

RESOLUTION 24-133

A RESOLUTION VACATING BEACH ACCESS POINT #42 LOCATED OVER REAL PROPERTY OWNED BY CAPTIVA VILLAS DEVELOPMENT LLC, GENERALLY LOCATED AT 200 ESTERO BOULEVARD, FORT MYERS BEACH; ACCEPTING AND APPROVING A COMPARABLE REPLACEMENT EASEMENT TO BE LOCATED ON REAL PROPERTY OWNED BY JABO, LLC, SUBJECT TO TERMS AND CONDITIONS AS CONTAINED IN A SECOND AMENDED AND RESTATED PEDESTRIAN RELOCATION AND VIEW EASEMENT AGREEMENT; DIRECTING THE TOWN CLERK TO RECORD THIS RESOLUTION; AUTHORIZING THE MAYOR TO SIGN ALL NEEDED DOCUMENTS; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the property owner, Captiva Villas Development LLC, (“Captiva”) has requested vacation of a pedestrian easement commonly referred to as Beach Access No. 42 located on its property at 200 Estero Boulevard, Fort Myers Beach; and

WHEREAS, JABO, LLC owns property directly to the south of Beach Access No. 42 on Captiva’s property, and has offered to voluntarily have the vacated easement relocated to its property to ensure continued public access to the beach and as a condition of approval of its special exception application; and

WHEREAS, if the easement is relocated to JABO, LLC’s property, the new beach access easement would extend from the trolley stop on Estero Boulevard in front of JABO, LLC’s property, through its pool deck area, to the beach, providing a legal right of access to the beach by the public as is currently provided by Beach Access No. 42. Exhibit A shows the approximate location of Beach Access No. 42 and the proposed new beach access easement; and

WHEREAS, relocation of Beach Access No. 42 to Jabo LLC’s property would also provide the public 1) with a right to use JABO LLC’s private restrooms, which are currently not available or accessible from Beach Access No. 42; and 2) eliminate the need to walk from the existing trolley stop to Beach Access No. 42; and

WHEREAS, the new beach access easement would be open from 8:00 AM to 11:00 PM to ensure the safety of the public; and

WHEREAS, Beach Access No 42 was granted to Lee County in 1985 by the then property owner and subsequently also granted to the Town of Fort Myers Beach; and

WHEREAS, Section 2-539 of the Fort Myers Beach Code of Ordinances provides guidelines for the vacation of streets, alleys, easements, or subdivision plats located in the Town; and

WHEREAS, in support of its application, Captiva has provided a copy of a title report/attorney opinion letter and documentation from the Tax Collector’s database to establish it is the owner of the property where Beach Access No. 42 is currently located: and

WHEREAS, the Town has no utilities under Beach Access No. 42; and letters of no objection have been obtained from private utility companies; and agrees to vacate the utility and drainage easements; and

WHEREAS, a public hearing was held before the Local Planning Agency (“LPA”) and after providing the applicant, staff, and the public an opportunity to present testimony and evidence, the LPA voted 4-3 finding the request to be consistent with the Town of Fort Myers Beach Comprehensive Plan and recommending approval of the vacation request, subject to final review of the proposed replacement access easement by the Town Attorney and additional signage directing the public to the location of the new access easement; and

WHEREAS, notice to the current property owners within 500 feet was provided more than 15 days prior to the hearing before the Town Council on June 17, 2024 and the Town Clerk has received an Affidavit of Mailing as required by Section 2-538(b); and

WHEREAS, adoption of this Resolution is in the best interest of the Town.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF FORT MYERS BEACH, FLORIDA, AS FOLLOWS:

Section 1. The above recitals are true, correct, incorporated herein by this reference, and adopted as the legislative and administrative findings of the Town Council.

Section 2. The Town Council hereby approves the vacation of an easement referred to as Beach Access No. 42, as more particularly described in Exhibit A, finding that the criteria in Section 2-539 of the Fort Myers Beach Code of Ordinances is satisfied. More specifically, that:

1. There is no future likelihood that the easement will be needed by the Town or otherwise conflict with the Town’s future road or infrastructure management; and
2. the convenient access of property owners on adjoining street rights-of-way or other lands will not be adversely affected; and
3. the applicant has provided comparable public access at no cost to the Town for the public to access the beach;

Section 3. The Town Council hereby accepts and approves an easement comparable to Beach Access No. 42, in the location shown in Exhibit A, subject to the terms and conditions contained in that certain Second Amended and Restated Pedestrian Relocation and View Easement Agreement attached as Exhibit B.

Section 4. The Town Clerk is directed to record this Resolution and its exhibits in the official public records of Lee County, Florida upon adoption and subsequent to recording of a subordination(s) approved by the Town Attorney of any mortgages on the property where the replacement easement is located.

Section 5. The Mayor is authorized to sign any and all documents needed to implement this Resolution.

Section 6. This Resolution shall take effect immediately upon adoption.

The foregoing Resolution was adopted by the Town Council upon a motion by Vice Mayor Atterholt and seconded by member Safford and upon being put to roll call vote, the result was as follows:

| | |
|-------------------------------|-----------|
| Dan Allers, Mayor | Abstained |
| Jim Atterholt, Vice Mayor | Aye |
| John R. King, Council Member | Aye |
| Scott Safford, Council Member | Aye |
| Karen Woodson, Council Member | Aye |

ADOPTED this 17th day of June 2024 by the Town Council of the Town of Fort Myers Beach, Florida.

TOWN OF FORT MYERS BEACH


Dan Allers (Jul 16, 2024 13:46 EDT)

Dan Allers, Mayor

ATTEST:



Amy Baker, Town Clerk

APPROVED AS TO FORM AND LEGAL SUFFICIENCY FOR THE USE AND RELIANCE OF THE TOWN OF FORT MYERS BEACH SOLELY:


Nancy Stuparich (Jul 16, 2024 13:04 EDT)

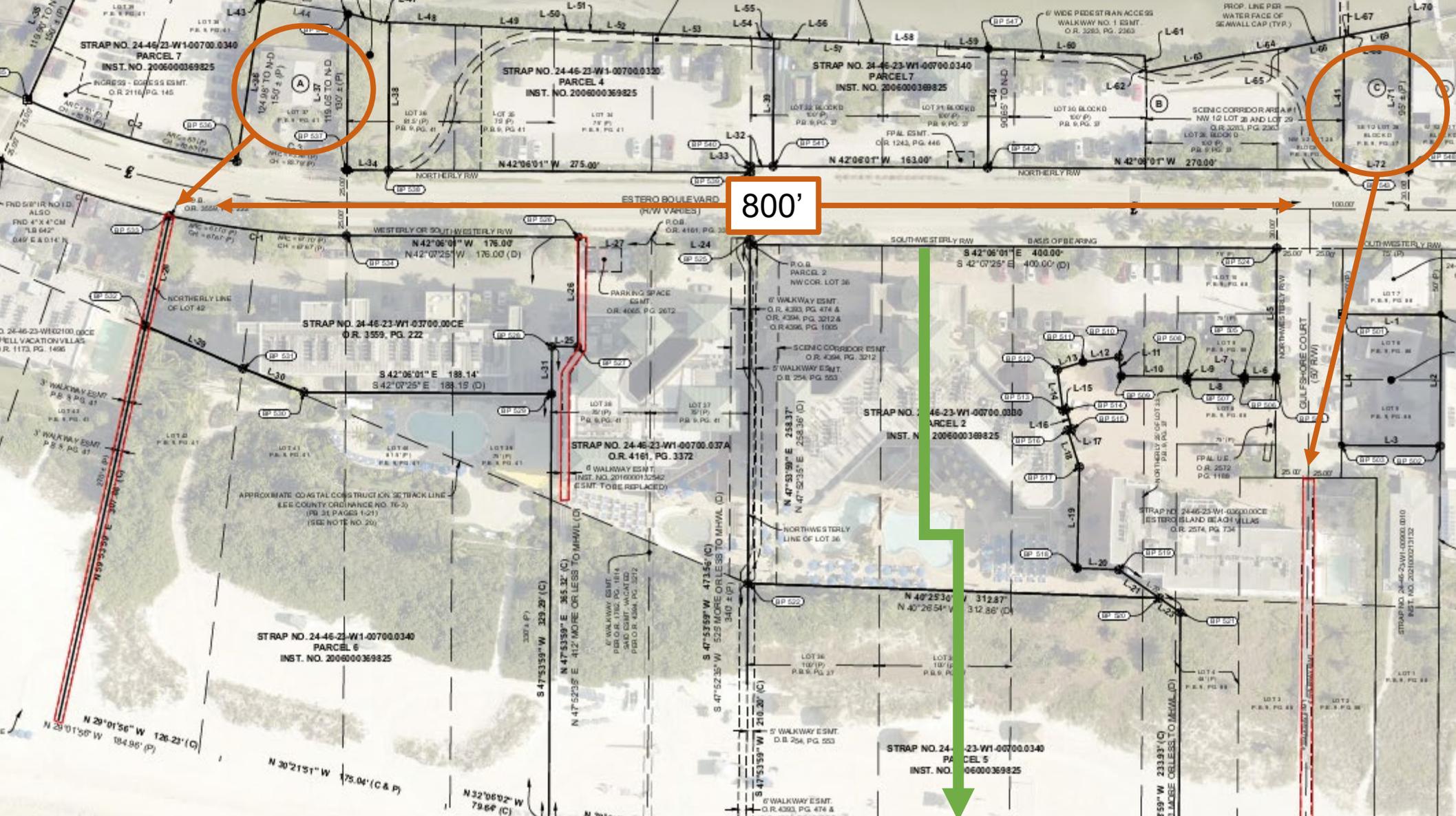
Vose Law Firm, Town Attorney

This Resolution was filed in the Office of the Town Clerk on this 16th day of July 2024.

Attachments:

Exhibit A- Location Map of Easement

Exhibit B- Second Amended and Restated Pedestrian Relocation and View Easement Agreement



This Instrument Prepared By:

**ROETZEL & ANDRESS, LPA
2320 First Street, Suite 1000
Fort Myers, Florida 33901**

**SECOND AMENDED AND RESTATED EASEMENT
RELOCATION VIEW CORRIDOR AGREEMENT**

This Second Amended and Restated Easement Relocation View Corridor Agreement (the "Agreement") is made by and between Captiva Villas Development, LLC, a Delaware limited liability company ("CVD"), whose address is 19354 Watermark Drive Suite 201, Cornelius, NC 28031, JABO, LLC, a Delaware limited liability company ("JABO"), whose address is 19354 Watermark Drive Suite 201, Cornelius, NC 28031, and the Town of Fort Myers Beach, a Florida municipality (the "Town"), whose address is 2731 Oak Street, Fort Myers Beach, FL 33931.

WITNESSETH:

WHEREAS, CVD, JABO, and the Town (collectively referred to hereinafter as the "Parties") are parties to that certain Amended and Restated Easement Relocation View Corridor Agreement, recorded as Instrument Number 2016000132542 in the Public Records of Lee County, Florida ("Existing Agreement");

WHEREAS, the Existing Agreement created, on property owned by CVD, (1) a certain walkway easement within the 2014 New Easement Area described on Exhibit A to the Existing Agreement (hereafter referred to as the "Existing Walkway Easement") and (2) a certain thirty six foot (36') wide view corridor over an area described on Exhibit B to the Existing Agreement (hereafter referred to as the "Existing View Corridor") and contained certain terms related thereto; and

WHEREAS, CVD and JABO have requested that the Town agree to terminate and relocate the Existing Walkway Easement to the easement area described in Exhibit A attached hereto ("2024 New Easement Area"), and Town has agreed to such relocation of the Existing Walkway Easement, all in accordance with the terms and conditions hereof; and

WHEREAS, CVD, JABO, and the Town desire to amend and restate the Existing Agreement to (1) provide for the relocation of the Existing Walkway Easement to the 2024 New Easement Area, (2) preserve and restate the Existing View Corridor, originally established in that certain Easement Relocation View Corridor Agreement, recorded in Official Records Book Page 4394, Page 3212 *et seq.* of the Public Records of Lee County, Florida, and carried forward in the

Existing Agreement, and (3) conform such easements and agreements to the current intent and desires of the Parties; and

WHEREAS, the Parties acknowledge that this Agreement is being voluntarily entered into and its approval shall be evidence of satisfaction of a condition of approval of a special exception approved by the Fort Myers Beach Town Council in Resolution 24-133.

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties hereto, CVD, JABO, and Town agree as follows:

1. **Incorporation by Reference.** The foregoing WHEREAS provisions are incorporated by reference as if stated herein in their entirety as evidence of the intent of the Parties.

2. **Grant of Pedestrian Easement.** JABO hereby grants and conveys to Town a perpetual, non-exclusive walkway easement (“2024 New Easement”) on, over and across the 2024 New Easement Area described in Exhibit A attached hereto for the purposes of providing the public with pedestrian (only) ingress and egress to and from Estero Boulevard and the Gulf of Mexico between the hours of 8:00 AM and 11:00 PM. JABO shall construct and improve the walkway within the 2024 New Easement Area; provided, however, that JABO will not construct any structures or facilities within the 2024 New Easement Area. JABO further will, in perpetuity, maintain the walkway in good order and repair, at JABO’s sole cost and expense. The 2024 New Easement only allows use by pedestrians of the 2024 New Easement Area consistent with rights of the public to use public areas; however, such users shall not be permitted to use motorcycles, bicycles, skates, skateboards, scooters or other motorized or non-motorized aids to or forms of transportation within the 2024 New Easement Area. JABO agrees to not impose any additional restrictions upon the use of the 2024 New Easement Area without the express approval of the Town, which shall not be unreasonably withheld. As a benefit to the public, JABO agrees to allow reasonable use of its adjacent restroom facilities during the time the public has access to the 2024 New Easement Area. Furthermore, as an additional public benefit, JABO agrees to use its best efforts to work with the entity responsible for providing Town beach access signage to request that such entity erect signage identifying the 2024 New Easement Area. The obligations under this Section apply only to JABO, as it is the sole owner of the 2024 New Easement Area, together with JABO’s successors and assigns.

3. **Maintenance of Pedestrian Easement.** JABO will, in perpetuity, maintain the walkway in good order and repair, at JABO’s sole cost and expense. If JABO does not repair, replace, or restore such property within thirty (30) days following written notice by the Town that such repair, replacement, or restoration is required, then the Town may proceed to make such repair, replacement, or restoration on JABO’s behalf; provided, however, that, except in the event of emergency, if the repair, replacement or restoration is of a nature that cannot be reasonably obtained within such 30-day period, JABO shall have such additional period of time to cure such default as is reasonably required so long as JABO commences its cure within such 30-day period and diligently pursues the same to completion, and JABO shall reimburse the Town of all costs incurred by the Town within thirty (30) business days of demand from the Town.

4. **Grant of View Easement.** To the extent applicable based on ownership, CVD and JABO (hereinafter collectively referred to in this paragraph as the “Owner”) hereby grant and convey a non-exclusive, perpetual view corridor easement (“View Corridor”) on, over and across the thirty-six (36) feet wide area of land described in Exhibit B attached hereto to preserve a view of the Gulf of Mexico from Estero Boulevard, all as more particularly described in the Town of Fort Myers Beach Resolution 01-26 and ADD2003-00086 (the “View Corridor Plan”), copies of which are attached hereto as Exhibit C and Exhibit D respectively. As set forth in the View Corridor Plan, Owner has constructed and improved the View Corridor and Owner will not construct any structures or facilities within the View Corridor. Owner further will, in perpetuity, maintain the View Corridor in good order and repair, at Owner’s sole cost and expense. If Owner fails to do so, the Town may perform such maintenance and recover the reasonable cost thereof from Owner. Within the View Corridor, parking is allowed, in substantial conformance with the View Corridor Plan.

5. **Termination of the 2014 Easement.** This Agreement amends and restates in its entirety the Existing Agreement. Notwithstanding, and without limitation, the Existing Walkway Easement as defined in the Existing Agreement, is hereby terminated subject to compliance with the vacation procedure in the Town of Fort Myers Beach Code of Ordinances and any applicable Florida law, and CVD shall own the 2014 New Easement Area free and clear of any walkway easement rights in favor of the Town.

6. **Covenant Running with the Land.** The restrictions and easements provided for herein shall run with the land in perpetuity.

7. **Effect on Mortgages and Deeds of Trust.** All mortgages, deeds of trust and other monetary liens upon all or any part of the 2024 New Easement Area that either come into existence or are recorded in the place for the recording of such liens after the date of this Agreement will be subject to and subordinate to this Agreement.

8. **Managerial Control Retained by JABO.** Nothing in this Agreement shall be construed as giving rise to any right or ability of the Town to exercise physical or managerial control over day-to-day operations in the 2024 New Easement Area, or any of JABO’s activities on its property adjacent to the 2024 New Easement Area, or otherwise to become an operator with respect to the 2024 New Easement Area.

9. **Compliance with Law.** Notwithstanding provisions hereof to the contrary, if any, JABO shall be solely responsible for complying with all federal, state and local laws and regulations in connection with the conduct of any use of the 2024 New Easement Area, and JABO shall be solely responsible for obtaining any required permits and approvals needed for construction and operation of the 2024 New Easement Area from the relevant governmental authorities in connection therewith.

10. **Notices.** All notices to Town required of CVD and JABO under the terms of this Agreement, and all requests for the approval by Town, shall be in writing and shall be deemed to have been given when either served personally or when sent by certified mail, with return receipt requested and postage prepaid, addressed to Town at the address stated on the first page of this

Agreement or such other address provided by notice from Town, CVD or JABO to the other for this purpose.

11. **Governing Law.** This Agreement shall be governed by and construed under the law of the State of Florida. The jurisdiction and venue of any and all claims, controversies or disputes arising out of or relating to this Agreement shall be in the State of Florida Twentieth Judicial District, in Lee County, Florida or in Federal District Court, Middle District of Florida, Fort Myers Division. If litigation ensues regarding this Agreement, each party hereto shall bear its own attorneys' fees and costs.

12. **Compliance/Consistency with Section 768.28, Fla. Stat.** Any term or condition contained herein by the Town shall not be construed as a waiver of the Town's sovereign immunity and shall be limited to liability limits consistent with the requirements of Section 768.28, Fla. Stat. and subject to the procedural requirements set forth therein. Any purported indemnification by Town in the Agreement in derogation hereof shall be void and of no force or effect.

13. **Indemnification.** JABO shall defend, indemnify, and hold the Town harmless from all claims, losses, liabilities, actions, liens, proceedings and costs, and any accident, injury, loss or damage whatsoever occurring to any person or to the property of any person arising out of or resulting from the public's use of the 2024 New Easement Area, excluding only the sole negligence of the Town. This provision shall also pertain to any claims brought against the Town by any of JABO's guests or anyone directly or indirectly employed by JABO. JABO's obligations under this paragraph shall not be limited by a lack of sufficient insurance protection.

14. **Insurance.** JABO shall have in effect liability insurance. Insurance certificates shall be in a form, and underwritten by an insurance company(s), licensed in the State of Florida. Each Certificate of Insurance shall specifically include all of the following: 1) The name and type of policy and coverages provided; 2) the amount or limit applicable to each coverage provided and the deductible amount, if any, applicable to each type of insurance coverage being provided; 3) the date of expiration of coverage; 4) the designation of the Town as an additional insured; and 5) a cancellation notice to read as follows:

Cancellation - Should any of the above described policies be cancelled before the expiration date thereof, the issuing company will endeavor to mail 30 days written notice to the Certificate Holder named.

JABO shall obtain and maintain commercial general liability coverage on a form no more restrictive than the last edition of the Commercial General Liability Policy filed by the Insurance Services Office and must include the following: 1) Minimum limits of \$3,000,000 per occurrence; 2) \$3,000,000 aggregate for Bodily Injury Liability; and 3) a minimum limit of \$3,000,000 for Property Damage Liability or a minimum combined single limit of \$3,000,000.

[Signatures on following pages.]

IN WITNESS WHEREOF, the Parties have signed this Second Amended and Restated Easement Relocation View Corridor Agreement this 17th day of June, 2024.

“Town”

Approved as to form:

Town of Fort Myers Beach

By: Nancy Stewart
Vose Law Firm, LLP, Town Attorneys

By: Dan Allers
Dan Allers, Mayor

Attest:
By: Amy Baker
Amy Baker, Town Clerk

STATE OF Florida)
COUNTY OF Lee) §:

The foregoing instrument was acknowledged before me by means of physical presence or online notarization, this 12 day of July, 2024, by Dan Allers, as Mayor of the Town of Fort Myers Beach, on behalf of the Town, who is personally known to me OR provided _____ [type of identification] as identification.

(Notary Seal / Stamp)



Amy J Baker
Notary Public – State of Florida
Print Name: Amy J. Baker
Serial No: HH241709
My Commission Expires: June 12, 2026

Witnesses (as to Captiva Villas):

Kat Kuza
Print Name: Katja Kuza
Address: 9815 Willow Leaf Lane
Cornelius, NC 28031

Shelley Cooper
Print Name: Shelley Cooper
Address: 115 E Mint Ave.
Mooresville, NC 28117

STATE OF North Carolina
COUNTY OF Mecklenburg) §:

The foregoing instrument was acknowledged before me by means of physical presence or online notarization, this 9 day of July, 2024, by Robert W. Boykin, as Manager of New Pink Shell, LLC, a Delaware limited liability company, sole member of Captiva Villas Development, LLC, a Delaware limited liability company, on behalf of said companies, who is personally known to me OR provided _____ [type of identification] as identification.

(Notary Seal / Stamp)

BRANDY GETTLES
NOTARY PUBLIC
Cabarrus County
North Carolina
My Commission Expires September 18, 2027

“CVD”

CAPTIVA VILLAS DEVELOPMENT, LLC,
a Delaware limited liability company

By: New Pink Shell, LLC, a Delaware
limited liability company, Sole Member

By: Robert W. Boykin
Robert W. Boykin, Manager

Witnesses (as to JABO, LLC):

Katja Kunz
Print Name: Katja Kunz
Address: 9815 Willow Leaf Lane
Coinjia, NC 28031

Shelley Guerin
Print Name: Shelley Guerin
Address: 115 E Mint Ave.
Mocksville, NC 28117

STATE OF North Carolina)
COUNTY OF Mecklenburg) §:

The foregoing instrument was acknowledged before me by means of physical presence or online notarization, this 9 day of JULY, 2024, by Robert W. Boykin, as Managing Member of JABO, LLC, a Delaware limited liability company, on behalf of such company, who is personally known to me OR provided _____ [type of identification] as identification.

(Notary Seal / Stamp)

BRANDY GETTLES
NOTARY PUBLIC
Cabarrus County
North Carolina
My Commission Expires September 16, 2027

"JABO"

JABO, LLC, a Delaware limited liability Company

By: Robert W. Boykin
Robert W. Boykin, Managing Member

Brandy Gettles
Notary Public - State of North Carolina
Print Name: Brandy Gettles
Serial No: _____
My Commission Expires: 09/16/2027

20350456_4