AFP 103 Corp. v. Common Wealth Tr. Services, LLC, No. 3D21-2117, 2023 WL 2146247 (Fla. 3d DCA Feb. 22, 2023):

Florida Third DCA Finds Easements Created in a Declaration Are Void ab initio where a Fee Simple Property Owner Was the Only Party to the Declaration

In 2004, South Florida Hotel, Inc., ("South Florida Hotel") was the fee simple title owner to what would eventually be split into three lots of land—the "Convention Lot," the "Condominium Lot," and the "Undeveloped Lot." On March 29, 2004, South Florida Hotel executed and recorded a Declaration of Restrictive Covenants in Lieu of Unity of Title ("Covenant in Lieu") as required by the Zoning Code of Miami-Dade County (the "Code"). In the event of multiple ownership, the Covenant in Lieu required that subsequent owners be bound by a separate Declaration of Covenants, Conditions, Restrictions, Easements and Operating Agreement for Miami International Merchandise Mart, Hotel, Plaza and Convention Center (the "Declaration") which governed the entire property.

On April 30, 2004 South Florida Hotel recorded the Declaration. Importantly, the Declaration contained an "Easement and Operating Agreement."[1] The Easement and Operating Agreement provided reciprocal easements for parking, ingress and egress and specifically reserved those reciprocal easements for "all Owners and all Condominium Unit Owners . . . ." The Declaration also expressly provided that, should the intended creation of any easement therein fail for there being no grantee at the time of creation, the easement would be considered to have been granted directly to the MIMM Condominium Association, Inc. ("MIMM") as agent for the intended grantees.

On October 3, 2005, South Florida Hotel executed a Warranty Deed conveying the Condominium Lot and the Convention Lot to SF Hotels, Inc. The Warranty Deed also alleged to convey South Florida Hotel's "rights pursuant to [the Declaration] . . . as modified by the Supplemental Declaration of Covenants and Conditions, dated September 30, 2005, *to be recorded in the Public Records of Miami-Dade County, Florida* prior to or concurrently with this deed." (emphasis added). The Warranty Deed was recorded on October 12, 2005.

Twenty days later, on November 1, 2005, South Florida Hotel recorded an undated Supplemental Declaration of Covenants and Conditions ("Supplemental Declaration"). The Supplemental Declaration modified the Declaration by requiring, among other things, the Undeveloped Lot owner (i.e., South Florida Hotels) to maintain at least 583 parking spaces for the other parcels to use.

[1] Per the Code, the owner of property subject to a Covenant in Lieu of Unity of Title must agree that he or she will not convey portions of the subject property unless and until the owner and such other parties have executed "in recordable form" an easement and operating agreement providing for, among other things, easements for parking, ingress and egress. Neither SF Hotels, Inc., AFP nor Common Wealth executed a document complying with the applicable Code provisions.

South Florida Hotel was the only entity to sign the Supplemental Declaration, although a master association and MIMM, both of which were associated with the Condominium Lot, consented to the Supplemental Declaration. Pursuant to the Code, any supplement to the Declaration required prior written approval from the Office of the County Attorney. The Office of the County Attorney did not join the Supplemental Declaration.

On August 11, 2009, SF Hotels, Inc. conveyed the Convention Lot to AFP 103 Corp. ("AFP"). On June 27, 2019, Common Wealth acquired the Undeveloped Lot from South Florida Hotel after foreclosure. In February 2020, Common Wealth put a fence around the Undeveloped Lot. Aside from violating the terms of the Declaration, the Condominium Lot and the Convention Lot relied on the ability to park on the Undeveloped Lot in order to satisfy parking requirements set forth in the Code. MIMM filed an action ("MIMM case") alleging Common Wealth's breach of the Declaration. Common Wealth moved for summary judgment arguing that the Declaration was void *ab initio*. On April 7, 2021, following an uncontested hearing, the trial court granted Common Wealth's motion and entered summary judgment in favor of Common Wealth.

On April 21, 2021, Common Wealth filed a third complaint against AFP seeking relief similar to that granted in the MIMM case. In its response to Common Wealth's motion for summary judgment, AFP also moved for rehearing on the entry of judgment in favor of Common Wealth in the MIMM case. After a hearing on Common Wealth's motion for summary judgment, the trial court granted summary judgment in favor of Common Wealth. AFP appealed.

On appeal, the Third DCA held that the easements granted in the Declaration were void *ab initio*. Relying on *One Harbor Fin. Ltd. Co. v. Hynes Properties, LLC*, 884 So. 2d 1039 (Fla. 5th DCA 2004), the district court held that an owner cannot create an easement over his or her own property when the owner owns both the dominant and servient estate. Notably, the *One Harbor* case is factually distinct from the facts at issue here. Specifically, the seller in *One Harbor* imposed an easement on the servient estate in favor of land that the seller was to retain and then sold that servient estate without referencing the easement. Here, South Florida Hotel not only referenced the documents creating the easement in the vesting deeds but it retained the servient estate burdened by the easements.

As discussed above, the Code required subsequent owners of property subject to a Covenant in Lieu of Unity of Title to execute an easement and operating agreement "in recordable form." In support of the Third DCA's reliance on *One Harbor*, the Court suggested that this Code requirement was intended to comply with the holding of *One Harbor*. Note that this could not possibly be the case because the applicable section of the Code was adopted in 1998, nearly six years before *One Harbor*.[2]

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[2] The Court also suggested that, even if the Code did not require subsequent owners to join in the Easement and Operating Agreement, the fact that Code required a property owner to record a declaration of restrictive covenants providing easements for parking, ingress and egress would not have saved the easements in this case. Put simply, a zoning code does not supersede Florida property law rules.

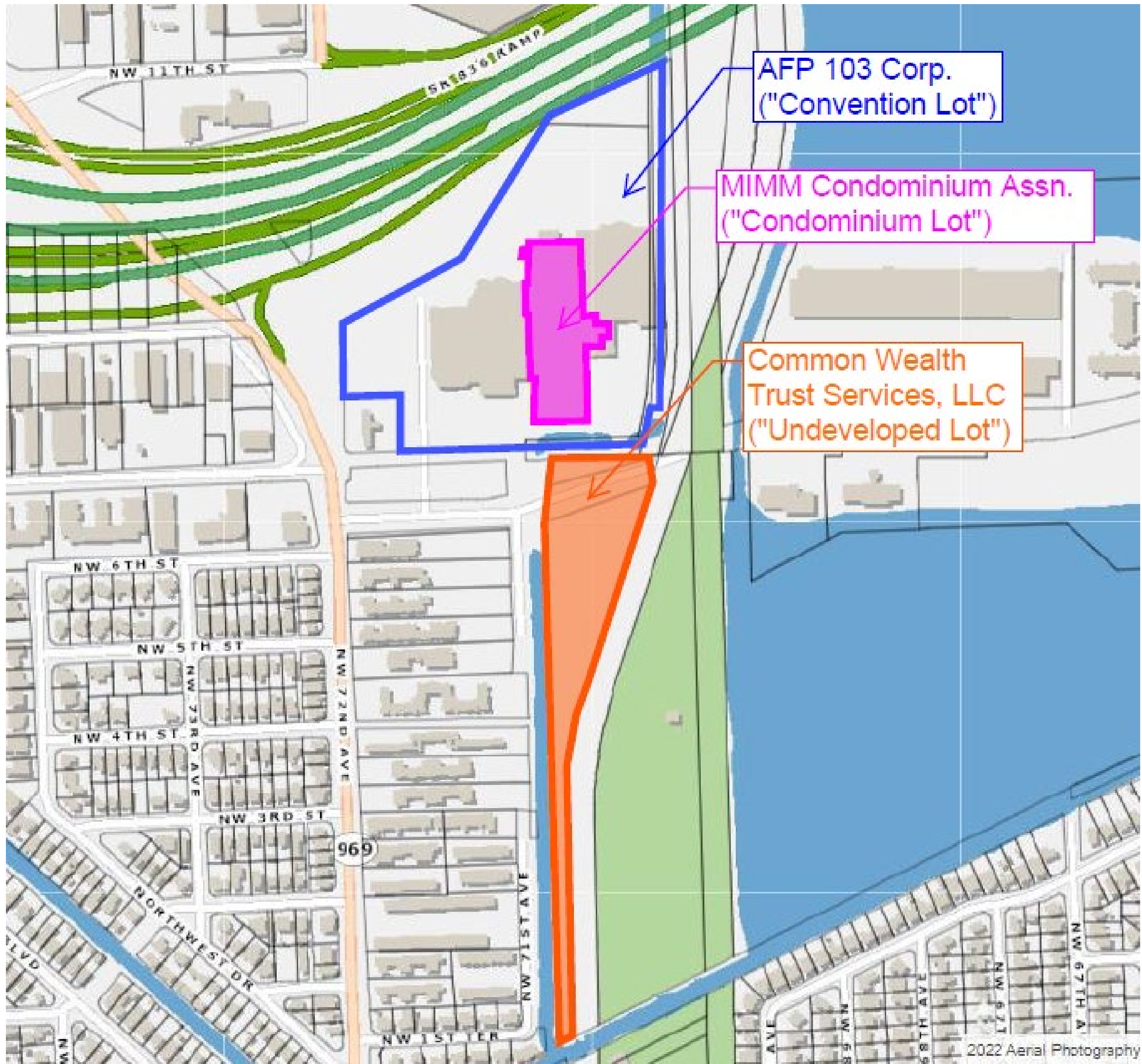
Although not necessary to support the finding that easements created by the Declaration were void, the Court also noted that the requirements of the Code were not met. Specifically, subsequent property owners did not execute a recordable easement and operating agreement. In the words of the Third DCA, "thus, the alleged easement was *void ab initio*." Seemingly, the Court found that because the technical requirements of the Code were not met, the easement was *void from the outset*. The Court did not address the fact that compliance with the applicable portion of the Code could not have been satisfied until the conveyance of a portion of the subject property. This finding suggests that failure to meet the technical requirements of a Code at a future date could void an already established easement.

The Court also noted that the Supplemental Declaration did not function to impose the easements even though it was referenced in the deed from South Florida Hotel to SF Hotel because "a document cannot incorporate by reference the terms of another document that has not yet come into existence" (citing *2000 Presidential Way, LLC v. Bank of N.Y. Mellon*, 326 So. 3d 64, 70 (Fla. 4th DCA 2021). The Appeals Court emphasized that, although the deed from South Florida Hotel to SF Hotel referenced a "Supplemental Declaration of Covenants and Conditions dated September 30, 2005," the recorded Supplemental Declaration was undated, was not recorded on September 30 and was null and void.

The Court summarily dismissed AFP's equitable arguments, including those of estoppel, laches and unclean hands relying on *One Harbor*. The easement was void *ab initio* and therefore, according to the Court, it did not have the power to grant equitable remedies where an easement was never valid.

Finally, the Court denied AFP's request for a finding of an implied easement based on the failure of AFP to move for rehearing on the issue at the trial court level.

10/7/1997	South Florida Hotel, Inc. ("SFH") acquired title to Convention Lot, Condominium Lot and Undeveloped Lot
3/29/2004	SFH recorded Declaration of Restrictive Covenants in Lieu of Unity of Title
4/30/2004	SFH recorded Declaration of Covenants
10/3/2005	SFH conveyed Convention Lot and Condominium Lot to SF Hotels Inc.
11/1/2005	SFH recorded Supplemental Declaration (signed only by SFH)
8/11/2009	SF Hotels Inc. conveyed Convention Lot to AFP 103, Inc.
6/27/2019	SFH conveyed Undeveloped Lot to Common Wealth Trust Services, LLC


AFP 103 Corp.
("Convention Lot")
MIMM Condominium Assn.
("Condominium Lot")
Common Wealth
Trust Services, LLC
("Undeveloped Lot")
NW 11TH ST
NW 6TH ST
NW 5TH ST
NW 4TH ST
NW 3RD ST
NW 72ND AVE
NW 73RD AVE
NW 71ST AVE
NORTHWEST DR
NW 1ST TER
969
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