

Publix Landlord Outmaneuvered in Cutler Bay

[Samantha Joseph](#), Daily Business Review

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20425 Old Cutler Road Google Earth

A landlord-tenant dispute between Publix Super Markets Inc. and the owner of a Cutler Bay shopping center ballooned into a complicated legal fight that entangled the entire town, challenging its zoning plans in a bid to stop a neighboring development.

The spat started when anchor tenant Publix notified landlord Realty Associates Fund IX LP it would be leaving the Old Cutler Towne Center to move into new, larger space to be built about a half-mile away.

But the retailer didn't plan to give up the roughly 35,000 square feet it rented at 20425 Old Cutler Road, already built out and ready for a competitor to swoop in and open shop.

Instead, the landlord said Publix proposed continuing to pay rent on the space even after it moved out, just to keep another supermarket from moving in.

Relying on a clause in the lease that only required it operate at the shopping center for one day out of the entire contract term, Publix planned to move out but hold the keys.

Realty Associates, a company linked to Boston-based TA Realty, one of the nation's largest private landlords, cried foul. It said the strip mall's mostly mom-and-pop tenants would suffer without the heavy foot traffic generated by the anchor tenant.

In a lawsuit filed in Miami-Dade Circuit Court, it accused the supermarket chain of breach of contract, "going dark aggressively" and "unfair, anticompetitive and malicious interpretation of a commercial lease agreement."

But here's the thing: While the landlord and tenant traded lawsuits, Realty Associates spread the litigation's tentacles. Instead of just fighting Publix, its lawsuits reeled in Cutler Bay and GCF Investment Inc., a developer planning a mixed-used project on a 40-acre parcel that would house the new Publix store.

GCF Investment is the company behind a proposed pedestrian-friendly town center with a pharmacy, restaurants, bank, retail, office space and a Publix supermarket on a parcel known as the Potato Field east of Old Cutler Road between Southwest 208 and 212 streets.

Cutler Bay approved the project in May 2013, passing a series of resolutions to transform the 40-acre site in to a town center with a Publix store.

Realty Associates said the project violated the town's comprehensive plan designation for the site and questioned the constitutionality of the rezoning, arguing GCF's project failed to qualify as a mixed-used project without a residential component.

"Really, what the property owner was concerned about is that they would be losing the revenue from their biggest tenant and possibly the in-line tenants as well," the town's attorney, John Quick of Weiss Serota Helfman Cole & Bierman in Miami, told the Daily Business Review.

Quick teamed with Weiss Serota colleagues Laura Wendell and Chad Friedman and a GrayRobinson team led by Mark Miller to represent the town against Realty Associates' suit.

"It has been our position in the case that RAF isn't motivated by any desire to vindicate the town of Cutler Bay's comprehensive plan," Miller said. "They've been motivated to vindicate their own economic interests. I'll leave it to them to say what the case is about."

The case went to a three-day trial in February before Miami-Dade Circuit Judge Norma Lindsey. The town and Publix argued the new project was compatible with the comprehensive plan and a mixed-used zoning designation did not mandate a residential component. They moved for a directed verdict after the plaintiff rested, and Lindsey granted that motion March 6, upholding the constitutionality of the land development regulation.

On Aug. 28, after mediation failed on remaining counts, the judge sided with Publix, GCF and the town, ruling the mixed-used project did not request a residential component.

"We're obviously very disappointed with the court's decision and will be exercising our rights to appeal in the near future," Realty Associates attorney John Shubin, founding partner at ShubinBass in Miami, said Wednesday. He led a ShubinBass team including Salvatore Fasulo and Deana Falce.

"We continue to believe that the town did not properly abide by the plain language of its comprehensive plan, specifically the requirement that the site have a mixed-use development," he said. "We continue to maintain that the town's actions violated both the spirit and the letter of their

comprehensive plan."

Samantha Joseph can be reached at 954-468-2614.

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