

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

GEORGE H. DECKER,

Plaintiff/Petitioner,

v.

Case No. _____

**CITRUS COUNTY, a political
subdivision of the State of Florida,**

Defendant/Respondent.

_____ /

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR
DAMAGES, DEMAND FOR A JURY TRIAL, PETITION FOR ON THE
RECORD REVIEW OF THE DECISION OF CITRUS COUNTY BOARD
OF COUNTY COMMISSIONERS AND REQUEST FOR ATTORNEY’S FEES**

COMES NOW, Plaintiff, GEORGE H. DECKER, who, for his cause of action against CITRUS COUNTY, a Political Subdivision of the State of Florida, would state as follows:

I. JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 2201 and pursuant to 42 U.S.C. Sec. 1981; 42 U.S.C., Sec. 1983; 42 U.S.C., Sec.1988, and to the Fifth, and Fourteenth Amendments to the Constitution of the United States and to Article I, Section 9 of the Constitution of the State of Florida.

2. The Diversity Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1332, because Plaintiff, George H. Decker is a citizen of the State of Tennessee and Defendant is a citizen of the State of Florida. Plaintiff Decker seeks damages in excess of \$75,000 exclusive of interest, costs and attorney’s fees, thereby bringing this matter within the Diversity Jurisdiction

of this Court over both the Federal and State law claims.

3. Supplemental State Law claims are brought pursuant to this Court's Diversity Jurisdiction as provided for in 28 U.S.C., Sec. 1367, although this Court has jurisdiction of all claims based on the diversity of citizenship pursuant to 28 U.S.C. Sec. 1332.

4. The Supplemental Jurisdiction of this Court with respect to the Petition for On the Record Review, is invoked pursuant to 28 U.S.C. § 1367 and to *City of Chicago et al., v. International College of Surgeons*, 522 U.S. 156, 118, S.Ct. 523, (1997). The claims in the Petition for On the Record Review are so directly related to, and inextricably intertwined with the claims in the action within this Court's original jurisdiction that they form part of the same "case or controversy" under Article II of the Constitution of the United States.

5. Venue is proper in the Ocala Division of the Middle District of Florida since the conduct complained of herein occurred within Citrus County, Florida, which is within the geographical area assigned to the Middle District of Florida, Ocala Division.

6. Venue is also proper in the Ocala Division of the Middle District of Florida since, for the purposes of venue, Defendant, Citrus County, is a resident of said Division and District.

7. This action is brought to determine issues, rights and liabilities of an actual and present controversy between the parties involving the validity of Citrus County legislation, and policies, procedures, and actions, essentially making it impossible to establish any form of development on Plaintiff's property.

8. All of Defendant's actions at issue herein were actions under the color of state law.

9. Plaintiff further seeks a declaratory judgment specifically finding the subject

provisions of the challenged legislation, and the challenged policies, procedures, and actions to be unconstitutional because said provisions and actions deny Plaintiff his Federal Constitutional and state rights to develop and profit from his property, thereby taking his property and defeating his reasonable investment backed expectations.

10. Plaintiff also seeks to obtain permanent injunctive relief to enjoin Defendant Citrus County from enforcing any and all provisions of the challenged legislation, policies and procedures because such enforcement eliminates, prevents, chills and/or discourages, and, ultimately, totally restrains Plaintiffs from owning, operating and participating in the development of his property.

11. Plaintiff also seeks a judgment that the actions of the Citrus County Board of County Commissioners, in adjudicating Plaintiff's applications for development approvals, denied Plaintiff procedural and substantive due process, departed from the essential requirements of the law, and were not based on competent, substantial evidence, thereby depriving Plaintiff of property rights guaranteed by the Constitution and laws of the United States and of the State of Florida.

II. PARTIES

12. Plaintiff, George H. Decker is a natural person who resides in Sevier County, Tennessee, and who owns property in the Ozello area of unincorporated Citrus County.

13. Defendant, Citrus County, is a political subdivision of the State of Florida, organized and existing pursuant to Article VIII, Section 1, of the Constitution of the State of Florida and to Chapter 126, Florida Statutes.

14. Defendant, Citrus County, shall be deemed to include Citrus County staff

members and elected and appointed officials who have acted against Plaintiff to deprive Plaintiff of rights guaranteed to Plaintiff by the Constitution and laws of the United States and of the State of Florida.

III. GENERAL ALLEGATIONS

15. Plaintiff's property, Pirate's Cove, is located in the Ozello community of unincorporated Citrus County, at the end of the Ozello Trail.

16. Pirate's Cove and the lots in its immediate area were developed as an unrecorded plat: Sunny Isles Estates, Unit 1.

17. The property once housed a restaurant and bar of approximately 8,000 square feet, a seven unit motel, five small cabins, and an 18 space recreational vehicle park with hook-ups and a community building for laundry and showers.

18. Pirate's Cove was badly damaged by a no-name storm in 1993, and then by Tropical Storm Josephine in, 1996.

19. Plaintiff, Pirate's Cove's current owner, George Decker, began to acquire the property in May, 2003, when he acquired the principal parcel of Pirate's Cove, which parcel contained the restaurant building and the motel.

20. Between June, 2004, and January, 2012, Mr. Decker acquired the balance of the properties that now comprise the 3.6 acre Pirate's Cove site.

21. After Mr. Decker acquired most of the Pirate's Cove property, a number of significant issues arose. The most contentious issue was the condition of the restaurant building and whether the building could be rehabilitated at its location with regard to setbacks from the water could be preserved. (It was acknowledged that the motel building required demolition.)

22. Other issues included whether the recreational vehicle park had retained its legal nonconforming status, and there was a significant problem with vandalism and trespassing, particularly in the overnight hours.

23. In dealing with each of these issues, Citrus County took a position adverse to the interests of Plaintiff.

24. While it was undisputed that the motel building required demolition, the status of the then existing restaurant building was not as easily resolved, as there was competent, substantial evidence that the residual value of the restaurant building was sufficient to be exempt from demolition under the County's unsafe structures ordinance (Article V, § 21.50, *et.seq.*, Citrus County Code).

25. Nonetheless, on March 17, 2010, Mr. Decker's then counsel, purportedly for reasons that resulted in subsequent malpractice litigation, withdrew a previously filed appeal of the County's demolition order and the restaurant and motel buildings were demolished by May or June, 2010. The cabins were demolished in November, 2011. The property is now vacant except for a community building that used to house a laundry, showers, and related appliances and facilities.

26. In September, 2011, Plaintiff retained the undersigned counsel and a land use planning consultant to review the current status of the property, its history over time, and possible development scenarios for the future.

27. Because of the uncertain propriety of the unsafe structures demolition order, Plaintiff's approach to a new round of development approvals was cautious, beginning with a public records request, pursuant to Chapter 119, Florida Statutes, to review the County's

documentation on the project up to that point in time.

28. Citrus County's response to the public records request was prompt and thorough. The results of initial public records request led to other public records requests which also were answered promptly and thoroughly. County staff who were present as the records were reviewed were cordial and were helpful in providing background on matters not readily evident in the written record.

29. This positive response by Defendant's agents and an apparent willingness to see some form of development at Pirate's Cove led to a pre-application meeting with County staff on October 5, 2011.

30. Based on the historic use of the property as a tourist destination (the motel, cabins, recreational vehicle park and a destination restaurant) and a vested rights determination that the property was entitled to be used for 14 residential uses, (Exhibit A, attached hereto and made a part hereof by reference), a resort condominium seemed to be the appropriate use, and a yield of approximately 30 units also seemed appropriate, given that the resort condominium would not be a permanent residence for any owners or tenants.

31. Occupancy of the resort condominium units by either owners or tenants was always contemplated as being in the 180 day range, with a specific undertaking to limit rental occupancies to 180 days or less so that those rental charges would be subject to being taxed under the applicable tourism "bed tax" as an intended benefit to the County.

32. It was also decided that the most appropriate method of fashioning the approvals for Pirate's Cove was in the form of a Development Agreement as permitted by § 163.3221, *et.seq.*, Florida Statutes and by (then) § 78.83 of the Citrus County Code.

33. The Development Agreement was intended to provide the ability for interaction between the parties to lead to an outstanding project coupled with improvements to Citrus County's adjacent Ozello Community Park, road improvements, and other benefits to Citrus County and to Ozello Water, the local water supply provider.

34. At this point, it is important to note that Citrus County had recently approved a resort condominium with a maximum of 180 day occupancies: Riverside Resort. This approval was granted on July 11, 2006, and specifically permitted occupancies by owners or tenants of up to 180 days (Exhibit B, attached hereto and made a part hereof by reference).

35. No change to any County policy, ordinance or regulation dealing with the permitted occupancies of a resort condominium from 180 days in (July, 2006, when the Riverside Resort was approved), to 30 days (in August, 2013), when the Pirate's Cove applications were pending, was ever made by Citrus County, (Exhibit C, attached hereto and made a part hereof by reference).

36. The request to negotiate a Development Agreement, which request specifically identified the project as a resort condominium, using the same term as the Ordinance approving the Riverside Resort, was made of Citrus County on January 27, 2012. (Exhibit D, attached hereto and made a part hereof by reference).

37. Plaintiff, seeking to be open and entirely transparent to the community as it pertained to his development goals, held a voluntary neighborhood meeting to present the plans for Pirate's Cove on February 13, 2012.

38. The request to negotiate a Development Agreement was heard by the Board of County Commissioners on February 14, 2012, and was approved by a very welcoming Board of

County Commissioners. (Exhibit E, attached hereto and made a part hereof by reference). During the presentation to the Board, the project was repeatedly described as a “resort condominium.”

39. A pre-application meeting was held on April 20, 2012, followed by a meeting with staff on the issue of any remaining state ownership in the area. Plaintiff also held a second, voluntary, neighborhood meeting on July 31, 2012.

40. An “Initial Executive Summary” of a Planning Review (Exhibit F, attached hereto and made a part hereof by reference) designed to analyze the land use planning related issues at Pirate’s Cove was provided to Citrus County in February, 2012, and included the following description of the project:

The resort condominium is a new but increasing popular and present form of land use. In a resort condominium the rooms available to the public are owned in fee simple by individual owners. Those owners are free to use their condominium units at their leisure for a period, presently expected to be approximately six months, or, alternatively, to place their unit into a resort management program for the entire year. When the units are not owner occupancy, they will be available for rent to the general public.

41. A First Revised Initial Executive Summary of the Planning Review (Exhibit G, attached hereto and made a part hereof by reference) was provided to Citrus County in October, 2012. This First Revised Executive Summary contained the same language as the original document.

42. The Final Planning Review, expounding on the February, 2012, Initial Executive Summary, was submitted to Citrus County in July, 2013. This “Final Planning Review”

described the project as follows: ¹

As required by the Citrus County Code, the proposed Development Agreement includes draft covenants running with the land. The basic concept is that the 33 resort condominium units will be owned by individual owners who may use those units up to approximately 185 days per year. For the remaining approximately 180 days of the year the unit must be in the rental pool.

43. At the suggestion of the then Director of Development Services, Plaintiff had prepared for the County's consideration draft recitals (or "whereas" clauses) (Exhibit H, attached hereto and made a part hereof by reference) for the approval of Pirate's Cove as a resort condominium. These draft recitals, dated January 5, 2012, included the following:

WHEREAS, the redevelopment of Pirate's Cove will provide for short- and medium-term tourist and second home occupancies which will enhance Citrus County's economic base while not impacting matters such as evacuation times, need for schools, libraries, social services and neighborhood parks; and

...

WHEREAS, the redevelopment of Pirate's Cove as a resort condominium will operate as the functional equivalent of a hotel with some short- and mid-term owner occupancies; and

44. Finally, as required for the approval of a Development Agreement, the proposed Agreement was submitted to Citrus County on December 27, 2012. The condominium documents (Exhibit I, attached hereto and made a part hereof by reference) which were an exhibit to the proposed Development Agreement (as the required "restrictive covenants") included the

¹ An updated version of this Planning Review (Exhibit W, attached hereto and made a part hereof by reference) was made a part of the record in the rezoning proceedings before the Board of County Commissioners and is found as an exhibit in Count VIII, the Petition for On the Record Review.

following:

29. Owner Occupancy of Resort Units. A Resort Unit Owner and his immediate family may occupy the Resort Unit for a period not greater than 185 days in any calendar year. Such owner occupancy may be in one continuous 185 day period or in unconnected increments of one night or more. The Resort Unit Owner shall coordinate with the Resort Area Owner as to the Resort Unit Owner's intention to occupy his Resort Unit so that at all times the Resort Unit Owner is not using his Resort Unit, the Resort Unit shall be available to the rental pool described below.

...

31. Resort Unit Guest Occupancy. Each Resort Unit may be occupied by transient Resort Guests for periods of not less than one night and not more than 180 days, which periods may be one continuous 180 period or in unconnected increments of one night or more. Subject to availability, Resort Guests may reserve Resort Units in advance or at the time of their arrival.

45. Thus, on at least eight occasions, six of them "in writing," the proposed use of Pirate's Cove as a "resort condominium with owner and tenant occupancies of up to approximately 180 days" was identified to Citrus County.

46. During this process, a further pre-application meeting set for October 11, 2012, was canceled at the last minute, and staff declined to reschedule that meeting.

47. This was the first apparent exhibition of the County staff engaging in deliberate conduct to delay and deliberately obstruct the Pirate's Cove project.

48. With the final applications submitted and pending, an application review meeting was finally scheduled for August 15, 2013.

49. It was the understanding of Plaintiff and of his Pirate's Cove Design Team (described below) that this meeting would be a review of the details of the proposal, including

structural and mechanical elements of the building, site design issues, and mapping issues.

50. Plaintiff was represented, not only by his planner and legal counsel, but also by mechanical and structural engineers, and other design professionals, all available to review the details of the project.

51. In fact, Defendant's agents had been provided a list of attendees for the meeting and the attendees' special areas of expertise and what information they would present at the design review meeting. (Exhibit J, attached hereto and made a part hereof by reference).

52. Instead of being a meeting to review the details of the project, Citrus County staff shockingly announced that the entire concept of a "resort condominium with occupancies in the 180 day range," the same form of development approved at the Riverside Resort, was prohibited based on a reading of the interaction between the Florida Building Code and the Citrus County Comprehensive Plan.

53. This announcement came more than 18 months after the form of the development had been identified, and that form had been reiterated in six written documents and in at least two meetings.

54. This was the second exhibition of what the Plaintiff believed were blatant misrepresentations, purposeful omissions, delays and deliberate obstructions imposed by Defendant's agents on the Pirate's Cove project.

55. On January 24, 2014, Mr. Decker's planning and legal advisors were able to meet with staff in an effort to obtain an elaboration by staff of their "rationale" behind the new determination made by staff that occupancies at Pirate's Cove would be limited to 30 days, this making the project unfeasible.

56. At the January 24, 2014, meeting, County staff verbally indicated that the prohibition against the 180 day occupancies was based a reference in the previously adopted Comprehensive Plan to the Florida Building Code. The County took the position that unilateral and unlimited revisions to the Florida Building Code were somehow incorporated into the operative Comprehensive Plan, despite the notice and hearing requirements for such amendments.

57. As soon as that explanation had been received, a formal request was made of Citrus County for a determination of the permitted occupancy on February 10, 2014. (Exhibit K, Attachment 5, attached hereto and made a part hereof by reference).²

58. Although there was an “interim” response to the request for an interpretation, as of May 15, 2014, there had been no formal response to the request for a written determination of the issue.

59. This was the third exhibition of what the Plaintiff believed were blatant misrepresentations, purposeful omissions, delays and deliberate obstructions imposed by Defendant’s agents on the Pirate’s Cove project.

60. Accordingly, on May 15, 2014, Plaintiff’s land use planning consultant appeared before the Board of County Commissioners in the “Open to the Public” portion of the Board’s meeting, requesting a response to the request for a determination of the interpretation requested of Defendant’s staff.

61. A written determination from County staff was provided the next day, affirming

² A request for a legal opinion regarding enactment procedures was made the same day, (Exhibit L, attached hereto and made a part hereof by reference), and remains unanswered to this day. If it had been found that the required notice and hearing procedures were not followed, the substance of the matter would have become immaterial.

the County's claim that the occupancies at Pirate's Cove would be limited to 30 days. (Exhibit K, Attachment 6. That determination was appealed by Plaintiff eight days later. (Exhibit K).

62. Also at the August 15, 2013, meeting with Citrus County Staff, after Staff had, for the first time in more than 18 months, stated that the Pirate's Cove project as designed could not be permitted, Plaintiff and his advisors were advised that the County could no longer fulfill its obligations under the proposed Development Agreement: implementation of a park improvement plan, and the installation of restroom facilities at the Ozello Community Park.

63. Since a major goal of the Development Agreement was no longer achievable, that being the improvement of the County's facilities, the Development Agreement application was withdrawn, and a form of approval that would permit the proposed use subject to appropriate conditions was needed.

64. Defendant and Plaintiff agreed that the appropriate vehicle for the approval of the development was approval of a Planned Unit Development (PUD) for the property. That application was denied and is the subject of the on the record review sought in the Petition for Writ of Certiorari in Count VIII, below.

65. The appeal of the staff's occupancy determination was heard on the same day as the hearing on Plaintiff's application for an amendment to the Generalized Future Land Use Map, the Zoning Atlas and approval of a Planned Unit Development: GFLUM/AA/PUD.

66. Plaintiff prevailed on his appeal of the staff determination as to the permitted occupancies of a resort condominium.

67. Throughout, the delays in the project were truly problematic. It took from January, 2012, to August, 2013, for the County to raise any concern about the form of

development and the occupancy of the units, despite having been advised of the nature of the proposed occupancy on at least eight occasions, six of which were in writing.

68. And it took a further nine months to obtain a formal interpretation of the issue (some due to scheduling problems, but including a three month delay in formally responding to the requested interpretation).

69. This was the fourth exhibition of what the Plaintiff believed were blatant misrepresentations, purposeful omissions, delays and deliberate obstructions imposed by Defendant's agents on the Pirate's Cove project.

70. Although mooted by the granting of Plaintiff's appeal to the Board of County Commissioners on the occupancy issue, Citrus County failed and refused to respond to legal argument made as to the procedural validity of the County's determination of the occupancy issue (Exhibit L).

71. This was the fifth exhibition of what the Plaintiff believed were blatant misrepresentations, purposeful omissions, delays and deliberate obstructions imposed by Defendant's agents on the Pirate's Cove project.

72. During the pendency of the GFLUM/AA/PUD application, Plaintiff's architect engaged in a conversation with two different Citrus County staff members.

73. The subject of the conversation was the yield of the proposed development based on the permitted Floor Area Ratio (FAR).³

74. One Citrus County staff member stated that the FAR did not include the ground floor of the building which, pursuant to Federal law, cannot be used for habitable space.

³ "A mathematical expression determined by dividing the gross floor area of a building by the area of the lot on which it is located." Citrus County Land Development Code, § 1500, p. I-25.

75. The more senior staff member disputed the original interpretation and stated that the ground floor would be required to be included in the Gross Floor Area, the basis of the calculation of the FAR. This interpretation would reduce the yield of the project by 25%.

76. In the case of Pirate's Cove, this change would reduce the yield of the property from a maximum 47,049 square feet of habitable area to 35,284 square feet of habitable area.

77. This was the sixth exhibition of what the Plaintiff believed were blatant misrepresentations, purposeful omissions, delays and deliberate obstructions imposed by Defendant's agents on the Pirate's Cove project.

78. Plaintiff's land use planning consultant challenged the interpretation of the Gross Floor Area definition based on a plain reading of the definition (Count V, below) and offered an alternative challenge that the project should be evaluated based on an earlier definition of Gross Floor Area in effect when the first application for development approval for Pirate's Cove was submitted (Exhibit M, attached hereto and made a part hereof by reference).

79. Citrus County's agents agreed that the Pirate's Cove application was vested under the former definition of Gross Floor Area (Exhibit N, attached hereto and made a part hereof by reference), but any new application that may be required in response to Citrus County's actions as complained of herein, may well be subject to the new and disputed definition of Gross Floor Area.

80. Based on the totality of the circumstances, and in an effort to compensate for the inordinate delays in this matter, the parties agreed to the sequential submittal of the PUD application, (which replaced the Development Agreement application), and its supporting documents and the utilization of the original submittals as the support for the applications. At

this time, August, 2014, the original Future Land Use Map and Atlas Amendment applications remained pending and were in process.

81. Thus, per the agreement between Plaintiff and Defendant, the PUD application was submitted sequentially as an addition to the pending GFLUM/AA application and as a substitute for the Development Agreement application.

82. The actual PUD application was submitted August 13, 2014, and the supporting drawings submitted on September 24, 2014, and the balance of the supporting documentation submitted shortly thereafter.

83. The objective of this sequential submittal was to have the applications heard by the Planning Commission on October 2, 2014, which did occur, and by the Board of County Commissioners on November 18, 2014. The latter date was rescheduled but the sequential submittal of the materials was intended solely to facilitate meeting that schedule.

84. Throughout the process of seeking approvals for Pirate's Cove, Defendant and its employees, officials and appointees have acted in gross bad faith seeking to delay, impede or prevent the development of Pirate's Cove by, by way of example and not limitation:

- a. Failing to object to the proposed form of development from January, 2012 through August, 2013;
- b. Failing to respond to correspondence from Plaintiff's land use planning consultant as to the status of a potential shared parking agreement with Citrus County for the adjacent Ozello Community Park;
- c. On less than four hours' notice, canceling the pre-application meeting set for October 11, 2012;

- d. Refusing to reschedule the pre-application meeting set for October 11, 2012;
- e. Continually, without explanation or reason, changing its position with respect to potential ownership issues with an area within Pirate's Cove but not within the Pirate's Cove legal description, known as "the Elbow;"
- f. Permitting Plaintiff to incur the expense of bring his entire design team to Citrus County for what was supposed to be a detailed design meeting, instead raising for the first time at that meeting the fundamental question of the permitted occupancy of the development, a position the County knew would threaten the entire project;
- g. Stating, untruthfully, when Plaintiff's consultant appeared in the "Open to the Public" portion of the Board of County Commissioner's May 15, 2014, agenda that: "there was a room full of people" objecting to the project at the time Plaintiff received the Board's approval to negotiate a Development Agreement;
- h. Advising Plaintiff's agents that the GFLUM/AA/PUD application would be heard on November 18, 2014, and failing to schedule the application for that date;
- i. Falsely and maliciously advising the Citrus County Local Planning Agency that Plaintiff had failed to submit revised design plans on the agreed timetable;
- j. Pre-judging the vested status of those portions of Pirate's Cove already

zoned Coastal Lakes Commercial, when no vested rights determination had been requested;

- k. Stating to the Board of County Commissioners that Plaintiff had not demonstrated solid waste concurrency when, in fact, such concurrency had been demonstrated, (Exhibit O, attached hereto and made a part hereof by reference);
- l. Falsely and maliciously showing an older photograph of Pirate's Cove in an unkempt status while claiming the photograph to be recent.

85. Defendant and its employees, officials and appointees inflicted damage on Plaintiff that was wanton, intentional, malicious, and without any pretext whatsoever as being in fulfillment of a legitimate purpose.

86. Plaintiff asserts that his position, set forth in this Complaint, is legally sound and supported by fact and law. The Defendant's actions, however, have created a *bona fide* controversy between the parties and Plaintiff is in doubt as to his rights, privileges and immunities with respect to the matters at issue. Plaintiff requires, therefore, a declaratory judgment declaring his rights, privileges and immunities.

87. Plaintiff has no adequate remedy at law. No amount of money damages could adequately compensate the Plaintiff for the irreparable harm that would occur if the County is permitted to enforce the unconstitutional and unlawful regulations at issue herein.

88. Plaintiff has suffered actual, consequential and special damages as a result of the actions of the County, as alleged herein, which actions were all taken and implemented under the color of state law.

89. Plaintiff has been required to retain the undersigned attorney and to pay him a reasonable fee for his services.

COUNT I
THE OCCUPANCY ISSUE
(Federal Procedural Due Process – Declaratory Judgment and Damages)

90. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

91. On July 11, 2006, Citrus County approved development plans for the Riverside Resort that specifically and expressly permitted owner and tenant occupancies of up to 180 days (Exhibit B).

92. On August 15, 2013, more than 18 months into the Pirate’s Cove project, Citrus County staff, for the first time, took the position that occupancies at Pirate’s Cove would have to be limited to 30 days. This position was formalized in May, 2014 (Exhibit K).

93. The alleged basis for this change of position was that Policy 4.10.10 of the Citrus County Comprehensive Plan:

Policy 4.10.10

New construction or expansion of the following residential occupancy uses, as defined by the Florida Building Code (First Edition, Chapter 3, Section 311), are not allowed anywhere within the Coastal High Hazard Area:

...

R2: Multiple dwellings where the occupants are primarily permanent in nature, including: apartment houses, convents, dormitory facilities which accommodate 6 or more persons of more than 2 ½ years of age who stay more than 24 hours, fraternities, sororities, monasteries, and rooming houses (transient).

94. In 2006, when the Riverside Resort was approved, the Florida Building Code did not contain a definition of the word “transient.”

95. The 2010 Florida Building Code did define “transient,” imposing the 30 day maximum occupancy.⁴

96. Citrus County staff took the position that the establishment of the 2010 Florida Building Code with the definition of “transient” limiting occupancies to 30 days, “rolled forward” as a *de facto* amendment to the Citrus County Comprehensive Plan.

97. Citrus County used this *de facto* amendment to its Comprehensive Plan as the basis for its objection to the proposed occupancy at Pirate’s Cove.

98. At the Planning and Development Commission (PDC) hearing of the Pirate’s Cove approval applications, staff was asked if the PDC had recommended approval of an amendment to the Citrus County Comprehensive Plan that would have changed the permitted occupancies since the Riverside Resort had been approved. The response was that staff was unaware of any such recommendation, (PDC Transcript, pp. 41 - 44).⁵

99. Likewise, the undisputed evidence before the Board of County Commissioners was that there had been no notice of, and no opportunity to be heard with respect to, any changes in the County’s adopted land use controls.

100. Accordingly, the changed policy imposed on Plaintiff by Citrus County was adopted without notice or an opportunity to be heard.

⁴ The numerous conflicts between definitions, the supremacy of statutory definitions, and the issue of delegation of legislative authority were all explored in Plaintiff’s legal analysis of this issue (Exhibit L).

⁵ The proceedings on the development approval applications by Plaintiff were transcribed for the On the Record Review in Count VIII, below. These transcripts are incorporated herein as exhibits and will be referred to as “PDC Transcript” for the Planning and Development Commission meeting and as “BoCC Transcript” for the Board of County

101. The procedural due process in the enactment of land development regulations required by the Fifth and Fourteenth Amendments to the Constitution of the United States does not require strict compliance with state enactment processes.

102. However, a complete absence of notice, and a complete absence of an opportunity to be heard does rise to the level of a federal constitutional violation.

103. In the case of the policy change from permitting 180 occupancies in 2006 at the Riverside Resort to limiting the occupancies to 30 days at Pirate's Cove in 2013, there was no notice of this change and no opportunity to be heard.

104. Plaintiff has been damaged by Citrus County's imposition of this unconstitutionally adopted interpretation in, by way of example and not limitation:

- a. The temporary taking of Plaintiff's property;
- b. The cost of the delays in obtaining a hearing on this issue and on Plaintiff's requested development approvals;
- c. The cost of professional services necessary to resolve this issue of general application to Citrus County;
- d. The costs incurred by Plaintiff in traveling to Florida for matters related to this policy question and the diminution of Plaintiff's business while Plaintiff was traveling.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that the failure of Citrus County to provide notice and an opportunity to be heard with respect to the

Commissioners meeting.

change in policy between 2006 and 2013 was done in an unconstitutional fashion in derogation of Plaintiff's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States;

- b. Awarding Plaintiff his actual damages arising from this matter; and
- c. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT II
THE OCCUPANCY ISSUE
(Diversity Jurisdiction: State Enactment Claim – Declaratory Judgment)

105. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

106. On July 11, 2006, Citrus County approved development plans for the Riverside Resort that specifically and expressly permitted owner and tenant occupancies of up to 180 days (Exhibit B).

107. On August 15, 2013, more than 18 months into the Pirate's Cove project, Citrus County staff, for the first time, took the position that occupancies at Pirate's Cove would have to be limited to 30 days. This position was formalized in May, 2014 (Exhibit K).

108. The alleged basis for this change of position was Policy 4.10.10 of the Citrus County Comprehensive Plan:

Policy 4.10.10

New construction or expansion of the following residential occupancy uses, as defined by the Florida Building Code (First Edition, Chapter 3, Section 311), are not allowed anywhere within the Coastal High Hazard Area:

...

R2: Multiple dwellings where the occupants are primarily permanent in nature, including: apartment houses, convents, dormitory facilities which accommodate 6 or more persons of more than 2 ½ years of age who stay more than 24 hours, fraternities, sororities, monasteries, and rooming houses (transient).

109. In 2006, when the Riverside Resort was approved, the Florida Building Code did not contain a definition of the word “transient.”

110. The 2010 Florida Building Code did define “transient,” imposing the 30 day maximum occupancy.⁶

111. Citrus County staff took the position that the establishment of the 2010 Florida Building Code with the definition of “transient” limiting occupancies to 30 days, “rolled forward” as a *de facto* amendment to the Citrus County Comprehensive Plan.

112. Citrus County used this *de facto* amendment to its Comprehensive Plan as the basis for its objection to the proposed occupancy at Pirate’s Cove.

113. At the Planning and Development Commission (PDC) hearing of the Pirate’s Cove approval applications, staff was asked if the PDC had recommended approval of an amendment to the Citrus County Comprehensive Plan that would have changed the permitted occupancies since the Riverside Resort had been approved. The response was that staff was unaware of any such recommendation, (PDC Transcript, pp. 41 - 44).⁷

114. Likewise, the undisputed evidence before the Board of County Commissioners was that there had been no notice of, and no opportunity to be heard with respect to, any changes

⁶ See footnote 2 and accompanying text.

⁷ See footnote 2 and accompanying text.

in the County's adopted land use controls.

115. Accordingly, the changed policy imposed on Plaintiff by Citrus County was adopted without notice or an opportunity to be heard.

116. Section 163.3184 (11) establishes the procedures for the adoption of an amendment to a comprehensive plan.

117. In particular, § 163.3184 establishes a generalized hearing schedule for the adoption of a comprehensive plan amendment, and incorporates the notice requirements of Chapters 125 and 166, Florida Statutes.

118. Section 163.3184 also provides for state review of comprehensive plan amendments.

119. Citrus County imposed the "rolled forward" Florida Building Code provisions through a *de facto* amendment to the Citrus County Comprehensive Plan.

120. This *de facto* Comprehensive Plan Amendment was not:

- a. Subject to the public hearing process established by § 163.3184;
- b. Reviewed by the state as required by § 163.3184; and
- c. Advertised as required by Chapters 163 and 125.

121. Accordingly, the *de facto* amendment to the Citrus County Comprehensive Plan rolling forward to adopt Florida Building Code provisions was null and void *ab initio*.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that the failure of Citrus County to provide notice and an opportunity to be heard with respect to the change in policy between 2006 and 2013 was done in violation of §§

163.3184 and 125.66, Florida Statutes;

- b. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT III
DENIAL OF EQUAL PROTECTION
(Federal Equal Protection Claim – Declaratory Judgment and Damages)

122. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

123. As demonstrated throughout this complaint, Plaintiff has been subjected to the rigorous enforcement of Citrus County rules, ordinances, regulations, and policies, even some that were created “on the fly” with no formal or requisite legislative foundations.

124. In contrast, the Margueritagrill, a bar and grill, located at 10200 West Halls River Road and the Barzano Commercial Building at 10460 West Yulee Drive, both in the Homosassa area of unincorporated Citrus County, have been granted, both formally and legally and informally and illegally, numerous variances from the strict application of Citrus County’s development requirements.

125. This disparate treatment is a denial of the equal protection of the law in that Plaintiff does not have the same right as Margueritagrill and Barzano to the full and equal benefit of all laws and proceedings for the security his property.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that Citrus County’s disparate treatment of Plaintiff’s property compared to the treatment of other

commercial developments in Citrus County constitutes a denial of equal protection of the law in derogation of Plaintiff's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States;

- b. Awarding Plaintiff his actual damages arising from this matter; and
- c. Awarding Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT IV
TEMPORARY TAKING
(Federal Due Process – Damages)

126. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

127. Plaintiff has a real and protected property in his real property and in the right to develop said property.

128. Citrus County, acting under color of state law by going too far in the use of its police power to restrict the use of Plaintiff's property, has, at least temporarily, taken Plaintiff's protected property interest in his property.

129. Citrus County by its action has deprived Plaintiff of all or most of his interest in his property.

130. Said taking has unreasonably interfered with Plaintiff's reasonable investment backed expectations.

131. Plaintiff has been damaged by Citrus County's temporary taking of his property and by the other actions of Citrus County in, by way of example and not limitation:

- a. The temporary taking of Plaintiff's property;

- b. The cost of the delays in obtaining a hearing on this issue and on Plaintiff's requested development approvals;
- c. The cost of professional services necessary to resolve this issue of general application to Citrus County;
- d. The costs incurred by Plaintiff in traveling to Florida for matters related to this policy question and the diminution of Plaintiff's business while Plaintiff was traveling.

132. The actions of Citrus County complained of herein, singly and commutatively constitute a temporary taking of all beneficial use of Plaintiff's real property, thereby damaging Plaintiff.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Awarding Plaintiff his actual damages arising from this matter; and
- b. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT V
FLOOR AREA RATIO DETERMINATION
(Diversity Jurisdiction: State Interpretation Claim – Declaratory Judgment)

133. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

134. On June 12, 2012, the Citrus County Board of County Commissioners adopted Ordinance 2012-06, processed under application OA-11-07.

135. Ordinance 2012-06 adopted the following definition of "Floor Area, Gross:"

Floor Area, Gross: The floor area *within the inside perimeter of*

the exterior walls of the building under consideration, exclusive of vent shafts and courts, without deduction for corridors, stairways, closets, the thickness of interior walls, columns, or other features. The floor area of a building, or portion thereof, not provided with surrounding exterior walls shall be the usable area under the horizontal projection of the roof or floor above. The gross floor area shall not include shafts with no openings or interior courts. [Emphasis Added]

136. Assuming, *arguendo*, that it is lawful for it to do so, Citrus County has interpreted this new definition as including ground floor parking under the building, a common feature of almost all new buildings which, like Pirate's Cove, are to be built in a floodplain.⁸

137. As shown on the elevation and ground floor plan of the proposed Pirate's Cove, (Exhibits P-1 and P-2, attached hereto and made a part hereof by reference), there are no exterior walls around the ground floor of the building.

138. Therefore, the interpretation of staff (Exhibit N), by its plain language the new definition of "Floor Area, Gross," does not include the parking area.

139. Based on the wrongful denial of the applications at issue in Count VIII, the Petition for Writ of Certiorari, Plaintiff may be bereft of his vested right to the correct FAR calculation and may be subject to the unreasonable and improper interpretation at issue herein.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that Citrus County's interpretation of the definition at issue is incorrect and that the Floor Area

⁸ The previous definition specifically excluded this area:

Floor Area, Gross: The sum of the gross horizontal areas of the several floors of a building measured from the exterior face of exterior walls or from the centerline of a wall separating two buildings, **but not including interior parking spaces, loading space for motor vehicles**, or any space where the floor-to-ceiling height is less than six feet. [Emphasis Added]

Ratio for Pirate's Cove should be calculated without including the ground floor;

- b. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT VI
FLOOR AREA RATIO DETERMINATION
(Diversity Jurisdiction: State Enactment Claim – Declaratory Judgment)

140. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

141. Section 125.66 (4) (b) (2) establishes the precise language to be used in the notices of public hearings for amendments to ordinances such as the Citrus County Land Development Code, although only “substantial” compliance with the mandated form is required.

142. Rather than using the heading required by the statute: “Notice of _____ change,” each notice published by Citrus County was headed: “Notice of Intent to Consider an Ordinance Regulating Land Development in Citrus County to be Known as the Citrus County Land Development Code,” (Exhibit T, attached hereto and made a part hereof by reference.)

143. Thus headline is not in substantial compliance with the statutorily mandated language.⁹

144. Section 163.3164 (2) provides:

After a comprehensive plan for the area, or element or portion thereof, is adopted by the governing body, no land development regulation, land development code, or amendment thereto shall be adopted by the governing body until such regulation, code, or amendment has been referred either to the local planning agency or

⁹ There are other deviations from the mandated language but these deviations do not appear to be substantial.

to a separate land development regulation commission created pursuant to local ordinance, or to both, for review and recommendation as to the relationship of such proposal to the adopted comprehensive plan, or element or portion thereof.

145. Based on the record of Ordinance 2012-06, the Citrus County Local Planning Agency, (then known as the Planning and Development Review Board (PDRB)) considered Application OA-11-07 on April 19, 2011; July 7, 2011; July 21, 2011; August 18, 2011; September 15, 2011; October 20, 2011; and November 17, 2011, (Exhibit Q, attached hereto and made a part hereof by reference).

146. At its April 19, 2011 meeting, the PDRB recommended “**APPROVAL** to sending to the BOCC.”

147. Based on the record of Ordinance 2012-06, at no other time did the PDRB make any other recommendation to the Board of County Commissioners.

148. Based on the record of Ordinance 2012-06, at no time did the PDRB do the one thing that it is mandated by statute to do: a “review and recommendation as to the relationship of such proposal [land development regulation] to the adopted comprehensive plan, or element or portion thereof.”

149. Based on the wrongful denial of the applications at issue in Count VIII, the Petition for Writ of Certiorari, Plaintiff may be bereft of his vested right to the correct FAR calculation and may be subject to the unreasonable and improper interpretation at issue herein.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that Ordinance 2012-06, imposing the new floor area ratio calculation is null and void *ab initio* for

failure of the County to substantially comply with the notice requirements of § 125.66, Florida Statutes, and for the failure of the Local Planning Agency to make a recommendation that the amendment was consistent with the Citrus County Comprehensive Plan;

- b. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT VII
CURRENT ZONING
(Diversity Jurisdiction: Current Zoning Claim – Declaratory Judgment)

150. Plaintiff re-alleges and incorporates paragraphs 1 through 89 above as if set forth fully herein.

151. Throughout the application process described above, *e.g.*, PDC Transcript, p. 6, ll. 19 - 21, BoCC Transcript, p. 87, ll. 8 -10 ; staff report (Exhibit R, attached hereto and made a part hereof by reference at page 1), Citrus County referred to Pirate’s Cove as being zoned entirely Coastal Lake Residential.

152. However, as clearly shown on a zoning map of the area, (Exhibit S, attached hereto and made a part hereof by reference), a portion of the property is already zoned Coastal Lakes Commercial.

153. Nonetheless, by administrative fiat, Citrus County seems to have concluded that all development rights associated with the Coastal Lakes Commercial parcels have been extinguished:

MR. BROOKS: The existing construction that’s out there, is any of that on the CLC?

MS. COUTU: None of it’s usable or anything. I’m sure some of it

is because some of it abuts the water, but it can't be used. It's not vested for a footprint because the use has disappeared for so long.

PDC Transcript, p. 130 ll. 1 - 7.

154. Previously, Ms. Coutu had testified that there had been no vested rights determination requested; PDC Transcript, p. 116, ll. 4 - 5.

155. Since there has been no application for a vested rights determination, Citrus County cannot be certain as to what development rights still accrue to the two parcels (and the intervening vacated right-of-way), that are undisputedly presently zoned Coastal Lakes Commercial.

156. This effort to pre-judge any vested rights that might accrue to those parts of Pirate's Cove already zoned Coastal Lakes Commercial deprive Plaintiff of his property with due process and without compensation and this effort is patently unconstitutional.

WHEREFORE, Plaintiff respectfully requests the Court to grant the following relief:

- a. Entering a Declaratory Judgment declaring that Plaintiff is entitled to a formal adjudication of the status of those parts of Pirate's Cove already zoned Coastal Lakes Commercial, which adjudication must follow an application, review and opportunity to be heard and that Plaintiff's vested rights for these areas have not been automatically extinguished;
- b. Award Plaintiff the cost of this action and such other relief as may be just and proper.

COUNT VIII
ON THE RECORD REVIEW
(Diversity Jurisdiction – State on the Record Review – Petition for Writ of Certiorari)

A. JURISDICTION

Pursuant to 28 U.S.C. § 1367, and *International College of Surgeons, supra*, Petitioner appeals to this Court the denial of his request for amendments to the Citrus County Future Land Use Map, the Citrus County Land Development Code Atlas and approval of a Planned Unit Development. In *College of Surgeons*, the Court held, in pertinent part:

We granted certiorari to address whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of federal district courts. 520 U. S. ____ (1997). Because neither the jurisdictional statutes nor our prior decisions suggest that federal jurisdiction is lacking in these circumstances, we now reverse.

... In this case, there can be no question that ICS’s state court complaints raised a number of issues of federal law in the form of various federal constitutional challenges to the Landmarks and Designation Ordinances, and to the manner in which the Commission conducted the administrative proceedings. It is true, as ICS asserts, that the federal constitutional claims were raised by way of a cause of action created by state law, namely, the Illinois Administrative Review Law. ... As we have explained, however, “[e]ven though state law creates [a party’s] causes of action, its case might still ‘arise under’ the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.” ...

As for ICS’s accompanying state law claims, this Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts’ original jurisdiction over federal questions carries with it jurisdiction over state law claims that “derive from a common nucleus of operative fact,” such that “the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional” case. ...

...

The District Court properly recognized that it could exercise

supplemental jurisdiction over ICS's state law claims, including the claims for on-the-record administrative review of the Landmarks Commission's decisions." [Citations omitted] *Ibid.*

In the instant case, this Petition for Writ of Certiorari and the related Counts at law or in equity specified herein are inextricably intertwined; they derive from the same common nucleus of operative facts. The record for the Petition for the on-the-record review supports and enhances Plaintiff/Petitioner's claim that the County's land development controls are unconstitutional, both facially and as applied, in violation of the Federal Constitution. The Petition also establishes that Citrus County departed from the essential requirements of the law in denying Petitioner's applications, failed to base said denial on competent, substantial evidence, and failed to provide Petitioner with procedural due process.

Thus, this Petition also serves as a *de facto* and *de jure* "as applied" challenge on these issues. Accordingly, this Court should exercise its discretion and accept diversity/supplemental jurisdiction over this Petition for an on-the-record review of the actions of Citrus County.

B. RECORD REFERENCES

References to the transcript of the proceedings of the Planning and Development Commission will be to PDC Transcript, p. ___, (Exhibit U, attached hereto and made a part hereof by reference); references to the transcript of proceedings before the Board of County Commissioners will be to BoCC Transcript, p. ___, (Exhibit V, attached hereto and made a part hereof by reference), references to Exhibits already made part of this Complaint will be to the Exhibit Letter given above and references to exhibits before the Board of County Commissioners will be as set out below.

C. STATEMENT OF THE CASE AND OF THE FACTS

This statement is based on the transcripts of the proceedings before the Planning and Development Commission (PDC) and the Board of County Commissioners, (BoCC), the staff report to the BoCC which was made a part of the record, BoCC Transcript, p. 7; the Planning Review prepared for Petitioner, which was moved into evidence, BoCC Transcript, p. 128, ll. 7 - 9, and which is found as Exhibit W; and the PowerPoint presentations made to the PDC and the BoCC, on behalf of Petitioner, which were moved into evidence, PDC Transcript, p. 69, ll. 22 - 25, BoCC Transcript, p. 128, ll. 7 - 9.

The applications under review in this Petition were commenced in January, 2012. BoCC Transcript, p. 107, ll. 16 - 17. Petitioner voluntarily held two neighborhood meetings, BoCC Transcript, p. 107, l. 22 - p.108, l. 15.

A scheduled pre-application meeting was canceled at the last minute, and staff declined to reschedule it, BoCC Transcript, p. 108, ll. 15 - 21. The formal applications were filed in December, 2012 and included the GFLUM and Atlas amendments and a proposed Development Agreement, BoCC Transcript, p. 108, l. 22 - p. 109, l. 1. However, it took until August, 2013, to schedule what was anticipated to be a detailed design meeting:

...[MR. McLAUGHLIN] and then it took until August of 2013 to get to a planned detail and design review meeting. So you can understand our concerns about the length of time this is taking.

We anticipated that the detail design meeting would be the nuts and bolts when the Staff just identified as some of the details of the design. We had our mechanical engineer. We had our structural engineer. We had our surveyor. We had – actually he was a certified cadastral mapper, but close enough. We were prepared to talk about the nuts and bolts of the project when we were told two things, two very critical things; one, that the County could not fulfill the obligations under the draft development agreement

because of the Progress Duke issue and the 30-day occupancy limit. ...

BoCC Transcript, p. 109, ll. 1 - 17.

Thus, there were extensive delays in the application review process including one where Petitioner's representative had to appear before the BoCC in the "open to the public" portion of a meeting in order to have the BoCC direct staff to provide an interpretation of the "occupancy" issue. BoCC Transcript, p. 21, ll. 10 - 16.

When Citrus County did attempt to remedy these unconscionable delays, that attempt was made in a fashion that continued to deny Petitioner procedural due process. For example, staff consented to the submittal of the site plan by September 24, 2014, but then failed to review that plan before it was considered by the PDC on October 2, 2014:

... [MS. COUTU] We have a new site plan that's in your packet. Came in September 24th. Staff has not reviewed that. It's not reflected in our site plan – in our staff report.

PDC Transcript, p. 19, ll. 3 - 6.

One reason for the delay in submitting the site was that staff changed and re-changed the rules during the submittal process (Count V, above). These changes were reflected in the record:

... [MR. WILLIFORD] I'd love to have had the most recent plans in your hands for review today; however, dealing with staff I was informed that FAR included parking underneath the structure – or excuse me. Let me back up. Did not include it so we did the design. And I was informed it did include it so we did a redesign. Then I was informed it didn't include it so we did a redesign.

And you don't have the last design in your hands other than what you're going to see here and it may be included in your packet, but staff hasn't addressed it in their presentation.

PDC Transcript, p. 52, l. 20 - p. 53, l. 7.

While the cause of delays in the application process is disputed, the fact that there were delays, including the inability for the application to be heard by the BoCC in November, 2014, were acknowledged by staff, BoCC Transcript, p. 90, ll. 3 -16.

The staff analysis was also misleading with respect to the current status of the property:

[MS. COUTU] This is what's left on the site. There's not much. If you'd walk there is a lot of debris. It wasn't completely demoed. There's pieces here and there. You can see kind of the remains of a building. It's certainly not occupiable. It's not meeting codes. It really should be – they should tear it down.

BoCC Transcript, p. 92, ll. 12 - 18.

In fact, the site was more accurately described by Petitioner's land use planning consultant:

[MR. McLAUGHLIN] Because I was out there not too long ago and there was certainly – the only structure left is the old community building. It looked like those photographs are of the old cabins.

...

Commissioner Damato, at the hearing when the Board agreed to negotiate a development agreement, asked about the status of the building, and the main building had been torn down by that point. And I think we had the rest of it torn down in late 2011, so all that was left and it was in reasonably good shape was the community building.

BoCC Transcript, p. 102, l. 19 - 103, l. 1.

The key to this Court's analysis of this Petition for Writ of Certiorari is the issue of

compatibility. There are two aspects to this issue: compatibility with the neighborhood and compatibility with the Citrus County Comprehensive Plan. Citrus County's staff's position was stated:

[MS. COUTU] Finally, probably Staff's most consistent concern about this particular application is compatibility with the area. Ozello is a very small kind of a fishing community. A sleepy fishing community actually fits. There's nothing four story out there. Having a four-story hotel and with the restaurant out there is a very intense use.

Having it at the maximum floor area ratio and above the maximum impervious surface ratio is also a very intense use for this area, although commercial area – commercial uses in this area may be very appropriate. There was a restaurant here before. We know that. The Applicant actually mentioned there was once a brothel here. That could be.

Commercial in this area is possibly very appropriate for perhaps a single-story hotel or a small restaurant. Maybe very appropriate just like the Peck's up the road. This is not. This is a four-story hotel with a restaurant. It's got 77 units right now proposed, has a meeting room. You've heard him say a lobby and a gift shop. It's a very intense use for this particular site.

BoCC Transcript, p. 100, l. 19 - p. 101, l.18.

In contrast, Mr. McLaughlin, who was clearly qualified to provide competent, substantial evidence, (BoCC Transcript, p. 106, l. 22- p. 107, l. 6), focused on the statutory definition of compatibility:

(9) "Compatibility" means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

Section 163.3164 (9), Florida Statutes.

[MR. McLAUGHLIN] Compatibility is a big issue and Staff's graphic of this is better than ours. But you can see from this that the park is to the north. The one key residence is here. Our design concentrates the building as far away from the residential up in the corner of the property as we can according to Code.

It's adjacent to the very busy Ozello community [park]. Those photographs that I showed you showed it had a history of very active use as a restaurant and motel units and cabins. The site is [relatively] remote. Nothing in the design will obstruct views or cast shadows or cause light pollution.

Pirate's Cove and the nearby residential uses, the park and Peck's Restaurant can coexist in relevant proximity to each other in harmony and in a stable condition over time. Compatibility doesn't mean a cookie cutter; single family, single family, single family, single family. It means that they can coexist. They will not negatively impact directly or indirectly the adjacent uses and the nearby uses and that they will not create land use incompatibility.

...

Again, the existing land uses in the area will not be negatively impacted directly or indirectly and will not create land use incompatibility because we're going to put the building in the corner of the property.

BoCC Transcript, p. 123, l. 21 p p. 124, l. 20; p. 126, ll. 3 - 7.

After a number of opponents spoke, none offering competent, substantial evidence with respect to Petitioner's proposal, and most expressing a "Not In My Back Yard," attitude, Petitioner's consultant offered rebuttal testimony. Addressing concerns about the intensity of the proposed development, Mr. McLaughlin stated:

[MR. McLAUGHLIN] There seems – you know, the project was at one point approved for 23 RV spaces and at least 18 of those were occupied. It was approved for seven motels and – motel units and they were occupied. It was approved for four cabins and they were occupied. It was approved and existed as an

8,000-square-foot restaurant. So the intensity has already been established.

BoCC Transcript, p. 133, l. 20 - p. 124, l. 2.

The second element of the issue of compatibility was the frequently expressed staff concern about the occupancy issue, which had previously been resolved in Petitioner's favor. Nonetheless, the focal point of the staff report, which formed the basis of the Board's decision to deny the requests, was the occupancy issue;

Proposed Findings of Fact - Land Use Change

3. The proposed land use is inconsistent with Policy 4.10.10 (See PUD discussion below) of the Comprehensive Plan.

Exhibit R, pp. 6 - 7.

Coastal High Hazard Area standards: The application site lies within the Coastal High Hazard Area (CHHA) as well as the velocity flood zone. As such, the application must also comply with the standards outlined within LDC Section 3540, Coastal High Hazard Area, and the CHHA requirements in the Comprehensive Plan.

...

LDC Section 3540.F. states the following:

"The following uses are prohibited from locating within the CHHA except as specifically exempted below:

"...R-2 and R-4 Residential occupancy uses including, but not limited to; multifamily dwellings, lodging houses, apartment houses, residential care facilities, and group homes. R-2 residential uses are not allowed within that portion of the Coastal High Hazard Area which is located to the West of U.S. Highway 19, but shall be allowed to the East of U.S. 19 ..."

The applicant's background information provided with this application, as well as statements made at the PDC hearing, indicates an intent to allow condominium uses with residents on

the site for no more than 180 days at a time. However, Comprehensive Plan Policy 4.10.10 dictates the standard set forth in Section 3540.F. by prohibiting R-2 and R-4 occupancy types in the CHHA. (R-2 and R-4 occupancy types are defined within the Florida Building Code. An R-1 use is a residential occupancy such as a hotel where the occupants are primarily transient in nature, whereas R-2 uses are residential occupancies where the occupants are primarily permanent in nature). The Director of the Department of Planning and Development has made a formal determination that the definition of “transient” would be as defined by Florida Statute 509.013 as follows:

“Transient public lodging establishment” – any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

As such, the Citrus County Building Official has determined that the proposed use as a condominium for occupancy for more than 30 days is an R-2 occupancy type and is prohibited within the CHHA. (Reference May 13, 2014 letter from Jenette Collins to Bruce McLaughlin attached to this report for additional information regarding this determination)

Deviation – Allow R-2 use in the CHHA west of US-19 (violates Comprehensive Plan Policy 4.10.10).

Exhibit R, pp. 8 - 9.

Policy 4.10.10 New construction or expansion of the following residential occupancy uses, as defined by the Florida Building Code (First Edition, Chapter 3, Section 311), are not allowed anywhere within the Coastal High Hazard Area:

New construction or expansion of the following residential occupancy uses are not allowed within that portion of the Coastal High Hazard Area which is located to the West of U.S. Highway 19, but shall be allowed to the East of U.S. 19 provided all minimum standards of the LDC are met, the proposed development is compatible with surrounding development, the development’s access, internal design, and general location do not impede the

evacuation of its residents or neighbors, and the project does not negatively impact area evacuation clearance times:

R2: Multiple dwellings where the occupants are primarily permanent in nature, including: apartment houses, convents, dormitory facilities which accommodate 6 or more persons of more than 2 ½ years of age who stay more than 24 hours, fraternities, sororities, monasteries, and rooming houses (transient).

New construction or expansion of the following residential occupancy uses are allowed within the Coastal High Hazard Area:

R-1: Residential occupancies where the occupants are primarily transient in nature, including: Boarding housing (transient), hotels, and motels, and

R-3: Residential occupancies including the following: 1 and 2-family dwellings where the occupants are primarily permanent in nature and not classified as R-1, R-2, or Institutional, child care facilities which accommodate 3 or fewer children of any age for any time period, rectories and parsonages....

[Staff comment – the applicant has filed a formal appeal in response to staff’s determination that the proposal does not comply with this policy. That appeal has been placed on hold at the applicant’s request until December 16, 2014, and as such staff continues to comment that the application as currently proposed is inconsistent with this policy].

Exhibit R, p. 12.

SUMMARY OF FINDINGS

It has been determined that the reviewing body (BCC) shall consider the proposed Planned Unit Development. Staff has found that the proposed development, even with a revised site plan as submitted, is inconsistent with the Comprehensive Plan for a condominium use (R-2 occupancy) within the CHHA. Staff also has a concern with the request for a maximum ISR and FAR allowance within this remote, predominantly residential community in the velocity flood zone, and the overall compatibility of a four-story commercial structure in this coastal area. The subject property has requested a land use change to Coastal Lakes Commercial on the Future Land Use Map, and the Land Use Atlas

Map, and this change will need to be approved to accommodate the uses as proposed. Granting this request will adversely affect the public interest, and would be generally incompatible with adjacent properties and other properties in the district.

RECOMMENDATION:

STAFF RECOMMENDATION:

Based on the staff report analysis, the findings of fact for the Comprehensive Plan, and the findings of fact for the Planned Unit Development, the application is inconsistent with the Citrus County Comprehensive Plan, the Citrus County Land Development Code, and is incompatible with the surrounding area.

1. Comprehensive Plan Amendment – **DENIAL**
2. Atlas Amendment – **DENIAL**
3. Planned Unit Development - **DENIAL**

Exhibit R, pp. 14 - 15.

Thus, a significant portion of the staff's recommendations of denial was based on the occupancy issue which was resolved in Petitioner's favor, and which is anticipated to be resolved in Petitioner's favor in Counts I and II, above. This misguided analysis becomes germane to the consideration of the Board of County Commissioners' decision:

[COMMISSIONER KITCHEN] ... I would have to say that I agree with the findings of fact presented by Staff that this is not compatible as being presented.

BoCC Transcript, p. 138, ll. 18 - 21.

[COMMISSIONER MEEK] ... I would have to say that I do not feel that the application that is in front of us right now in its current form is consistent with our Comprehensive Plan. I feel that because of the issues that were mentioned and have been mentioned in our Staff Report and the things that have been put on record, I would not support the project in its current state as it is

right now.

BoCC Transcript, p. 143, l. 19 - p. 144, l. 2.

[COMMISSIONER DAMATO] The cost of the project's increased and enhanced intensity, density and location in the Coastal High Hazard Zone and along with its incompatibility with the existing residential character of the neighborhood and the comp plan, denial by Staff and denial by the Planning Development Commission, I cannot support the project as proposed.

BoCC Transcript, p.145, l. 24 - p. 145 l. 5.

Thus, in voting to deny Petitioner's applications, at least three commissioners relied on staff analyses and recommendations. The problem with this reliance was identified by the County Attorney in the appeal proceeding:

ATTORNEY PARSONS: And, Mr. Chairman, I can explain that. With regards to the appeal, within the B7 which is your 5:01, there is reference to Staff's interpretation within the PUD as part of its denial of the CPA-AA-PUD. It's one of the reasons that Staff had recommended denial. So whatever you can choose on this appeal may have some effect on the next one depending upon which way you all find the interpretation to be correct or not.

BoCC Transcript, p. 47, ll. 3 - 12.

Accordingly, the denial of the application was based, in large part, on a staff interpretation that had just been overruled by the Board of County Commissioners and which was of dubious legality as set out in Counts I and II, above, and "incompatibility" with the Citrus County Comprehensive Plan was not established.

As to compatibility with the neighborhood, the staff remarks were based on some ephemeral concept of "compatibility" while Petitioner's analysis was based on a statutory

definition of compatibility. There was no evidence, let alone competent, substantial evidence, to support the finding of land use incompatibility.

Finally, the recommendation of denial by the PDC played a significant role in the BoCC's decision: BoCC Transcript, p. 102; p. 145, Exhibit R, p. 15. Yet, as demonstrated throughout this petition, the failure of staff to review the proposed site plan, the change and change back in the FAR requirement, and every other aspect of the PDC review of the applications lacked even a modicum of procedural due process.

D. STANDARD OF REVIEW

This Petition for Writ of Certiorari is known as a "first tier" review of the land use decision of a local government. The standard of review in a first tier proceeding is described:

In the "first-tier" review, a party may seek certiorari review in the circuit court, which is more akin to an appeal and is not discretionary. The court must review the record from the commission decision and determine whether: (1) procedural due process has been afforded; (2) whether the essential requirements of law have been observed; and (3) whether competent substantial evidence supports the commission's judgment. The "competent substantial evidence" standard of review applied to this first-tier review "is tantamount to legally sufficient evidence."

Town of Juno Beach v. McLeod, 832 So.2d 864, 866 (Fla. 4th DCA 2002), citing *Town of Manalapan v. Gyongyosi*, 828 So.2d 1029 (Fla. 4th DCA 2002).

Manalapan offers a more detailed analysis of the standard of review:

Certiorari review of a board's decision must be in accord with *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982), which established a two-tier review of such decisions. In the "first-tier" review, a party may seek certiorari review in the circuit court, which is more akin to an appeal and is not discretionary. See *Dusseau v. Metro. Dade County Bd. of County Comm'rs*, 794 So.2d 1270, 1273-74 (Fla. 2001); *Fla. Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla. 2000).

The court must review the record from the commission decision and determine whether: (1) procedural due process has been afforded; (2) whether the essential requirements of law have been observed; and (3) whether competent substantial evidence supports the commission's judgment. *See Vaillant*, 419 So.2d at 626. The "competent substantial evidence" standard of review applied to this first-tier review "is tantamount to legally sufficient evidence." *Fla. Power & Light*, 761 So.2d 1092. ...

Id., at 1032.

E. SUMMARY OF ARGUMENT

The Citrus County Board of County Commissioners based its denial of Petitioner's applications on claims that the project was incompatible with the Citrus County Comprehensive Plan and with the neighborhood. The alleged comprehensive plan inconsistency was based on an unlawful interpretation of the Comprehensive Plan by Citrus County staff, which interpretation had been overturned by the Board of County Commissioners, although that decision was not referenced in the Board's decision. The alleged neighborhood incompatibility was not based on the statutory definition of compatibility and there was no evidence in the record supporting a finding of incompatibility as that term is defined by law.

In denying Petitioner's applications, Citrus County denied Petitioner procedural due process, departed from the essential requirements of the law, and failed to base its decision on competent, substantial evidence.

F. ARGUMENT AND CITATIONS OF AUTHORITY

1. Procedural Due Process

Procedural due process is described:

Procedural due process imposes constraints on government decisions which deprive individuals of "liberty" or "property" interest within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. ...

...

... The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Mathews v. Eldridge, 424 U.S. 319, 332, 333, 96 S.Ct. 893 (1976)

Thus the opportunity to be heard is an essential element of procedural due process, and this opportunity must be meaningful:

... it is equally clear that the government must provide the requisite notice and opportunity for a hearing “at a meaningful time and in a meaningful manner,” although in “extraordinary situations” the provision of notice and a hearing may be postponed until after the deprivation has occurred. *Fuentes v. Shevin*, 407 U.S. 67, 80, 90, 92 S.Ct. 1983, 1994, 1999, 32 L.Ed.2d 556 (1972). If the government fails to comply with the dictates of the Due Process Clause, the aggrieved party can seek compensatory damages and equitable relief under 42 U.S.C. § 1983.

Grayden v. Rhodes, 345 F.3d 1225 (11th Cir. 2003).

Procedural due process was denied to Petitioner in the instant matter because the Board of County Commissioners’ decision was predicated, in part, on the Planning and Development Commission’s recommendation of denial. The latter recommendation was based on a staff report that was prepared under the misconstrued occupancy issue and which, in spite of staff’s undertaking to review the site plan submitted September 24, 2014, was not reviewed by staff prior to the PDC hearing,¹⁰ largely because Citrus County changed, and then changed back, the

¹⁰ In fact, this chain of events led the Chairman of the PDC to wonder if there was a “bait and switch” in play: PDC Transcript, p. 131, ll. 4 - 10:

... Okay. I’ll make a comment, though I think – I feel like I’ve been bait and switch here. You know, we get the 33 and now it’s 70-unit and I haven’t -- certainly the

applicable FAR rule.

This sequence of events led to a denial of procedural due process:

There are no hard and fast rules by which to measure meaningful notice. “An elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13, 98 S.Ct. 1554, 1562, 56 L.Ed.2d 30 (1978) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)).

Nash v. Auburn University, 812 F.2d 655 (11th Cir. 1987).

Put simply, this sequence of events denied Petitioner procedural due process of law and requires reversal of the Board of County Commissioners’ decision.

2. Competent Substantial Evidence

While it is undisputed that Citrus County staff were qualified to provide competent, substantial evidence, as set out in the following section, the staff report and comments led to a departure from the essential requirements of the law because staff did not address the statutory definition of compatibility.

With respect to the lay testimony in opposition, it does not constitute competent, substantial evidence:

... Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. *Metro Dade County v. Blumenthal*, 675 So.2d 598, 601 (Fla. 3d DCA 1995). For example, lay witnesses may testify about the natural beauty of an

weight of the evidence is with Mr. McLaughlin, but I certainly couldn’t make a determination because it is a bait and switch situation. ...

area because this is not an issue requiring expertise. *Blumenthal*, 675 So.2d at 601. Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. *Pollard v. Palm Beach County*, 560 So.2d 1358, 1359-60 (Fla. 4th DCA 1990). Similarly, lay witnesses' opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur. *See City of Apopka v. Orange County*, 299 So.2d 657, 659-60 (Fla. 4th DCA 1974) (citation omitted). There must be evidence other than the lay witnesses' opinions to support such claims. *See BML Invs. v. City of Casselberry*, 476 So.2d 713, 715 (Fla. 5th DCA 1985); *City of Apopka*, 299 So.2d at 660.

Katherine's Bay, LLC v. Fagan, 52 So.3d 19 (Fla. 1st DCA 2010).

Accordingly, the lay persons' statements to the Board of County Commissioners were not competent, substantial evidence, and do not establish a foundation for the denial of Petitioner's applications.

Beyond the extent to which staff comments fail to establish a substantial basis of fact to support the Board's decision, the staff's work, conflated as it was with the occupancy issue, fails to provide competent, substantial evidence in support of the Board's decision.

3. Essential Requirements of the Law

The essential requirements of the law are described:

... A rich heritage of decisional law provides definition to the concept of "departure from the essential requirements of law." Understanding of this body of common law enables jurists and practitioners to recognize when there has been such a disregard of basic legal requirements, and to distinguish it from ordinary legal error. ...

R.L.B. v. State, 486 So.2d 588 (Fla. 1986); dissenting opinion.

The essential requirements of the law require compliance with Florida precedent, *Gadsden County Times, Inc. v. Horne*, 426 So.2d 1234 (Fla. 1st DCA 1983) adherence to clearly established principles of law, *Abbey v. Patrick*, 16 So.3d 1051, (Fla. 1st DCA 2009); provision of due Process, *Haines City Community Dev. v. Heggs*, 658 So.2d 523 (Fla. 1995); the absence of errors so fundamental as to infect the judgment, and the absence of a miscarriage of justice. *Ibid.*

In the instant case, the key essential requirement of the law is compliance with the statutory definition of compatibility:

(9) “Compatibility” means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

Section 163.3164 (9), Florida Statutes.

As discussed in the Statement of the Case, the findings of incompatibility came, not from an analysis of the facts surrounding the application such as permitted uses, the structure, and proposed activities, access issues, light and air, and setbacks and buffers, but from some vague notion that Ozello is an old and sleepy fishing community which would be adversely affected by sharing its benefits with a first class addition to the area. Compatibility does not mean that a new development needs to be exactly like, or even similar to, what may already be in the vicinity. Fear, speculation, accusations of ruining “Old Florida:” none of these “concerns” address the legal definition of compatibility. The only competent, substantial evidence on the issue of

compatibility tracked the state statute's definition of compatibility and was that the proposed use was compatible with its neighborhood.

CONCLUSION AND REQUEST FOR RELIEF

Based on all of the foregoing, Petitioner respectfully requests this Honorable Court to find that the decision of the denied Petitioner procedural due process of law, departed from the essential requirements of the law and was not based on competent, substantial evidence.

For the foregoing reasons, the decision of the Board of County Commissioners should be reversed and this matter remanded to the Board of County Commissioners with instructions that the Petitioner's applications be heard in accordance with the order of remand.

DEMAND FOR A JURY TRIAL

A jury trial is demanded for all issues so triable.

REQUEST FOR ATTORNEY'S FEES

157. Plaintiff re-alleges and incorporates herein ¶¶ 1 through 156, *supra*, as if fully set out herein.

158. This is an action to enforce rights and privileges guaranteed by the Constitution of the United States. As such, Plaintiff is entitled to an award of attorney's fees, pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

/s/ Luke Lirot

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