

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

**CONCERNED CITIZENS FOR** )  
**HISTORIC PRESERVATION, INC.,** )  
*Plaintiff,* )  
*vs.* )  
**CITY OF WINTER PARK, a** )  
**Florida municipal corporation,** )  
**and** )  
**520 N. INTERLACHEN, L.L.C., a** )  
**Florida limited liability company,** )  
*Defendants.* )

**Case Number 48-2013-CA-012122**  
**Division 33 – Judge Robert J. Egan**

**AMENDED COMPLAINT FOR  
DECLARATORY JUDGMENT AND  
MANDATORY INJUNCTION**

Plaintiff Concerned Citizens for Historic Preservation, Inc. sues Defendants City of Winter Park and 520 N. Interlachen, L.L.C. for a judgment declaring that an action of the City rescinding the designation on a piece of property in the City as a historic site was unlawful, and an injunction prohibiting the Defendants from engaging in any act furthering the alteration, demolition or other modification of the subject property, or in the alternative, commanding the restoration of the property to the condition it was in at the time the designation was removed.

**PARTIES**

1. Plaintiff Concerned Citizens for Historic Preservation, Inc. (hereinafter “Concerned Citizens”) is a Florida non-profit corporation that does business and operates in Winter Park, Orange County, Florida.
2. Members, officers and directors of Concerned Citizens are residents and taxpayers of Winter Park.
3. Concerned Citizens is an aggrieved party made up of members that are adversely affected by the actions of the City and 520 N. Interlachen, and have suffered and will suffer an adverse effect to their interests that are protected or furthered by Chapter 58, Article III, Winter Park, Florida, Ordinances (2013) (hereinafter referred to as “Historic Preservation Ordinance”).
4. The members, officers, and directors of Concerned Citizens own properties and operate businesses adjacent to and nearby the property whose historic site designation was illegally removed by the City, at the indirect demand of 520 N. Interlachen.<sup>1</sup>

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<sup>1</sup> The demand was made by SunTrust Bank on behalf of a prospective buyer.

5. The stated purpose for which Concerned Citizens was organized is “to support and encourage historic preservation in the City of Winter Park, Florida and beyond;” as a result, Concerned Citizens’ interests will be materially and adversely affected even greater than the general interest in the community, which will also suffer as a result of the actions of the Defendants.

6. The City of Winter Park (hereinafter “The City” or “Winter Park”) is a municipal corporation located in Orange County, Florida.

7. 520 N. Interlachen is a Florida limited liability company, with its principal address at 1806 Hammerlin Avenue, Winter Park, Florida.

#### **VENUE**

8. Winter Park is located in Orange County, within the Ninth Judicial Circuit of Florida.

9. 520 N. Interlachen has its principal address in Orange County, within the Ninth Judicial Circuit of Florida.

10. Venue is proper in the Ninth Judicial Circuit, in and for Orange County, Florida.

#### **JURISDICTION**

11. This Court has statutory authority to enter a judgment declaring the City’s right to remove a historic site designation in violation of its own Code of Ordinances pursuant to § 86.011(1) and (2), Fla. Stat.

12. This Court has the statutory authority to issue an injunction prohibiting the City and 520 N. Interlachen from taking any action furthering the alteration, demolition or other modification of property which has been unlawfully removed from the Winter Park Register of Historic Places pursuant to § 26.012(3), Fla. Stat.

#### **FACTS**

13. The subject property is located at 520 N. Interlachen Avenue on the very attractive and historic lakefront on the southeast side of Lake Osceola in Winter Park, Florida.

14. The property, known as the James Capen House (hereinafter “the House” or “the Capen House”, is associated with the very early development of Winter Park.

15. In 1885, Oliver Chapman and Loring Chase, founders of Winter Park, sold the land for the Capen House to James Capen's mother, Mrs. L. W. Capen.
16. The Capen House was originally constructed for James S. Capen's family.
17. The House was built by Royal Rollin Thayer, a prominent carpenter, contractor, and founding father of Winter Park.
18. The original construction of the House was a Folk Victorian style two-story wood frame building.<sup>2</sup>
19. James S. Capen was a leading real estate investor and owner of orange groves in Winter Park. He also served as one of the original aldermen of Winter Park, along with Royal Rollin Thayer. James Capen was also instrumental in the formation of the Orlando and Winter Park Railroad Company.
20. Royal Rollin Thayer is also credited as the builder of the Comstock-Harris House, the most prominent home in Winter Park, listed on the National Register of Historic Places.
21. The Capen House was sold to Amelia Hopkins, a Winter Park socialite, in 1898.
22. Hopkins sold the property to Frank Snow in 1904, who sold it to J.F. Johnson in 1910.
23. Howard Showalter, a wealthy business-owner and investor from West Virginia, purchased the Capen House in 1923.
24. Howard Showalter's children grew up in the House and graduated from Winter Park High School and Rollins College.
25. Both Howard Showalter Jr. and Joseph Showalter formed the Showalter Corporation, which was later renamed Showalter Flying Service, Inc.
26. The Showalter Flying Service was instrumental in revitalizing the Orlando Municipal Airport in the late 1940s.
27. Showalter Flying Service is currently Florida's oldest and largest family-owned airport fixed-based operator, and has been in business for over 68 years.

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<sup>2</sup> A photo of the original design is attached at Exhibit A to the original Complaint.

28. The Showalter Family redesigned the Capen House during the Tudor Revival in 1923; this redesign has achieved significance in its own right as a representation of the Florida Land Boom period of the 1920s.<sup>3</sup>

29. The Capen House was added to the Florida Master Site Files during the first survey of Winter Park historic resources and was included in the *Historic Winter Park: A Driving Tour* guidebook in 1976.

30. The Capen House was purchased by Wilbur Jennings in the late 1940s, who owned it until 1995.

31. The House was then sold to James Taylor and Susan Stanley, who sold it to Patrick and Marisol Jackson in 2004.

32. Clardy Malugen purchased the Capen House in 2006.

33. After purchasing the House, Malugen, spent over \$650,000 restoring floors and woodwork, adding new plumbing, wiring, air conditioning, and appliances.

34. Prior to purchasing the Capen House, Malugen spent more than \$650,000 restoring floors and woodwork, adding new plumbing, wiring, air conditioning, fixtures and appliances, as well as a new laundry room and a new garage.

35. Malugen was repeatedly assured that putting the home on the Winter Park Registry of Historic Places would protect the home from future developers who might seek to demolish it due to its valuable location.

36. Consistent with the Historic Preservation Ordinance, Malugen was told that such designation could only be removed if the home were in a state of disrepair and unsafe.

37. To accomplish the restoration of the House, Malugen hired an expert in restoration of historic properties as the architect.

38. The Capen House is a notable and historic landmark along its section of Interlachen Avenue, which is recommended as a potential historic district in Winter Park historic resource surveys.

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<sup>3</sup> A photo of the current design is attached aa Exhibit B to the Complaint.

39. It is this very attractiveness of the Interlachen Avenue lakefront that leaves historic properties, such as the Capen House, threatened by redevelopment.

40. The Capen House has been kept in good condition and was recommended by the Winter Park Historic Preservation Commission (hereinafter referred to as the “Preservation Commission”) for listing as a historical landmark in both December 13, 2006 and July 13, 2011.

41. Proud of the restoration, Malugen applied to the City for designation in the Register of Historic Places on December 12, 2006, along with a Certificate of Review for a new garage addition.

42. The Winter Park Register is a listing of historic landmarks and properties created under the authority of the City’s Historic Preservation Ordinance.

43. The Historic Preservation Ordinance was created under the authority of Chapter 267, Fla. Stat., as part of the City’s Land Development Code.

44. § 267.061, Fla. Stat., requires that rules and ordinances created under its authority comply with the requirements of the National Register of Historic Places.

45. The Preservation Commission is the board that was created by and administers the City’s Historic Preservation Ordinance.

46. The Preservation Commission uses the National Register of Historic Places criteria in making its determinations.

47. The Preservation Commission receives funding from, *inter alia*, the Florida Historic Preservation Grant Program and the National Trust for Historic Preservation.

48. Though the Preservation Commission unanimously voted to designate the Capen House to the Winter Park Register on December 13, 2006, concerns about the garage addition led to a postponement of the finalization of the designation by vote of the Defendant City Commission; the garage was later approved and completed in 2007.

49. Malugen, as the owner of title to the Capen House, followed up on the designation request on June 22, 2011.

50. Once again, the Preservation Commission unanimously voted to designate the Capen House to the Winter Park Register on July 13, 2011.

51. On August 8, 2011, after notice and a hearing, the Winter Park City Commission unanimously passed Resolution 2091-11, entitled:

A RESOLUTION OF THE CITY COMMISSION OF WINTER PARK  
DESIGNATING THE PROPERTY LOCATED AT 520 NORTH  
INTERLACHEN AVENUE, WINTER PARK, FLORIDA AS A  
HISTORIC LANDMARK IN THE WINTER PARK REGISTER OF  
HISTORIC PLACES

52. That Resolution was adopted by signature of Mayor Kenneth Bradley on the same day.<sup>4</sup>

53. The City Preservation Commission created a placard and delivered it to Malugen to be placed on the Capen House to indicate its designation as a historical landmark.

54. The Capen House remained on the Winter Park Register for over a year, without protest, until August 17, 2012.

55. On January 23, 2012 SunTrust Bank (hereinafter “the Bank” or “SunTrust”), Malugen’s lender and the holder of the mortgage on the House, obtained a final judgment of foreclosure on the property from this Court.<sup>5</sup>

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<sup>4</sup> Resolution 2091-11 is attached to the Complaint as Exhibit C.

<sup>5</sup> Florida is a lien theory state, and has been since 1853. *Martyn v. First Fed. Sav. & Loan Ass’n of West Palm Beach*, 257 So. 2d 576, 577 (Fla. 4<sup>th</sup> DCA 1971). Until transfer of possession and title by foreclosure sale, a mortgagee has only bare title with only the right to enforce its claim—this title can *only* be divested by sale under decree. *Id.* at 577-78. *See also Holliday v. Wade*, 117 F. 2d 154 (5<sup>th</sup> Cir. 1941) (in Florida, mortgagee has neither title to nor right to possession of mortgaged realty); *Hemphill v. Nelson*, 95 Fla. 498 (1928) (a mortgage is specific lien on property, not conveyance of title or right of possession and where title remains in mortgagor, mortgagee has only the right to enforce claim); *Evins v. Gainesville Nat’l Bank*, 80 Fla. 84 (1920) (under this section a mortgagee, either before or after default in payment, has no title by virtue of his mortgage to the mortgaged real estate, his interest being simply a specific lien for the security of the debt mentioned in the mortgage, and he can acquire the legal title as against the mortgagor or his grantees only by outbidding every other person at the foreclosure sale); *Coe v. Finlayson*, 41 Fla. 196 (1899) (mortgage is only a lien and mortgagee can maintain no action relative to mortgaged premises until he becomes owner at foreclosure sale); *McMahon v. Russell*, 17 Fla. 698 (1880) (title to mortgaged land is divested only by sale under decree).

56. Malugen filed an appeal of that final judgment.

57. On August 17, 2012 an attorney for SunTrust sent a letter to the City's Planning Department demanding removal of the Capen House from the Winter Park Register.

58. In that letter the Bank falsely accused Malugen of requesting the designation on the Winter Park Register for the Capen House "for bad faith, tactical reasons."

59. The Bank acknowledged in that letter that it knew Malugen applied for the designation in 2006.

60. The Bank did not take any action in opposition to the request for the designation.

61. The Historic Preservation Ordinance only provides for removal of historic designation when a historical landmark is too deteriorated, difficult, or expensive to renovate.<sup>6</sup>

62. On September 24, 2012 the City Commission, in a 6-minute hearing without a recommendation from the Historic Preservation Commission, rescinded the designation at a public hearing by unanimous vote.<sup>7</sup>

63. At that public hearing the Commission was incorrectly informed by the City Attorney that the City Code does not contain any process by which a designation can be removed.<sup>8</sup>

64. Upon information and belief, Concerned Citizens alleges that Winter Park City Commissioners engaged in unauthorized private communications between one another and with third parties interested in removing the designation.

65. Such communications are prohibited under Florida law.<sup>9</sup>

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<sup>6</sup> This is consistent with the requirements of the National Register, which only allows removal from the register for specific grounds.

<sup>7</sup> Resolution 2112-12 is attached as Exhibit D to the original Complaint. This six-minute meeting and unanimous vote stands in stark contrast to the 5-year process in obtaining the designation in the first place. <http://www.youtube.com/watch?v=dg1E8M60i6A>

<sup>8</sup> The Code expressly provides for participation in the process by the Historic Preservation Board.

<sup>9</sup> See Count II, *infra*.

66. Neither before nor during the hearing did the City Commissioners solicit input from the Preservation Commission, as required by the Historical Preservation Ordinance.

67. During the hearing, SunTrust representatives made baseless claims that Malugen applied for historic designation for tactical reasons to gain leverage in her foreclosure negotiations with the Bank as actual unrefuted evidence of fraud.

68. Since the inception of the Winter Park Register in 2001, almost 80 properties have been designated as historic places in Winter Park by the Preservation Commission.

69. The Capen House is the only property to have ever been removed, and it was done so without a vote by the Preservation Commission itself.<sup>10</sup>

70. On May 13, 2013, following purchase of the Capen House on March 15, 2013, the current owner applied for a demolition permit in an effort to raze the property to make way for more modern accommodations.

71. The City Commission held a hearing on June 10, 2013 in which it was admitted on the record that the rescission of the historic designation was based on representations by SunTrust that Malugen did not have authority to request such designation and that she made the request for fraudulent purposes.

72. In the same hearing, the Commission acknowledged that the property did not belong to the Bank until July 17, 2012, when they acquired title, almost a full year after the property was designated as a historic place.

73. Notwithstanding the inappropriate removal of the Capen House from the Winter Park Register, the City Commission continued to discuss the demolition of the Capen House in reference to the Historical Preservation Ordinance.

74. At this hearing, a large public outcry of concerned citizens failed to convince the City Commissioners to delay approval of the demolition permit until a review of the demolition process and historic preservation ordinance could take place.

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<sup>10</sup> See Exhibit E to the Complaint.

## **COUNT I – DECLARATORY RELIEF**

75. Concerned Citizens re-alleges and reincorporates its allegations contained in paragraphs 1 through 74 above as if fully set forth herein.

76. This is an action for declaratory relief seeking to determine the parties' rights pursuant to § 86.021, Fla. Stat.

77. There is a bona fide dispute between the parties as to the City's authority to rescind a designation on the Winter Park Register absent destruction, significant deterioration, or extreme difficulty or expense to renovate and absent a recommendation by the Preservation Commission.

78. The City lacked authority to rescind the designation, or in the alternative, acted arbitrarily and capriciously in doing so.

79. The City acted in violation of its own rules and regulations, making its action in rescinding the designation void ab initio.

80. The City has taken the position that the City Commission's vote to rescind the Capen House's historic designation was appropriate and that it has violated none of its ordinances in doing so.

81. The parties are in doubt as to their status and rights under Florida Law.

82. The parties are entitled to have their doubts removed and all parties with an interest in this action are presently before this Court.

WHEREFORE, Concerned Citizens for Historic Preservation, Inc., requests that this Court enter a final judgment declaring that the City's rescission of the Capen House's designation on the Winter Park Register as a historic landmark to be a nullity, and that Concerned Citizens is entitled to have the Capen House re-designated as a historic landmark on the Winter Park Register, awarding Concerned Citizens all recoverable costs and all and further relief as this Court deems just and proper.

## **COUNT II – MANDATORY PERMANENT INJUNCTION**

83. Concerned Citizens re-alleges and reincorporates its allegations contained in paragraphs 1 through 74 above as if fully set forth herein.

84. A clear legal right of Concerned Citizens and the citizens of Winter Park at large has been violated, by the unlawful rescision of the historic landmark designation.

85. The unlawful rescision of the designation has caused, and will continue to cause, irreparable harm to Concerned Citizens and the citizens of Winter Park at large.

86. Concerned Citizens has no adequate remedy at law.

87. Work has already begun to remove the house from the property at 520 N. Interlachen, and to demolish other buildings and improvements to the property that are an integral part of the historic nature of the site.

WHEREFORE, Concerned Citizens for Historic Preservation, Inc., requests that this Court issue a mandatory injunction, compelling Defendant 520 N. Interlachen, L.L.C. to return the property to its condition before the historic landmark designation was wrongfully rescinded.

### **COUNT III – SUNSHINE LAW VIOLATION**

88. Concerned Citizens re-alleges and reincorporates its allegations contained in paragraphs 1 through 74 above as if fully set forth herein.

89. This is an action pursuant to Section 286.011, Florida Statutes.

90. On information and belief, Concerned Citizens alleges that two or more members of the City Commission violated § 286.011, Fla. Stat. in the consideration and vote on the rescission of the designation on the Winter Park Register for the Capen House.

91. On information and belief, Concerned Citizens alleges that some of the Commissioners received written or oral communications that were not made part of the record before the final action on this matter and wrongfully discussed the issues in private meetings.

92. On information and belief, Concerned Citizens alleges that at least one member of the City Commission wrongfully received confidential information from the mediator of the foreclosure dispute between SunTrust and Malugen that was relied upon for that Commissioner's vote.

93. The information referred to in para. 89, *supra*, was not disclosed at a public hearing and the Commissioner did not disqualify herself.

