PETITION FOR AN ADMINISTRATIVE HEARING
in the matter of
Lake County Ordinance No. 2010-25 Amending the County's Comprehensive Plan
and the related
07/23/2010 DCA Notice of Intent finding the Amendment IN COMPLIANCE
DCA Docket #: 10- 1ER-NOI-3501-(A)-(I)

August 12, 2010

Amended and Restated as of August 19, 2009

Agencies Affected:

Agency Clerk
Florida Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, FL 32399-2100

Ms. Melanie N. Marsh, Esq.
Acting County Attorney
Lake County, Florida
315 West Main Street
P.O. Box 7800
Tavares, FL 32778

Petitioner:

Jon Pospisil,
both individually and, as
manager of JSP/THR, LLC
P.O. Box 81
Goldenrod, FL 32733-0081

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Petitioner is not legally trained and has not retained counsel for this matter, but reserves the right to do so.

Party in Interest:

Mr. Horst Butzke, Mgr.
HB 20-13, LLC
410 Deer Pointe Circle
Casselberry, FL 32707

Petitioner's Standing and Substantial Interests:

1. (A) Petitioner is an "affected person" as defined in F.S. 163.3184(1)(a).

(B) The general nature of Petitioner's substantial interests is as direct owner of an undivided 80% interest in approx 65 A. on Gray's Airport Road in the vicinity of Lady Lake ("Property One"), and as manager of JSP/THR, LLC which holds an interest in approx 30 A. on Thrill Hill Road east of Eustis ("Property Two") both in Lake County (collectively, the "Properties"). As such, my primary substantial interests are –

(1) that the County not engage in regulatory takings with respect to properties in which I hold an interest, or otherwise adopt regulations or take actions that would directly adversely affect the value of those interests, and

(2) that the County not impose onerous regulations or regulatory takings on the property of others thereby clouding the County's overall business climate, reducing the just values of those properties subject to such takings or other onerous regulation and, consequently, the County's property tax receipts, to a level below what they otherwise would be, while at the same time incurring the financial liabilities associated with such takings, possibly requiring an increase in real property tax rates or a reduction in county services, any or all of which would adversely impact both the present and future value of all real property located in the County, and

(3) that the County engage in reasonable environmental regulation to prevent any substantial degradation of the environment in the County (including, to the extent of its' legal authority, the quality and quantity of both surface and subsurface waters) so that property values in the county do not suffer as a result of such degradation.

Receipt of Notice:

2. On 07/23/2010, Petitioner telephoned the Department and learned that the Notice Of Intent was then being posted on its' website.

Matters Of Dispute:

3. On May 25, 2010, the Board of County Commissioners of Lake County (the 'County') passed an ordinance amending the County's comprehensive plan (the 'New Plan' or simply the "Plan"), in effect, replacing the entire previous plan, Lake County, Florida Comprehensive Plan as Amended through Ordinance 2009-32 (the "Old Plan") . On July 23, 2010 the Department of Community Affairs ('DCA' or the 'Department,' County and DCA collectively, 'Respondents') published a Notice of Intent finding the Amendment IN COMPLIANCE. Petitioner maintains that the New Plan is NOT in compliance for the reasons set forth below.

Ultimate Facts Alleged

4. (a) F.S. 163.3184(1)(b) defines compliance as follows:

> "In compliance" means consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code, where such rule is not inconsistent with this part and with the principles for guiding development in designated areas of critical state concern and with part III of chapter 369, where applicable.

(b) As set forth in greater detail below, Petitioner contends that the New Plan is NOT in compliance because it fails to meet the property rights requirements of the U.S. Constitution, the Florida Constitution, the state comprehensive plan [F.S. 187.201 (14)], F.S. 380.08(1), and, where applicable, of part III of Chapter 369, (i) with respect to Property One, (ii) with respect to

Property Two, and (iii) with respect to a number of properties in the Wekiva Study Area ("WSA").

(c) Because the New Plan states that County shall respect property rights but does not in fact do so, and because the base density the New Plan applies to Petitioner's Property One is not consistent with the stated goals and criteria of the Plan, the Plan is internally inconsistent and so does not comply with Rule 9J-5.005(5)(a) and does not comply with F.S. 163.3177(2).

(d) The New Plan fails to meet the environmental conservation goals of Part III of Chapter 369,

(e) and that chapter's requirement that patterns of land use be considered in designing the plan.

(f) Fails to meet the data and analysis requirements of Rule 9J-5.005(2) and Rule 9J-5.006(2), F.A.C.

(g) Rule 9J-11.010 requires an amendment to be consistent with FS 163.3177(2) which requires that the comprehensive plan be financially feasible, but if the New Plan is implemented as written, it will result in substantial liabilities for regulatory takings and as no provision has been made in the Amendment for such liabilities, such render the plan not financially feasible.

5. **<u>Organization of this Petition</u>:** This Petition is organized in three parts as follows –

Part I – Objections re: Property One & Property Two

(A) Background information on Properties One & Two

(B) Facts, Objections & Remedies specific to Property One

(C) Facts, Objections & Remedies specific to Property Two

Part II -- Objections re: portions of the Wekiva Study Area ("WSA") provisions

(A) Background information re: WSA provisions

(B) WSA changes not supported by requisite data & analysis

(C) WSA changes inconsistent with existing development patterns

(D) WSA changes inconsistent with property rights

Part I – Objections re: Property One & Property Two

(A) Background Information on Properties One and Two

6. Background facts which Petitioner believes to not be in dispute:

(a) Beginning in 1984, on behalf of his mother, to continue a small part time family business, Petitioner began to seek property in central Florida for eventual residential development which could be obtained in exchange for some as yet unsold lots within an industrial subdivision in south Florida which had been developed by his father.

(b) Property One was explicitly purchased with eventual development in view. Petitioner viewed its' development prospects as attractive since a subdivision on its' south border had already been developed at a density of approximately 4 du/acre.

(c) Property Two was also purchased with an eye to future development and a premium price was paid for it because though relatively small, it was surrounded on three sides by county maintained paved roads that would, at the time, have initially permitted a number of residential lots to be sold without any investment in road construction until after the initial lots had been sold.

(d) In 1985, Petitioner's mother closed on the two properties he had earlier identified, obtaining an undivided 80% interest in each.

(e) In 2003, Petitioner began development oriented activity for the two properties, talking to realtors and engaging surveyors and real estate and land use attorneys, and subsequently up to the present time, has been working on such and has expended substantial funds for engineers, surveyors, attorneys and consultants to assess development possibilities, remove impediments to development (for example, successfully obtaining a FEMA map amendment on a portion of Property Two, and also a 'lot of record' determination and 'lot line deviation' adjustments on land that was formerly a portion of Property Two), and prepare for a DRS meeting (Development Review Staff meeting) with Lake County staff to review a plan for Property One. In addition, Petitioner has personally spent countless hours reading and investigating Lake County's Old Plan and LDRs, and attending and speaking at meetings, hearings and workshops of the Lake County LPA and BCC related to both the Old Plan and New Plan. Moreover, Petitioner has spent many other long hours in LPA & BCC meetings regarding other regulations affecting development in the county such as the Landscape, Noise and Grading Ordinances in order to monitor their possible effects on the development potential of the two Properties.

(f) Following his mother's demise, Petitioner both obtained an undivided 80% interest in the Properties and turned down an unsolicited offer to purchase Property One to enable him to realize the development potential of the property himself.

(g) Petitioner has previously presented the substance of the analysis w/r/t Property One set forth in paragraphs 7 & 8 below to both the LPA (Lake County's Land Planning Agency) and the Lake County Commission ("BCC") together with requests for relief on a number of occasions, and has also previously presented the substance of the analysis w/r/t Property Two set forth in Part I (C) below to the BCC

DISPUTED ISSUES OF MATERIAL FACT

Part I –

(B) Facts, Objections & Remedies specific to Property One

Property Rights Violations, Internal Inconsistencies, Other Issues

7. Density Calculations for Property One under the Old Plan

(a) Although he has in the past on a number of occasions been misinformed by various parties (including some former County staff) regarding the development potential of Property One under the Old Plan, each element of the following analysis has on one or more occasions been agreed to by County staff. Therefore Petitioner in good faith believes that the remainder of this paragraph 7 consists of facts that are not in dispute, but cannot affirmatively declare that such is the case.

(b) An approx. 11 acre portion of Property One is designated Urban Expansion under the Old Plan. (County staff calculated the area to be 10.83 A.)

(c) Under the Old Plan, the base density for residential development in areas designated as Urban Expansion is 1 dwelling unit ("du") per acre. (Old Plan, Policy 1-1.6, page 4) The remaining acreage is designated Suburban and under current conditions would generally be developed at a density of 1 du/ 5 A (commonly denoted as "1 to 5" or "1:5").

(d) County staff has over the past several years, on several occasions informed Petitioner that subject only to meeting concurrency and the requirement that central water be provided, land designated as Urban Expansion can be developed at the base density of 1:1 (1 du per A.) simply by the usual preliminary plat and final plat approval process, **without the need to**

be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.

(e) Petitioner has previously obtained and presented to County a letter from the public utility in the neighboring subdivision indicating that such utility has the capacity and is willing to serve as many as 120 homes in a subdivision on Property One. And even absent such letter and such ability to serve, under the Old Plan, Petitioner or another developer of the property could provide central water to the subdivision and go straight to the plat approval process, **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.**

(f) Utilizing only the aforesaid provisions of the Old Plan then, 11 (eleven) dwelling units ("du") could be placed on the 11 A. of Urban Expansion and with the remaining 54 acres developed at 1:5, for a total of 21 or 22 du (depending rounding) which could be placed on the property, **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.**

(g) However, under the Old Plan, an additional 10 acres from the parent parcel lying within 1320 feet of the Urban Expansion boundary line could also be developed under the same rules that apply to the 11 A. designated Urban Expansion. This means that a total of 29 or 30 homes could be placed on the property, **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.**

(h) In addition, under the Old Plan, the two owners could easily partition the property in such a way that each could individually take advantage the provision of the Old Plan permitting up to 10 acre portions of the parent parcel lying within 1320 ft. of the Urban

Expansion boundary line to be developed according to the Urban Expansion criteria, so that a total of 31 A. of the 65 A. could be so subdivided. The remaining 34 A. could then be subdivided into 7 lots of 5 acres each. This means that 37 or 38 homes could be placed on the property, **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.**

(i) Moreover, a point system under the Old Plan would permit the owners to apply for a rezoning to increase the permissible density of the 31 A. that could be developed under the Urban Expansion designation to 2.5 du/A. or even 3.5 du/A. County staff has on more than one occasion agreed that Property One has enough points to qualify for a rezoning to the 2 ½:1 density, which would permit a total of 85 homes on the subject property, or, with city sewer or a "package plant," a rezoning to 3 ½:1, for a total of 115 homes.

8. Under the New Plan, all of Property One is designated Rural Transition.

(a) The base density of the Rural Transition category (the density that could be used **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process**) is only 1:5 which would limit development to only 13 homesites rather than the 37 or 38 allowable under current rules (the Old Plan), **a reduction of about 2/3rds**!

(b) The Rural Transition designation would allow Petitioner to bear the time, trouble, expense and delay of **applying for** an increase in zoning to permit a density of 1:3 with 35 % common area for a total of 22 homesites, and any such application might or might not be approved. And even if approved, because the increase in density is not sufficient to compensate

for the 35% open space requirement that accompanies the 1:3 zoning category, there would be no financial benefit to making such application.

(c) However, the Rural Transition category also permits a landowner to **apply for** a zoning change to permit a density of 1:1, which requires 50% common area but would allow a total of 65 lots. And, as is the case with any zoning application, **this would involve the time, trouble, expense, and delay associated with a zoning or re-zoning application and hearing process**, and of course, after all the work and expense, the re-zoning might or might not be granted.

ULTIMATE FACTS ALLEGED AND BASIS OF REVERSAL –Pt 1 Property 1

Count one

Failure of the New Plan to maintain the development potential associated with Property One in the Old Plan is inequitable and has effected a regulatory taking.

9. **(a)** To summarize the large difference between how Property One is treated under the Old Plan and the New Plan;

(i) under the Old Plan, 37 or 38 homes could be placed on the property, **without the need to be involved with the time, trouble, expense, delay and uncertain outcome of any zoning or re-zoning application and hearing process.** Under the New Plan, that number has been reduced to 12 or 13 (depending on rounding), **a reduction of approximately two thirds!**

(ii) under the Old Plan, a re-zoning to a first level density increase would allow 85 lots on Property One while a first level rezoning under the New Plan would allow no more than 22 lots, **a reduction of nearly three-quarters!**

(iii) under the Old Plan, a second level re-zoning would allow 115 homesites while a second level rezoning under the New Plan would allow no more than 65, **a reduction of more than 40%.**

Therefore, although an increase in density might (or might not) be granted be in a rezoning proceeding, the New Plan, in and of itself, deprives Petitioner of permissible density and the corresponding property rights **at every level of possible zoning activity.**

(b) In the case of *Palozzolo* (121 S. Ct. at 2457), the U.S. Supreme Court enunciated three criteria to be used in analyzing non-categorical takings claims:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, **a taking nonetheless may have occurred**, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. (emphasis added)

Considering each of the three criteria in the present matter inescapably leads to the conclusion that a taking has occurred:

(i) it cannot be fairly stated that a density reduction of, on average, more than 60% (the average of 67%, 75% and 42%, depending on level of possible re-zoning activity) would not have a seriously deleterious effect on the value of most any property including Property One.

(ii) In view of the facts set forth in ¶ 6, 7 and 8 above, it cannot be fairly stated that the New Plan does not frustrate the *reasonable investment backed expectations* of Petitioner.

(iii) County cannot evade liability for a taking by claiming its' action in this matter is a legitimate exercise of its' police powers since, as set forth in Counts Two and Three below, the reduction in base density is not consistent with the standards set

forth in the New Plan, the very standards by which it wishes to be governed in its' exercise of those powers.

(c) Although, absent Petitioner receiving the relief sought in this administrative process, a separate judicial proceeding will be required to assess actual damages, as the preceding analysis makes clear, the New Plan effectuates a taking . Therefore it cannot be fairly stated that the New Plan complies with the above referenced constitutional, statutory and regulatory requirements regarding property rights. Therefore the New Plan is NOT in compliance**.**

10. (a) Any assertion by County that a taking has not occurred because County might (or might not) grant the maximum density under the New Plan in a future rezoning hearing is invalid because entitlements to land use based on a future land use designation in a comprehensive plan and those which result from a zoning decision are not simple equivalents even if both were to grant the same nominal density since:

(i) the plan amendment process is typically more difficult in terms of time, expense and delay, than the re-zoning process and

(ii) F.S. 163.3194(1)(a) & (b) are clear that in the case of a conflict between the comprehensive plan and a zoning ordinance or other regulations adopted under the plan, the comprehensive plan is the superior document in terms of authority. Indeed, according to the courts, "The comprehensive plan is similar to a constitution for all future development within the government boundary." Citrus County v. Halls River Development, Inc., 8 So.3d 413, 420-21 (Fla. 5th DCA 2009).

(b) consequently, the New Plan unfairly imposes on Petitioner the additional burden of the time, expense, delay and uncertainty of a re-zoning proceeding, just to have some hope of "re-gaining" a right inferior to the one which has been taken from him by the New Plan.

(c) Moreover, as set forth in ¶9(a) above, , the New Plan, in and of itself, deprives Petitioner of permissible density and the corresponding property rights at every level of possible zoning activity.

11. The New Plan, in Policy I-1.1.9, pg 33, states that "The County shall comply with all constitutional and statutory requirements governing the protection of property rights, …." But F.S. 380.08(1) reads:"Nothing in this chapter authorizes any governmental agency to adopt a rule or regulation or issue any order that is unduly restrictive or constitutes a taking of property …." Yet as set forth in ¶ 9 above, the New Plan does exactly what F.S. 380.08(1) prohibits, therefore rendering itself internally inconsistent and in violation of both F.S. 163.3177(2) and Rule 9J-5.005(5)(a), both of which require internal consistency. Therefore the New Plan is NOT in compliance.

Count Two

Reducing the Base Density on Property One to a rural level is both discriminatory and inconsistent with both the New Plan's stated goal of directing density to areas where urban services are available and the corresponding requirements of state law.

12. Discriminatory Impact: (a) Pure water service is undoubtedly the most fundamental of urban services, yet, it is well known that vast areas of the County lacking any urban services are designated "Rural" with a density of up to 1 du/5 A, the same as the New Plan's base density for Property One, even though Property One abuts a development with a density of 4:1 with central water and even though that franchised central water system has stated that they have capacity

for far more than the 65 units that would be the maximum allowable under Property One's Rural Transition designation. County's placement of Property One in the same category as properties without central water and failure to place it in the same category as other properties with central water is a denial of the "equal protection" guaranteed by the 14th Amendment of the U.S. Constitution and is therefore invalid, as well as a violation of 42 U.S.C. 1983 rendering the Plan invalid and also in violation of the equal rights provision of Article I Section 2 of Florida's Constitution.

(b) But the Florida's comprehensive plan explicitly states: "The plan does not create regulatory authority or authorize the adoption of agency rules, criteria, or standards not otherwise authorized by law" F.S. 187.101(2). Therefore, when the New Plan violates Florida's Constitution, it necessarily is also in violation of the state's comprehensive plan. But F.S. 163.3184(1)(b) defines "In compliance" to mean "consistent with the requirements of …the state comprehensive plan …." Therefore the Plan is NOT in compliance.

(c) Moreover, a discriminatory regulation results in a regulatory taking even where the damages are not large (*Lingle*) placing Plan in violation of Florida's multitutude of property rights protections. Therefore the Plan is NOT in compliance.

13. Inconsistency with the New Plan and state law:

(a) Policy I-1.1.3, page 32 of the New Plan reads :

> **Policy I-1.1.3 Direct Orderly, Compact Growth**
> Land use patterns delineated on the Future Land Use Map shall direct orderly, compact growth. The County shall discourage urban sprawl, as defined in Rule 9J-5.006 F.A.C., and direct growth and development to urban areas where public facilities and services are presently in place or planned.

(b) Rule 9J-5.006(5)(g) 6 lists "Fails to maximize use of existing public facilities and services" as one indicator of urban sprawl. The New Plan's reduction of Property One's base density to a rural level "fails to maximize use of existing" franchised water capacity and so contributes to urban sprawl rather than discouraging it as demanded by the Plan text, thereby rendering the New Plan internally inconsistent.

(c) Property One is contiguous to a neighboring subdivision developed at a density of about 4:1 and having central water service. Moreover, it is located within the Lady Lake Joint Planning Area and so designated for future incorporation within the city limits. Therefore it cannot be fairly said that Property One is in an area which is neither urban nor urbanizing nor can it fairly be said that public facilities are not in place. Therefore the text of the New Plan requires that the allowable density for Property One be maintained or **increased** to a density greater than rural. But instead, the New Plan's FLU Map drastically **decreases** the density to a rural level making the New Plan internally inconsistent.

(d) But F.S. 163.3177(2) and Rule 9J-5.005(5)(a) F.A.C. both require the Plan to be internally consistent. Therefore the New Plan is NOT in compliance.

Count Three

Reducing the Base Density on Property One to a rural level is inconsistent with the New Plan's stated goal of providing for land use transitions between varying densities.

14. (a) Page 31 of the New Plan states: "Goal I-1 PURPOSE OF THE FUTURE LAND USE ELEMENT … Ensure compatibility between densities and intensities of development, providing for land use transitions as appropriate to protect the long-term integrity of both urban and rural areas …." (emphasis added)

(b) But a rural density of 1:5 on Property One abutting a density of 4:1 does not provide the transition required in the Plan thereby rendering the Plan internally inconsistent and F.S. 163.3177(2) and Rule 9J-5.005(5)(a) both require internal consistency. Therefore the Plan is NOT in compliance.

Count Four

Reducing the Base Density on Property One to a rural level is a regulation without a valid public purpose and is inconsistent with statutory requirements

15. Given the inconsistency of the density reduction with the Plan's explicit provisions as set forth in counts two and three above, the density reduction can hardly be claimed to have an *essential nexus* with the legitimate goals of the Plan. Therefore the density reduction amounts to a regulation without a legitimate government purpose and so implementation of that provision of the Plan would be a denial of substantive due process (*Lingle*) fraught with implications for takingsand the violation of property rights. Therefore the Plan is NOT in compliance.

16. F.S. 163.3202(2)(i) requires County to adopt LDRs which "Maintain the existing density of residential properties … if the properties are intended for residential use and are located in the unincorporated areas that have sufficient infrastructure…." County plainly intends Property One for residential use since that portion not designated as Urban Expansion on the "old" Future Land Use Map has been designated "Suburban," a residential future land use category and is designated "vacant residential" by the County Property Appraiser;s office. The point system which would, under the Old Plan, entitle Property One to an **increase** in density addresses the sufficiency of infrastructure. Therefore the **reduction** of Property One's base density to a rural

level makes it impossible for County to adopt LDRs that comply with this statute. Therefore the New Plan is NOT in compliance.

RELIEF SOUGHT BY PETITIONER—Part 1 Property One

17. Revise the New Plan to provide Property One with the same development potential that it has under the current Old Plan.

Part I –

(C) Facts, Objections & Remedies related to Property Two

Excessive Karst Feature Protection Buffers

Background Facts which Petitioner believes to not be in dispute

18. Property Two (Lot 178, Eldorado Heights) consists of approximately 30 acres which had been an active orange grove up until a few years before it was acquired by Petitioner's family in 1985. It is located east of Eustis, off Thrill Hill Road, within the Wekiva Study Area but outside of the Wekiva-Ocala Rural Protection Area.

19. The southeast corner of Property Two is dominated by a large karst feature (sinkhole) on the side of a hill. This means that run-off from stormwater falling uphill from the sink will flow toward and possibly into it, rain falling on its' downhill side will flow away from it, and depending on the specific contours of the land to its sides, sheet flows on the land's surface may or may not simply go downhill beside the sink without entering it.

20. At several points, the New Plan commendably requires most applications for development orders within the Wekiva Study Area (or any other area where the karst geology could lead to groundwater pollution by run-off, or to the formation of new sinks or solution pipes) to include an analysis of soils and hydrogeologic and geotechnical reports, such reports in each case, to be prepared by a qualified professional.**21.** At this time it is not known whether or not the karst feature on Property Two has a direct aquifer connection. Karst features with direct aquifer connections are especially in need of protection from stormwater surface flows so that fertilizers, lawn and agricultural chemicals or other pollutants do not enter the aquifer.

22. **(a)** The New Plan attempts to protect groundwater from possible surface water contamination by establishing setbacks from karst features and requiring that any natural vegetation within the setback area be retained & maintained. These regulations appear at several places in the New Plan.

(i) Policy I-3.4.8 of the New Plan (pp. 88-89) and Policy IX-1.3.8 (pg. 304) both require a 100 foot setback in the form of a natural landscape buffer from any karst feature, and

(ii) Policy III-2.1.14 (pg. 193) states: "The information contained in the hydrogeologic survey shall establish setbacks …." of an unspecified and thereby **unlimited** amount.

(iii) since Policy I-1.1.7 provides that where two policies of the plan conflict, the more stringent one will apply, in effect, the required setbacks range in width from 100 feet up to unlimited.

DISPUTED ISSUES OF MATERIAL FACT

Background Facts which Petitioner expects Respondents to dispute

23. **(a)** Depending on soil type or types, drainage patterns, the nature and quantity of vegetation in place or to be planted, and perhaps other factors, a fixed buffer of 100 feet or any other pre-determined amount may be substantially in excess of that required to protect the aquifer from contamination via surface run-off finding its way into the aquifer through a karst feature, especially where that buffer is downhill from a karst feature.

(b) There has as yet been no geotechnical study of Property Two of which Petitioner is aware, so the precise boundaries of the karst feature are not known with certainty. Nevertheless, using the topographical maps available on County website, it is possible estimate those boundaries and to note probable patterms of sheet flow on the land's surface. Based on those maps, Petitioner observes and estimates –

(i) a portion of the perimeter of the Karst feature lies on a neighboring property. Petitioner estimates that the portion lying on Property Two has an length of sixteen hundred feet or more so that a 100 foot buffer would consume more than 3 ½ A. of land.

(ii) a portion of Property Two lies uphill from the karst feature so that the unlimited requirement for buffering could easily consume an additional 1 ½ to 2 A. or more.

(iii) a portion of Property Two lies downhill from the karst feature so that, absent the specific finding of a geotechnical study to the contrary, the only reasonable assumption is that no buffer would actually be required on the downhill side of the karst feature to protect the aquifer from surface run-off. Yet the Plan would require a full 100 ft or possibly unlimited buffer there.

(iv) in addition, depending on where the boundaries of the karst feature are actually drawn, it is possible that another 1 to 3 acres may drain to it so that in toto, 10 A. or more of what the Plan defines as net buildable area out of the estimated 25 to 27 non-wetland acres of Property Two could be consumed in aquifer protection. Yet,

(c) the New Plan does not permit the use of swale and berm or other structural means of protecting the aquifer, though these might well provide equivalent or superior protection at a very much lesser cost to the landowner or developer than the buffers required under the plan.

ULTIMATE FACTS ALLEGED AND BASIS OF REVERSAL –Pt 1 Property 2

Count Five

Failure to Respect Property Rights

24. Because the regulatory rationale for the required buffers is the protection of groundwater from surface pollution, the requirement to place a buffer downhill from a sinkhole, **where surface waters will flow away from the hole** is a regulation that lacks an "essential nexus" (*Nollan*) and so "does not substantially advance legitimate state interests" (A*gins*) resulting in a denial of substantive due process (*Lingle*). Therefore the requirement as written undeniably runs afoul of all Florida's requirements to respect property rights and the Plan is NOT in compliance.

25. **(a)** The requirement that even regulations with an *essential nexus* place only such burdens on regulated parties to the extent of *rough proportionality* implicitly requires that regulatory bodies achieve their purposes in the least burdensome way.

(b) Depending on the size of the karst feature and the characteristics of the land and soils surrounding it, and on the relative prices of land and construction at the time a subdivision is platted, the placement of a swale and berm or other structural method of protection may both be more feasible and offer superior protection. But this alternative is not permitted by the New Plan.

(c) In the specific case of Property Two, the large area of buffers likely to be required and the refusal to permit an equally effective but possibly lower cost alternative (swale and berm) renders the buffering requirement of the Plan disproportionately burdensome, and of an arbitrary and capricious character.

Therefore the Plan is NOT in compliance.

26. In the absence of an objective standard, County cannot show that the buffer requirements would not be disproportionately burdensome to development and thereby:

(a) fail to meet the requirements of statute and regulation to respect property rights

(b) expose the County to liability.

THEREFORE the New Plan should be found NOT in compliance.

Count Six

Lack of an Objective Standard for Karst Feature Aquifer Protection

27. Rule 9J-5.005(6) F.A.C. states: "Goals, objectives and policies shall establish meaningful and predictable standards for the use and development of land…." But the Plan **places no limit** on the amount of land that must be set aside to buffer a karst feature **nor does it provide any**

criteria by which to interpret the results of the required geotechnical study or to determine the necessary width of any buffer to be required, thus failing in this case, to "establish meaningful and predictable standards for the use and development of land." Therefore the New Plan is NOT in compliance.

RELIEF SOUGHT BY PETITIONER

28. **(a)** replace the requirement for buffering with the requirement that development protect karst features from surface run-off according to a plan which,

(i) in the reasonable opinion of County, would protect a karst feature from a rain event of a specific objective standard (e.g., a 10 year 24 hour storm event),

(ii) could utilize any combination of buffers (including buffers or open space that may be provided to meet other requirements of the Plan), swale and berm, or other structural means,

(iii) would require that the karst/aquifer protection plan be based on,and apply standard engineering methods and assumptions to the soil analysis and hydrogeological and geotechnical reports required by the Plan, including consideration of slope, vegetative cover present or to be planted, and any other factors required to be considered to meet accepted professional standards for the engineering of stormwater management systems, and

(iv) require neither buffering nor structural barriers where the studies and engineering standards indicate that because of the topography (e.g., possibly areas on the downhill side of a sink), or other relevant conditions, none is required to protect the aquifer.

or, in the alternative

(b) provide that development on Property Two may take place at an overall density of 1 du/A with 50% open space, meeting the other criteria for such development as are provided in the Plan and the LDRs to be adopted to implement the Plan.

28. omitted

29. omitted

Part II – Facts, Objections and Remedies re: the Wekiva Area

(A) Background re: Wekiva Study Area ("WSA") provisions

30. On April 28, 2009, the Board of County Commissioners of Lake County passed an ordinance (the 'Amendment') amending portions of the County's comprehensive plan (the 'Old Plan') related to the Wekiva Study Area (the 'WSA') defined by FS 369.316. On June 26, 2009 the Department of Community Affairs ('DCA' or the 'Department,' County and DCA collectively, 'Respondents') published a Notice of Intent finding the Amendment IN COMPLIANCE.

31. **(a)** Subsequently, Petitioner filed a petition for an Administrative Hearing on the Amendment, the status of which as of this date has not yet been determined by Florida's 5th District Court of Appeals.

(b) In the interim, County has adopted the New Plan which substantially incorporates the Amendment's FLU changes (while somewhat ameliorating a few of the substantive problems that were present in the Amendment), but did so (i) without the support of appropriate data and analysis, (ii) in a way that was not consistent with prior development patterns and which (iii) violated the property rights of owners in two of the three areas.

32. (a) In comparison with the Old Plan, the Amendment and New Plan change the Future Land Use ("FLU") designations in three large areas within the WSA, reducing densities for residential development in two areas and increasing them in the third as described in more detail here. The three areas are --

(i) An area north of SR-44 most of which had been and continues to be designated as Rural on the Future Land Use Map (the '**North**' area). Most of this area formerly either had, or effectively had, a maximum permissible base density of one dwelling unit to five acres ('1 du/ 5 A.' or '1:5'). While nominally retaining the Rural category in this area, the Amendment and Plan in effect, decrease the base density for parcels of 50 or more acres in this area to 1:20 by prohibiting use of the 1:5 base density unless one agrees to place 35% of one's useable land under a conservation easement. The Plan has somewhat ameliorated this policy by applying it only to parcels of 50 acres and larger.

(ii) Within the Wekiva River Protection Area (the 'WRPA') as well as the WSA, an area east of CR-437 delimited in the Plan and labeled as the A-1-20 Receiving Area also known as Receiving Area One ('**RA-1**'). Property in this area was to be permitted a density increase under a point system which included in part a

Transfer of Development Rights ('TDR') regime which Petitioner believes to have been put in place in response to the enactment of part II of Chapter 369. Though nominally the base density under the pre-Amendment Plan was 1:20, the effective base density was 1:5 since the point system essentially guaranteed that land within this area could be subdivided into 5 A. lots (a density of 1:5) without the purchase of TDRs and without requiring common areas or conservation easements. The point system also provided opportunities to obtain additional points for a variety of factors including provision of open space, proximity to fire houses and schools and the purchase of TDRs, et. al., theoretically permitting increased densities of as much as 1:1. The Plan leaves the base density in place but then, for parcels of 50 or more acres., in effect, reduces the base density by abolishing the point system and adding the requirement to place 50% of one's useable land under a conservation easement and transfer title to an HOA or County or an environmental organization , thus reducing the effective base density from 1:5 down to 1:20.

(iii) An area south of SR-44 and west of CR-437 (the '**South**' area), most of which was formerly assigned a Future Land Use Category of rural with a maximum density of 1:5, is now assigned to the Rural Transition category with the same 1:5 as base density but with the possibility of increasing that to 1:3 or even 1:1 subject to zoning approval and requiring certain percentages of common area and other design standards to be met.

(b) In summary then, the Amendment aims to reduce the density of new development in the **North** area and in **RA-1**, but increase density for virtually all of the **South** area.

DISPUTED ISSUES OF MATERIAL FACT

Part II – (B) WSA changes not supported by requisite data & analysis

Count Seven

The aforementioned FLU changes are not supported by the requisite Data & Analysis

33. When the Amendment was adopted, it did not appear that there was *any* Data and Analysis available in support of the changes. The changes in Future Land Use designations for the three subject areas were re-adopted into the New Plan without any new data and analysis to specifically support them. Though accompanied by voluminous county-wide data and analysis, and the Data and Analysis submittal accompanying the New Plan contains a few paragraphs describing the statutory history and requirements for the WSA and the County's aspirations w/r/t some of those requirements, it cannot be fairly stated that the New Plan package contains any such data or analysis that would support the FLU changes in these three areas. The County should not be allowed to skirt the requirement for data and analysis with respect to these three areas merely by burying the Amendment's FLU designation changes in the subsequent and much larger and more complex matter of the New Plan

34. F.A.C. 9J-5.005(2)(a) expressly requires that "… plan amendments shall be based upon relevant and appropriate data and the analyses applicable to each element." Respondents cannot show that with respect to the WSA FLUM changes, either the Amendment package or the New

Plan package contained any such data or analyses supporting such density changes or the Land Use Analysis required by Rule 9J-5.006(2), F.A.C. Therefore the Plan is NOT in compliance.

Part II – (C) New Plan inconsistent with existing development patterns

Count Eight

The FLUM changes in the WSA are not consistent with existing development patterns

35. . In view of County's failure to undertake and provide the required data and analysis w/r/t the subject FLUM changes, Petitioners data and analysis described below should be accepted as dispositive.

(a) An analysis of overall development patterns shows the area targeted for increased density, the **South,** to be the least developed of the three areas today with only 41% of the gross acreage subdivided into lots of less than approximately 10 A. (i.e., lots that are already too small to be further subdivided at a base density of 1:5), while the two areas slated for decreased density are already more developed and have, in the case of **RA-1**, 52% of the gross acreage so subdivided, and in the case of **North**, 69% already so subdivided.

Area	density change	% developed at < 10 A.	% not yet developed		developed acreage	undeveloped acreage	total acreage
North	decrease	69%	31%		5,745	2,575	8,320
RA-1	decrease	52%	48%		2,580	2,360	4,940
South	increase	41%	59%		1,793	2,607	4,400

(The foregoing analysis is based on maps from the County's 'old' GIS system which was also used to access property record cards prepared by the Lake County Property Appraiser's Office.)

(b) Given the foregoing analysis, it is plain that the increases and decreases in density intended by the Amendment are not consistent with existing development patterns.

(c) When the law (F.S. 369.321(3)) requires that existing development patterns be considered, it cannot simply mean them to be noted and then ignored. Therefore the Plan is NOT in compliance.

Part II – (D) New Plan's WSA changes inconsistent with Property Rights

Count Nine

The WSA FLUM changes do not meet statutory requirements to recognize property rights and to balance resource protection with existing plans

37. (a) statutory requirements. FS 369.321 (3) reads in part: "Such strategies **shall recognize property rights** and the varying circumstances within the Wekiva Study Area, including rural and urban land use patterns," (emphasis added) and FS 369.322 (3) recognizes "the need to balance resource protection … consistent with existing (i.e., then in existence) comprehensive plans …." (parenthetical added) which would allow affected property owners to realize their *reasonable investment backed expectations*, thus furthering the stated requirement to recognize property rights.

(b) The then existing pre-Amendment plan provided effective base densities here of 1:5 with no requirement for dedications. There are no other factors of sufficient weight to require the density reductions/common area/dedications in the North or RA-1 which would be imposed by the Amendment and New Plan.

(i) **Not <u>aquifer recharge</u> concerns.** **1.** In setting (or permitting) ISRs of 20-30% in the WSA, the County (and DCA) implicitly admits that aquifer recharge is not the concern here since that could be easily improved by simply limiting ISRs in rural residential subdivisions to 5% while continuing to permit a minimum lot size of 5 A., a requirement that would be an imposition on only the tiniest minority of residential/pastoral 5 A. lot owners.

2. The Amendment (Policy 7-2.2A) and the New Plan (Policies III-2.1.15 and III-2.1.20) refer to a reduction in densities as one possible method of protecting re-charge areas and springsheds, so proposing to increase the permissible density in the South area in and of itself proves that aquifer recharge and springshed protection cannot be concerns, especially when that density increase is closer to the springhead and will most likely dramatically increase the Directly Connected Impervious Areas in the South area. Respondents thereby concede that aquifer recharge cannot be a reason to drastically reduce densities in the other two areas.

3. The Amendment and New Plan packages both include a map prepared by the Department showing high recharge areas within the WSA. That map shows all three of the subject areas to have high recharge characteristics (indeed, according to that map labeled Wekiva Study Area Most Effective Recharge

Areas, the **North** area targeted for density reductions is actually the only one of the three areas a substantial portion of which is NOT noted as high recharge) , once more demonstrating Respondents cannot use recharge concerns to justify the reductions in density.

4. There is no known process by which mere transfer of title (to County, an HOA or environmental organization) would render otherwise impervious surfaces pervious or in any way improve their value for recharge nor conversely any process by which mere failure to transfer title would render otherwise pervious surfaces impervious or in any way reduce their value for recharge.

(ii) **Not <u>water use</u>. 1.** Policy 1-22.5 of the Amendment (p. 49) and Policy I-3.4.5 of the New Plan (p.88) permit up to 50% of the pervious area of a development including both common areas and residential lots to be irrigated landscaping. Respondents thereby concede that water use is not an overriding concern here since 5 A. equestrian lots typically have four or more acres of un-irrigated pasture resulting in only 20% or less of the pervious area being irrigated.

2. The planned density in the South will, if built out at anything close to the maximum density permitted by the Amendment and New Plan, result in more lawns on smaller lots in subdivisions with HOAs and at least partially irrigated common areas causing an increase in water use in comparison with the same area developed as 5 A. equestrian lots, clearly demonstrating that water consumption cannot be used by Respondents as a basis for overriding the historic densities and land uses in the North and RA-1.

(iii) **Not <u>habitat preservation</u>, 1.** since with respect to the subject density requirements, the Amendment makes no distinction between environmentally sensitive lands and others. .

2. The New Plan's "Listed Species and Habitat Map" establishes that 90% or more of the undeveloped lands subject to the dedication requirement within the WSA are NOT sensitive habitat, yet the Plan imposes a burdensome requirement on ALL of the undeveloped properties in the two subject areas.

3. Moreover the Amendment and New Plan contain numerous other provisions protecting wildlife and habitat so that it is doubtful that the reduced density in the North and RA-1 areas would provide a materially incremental conservation benefit in this regard, even in many environmentally sensitive areas

(iv) **Not <u>infrastructure</u>.** No more lots would result if the North and RA-1 areas were developed at 5 A. under prior rules, than would result if those areas were developed at 1:5 under the Amendment as written and such lots would not in either case be exempt from concurrency requirements. Indeed, if all of the undeveloped parcels in the North area were subdivided into 5 A. tracts, there would be scarcely 500 more homes possible, and even fewer numbers would be added in RA-1 on the same basis, in combination, less than a single DRI.

(v) **Not <u>rural preservation.</u>** Although RA-1 is also governed by part II of Chapter 369 which part does require the County to protect "the rural character" of the WRPA [369.305 (1) (b)] (and County may wish to do so in the North area as well),

1. unless Respondents can show that the average lot size for all developed property in each respective area very substantially exceeds the 5 A. lot size implicit in the former effective base density, then no larger lot size is required to maintain the rural character of either of the two areas. [NB: County should be able to do such computations as well as verify and refine and extend Petitioner's analysis with comparative ease as it has direct electronic access to the data required. Petitioner's data analysis summarized above took the better part of each of three days.]

2. the point system adopted for RA-1 under the Old Plan in response to Part II of Chapter 369 F.S. would have permitted densities significantly greater than 1:5 showing that a density of less than 1:5 is not required maintain the area's rural character within the meaning of the law.

(b) The statute plainly requires that resource protection should be balanced with existing plans. But the New Plan plainly imposes an extremely burdensome policy on property owners in the subject areas while providing little or no resource protection making it by definition unbalanced. Therefore the Plan is NOT in compliance.

(c) in view of the long established densities in the subject areas, the failure to balance frustrates the *reasonable investment-backed expectations* of the area's property owners thereby frustrating the statute's stated intent of protecting property rights. Therefore the New Plan is NOT in compliance.

38. **(a)** The statutory requirement for balance with existing plans requires that less burdensome means should be chosen when such are available to achieve the legislative purposes of the Act and such are available.

(i) Aquifer recharge concerns could less burdensomely be addressed by the simple expedient of limiting the ISR to 5% on lots of 3 A. or more.

(ii) Water consumption concerns could be more effectively and less burdensomely addressed by permitting 5 acre lots but, for regulatory purposes, bifurcating 5 A. lots into an agricultural portion and a residential portion with the residential portion limited to the lesser of one acre or 10 % of the total lot size and then applying the above referenced irrigated landscape restrictions of the Amendment and New Plan to the residential portion and prohibiting any permanently irrigated landscaping on the agricultural portion but relieving the agricultural portion of the limitations on chemical applications in the same bullet point to the extent that Best Management Practices were used in the agricultural portion. Such bifurcation would not be burdensome to County as Property Appraiser already bifurcates parcels for appraisal purposes.

(iii) Wildlife corridors could be more effectively instituted with less burden by a simple requirement that where such corridors were planned, up to 35% (or 50% in the WRPA) of the land could be placed under conservation easements on individual lots, permitting the land subject to the easement to be used for pasture or any other agricultural pursuit, but providing that any fencing on or across the easement must have provisions permitting the passage of wildlife.

(b) Because less burdensome and/or more effective means are available to achieve the resource protection goals of the statute, it cannot be fairly stated that the New Plan provides the statutorily required balance. Therefore the Plan is NOT in compliance.

39. (a) If the New Plan is implemented as written, the County could no more avoid liability for such taking by asserting that its' actions did not amount to a taking because it had deprived owner of all or substantially all economic value or use of only the 35% (or 50%) common area, than it could avoid liability for a possessory taking by asserting that because it was only taking a tenth of an acre from a 50 A. parcel for additional road right-of-way, and had not deprived the owner of all or substantially all economic benefit of the remaining 49.9 acres, it should not therefore be required to compensate the property owner for the $1/10^{th}$ acre that it did take.

(b) That such conservation easements have substantial value is (i) recognized by the federal tax code which allows a fair market value income tax deduction for voluntary contributions of conservation easements to eligible organizations, (ii) established by the practices of the state which has expended substantial amounts of Florida Forever funds or other state conservation funds for the purchase of such easements and (iii) confirmed by the New Plan which adopts purchase of such easements as a policy "in order to establish natural area networks or greenways" (Policy VI-1.4.10, pg. 255) making it indisputable that the involuntary dedication of such easements is, in the present context, a taking. Moreover, such payments and tax deductions are extended to grantors of such easements irrespective of whether they cover all or only part of a given parcel. Therefore it cannot be fairly stated that the New Plan respects property rights as is required by the statute, so the New Plan is NOT in compliance.

40. **(a)** The analysis of ¶ 37 above shows that there is no essential nexus between the required density reduction/common area/dedication requirements and the stated objectives of the New Plan or the statute, so there can neither be rough proportionality in the requirement nor a legitimate exercise of the police power.

(b) In terms of *Palozzolo*, the density reduction/common area/dedication requirement

(i) will have a very deleterious effect of the value of the subject properties since, other things being equal, no one will pay as much for half or 2/3 of a lot as they would for the entirety of the same lot.

(ii) as noted in ¶37(c) above, will frustrate *reasonable investment-backed expectation*s, and

(iii) has no nexus and therefore no rational basis,

Making the requirement a plain violation of property rights and therefore NOT in compliance.

ULTIMATE FACTS ALLEGED AND BASIS OF REVERSAL, Part II (B): WSA

As set forth in Counts 7, 8 and 9 above --

40. **(a)** Rule 9J-5.005(2)(a) FAC states that "All goals, objectives policies, standards, findings and conclusions … within plan amendments and their support documents, shall be based upon relevant and appropriate data and the analyses applicable to each element." But no such data or analyses supporting the WSA FLU changes have been presented by County or required by DCA. Nor can Respondents claim compliance by pointing to sub-section (b) of the same Rule: "This chapter shall not be construed to require original data collection by local government

…," as County has all necessary data already collected in the files of its' Property Appraiser and merely needs to analyze the data it has already collected. Therefore the Amendment is NOT in compliance.

(b) Land Use Analysis Requirements as set forth in Rule 9J-5.005(2)(b) include "An analysis of the character and magnitude of existing vacant or undeveloped land …." and no such analysis has been presented or required by Respondents with respect to the WSA FLUM changes.. Therefore the Amendment is NOT in compliance.

(c) F.S. 369.321(3) requires Amendments to "… recognize … the varying circumstances within the Wekiva Study Area, including rural … land use patterns." But as shown by Petitioner's analysis, neither the Amendment's decrease of permissible densities in two areas nor its' increase of permissible densities in a third is consistent with existing land use patterns. Therefore, the Amendment is NOT in compliance.

(d) F.S. 369.322(3) recognizes "… the need to balance resource protection … consistent with existing … county comprehensive plans …." But as set forth above, there are no resource protection factors of sufficient weight to require the adopted density reductions in the North or RA-1. Therefore the Amendment is NOT in compliance.

(e) Moreover, the concept of balance implies the need to weigh the benefits of a policy against its' costs and the need to utilize the least or a less burdensome means when such is available to achieve the legislative intent, and, as set forth at ¶ 38 above, less burdensome means are available. Therefore the Amendment is NOT in compliance.

(f) Each of the two areas in which the Amendment would decrease densities is already substantially developed, so any requirement for new development to materially exceed the average lot size of the existing development would violate the equal protection clause of the

14th Amendment of the U.S. Constitution. And unlike the case of eminent domain where the judgment of government officials is generally deferred to in determining the legitimacy of the taking (*Kelo*), subject only to the respective jurisdiction providing just compensation to a property owner, the equal protection clause sets forth an absolute affirmative duty of the government which is, in a sense, the very purpose of government. ("… to secure these rights, governments are instituted among men…") It should be obvious that no government established under the Constitution should knowingly violate one of its' provisions. Such a violation of both the U.S. and Florida constitutions renders the regulation invalid and the Amendment NOT in compliance.

(g) FS 369.321 (3) requires that: "Such strategies shall recognize property rights," and, as set forth in ¶39 above, the New Plan fails to do so, thereby falling short not only Chapter 369, but of Florida's other statutory and constitutional property rights protections that must be met for an amendment to be in compliance. Therefore it is NOT in compliance.

41. RELIEF SOUGHT BY PETITIONER**:**

(a) Removal of all impediments to the effective use of the long established 1:5 density within any of the 3 subject areas, and

(b) Agreement that no other impediments will be placed to its use in the future.

(c) That such other relief be granted as may be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 19, 2010, a true and correct copy of the foregoing Petition has been furnished by electronic transmission to the Respondents named on page 1, and by U.S. mail to the Interested Party and Ms. Melanie Marsh, Acting County Attorney for Lake County, Florida at the addresses shown on page 1.

The original will be forwarded by U.S. Mail to the Agency Clerk as well.

/S/ Jon Pospisil

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Jon Pospisil