, 215 (Fla. 1st DCA 2003) *citing Peregood vs. Cosmides*, 663 So. 2d 665 (Fla 5th DCA 1995); *Equity Resources Inc. vs.*

County of Leon, 643 So. 2d 1112 (Fla 1st DCA 1994). "The interest cannot be conjectural or merely hypothetical." *Id.* "Furthermore, the claim should be brought by, or on behalf of, the real party in interest." *Id.* at 216.

Assuming for arguments sake that the Plaintiffs timely brought an appeal of the School Board's decision to open a school, operate a school, the type of school, the closing of a school, or the operation of an illegally segregated school pursuant to §120.54(2)(a), as set forth below, then Plaintiffs must prove they were substantially affected by the School Board's action to satisfy the threshold of standing. *See* §120.56 Fla. Stat.; S*chool Board of Orange County vs. Blackford*, 369 So. 2d 689 (1979). In *Blackford*, the Florida Supreme Court found that the parents of existing students at a school that were being moved by the School Board due to a school closure did not have standing to challenge the School Board decision. *Id*. Pursuant to §120.56(4), Fla. Stat. " ... (a)ny person substantially affected by an agency's proposed rule has standing to challenge the existing rule." To meet the substantially affected test of §120.54 (4) and §120.56(4), Fla. Stat., "the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) "that the alleged interest is arguably within the zone of interest to be protected or regulated." *See Ward vs. Board of Trustees of Internal Improvement Trust Fund*, et al 651 So. 2d 1236, 1237 (1995) citing *All Risk Corp. of Fla. vs. State, Dept. of Labor & Employment Sec.*, 413 So. 2d 1200 (Fla 1st DCA 1982). Here, a step away from *Blackford*, neither Plaintiff is even alleged to be a parent of a student, and neither could be a current or future student of the School Board as one is a not-for-profit corporation, and one is a septuagenarian residing in Oregon. Further, neither Plaintiff is in the zone of interest of the 1951 Court-imposed Use Restriction and has failed to allege how either has suffered damages as a result of the School Board's alleged failure to comply with the released 1951 Court-imposed Use Restriction or its decision to close the school on the Hungerford Property.

Even assuming Plaintiffs could prove there was a violation of the 1951 Court-imposed Use Restriction, neither can establish a direct injury or meet the requirement of being substantially affected as neither Plaintiff is nor could be a student at the Hungerford Property. Therefore, the Complaint should be dismissed with prejudice for Plaintiffs' lack of standing.

2. <u>Plaintiffs lack standing as a matter of law as they do not have any special injury as required to state a claim against a governmental entity.</u>

Plaintiffs have also failed to allege any facts to establish either Corporation or Hatler's standing to challenge the School Board's actions, including failing to allege either suffered a special injury. The 1951 Court-imposed Use Restriction at issue in Count I of the Complaint is unenforceable, neither Plaintiff is or will be a student at the Hungerford Property, and the statutory procedures relating to disposal of School Board property at issue in Count II of the Complaint applies to all citizens of Orange County, Florida. The only injury Plaintiffs allege are speculative and contingent upon future actions of the School Board as to the Hungerford Property which have not yet occurred. "[T]he Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers." *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015) (*citing Sch. Bd. of Volusia Cty. v. Clayton*, 691 So. 2d 1066, 1068 (Fla. 1997); *N. Broward Hosp. Dist. v. Fornes*, 476 So. 2d 154, 155 (Fla. 1985); *Henry L. Doherty & Co. v. Joachim,* 146 Fla. 50, 200 So. 238, 240 (Fla. 1941); *Rickman v. Whitehurst*, 73 Fla. 152, 74 So. 205, 207 (Fla. 1917))**.**

Plaintiff Corporation has alleged no contractual relationship with the School Board, did not allege that it was a party to any prior settlement agreement(s), did not allege it is a Member of the Hungerford Chapel Trust, a trustee, or a trust beneficiary, or allege any special rights to utilize the

Hungerford Property. In two hundred and seventy-seven paragraphs in the Complaint, the Corporation alleges one injury which is as follows:

> *If the Hungerford Property is allowed to be sold in this manner in the future*, without any court scrutiny of the deed, the deed release, and the School Board's failure to comply with its duties under the law to dispose of the property only in the best interests of the public [Corporation's] organizational mission to preserve [Eatonville's] considerable cultural, historical, and educational resources for its future economic development will be significantly thwarted, if not eliminated altogether.

See Compl.¶ 228 (emphasis added). The only alleged injury is admitted by Plaintiffs to be contingent upon a future event of a possible sale in the future. Any future contract for sale of the Hungerford Property will require approval of the School Board at a publicly noticed meeting. Plaintiff Corporation did not allege that it appeared at any School Board hearing at which the various contracts, settlements, and amendments were heard and approved by the School Board. Plaintiff Corporation fails to allege any actual present injury, let alone a special injury, and therefore lacks standing to challenge the School Board's actions.

Plaintiff Hatler is not a citizen of or a taxpayer in Orange County, Florida, nor is she a member of the Hungerford Chapel Trust, a trustee, or a trust beneficiary. Rather, Plaintiff Hatler is a resident of La Pine, Oregon and a purported descendent of "the original settlers of the Robert Hungerford Normal and Industrial School public charitable trust." *See* Compl. ¶16. The Complaint does not allege any injury to Plaintiff Hatler, other than the conclusory statement that somehow the sale will devalue the Hungerford name. *See* Compl. ¶242. As such, Plaintiffs have failed to allege any special injury as required under the law and therefore lack standing to challenge the actions of the School Board and the Complaint should be dismissed with prejudice.

3. <u>There is no present, actual controversy because the 2011 Joint Stipulation, 2015 Settlement and Amended Settlement Agreement fully resolved the release of the 1951 Court-Imposed Use Restriction.</u>

Even assuming Plaintiffs do have standing to bring this action, as set forth in the Complaint, there was a concerted effort between Eatonville and the School Board to remove and release the 1951 Court-imposed Use Restriction on the Hungerford Property which culminated in the 2011 Allen Litigation and was resolved via the 2011 Joint Stipulation, 2015 Settlement, Amended Settlement Agreement and the 2022 Deed Release. As such, there is no bona fide, actual, present, or practical need for a declaration of this court regarding the released 1951 Court-imposed Use Restriction. The matter was fully resolved in the 2011 Allen Litigation via the 2011 Joint Stipulation, 2015 Settlement, Amended Settlement Agreement and the 2022 Deed Release, thus there is no present justiciable question regarding the 1951 Court-imposed Use Restriction on the Hungerford Property. Plaintiffs' Complaint is nothing more than seeking a declaratory judgment that would be merely advisory or one that answers moot or abstract questions. As such, Plaintiffs have failed to state a cause of action for a declaratory judgment in Count I of the Complaint and the Complaint should be dismissed with prejudice.

4. <u>There is no present, actual controversy because the School Board is taking no action in regard to the Hungerford Property.</u>

Further, assuming Plaintiffs have standing to bring this action, as set forth in the Complaint, there is no pending contract for the sale of the Hungerford Property, the School Board indicated that it was not accepting new bids on the Hungerford Property, and the School Board has taken no other action to sell or otherwise dispose of the Hungerford Property.

As to Count I, any controversy that Plaintiffs are attempting to create in their Complaint is based on assumptions. For a controversy to exist, the Plaintiffs assume the School Board will act at some future unknown noticed public meeting to approve a future unknown sales contract with unknown terms for an unknown use. At the present time, as admitted by the Plaintiffs, the School Board has not done so. *See* Compl. ¶ 140. There are no plans for the Hungerford Property,

including but not limited to no active requests for proposals, no bids for sale, no proposed contracts, and no planned public meeting; so, there is no actual controversy based on real facts to support a declaratory action. A declaratory action is not appropriate when there is nothing more than a mere possibility the Hungerford Property may be sold, or disposed of at some point in the future.

As to Count II, unless and until the School Board does act, the statutory and regulatory process that applies to the School Board's disposal of land is not applicable. Section 1013.28, Fla. Stat. (2023) provides that "Subject to the rules of the State Board of Education, a district school board . . . may dispose of land or real property to which the board holds title which is, by resolution of the board, determined to be unnecessary for educational purposes as recommended in an educational plant survey." The State Requirements for Educational Facilities, at Section 1.4(4) provide that " A Board may dispose of any land or other real property by resolution of such Board, if recommended in an educational plan survey and if determined to be unnecessary for educational or ancillary purposes." *State Requirement for Educational Facilities*, Florida Department of Education, November 4, 2014. At some time in the future if the School Board determines that it wishes to accept bids, enter a contract, or otherwise dispose of the Hungerford Property, it must do so through a public hearing process and pursuant to the statutory and regulatory process for disposal of land set forth above. Plaintiffs' allegations as to the School Board's compliance with the process are not ripe because the actions related to a future sale have not yet occurred. In this action, Plaintiffs are seeking a declaratory action based on past actions of the School Board, dating as far back as 2009. A declaratory action is not appropriate to pass judgment or issue an advisory opinion on past actions. Since the termination of the Hungerford Park contract, no disposal process has been initiated by the School Board and as there is no active contract for the sale of the

Hungerford Property, there is no actual controversy relating to the disposal process.

As there is no actual controversy as to either Count I or II, there is no basis for this Court to exercise any jurisdiction under Chapter 86, Florida Statutes and the Complaint should be dismissed with prejudice.

5. Plaintiffs' Complaint is barred by its failure to comply with the appeal deadlines set forth in the Administrative Procedure Act.

Couched as seeking a declaratory judgment that the 1951 Court-imposed Use Restriction is valid and enforceable, Plaintiffs are really asking this Court to require the School Board to open and operate a second school on the Hungerford Property. Any challenge of the requirement to open a school, operate a school, operate an illegal segregated school, or the closing of a school must be pursuant to the Florida Administrative Procedure Act and its attendant deadlines for filing set forth in §120.54(2)(a) Fla. Stat. (2023) as that is the primary agency with jurisdiction as "district school boards are constitutionally and statutorily charged with the operation and control of public K-12 education within their school districts." §1003.02, Fla. Stat. (2023); *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, (Fla. 2001). Circuit Court intervention by declaratory action is generally not proper where an appeal process and remedy is available pursuant to the Administrative Procedure Act. *State ex rel. Dep't. of General Services v. Willis*, 344 So. 2d 580 (Fla. 1st DCA 1977), approved by *Flo-Sun, Inc*. A declaratory action is only available in extraordinary circumstances that are so egregious or devastating that the promised administrative remedy is too little or too late. *School Board of Leon County v. Mitchell*, 346 So. 2d. 562 (Fla. 1st DCA 1977), citing *Willis,* 590.

At the heart of their Complaint, Plaintiffs are challenging the 2009 closing of one of the schools on the Hungerford Property and seeking to require the School Board to open a second school pursuant to the illegal and unenforceable 1951 Cout-Imposed Use Restriction. These are

within the scope of the Constitutional and statutory charge of the School Board. To challenge the 2009 decision to close the school and subsequent decisions between 2009 and 2023 made by the School Board, the Plaintiffs would have had to comply with deadlines set forth in §120.56(2)(a) which requires a petition to be filed within ten (10) days of the final public hearing which is jurisdictional. *Fla. Pulp & Paper Ass'n Envtl. Affairs, Inc. v. Dep't. of Envtl. Prot.*, 223 So. 3d 417 (Fla. 1st DCA 2017). Even though Plaintiffs were in existence and interested in Eatonville (*See* Compl. 181-183), Plaintiffs do not allege that they complied with the above rules required to challenge any of the decisions of the School Board that occurred in the fourteen (14) year period between 2009 when the School Board closed the school on the Hungerford Property and all intervening decisions relating to approval of contracts, settlement agreements, solicitation awards, and amendments to all the above. The exception allowing circuit courts to intervene in an agency decision via a declaratory action is in lieu of those actions where the administrative process will be too timely or not offer an appropriate remedy but does not apply where the Plaintiffs never availed themselves of the remedies available to them in the Administrative Procedure Act at all. See *State Dep't. of Envtl. Protection v. P.Z. Const. Co.*, 633 So.2d 76 (Fla. 3rd DCA 1994) (Where the company's failure to pursue administrative remedies did not mean that they were inadequate.) The Plaintiffs were in existence during all these actions complained of in their Complaint and failed to allege that they appeared or filed any appeals pursuant to the Florida Administrative Procedure Act during the past fourteen (14) years. Plaintiffs have effectively sat on their hands and now attempt to inappropriately circumvent the proper procedure and request relief from this Court that is otherwise not appropriate and is time barred by the Florida Administrative Procedure Act. *Willis*, at 592 ("We are not at liberty to employ an extraordinary remedy to assist a litigant who has foregone an ordinary one which would have served adequately.") As such, the Complaint

is barred as a matter of law, fails to state a cause of action, and should be dismissed with prejudice.

C. The 1951 Court-Imposed Use Restriction is Unenforceable.

Plaintiffs have asked the Court to enforce the 1951 Court-imposed Use Restriction:

> That upon the conveyance of said real property to the Board of Public Instruction of Orange County, Florida, said real property be used as a site for the operation of a public school thereon for negroes with emphasis on the vocational education of [N]egroes and to be known as "Robert Hungerford Industrial School" and the personal property as conveyed to said Board shall be used in connection therewith.

The Supreme Court of the United States, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held "that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." The Court continued "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." Id. Citing *Marsh v. Alabama*, 326 U.S. 501 (1946). The aforementioned 1951 Court-imposed Use Restriction requires the School Board to operate a public school for African American children only. The 1951 Court-imposed Use Restriction predated *Brown v. Board of Education*, 347 U.S. 483 (1954), which required the desegregation of public schools. Taking *Brown* and *Shelley* together, the 1951 Court-imposed Use Restriction became illegal after *Brown* as it required the School Board to operate a segregated school on the Hungerford Property as desired by Plaintiffs and is unenforceable pursuant to *Shelley* because its enforcement by this Court would preclude all other children who are not African American from attending said school in violation of their Fourteenth Amendment rights to equal protection under the laws of the United States. As such, the Plaintiffs' Complaint fails to state a cause of action as a matter of law because the relief sought

is the enforcement of the illegal 1951 Court-imposed Use Restriction, which, no matter how plead, cannot be enforced and the Complaint should be dismissed with prejudice.

D. Plaintiffs' Complaint must be dismissed for failure to join three indispensable parties, the Town of Eatonville, the Hungerford Chapel Trust and HostDime LLC.

Pursuant to Florida Rule of Civil Procedure 1.140(b)(7), a defendant may move to dismiss a complaint for "failure to join indispensable parties." "An indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interests of another party in the action." *Florida Dept. of Revenue v. Cummings,* 930 So. 2d 604, 607 (Fla. 2006). Put differently, indispensable parties are those who are "so essential to a suit that no final decision can be rendered without their joinder." *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 n.3 (Fla. 1984); see *Bastida v. Batchelor*, 418 So. 2d 297,299 (Fla. 3d DCA 1982) ("An indispensable party [is] one without whom the rights of others cannot be determined."). As a general rule, an indispensable party is one whose interest in the subject matter is such that if he is not joined a complete and efficient determination of the equities and rights between the other parties is not possible. *Grammer v. Roman*, 174 So. 2d 443, 445 (Fla. 2d DCA 1965) (citations omitted). The release and removal of the 1951 Court-imposed Use Restriction that Plaintiffs take issue with sprang from the 2011 Allen Litigation and the 2015 Settlement, which was court approved. The parties to the 2011 Allen Litigation and thus the 2015 Settlement and Amended Settlement Agreement and the resulting 2022 Deed Release were Eatonville, the successor trustees of the Hungerford Chapel Trust and the School Board. Additionally, resulting from the court approved 2015 Settlement and the subsequent Amended Settlement was the sale of a portion of the Hungerford Property to HostDime LLC. Hostdime LLC has developed the five (5) acre tract with a state-of-the-art data center that is nearing a grand

opening.

Plaintiffs want this Court to rescind the court approved 2015 Settlement and the Amended Settlement Agreement and to nullify the 2022 Deed Release in order to enforce the 1951 Court-imposed Use Restriction. In an action for rescission of a transaction, the parties to the transaction are indispensable. *Fireman's Ins. Co. of Newark, N.J. v. Vento,* 586 So. 2d 89 (Fla. 3d DCA 1991*)*; *Coast Cities Coaches, Inc. v. Whyte,* 130 So. 2d 121 (Fla. 3d DCA 1961). The rights and obligations of the parties to the 2015 Settlement and Amended Settlement Agreement will be altered by the Plaintiffs' claims that the 2015 Settlement and Amended Settlement Agreement is void ab initio and of no force or effect. The three parties to the 2015 Settlement and Amended Settlement Agreement have relied upon it in their actions as to the Hungerford Property over the past eight years, including issuance of Request for Proposals, entry into various purchase contracts, and ultimately the release of the 1951 Court-imposed Use Restriction in return for payment from the School Board of $1,000,000.00 to the Hungerford Chapel Trust. Moreover, the sales price paid to the School Board by HostDime LLC would have to be returned and the multi-story data center developed by HostDime LLC would be required to be removed if the Court declares that the Hungerford Property continues to carry the 1951 Court-imposed Use Restriction and that the 1951 Court-imposed Use Restriction is enforceable.

Interestingly enough, Plaintiffs assert that because the Florida Attorney General was not involved in the 2011 Allen Litigation, the 2015 Settlement, the Amended Settlement Agreement and thus the 2022 Deed Release should be nullified but does not name the Florida Attorney General as a party in this case. That is because the Florida Attorney General is not considered an indispensable party with regard to a trust administered under Florida law. *Biden v. Lord,* 147 So.3d 632, 637, fn 2 (Fla. 1st DCA 2014); §736.0110(3) Fla. Stat. (2006) ("The Attorney General *may*

assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.") (emphasis added).

Eatonville, the Hungerford Chapel Trust, and HostDime LLC are indispensable parties and failure to join them requires the Complaint be dismissed.

E. Failure to attach the 2015 Court-Approved Settlement Agreement requires dismissal of the Complaint.

Plaintiffs' Complaint should be dismissed for their failure to attach the document that is the basis of both counts. Rule 1.130(a), Fla.R.Civ.P., provides that "All . . . contracts . . . upon which the action may be brought . . . shall be incorporated in or attached to the pleading. (emphasis added). ". . . [T]he word "shall" . . . is normally meant to be mandatory in nature." *State v. Goode,* 830 So.2d 817, 823 (Fla. 2002). The terms "shall" used in Rule 1.130 is mandatory where it refers to an action preceding the deprivation of a substantive right, such as a judgment against the School Board. Id.

A "complaint based on a written instrument . . . does not state a cause of action until the instrument, or an adequate portion thereof is attached to or incorporated in the pleading in question." Safeco Ins. Co. v. Ware, 401 So.2d 1129, 1130 (Fla. 4th DCA 1981). The Court's approval of the 2015 Settlement forms the basis for the parties to that 2015 Settlement Agreement's actions from 2015 to date including the release of the 1951 Court-imposed Use Restriction. In the event the 2015 Settlement is unwound, including the Amended Settlement Agreement, the Hungerford Chapel Trust will be required to return the sums paid pursuant to said 2015 Settlement in the amount of $1,000,000.00. Plaintiffs fail to allege, incorporate, or attach any portion of the 2015 Settlement or the Amended Settlement Agreement to the Complaint. Therefore, the Court must dismiss the Complaint for failure to state a cause of action.

F. Plaintiffs Failed to State a Cause of Action for Injunctive Relief.

Plaintiffs also fail to state a cause of action for entry of injunctive relief, yet requests the Court enjoin the School Board in its prayer for relief. It is well settled that pleadings must demonstrate a right to a permanent injunction. *Smith v. Bateman Graham, P.A.*, 680 So.2d 497, 499 (Fla. 1st DCA 1996). A complaint for injunctive relief must allege every necessary fact clearly, definitely, and unequivocally and should state something more than conclusions and opinions of Plaintiffs. *See Central & S. Fla Flood Control Dist. V. Scott,* 169 So. 2d 368, 370 (Fla. 2d DCA 1964). A claim for injunctive relief action requires the Plaintiffs to demonstrate: (1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy at law; and (4) consideration of the public interest. *See St. Lucie County vs. Town of St. Lucie Village*, 603 So. 2d 1289, 1292 (Fla. App. 4th DCA 1992) and *Hiles vs. Auto Bahn Federation, Inc.*, 498 So. 2d 997 (Fla App 4th DCA 1986). "Another requirement for injunctive relief of prospective action is that the likelihood of the future conduct occurring must be real and exceedingly probable." *St. Lucie County*, 603 So. 2d 1289, 1292-1293 (Fla. App. 4th DCA 1992) citing *City of Coral Springs vs. Florida National Properties Inc.*, 340 So. 2d 1271 (Fla 4th DCA 1976). "To be subject of an injunction, a prospective injury must be more than a remote possibility; it must be so imminent and probable as reasonably to demand preventive action by the court." *City of Coral Springs*, 340 So. 2d 1271-1272 (Fla 4th DCA 1976). "In other words, the feared injury must be so near and present that the only way to avoid it is through injunctive relief." *St. Lucie County*, 603 So. 2d 1289, 1293. Simply put, Plaintiffs have not alleged facts demonstrating a clear right to the injunctive relief they seek, and the Complaint must be dismissed.

1. Plaintiffs have not shown any irreparable harm.

Plaintiffs have not alleged anywhere in the Complaint that they will suffer irreparable harm. “Irreparable injury will never be found where the injury complained of is ‘doubtful, eventual

or contingent.'" *Jacksonville Elec. Auth. v. Beemik Builders & Construction, Inc.* 487 So. 2d 372, 373 (Fla. 1st DCA 1986). "Mere general allegations of irreparable injury are not sufficient." *Stoner v. Peninsula Zoning Comm'n,*75 So. 2d 831, 832 (Fla. 1954). "[I]t must appear that there is a reasonable probability, not a bare possibility, that a real injury will occur." *Miller v. MacGill,* 297 So. 2d 573, 575 (Fla. 1st DCA 1974).

Plaintiffs fail to assert that there is a reasonable probability that a real injury will occur. As explained herein, Plaintiffs lack standing to bring the Complaint in the first place as they have not, nor could they suffer any injury as it relates to the Hungerford Property.

2. Plaintiffs do not have a clear right to legal relief.

As set forth herein, Plaintiffs lack standing to bring this action thus have no right to relief, the 1951 Court-imposed Use Restriction that Plaintiffs seek to enforce is illegal and unenforceable, and there is no actual controversy to invoke the Court's jurisdiction pursuant to §86.011, Fla. Stat., all as set forth above. Therefore, Plaintiff cannot establish a clear legal right of relief.

3. Plaintiff Has Not Shown an Inadequate Remedy at Law.

It is well-established that injunctive relief will not lie where there is an adequate remedy of law available. *Meritplan Ins. Co. v. Perez,* 963 So. 2d 771, 776 (Fla. 3d DCA 2007). Here, Plaintiffs have failed to assert any actual damage which could not be remedied by law. At best, Plaintiffs state, in a conclusory manner, that the responsible development of the Hungerford Property is key to its historical preservation efforts for the Hungerford Property, which it does not own, and Eatonville as whole.

4. Granting an injunction is not in the public interest.

Injunctive relief may be denied where the injury to the public outweighs any individual right to relief. *Knox v. Dist. Sch. Bd. Of Brevard,* 821 So.2d 311, 314 (Fla. 5th DCA 2002); *see*

also Dragomirecky v. Town of Ponce Inlet, 882 so 2d 495, 497 (Fla. 5th DCA 2004) ("Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied.")

Plaintiffs failed to plead as to the public interest as to injunctive relief.

Plaintiffs fail to state a cause action for entry of injunctive relief as they fail to allege facts to establish irreparable harm, a clear legal right, an inadequate remedy at law and consideration of the public interest and the Complaint should be dismissed with prejudice.

G. Plaintiffs' Complaint is an Attempt to Intervene in the 2011 Allen Litigation.

As mentioned herein, at no time during the pendency of the 2011 Allen Litigation did Plaintiffs seek to intervene in the matter. Thus, this case appears to be nothing more than Plaintiffs' attempt to end run its failure to intervene in the 2011 Allen Litigation or following the entry of the court's order approving the 2015 Settlement. As such, the Court should consider whether Plaintiffs would be permitted to intervene now, eight years later. Florida recognizes a very narrow exception to allow post-judgment intervention "when to do so would in no way injuriously affect the original litigants and when allowing intervention will further the interests of justice." *Biden* at 636 (*citing Lewis v. Turlington,* 499 So. 2d 905, 907-08 (Fla. 1st DCA 1986).

Biden is similar to this case in that it involved a charitable trust, decades of litigation, stipulations, and judicial modifications of the trust. In 2004, the trustees of the trust at issue filed an action to modify the trust, which resulted in a final judgment modifying the trust including definition of the trust's beneficiaries. While Delaware was not a party to the 2004 litigation, evidence suggested it was well aware of the matter. Eight years after the final judgment, the Delaware Attorney General sought to intervene as an indispensable party and to set aside the final judgment. The First District Court of Appeal found the Delaware Attorney General could not

intervene finding that the original parties to the 2004 litigation would be injured by the intervention and that the interests of justice would not be served. *Id.*

Accordingly, for Plaintiffs to be permitted to intervene in the 2011 Allen Litigation, the court would have to find (1) that intervention would in *no way* injure the original litigants: the School Board, Eatonville and the Hungerford Chapel Trust, and (2) that intervention would serve the interests of justice. As set forth herein, the original litigants to the 2011 Allen Litigation would be injured in the damage that would be caused by the unwinding of the series of events following the 2015 Settlement, including but not limited to the School Board's payment of $1 million to the Hungerford Chapel Trust. Further, Plaintiffs have not alleged any facts that the interests of justice would be served eight years later after entry of the 2011 Allen Litigation court's order approving the 2015 Settlement.

CONCLUSION

Plaintiffs have no standing to bring this action and as such are not entitled to any of the relief they are seeking: The 1951 Court-imposed Use Restriction was released in the 2011 Allen Litigation by the 2011 Joint Stipulation, 2015 Settlement, and the Amended Settlement Agreement, and reiterated by the 2022 Deed Release, thus any controversy surrounding same has been fully resolved. Further, if the 1951 Court-imposed Use Restriction were to be enforced, it would require the School Board to operate a segregated school on the Hungerford Property. The 1951 Court-imposed Use Restriction is illegal and unenforceable. There is no contract for sale for the Hungerford Property, the School Board has not taken any action to approve a contract for sale of the Hungerford Property or issue a request for bids for the Hungerford Property so there is no bona fide, actual, present, or practical need for the Court to declare School Board has failed to comply with its statutory duty under Florida statutes. Plaintiffs failed to avail themselves of the appeal process in the Administrative Procedure Act and are therefore

barred from bringing this action. Finally, Plaintiffs failed to join the Town of Eatonville, the Hungerford Chapel Trust, and Host Dime, LLC, all indispensable parties to this action, failed to attach necessary documents, and failed to plead the necessary requirements for an injunction. Given the facts and law set forth above, this Court should grant the School Board's Motion to Dismiss Plaintiffs' Amended Complaint, with prejudice.

WHEREFORE, Defendant School Board respectfully request that this Court enter an order dismissing the Complaint with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss has been electronically filed with the Orange County Clerk of Court using the E-Filing Portal System and furnished via email and facsimile this 14th day of August, 2023 to Kirsten Andersen, Esq.

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