

**ATTORNEY MEMORANDUM
POINCIANA COMMUNITY DEVELOPMENT DISTRICT**

To: Poinciana Community Development District (“CDD”) Board
of Supervisors

From: Jan A. Carpenter, Esq
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Date: October 16, 2019

RE: Amended Summary of Community Development District Merger Process

INTRODUCTION

We have been asked to provide an update to the Memorandum prepared for the Poinciana and Poinciana West CCDs by Michael C. Eckert and Lindsay C. Whelan of Hopping Green & Sam, dated September 16, 2015. Below is an edited version of the Memorandum, utilizing the previous memorandum as a baseline.

This memorandum provides general overview of the process related to a potential merger between the Poinciana Community Development District and the Poinciana West Community Development District (together, the “Districts”). Currently, community development districts that are at least 2,500 acres in size are established by administrative rule, adopted by the Florida Land and Water Adjudicatory Commission (“FLWAC”); FLWAC is located in Tallahassee, Florida and comprised of the Governor and the Florida Cabinet (collectively, the “Cabinet”). Poinciana CDD was formed by Rule 42AA-1, Florida Administrative Code, effective November 1, 1999, and subsequently expanded to 3240 total acres by subsequent petition and rule, made final on June 18, 2008. Poinciana West was formed by Polk County Ordinance No. 2006-052. A merger between the Districts would involve more than 2,500 acres and therefore, a petition requesting approval of a merger of the Districts should also be filed with, and ultimately adopted by, FLWAC.

Included herein is an overview of the primary documents that would need to be prepared in order to effectuate a merger of the Districts, along with an estimated timeline for the adoption of an administrative rule by FLWAC granting such merger. Additionally, due to the myriad of tasks and activities that must be completed in order to effectuate the approval of a merger between community development districts, a proposed task list outlining a number of potential tasks and considerations relative to such merger is attached to this memorandum as Exhibit A for your reference.

THE MERGER AGREEMENT AND MERGER APPROVAL RESOLUTION

Prior to filing a petition to merge community development districts, Section 190.046(3), *Florida Statutes*, provides that the districts desiring to merge shall enter into a merger agreement and shall provide for the proper allocation of the indebtedness assumed by the merged district and the manner in which such debt shall be retired (hereinafter referred to as the “Merger Agreement”). The Merger Agreement will also generally address all of the issues to be resolved prior to, during, and after the merger, including but not limited to, the determination the district intended to be the “surviving district,” the allocation of board of supervisors’ seats relative to the merged district, the assignment of district contracts, the transfer of district assets, and the

provision of any necessary revisions to rules and policies. Prior to entering into the Merger Agreement, staff will need to have performed significant due diligence regarding the disposition of the Districts assets, including, but not limited to, bond funding, the Districts records and any property owned by the Districts. Section 190.046(4)(b) additionally required that the merger agreement:

1. Require the surviving merged district board to consist of five elected board members.
2. Require each at-large board seat to represent the entire geographic area of the surviving merged district.
3. Ensure that each district to be merged is entitled to elect at least one board member from its former boundary
4. Ensure a fair allocation of board membership to represent the districts being merged; in the case of two districts merging, two board members must be elected from each of the districts and one member shall be elected at-large.
5. Require the election of board members for the surviving merged district to be held at the next general election following the merger, at which time all terms for preexisting board members shall end.

The Merger Agreement will be approved by each of the Districts' Board of Supervisors (the "Boards") at a publicly noticed meeting by the adoption of a resolution (the "Merger Approval Resolution(s)"). The Merger Approval Resolution will also provide for the approval of the merger itself and of the petition requesting the merger (the "Petition"), and will provide for direction to staff to file the Petition with FLWAC. The approval of the Merger Agreement and the Petition, effectuated by the adoption of the Merger Approval Resolutions by each Board, constitutes the consent of the landowners within the respective community development district to the proposed merger of same. Accordingly, upon approval of the Merger Approval Resolution by each of the Boards, no other specific landowner consent of a proposed merger is necessary.

THE MERGER PETITION

As discussed above, in order to merge the Districts, the Boards must file the Petition with FLWAC requesting that it adopt an administrative rule approving such merger. Pursuant to section 190.005(1), *Florida Statutes*, the required elements of the Petition are as follows:

1. Metes and bounds legal description of the external boundary of each of the Districts as they currently exist, and of the external boundary of the proposed merged district.
2. Board consent to the merger (evidenced by approval of the Merger Agreement and the Petition via the adoption of the Merger Approval Resolutions).
3. Designation of the five (5) persons to be members of the proposed merged district's Board of Supervisors.
4. Name of the proposed merged district. (A statement of whether a new district is to be established or whether one of the existing Districts shall be the surviving district).
5. Map of the proposed merged district showing current major trunk water mains and sewer interceptors and outfalls if in existence.

6. Proposed timetable for construction of district services and a good faith, non-binding, summary of estimated costs of constructing same.
7. Designation of the future general distribution, location, and extent of public and private uses proposed for the area within the proposed merged district by the future land use plan element of the effective local government comprehensive plan.
8. Statement of Estimated Regulatory Costs in accordance with Section 120.541, *Florida Statutes*.

Section 190.005(1)(e), *Florida Statutes*, sets forth the criteria that FLWAC shall consider when evaluating the Petition to determine whether to grant or deny same. Specifically, and as discussed in more detail herein, FLWAC shall consider the entire record of the DOAH Hearing (as hereinafter defined) including the transcript thereof, any resolution(s) adopted by Polk County relative to the merger, and the following factors:

1. Whether all statements contained within the Petition have been found to be true and correct.
2. Whether the establishment of the merged district is inconsistent with any applicable element or portion of the state comprehensive plan or of the effective local government comprehensive plan.
3. Whether the area of land within the merged district is of sufficient size, is sufficiently compact, and is sufficiently contiguous to be developable as one functional interrelated community.
4. Whether the merged district is the best alternative available for delivering community development services and facilities to the area that will be served by such district.
5. Whether the community development services and facilities of the merged district will be incompatible with the capacity and uses of existing local and regional community development services and facilities.
6. Whether the area that will be served by the merged district is amenable to separate special-district government.

MERGER PROCESS

Below is an outline of the process by which the District's would be merged. Due to multiple factors, which may be subject to delay, administrative postponement or unpredictability, it is difficult to present an accurate timeline of the merger process. However, the Board can generally expect the process described below to take approximately twelve (12) to eighteen (18) months.

START – STEP 1

Boards' direction to staff that it desires to effectuate a merger between the Districts. Staff will prepare the Merger Approval Resolution, Merger Agreement and Merger Petition for the Boards' consideration. Staff perform certain necessary due diligence, including, but not limited to,

determining whether bondholder consent is required prior to filing the Petition and whether to substitute parties for any pending or current litigation matters.

STEP 2

Agreement between the two board on all terms of the Merger Agreement and Merger Petition, including, but not limited to, the board members who will be elected to the surviving board. Adoption of the Merger Approval Resolutions by both Boards.

STEP 3

Prior to filing the Petition, the Petitioner must submit a \$15,000 filing fee, together with a copy of the Petition, to Polk County.

STEP 4

All Petition exhibits are submitted and twelve (12) original copies of the Petition are filed with FLWAC.

STEP 5

FLWAC determines whether the Petition is complete, typically takes one (1) to two (2) months. Once the Petition is determined to be complete, FLWAC will forward the Petition to the Division of Administrative Hearings (“DOAH”) with a written certification of completeness and a written request that a mandatory local public hearing (the “DOAH Hearing”) be held before an Administrative Law Judge (“ALJ”). FLWAC will also forward the Petition to the Department of Economic Opportunity and the appropriate regional planning council for their review.

Additionally, upon the Petition being deemed to be complete, FLWAC typically assigns the Petition an identification number and causes to be published in the Florida Administrative Register a Notice of Receipt of Petition.

STEP 6

The DOAH Hearing will be scheduled. The date of the DOAH Hearing is dependent on the schedule of the assigned ALJ. Additionally, Polk County is entitled to hold an optional public hearing (the “Optional County Hearing”) to consider the Petition and may by resolution express its support or objection to the granting of the Petition by FLWAC. The Optional County Hearing must be concluded within forty-five (45) days after the date of filing of the Petition; provided, however, that the time limits for holding the Optional County Hearing may be extended if requested by the Districts and agreed to by Polk County.

STEP 7

The Districts publish the required Notice of Local Public Hearing for the DOAH Hearing. This notice is required to be published at least once a week for four (4) successive weeks immediately prior to the hearing in a newspaper of general paid circulation within the county, and shall include the time and place of the hearing, a description of area to be included in the merged district, a map of the area within the merged district, and any other relevant information as requested by FLWAC.

STEP 8

In preparation for the DOAH Hearing, written testimony supporting the merger is pre- filed with DOAH. Pre-filed testimony is generally submitted by the District Chairs, District Manager and/or Financial Advisor, and District Engineer. Each witness must be available at the DOAH Hearing for direct and cross-examination as described below.

STEP 9

The assigned ALJ will conduct the DOAH Hearing on the Petition in conformance with the applicable requirements and procedures of Chapter 120, *Florida Statutes* (i.e. Florida's Administrative Procedures Act). All affected units of general-purpose local government (i.e. Polk County) and the general public are given an opportunity to appear at the hearing and to present evidence and argument on all issues involved. At this time, we will present evidence supporting the merger, and parties are permitted to examine and cross-examine or question witnesses.

STEP 10

Written statements in support of or in opposition to the merger must be filed within ten (10) days after the DOAH Hearing. The parties may also file proposed findings of fact and conclusions of law for the ALJ to consider.

STEP 11

The ALJ will prepare a written report of his or her findings and conclusions and forward the same, along with the record, to FLWAC. Also on about this date, the date for the FLWAC rulemaking hearing (the "FLWAC Hearing") will be set. The FLWAC Hearing is usually held during a regular Cabinet meeting, and the actual date will depend on the Cabinet's meeting schedule.

STEP 12

About ten (10) days prior to the upcoming Cabinet meeting, a meeting of the Cabinet Aides will be held to discuss recommending approval of the Notice of Rule Development and Notice of Intended Action/Rule Adoption for publication, which approval will occur at the upcoming Cabinet meeting.

STEP 13

A meeting of the Cabinet will be held to, among other things, authorize the publication of the Notice for Rule Development and Notice of Intended Action/Rule Adoption relative to the merger.

STEP 14

No later than twenty-nine (29) days before the FLWAC Hearing, the Notice of Rule Development will be published in the Florida Administrative Register. Additionally, no later than twenty-eight (28) days before the FLWAC Hearing, the Notice of Intended Action/Rule Adoption will be published in the Florida Administrative Register. Also about this time, and no later than twenty-one (21) days before the FLWAC Hearing, FLWAC will file a copy of the proposed rule approving the merger (the "Rule"), along with other required documentation, with the Florida

Administrative Procedures Committee.

Affected persons may request an opportunity to present evidence and argument relative to the proposed merger if such request is received by FLWAC within twenty-one (21) days of the date of publication of the Notice of Intended Action/Rule Adoption. All material pertinent to the proposed merger that is submitted to FLWAC by such persons within the twenty-one (21) day period following the publication of the Notice of Intended Action/Rule Adoption will be considered by FLWAC and made a part of the record of the rule-making proceeding.

Additionally, if requested in writing by an affected person, FLWAC will likely be required to hold a rule development workshop; provided, however, that a workshop will not be required if FLWAC explains in writing why a workshop is unnecessary. However, in the event that a workshop is required to be held, the Notice of Rule Development Workshop shall be published in the Florida Administrative Register no less than fourteen (14) days prior to the date of any such workshop.

STEP 15

FLWAC must give notice of the Cabinet meeting wherein the FLWAC Hearing will be conducted by publication in the Florida Administrative Register and on its website not less than seven (7) days prior to the meeting. Additionally, the Cabinet Aides will also meet approximately ten (10) days prior to the meeting to review the agenda for same.

STEP 16

On about this date, FLWAC will conduct the FLWAC Hearing wherein it will consider the factors set forth in Section 190.005(1)(e), *Florida Statutes*, the entire record of the DOAH Hearing, the transcript of the DOAH Hearing, and any resolutions adopted by Polk County regarding the merger in making its determination to grant or deny the Petition, thereby adopting the proposed Rule, as outlined in more detail on Page 3 of this memorandum.

STEP 17

The adopted Rule is filed with the Secretary of State; provided, however, that such rule may not be filed less than twenty-eight (28) days or more than ninety (90) days after the Notice of Intended Action/Rule Adoption, or until fourteen (14) days after adoption.

STEP 18

The Rule will be effective, and the Districts will actually become merged, twenty (20) days after being filed with the Department of State, or upon a later date as specified in the Petition and the Notice of Intended Action/Rule Adoption. It may be advantageous to provide for an effective date that is approximately sixty (60) days after adoption of the Rule so that the Districts can take all actions required under the Merger Agreement post-adoption, but pre-effective date of the Rule.

PROPOSED TASK LIST¹ FOR MERGER OF COMMUNITY DEVELOPMENT DISTRICTS

TASK	STATUS
INTRODUCTORY MATTERS	
<i>What is the Nature of the request?</i>	
Determine whether to include or exclude any additional lands, and how to characterize that addition or exclusion.	
<i>Description of the New/Surviving District</i>	
Identify the name of the new/surviving District.	
Prepare a general location map showing surrounding roads and landmarks with the proposed site marked.	
Prepare a metes and bounds description of the external boundaries of the new/surviving District. Any real property within the external boundaries of the new/surviving District which is to be excluded from the new/surviving District must be specifically described, and the last known address of all owners of such real property must be listed.	
Prepare a map of the new/surviving District showing current major trunk water mains and sewer interceptors and outfalls if in existence.	
<i>Organizational Matters</i>	
Identify the board members of the new/surviving District.	
Identify the schedule applicable to the transition of the new/surviving District Board.	
<i>Plans for the New/Surviving District</i>	
Prepare a description of the type of facilities the new/surviving District intends to finance, construct, acquire and/or install, as well as the anticipated owner and entity responsible for maintenance. Include a description of the estimated costs and timetable of constructing the infrastructure serving the lands within the new/surviving District. The estimated costs and timetable do <u>not</u> bind the new/surviving District and do not have to represent anything more than a good faith estimate.	
Designate the future general distribution, location and extent of the public and private land uses proposed for the new/surviving District by the future land use plan element of the local comprehensive plan.	

¹This exhibit is not meant to reflect an exhaustive list of all tasks and considerations relative to a potential merger between the Poinciana and Poinciana West Community Development Districts. Accordingly, there are likely to be additional issues and/or tasks that arise throughout the course of the merger process.

Prepare a statement of estimated regulatory costs in accordance with the requirements of Section 120.541 F.S.	
<i>Effective Date of the Merger</i>	
The effective date of the merger may need to be sixty (60) days after the adoption of the Rule. Such date shall be listed in the Petition and identified in the Notice of Intended Action/Rule Adoption.	
ASSETS	
<i>Real Property</i>	
Prepare a list of all rights in real property held by the prior Districts. Analyze the process for the transfer of real property from the prior Districts to the new/surviving District.	
Analyze how merger will affect the existing plats.	
Address how merger will affect the existing HOA documents, if any, or developer disclosures.	
Identify any existing permits and address what action would need to be taken with the regulatory agencies.	
<i>Other Property</i>	
Prepare a list of all other property held by the prior Districts. Analyze the process for the transfer of other property.	
ASSESSMENTS	
<i>Assessments</i>	
Analyze enforceability of prior assessment resolutions and liens and need for new or modified resolutions, liens or notices.	
Analyze/draft the methodology for the operations and maintenance assessments.	
Analyze whether a change in the methodology for the operations and maintenance assessments would affect any assessment resolutions and existing liens.	
Analyze whether there are any assets or outstanding liabilities that would need to be addressed as part of that methodology (e.g., should reserves for the upkeep of infrastructure be kept separate for each prior District or should they be lumped together in some other manner?).	
CONTRACTS, JUDGMENTS & DEBTS	
<i>Construction Contracts</i>	
Prepare list of existing construction contracts, and analyze each one (e.g., What's the status? How will they be affected? What are the assignment provisions? Are there any unresolved disputes? What happens with any payment and performance bonds?).	
<i>Interlocal Agreements</i>	
Analyze interlocal agreements with the County.	

<i>Collection Agreements</i>	
Analyze the impact of the collection agreements with the tax collector and property appraiser in the County, and include assignments, if feasible.	
<i>Other Contracts and Obligations</i>	
Prepare list of all other contracts and obligations of the prior Districts (e.g., maintenance, professional services, etc.), and analyze them (e.g., What's the status? How will they be affected? What are the assignment provisions? Are there any unresolved disputes? Any need to be rebid?).	
BONDS	
Inventory and analyze status of bond documents (e.g., continuing disclosure, acquisition, true-up, bonds, etc.).	
Analyze whether bondholder consent and/or notice of the action will be required.	
Analyze the status of the validation judgments for existing bonds.	
Analyze validation process for new bonds outside the scope of the existing validation judgments.	
Preparation of Bond Counsel Opinion Letter required by FLWAC.	
INSURANCE	
Analyze how to ensure that the prior Districts' property and liability insurance coverage doesn't lapse.	
ACCOUNTING AND AUDITS	
Analyze applicable accounting and audit issues, including whether a transition plan is necessary and how the effective date of the merger may affect the prior Districts' audits and the new/surviving District's audit.	
BUDGET	
Analyze the effect of the merger on the prior Districts' general fund budgets, debt service budgets, and any other applicable budgets, taking into consideration that the effective date of the merger could occur at any time during the year. One approach would be to leave intact the prior Districts' budgets (subject to any applicable amendments) and funds, until the new/surviving District goes through its first budget cycle.	
RULES & POLICIES	
Inventory and analyze whether any adopted rules and policies are to be terminated upon merger or continued forward, and whether there is any need to re-adopt them.	

ESTIMATED ADMINISTRATIVE SAVINGS* RELATIVE TO CDD MERGER

	Poinciana	Poinciana West	Merged District	
	FY 2020 Budget	FY 2020 Budget	Estimated Merged District Budget *	Estimated Savings
Supervisors Fees	\$12,000	\$6,000	\$12,000	\$6,000
FICA Expense	\$918	\$459	\$918	\$459
Engineering	\$18,000	\$15,000	\$25,000	\$8,000
Attorney	\$30,000	\$30,000	\$50,000	\$10,000
Arbitrage	\$450	\$450	\$900	\$0
Dissemination	\$5,000	\$5,500	\$10,500	\$0
Annual Audit	\$3,590	\$3,415	\$5,000	\$2,005
Trustee Fees	\$7,000	\$7,050	\$14,050	\$0
Assessment Administration	\$5,000	\$5,000	\$7,500	\$2,500
Management Fees	\$45,000	\$45,000	\$60,000	\$30,000
Information Technology	\$2,700	\$1,500	\$2,700	\$1,500
Telephone	\$100	\$100	\$100	\$100
Postage	\$2,600	\$1,500	\$2,600	\$1,500
Printing & Binding	\$2,000	\$750	\$2,000	\$750
Insurance	\$15,422	\$10,883	\$20,000	\$6,305
Legal Advertising	\$3,500	\$2,000	\$3,500	\$2,000
Other Current Charges	\$550	\$800	\$600	\$750
Office Supplies	\$400	\$200	\$400	\$200
Property appraiser	\$7,000	\$3,100	\$10,100	\$0
Dues, Licenses & Subscriptions	\$175	\$175	\$175	\$175
TOTALS:	\$161,405	\$138,882	\$228,043	\$72,244

* NOTE: Field budgets will not be affected since the scope of work will not change.

Estimated Total Administrative Savings Per Year	\$72,244
Estimated Fees and Expenses Relative to Merger	\$100,000
Estimated Years Until "Return on Investment"	1.38

Revised 10/09/19